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What You Need To Know About An Incurred Expense

One of the most significant changes to the *Schedule* post September 1, 2010 revolves around the question as to what constitutes an incurred expense. Gone are the days in which a family member/ friend would be compensated for providing attendant care assistance to a claimant for love. Now they must show they did it for money. More particularly, they must show that the third party service provider has lost money providing care to a claimant. The requirement to prove an incurred expense is mutually exclusive with respect to the claimant's need for a benefit. If the claimant cannot prove that he has suffered an incurred expense then he is not entitled to attendant care benefits, caregiving, and housekeeping benefits (the latter two for transitional policies); despite his legitimate need for same. If a claimant legitimately needs therapy but did not attend same due to fact that it was denied, then he is not supposed to be entitled to the cost of the treatment.

Section 3 (7) (e) of the *Schedule*

Section 3 (7) (e) of the *Schedule* sets out the test in order to prove an incurred expense:

> (e) subject to subsection (8), an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless,
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> (i) the insured person has received the goods or services to which the expense relates,
>
> (ii) the insured person has paid the expense, has promised to pay the expense, or is otherwise legally obligated to pay the expense, and
>
> (iii) the person who provided the goods or services,
>
> (A) did so in the course of his or her regular occupation or profession, or
>
> (B) sustained an economic loss as a result of providing the goods or services to the insured person.

First, a claimant must have actually incurred the expense. In a claim for medical benefits the claimant must have actually received the treatment. In a claim for attendant care benefits, the claimant must have received the care.

Second, the claimant has either paid for the services, promised to pay, or has an obligation to pay for the services. For a claim for medical treatment, the claimant can run a tab at the treatment facility and this will suffice to satisfy this aspect of the test. Money need not have changed hands yet.

Third, the good or service must have been provided by someone in the regular course of their occupation. This section has not been interpreted yet. Presumably, if a nurse / PSW is providing care to a claimant for their attendant care then the claimant passes this aspect of the test. It would appear that this applies to such a professional even if they are a family member/friend. If so, there is no obligation for this third party service provider to have suffered an economic loss.

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Fourth, if the service provider is not a professional, then the third party provider must have sustained an economic loss providing the service. At present, this is where all of the litigation is focussing on; what is an economic loss. To be clear, we are not dealing with an economic loss suffered by the claimant paying the service provider, but an economic loss suffered by the service provider herself. The most obvious example is a family member who quit her job (or reduced from full time to part time) to take care of a claimant due to the injuries sustained in an accident. The less obvious cases is virtually everything else. There are three appellant cases to date that provide some guidance and two arbitration decisions. While as these cases provide us with some guidance, there are many questions left unanswered.

Henry v. Gore (2013) Court of Appeal

Mr. Henry was 18 years old at the time of the accident and sustained catastrophic injuries that rendered him a paraplegic. His mother quit her job in order to take care of her son on a full time basis. The Form 1 submitted on behalf of the claimant was for 24 hour care which equalled $9,500 (the maximum entitlement as per the *Schedule* we know is $6,000). The insurer did not obtain its own Form 1. Rather, the insurer took the position that it is only obligated to provide attendant care benefits equal to the mother suffering an economic loss of 8 hours a day at work. In a nutshell, the mother suffered an economic loss of losing 8 hours a day (5 days a week) from her work and this is her entitled compensation. The insurer calculated the actual time the mother spent providing to her son attendant care and multiplied this by the applicable hourly rate and determined that the entitlement was $2,117.40. As a side note, the mother would be receiving more money taking care of her son then she would at her job.

The Court of Appeal found in favour of the claimant and concluded that he was entitled to $6,000 monthly in attendant care benefits. The Court reasoned that Economic Loss is not defined in the *Schedule*, and it chose not to provide us with a working definition that could be used in all cases. Since there is no definition of economic loss in the legislation, insurance coverage is to be defined broadly in favour of the insured. In terms of claims for attendant care, it was determined that once an economic loss has been established ("threshold") then the amount of attendant care benefits are to be paid in accordance with the Form 1. This decision is fairly clear in that once an economic loss has been established, that attendant care benefits must be paid in accordance with a Form 1. It does not matter that a Form 1 represents more then actual economic loss sustained by the claimant.

Simser v. Aviva (2014) Director's Delegate

In *Simser*, the claimant suffered a significant injury in which he was air-lifted to the hospital and remained there for nearly three months post loss. The claimant was separated at the time of the accident but his ex-wife and daughter moved into his home to provide care between February 2011 until October, 2011. Afterwards, the two of them moved out and the claimant retained a third party provider to assist with his attendant care and housekeeping. The issue in dispute was whether the claimant was entitled to attendant care and housekeeping benefits while his family members lived with him.

The Director's Delegate found that the claimant was not entitled to such benefits on the basis that an economic loss had not been established. The reasoning by the Director's Delegate revolved around both the legal principles and lack of evidentiary proof.

In part, the claimant testified that she suffered an economic loss for the following reasons: (1) that she had to give up her apartment as she could not pay her bills and assist with her ex-husband's bills; (2) she had to pay additional fuel costs; and (3) she missed time from work. Importantly, the only witness called on behalf of the claimant was his ex-wife. The hearing Arbitrator called into question the credibility of the ex-wife when he found that her alleged losses of income unspecific, unsubstantiated, unquantifiable, abstract, or hypothetical. Despite numerous requests for documents to support the theory of economic loss, none were introduced into evidence. The Arbitrator took an adverse inference from the absence of the supporting documentation. The Director's Delegate upheld the finding that the claimant has failed to prove on a balance of probabilities that she sustained a loss of income for the purposes of the claim for attendant care and housekeeping benefits.

The claimant attempted to expand the definition of economic loss in somewhat of a creative way by arguing that "less tangible forms of financial or monetary losses" also should be considered. In particular, the claimant relied on the expert evidence of a Professor of economics who essentially argued that "economic loss is equal to the opportunity cost of using this time in some other activity". For example, the fact that a service provider is providing attendant care services to the claimant takes away from the service provider from going to the movies or enjoying their time otherwise. The Director's Delegate disagreed and found that to accept the Professor's rendition of economic loss would render the "the economic loss requirement superfluous and meaningless".

The Estate of Reumen Marcus v. TTC (2014) Director's Delegate

This case revolved around whether the quantum of attendant care benefits owed to a claimant is based on the Form 1 rate or the actual rate the claimant paid to a professional service provider. The claimant was an 89 year old man who suffered significant injuries while riding a bus and died sometime thereafter. The Form 1 rate was $6,569.29 and the actual rate paid to the professional nurse hired to take care of the claimant was $1,820 a month. The Director's Delegate concluded that the proper quantification to be paid is the Form 1 rate (subject to the statutory maximum) and not the actual rate.

The Director's Delegate agreed with the Court of Appeal in *Henry* by finding that an incurred expenses is an entitlement threshold. Once the entitlement threshold has been satisfied, the next step is to pay the attendant care benefit in line with the Form 1. The amount of the attendant care benefit is not to be determined by the expense actually paid. As per section 19 of the *Schedule*, an insurer shall pay to the claimant attendant care benefits as per the Form 1 until such time as the insurer obtains its own Form 1 that may modify or terminate the benefit. The *Schedule* does not say that the insurer shall calculate the amount of the benefit based on the amount paid to the professional service provider.

Asokumaran v. TD Home and Auto Insurance Company (2014) FSCO

The sole question raised in this case is whether the claimant's friend sustained an economic loss when providing housekeeping and caregiving benefits (transitional policy) by purchasing bus tickets for the purpose of attending at the claimant's home. The service provider had incurred $5,408 worth of bus tickets but had not lost any employment income. The Arbitrator cited the *Henry* decision to stand for the proposition that there is no de minimis requirement for an expense to qualify as an economic loss. The term economic loss was read liberally as to include losses other then just a loss of income.

The Arbitrator was not asked to determine whether the bus tickets were obtained "as a result of " providing the goods and services to the claimant. Indeed, if the services provider was using a bus pass that she would normally have used as part of her daily activities then presumably she would not have suffered an economic loss "as a result of " the accident. This would have been expense that would have incurred in any event and probably would not qualify as an economic loss.

Aidoo v. Security National (2014) ADR Chambers

In this case, one of the key issues is whether the claimant's sister had suffered an economic loss while providing caregiving and housekeeping services (transitional policy) to the claimant. Prior to the accident the sister had completed a community college course in dental assistance and was promised a job at a dental office once she completed her co-op placement. She was not working in this capacity when the accident occurred. She did not take the job as she felt obligated to provide assistance to her sister. Further, during the time that she provided care to her sister she had part time employment at a youth centre. She would occasionally lose a shift at work in order to assist her sister. A shift would be four hours long and she was paid $12.00/hour; which would thereby would be an economic loss of $48.00. The claimant did not introduce any documentary evidence to substantiate this economic loss. No evidence was called to show a job offer or any evidence of a reduction in her hours at her part time job.

Despite the lack of documentary evidence the Arbitrator accepted the sister's evidence as credible and found that she had sustained an economic loss. Interestingly, there is no discussion as to whether the Arbitrator accepted that an economic loss had been established based on (a) the lost opportunity to work at a dental hygienist job into the future or (b) the occasional loss of some part-time hours. There was no discussion as to the quantum of the economic loss or any discussion of the entitlement threshold.

Section 3 (8) of the *Schedule*

A little known, but potentially dangerous section of the *Schedule* that should not be forgotten is section 3(8). The section states that:

(8) If in a dispute to which sections 279 to 283 of the *Act* apply, a Court or Arbitrator find that an expense was not incurred because the insurer unreasonably withheld or delayed payment of a benefit in respect of the expense, the Court or arbitrator, may for the purpose of determining an insured person's entitlement to the benefit, deem the expense to have been incurred.

Essentially, if the trier of fact believes that an insurer has unreasonably withheld paying a benefit that it may consider the expense to be incurred. While as this section has not yet been applied, the most obvious example would revolve around a medical benefit. If an insurer has deemed the claimant to have suffered an injury that falls within the MIG, when it is clear and obvious that her injuries ought not be so classified, then this section may apply. If a claimant has submitted treatment plans but has not gone for the therapy as she cannot afford to pay then the Court/arbitrator can use this section

to deem the treatment incurred. This would prevent the insurer from being rewarded for their patently wrong decision to deem the claimant to have suffered a MIG injury; and then not be obligated to pay for the benefits if the claimant did not go for the treatment.

To be clear, the claimant must prove that the insurer acted "unreasonably" and not simply made the wrong decision. The standard of proof for the claimant to prove "unreasonably" is perhaps equal to that of the standard to prove a special award type claim. While as the standard is perhaps difficult to prove, it remains to be seen as to how it is applied.

Transitional Policies And Incurred Expenses

Motor vehicle accidents that occur after September 1, 2010 but subject to policies that were purchased before that date are referred to as transitional policies. One of the controversial questions is whether the incurred provisions of Section 3 (7) (e) apply. In a nutshell, the claimant argues that he purchased the policy before September 1, 2010 and now the rules have changed if he was involved in an accident post September 1, 2010.

In *Zaya v. State Farm* (2014) the Arbitrator concluded that if a motor vehicle accident occurs on or after September 1, 2010 then the benefits provided are subject to the new incurred provisions. The Arbitrator found that the language of the new section is clear and unambiguous. The Arbitrator found that an accident benefits claim only becomes sufficiently concrete for a substantive right to materialize once the accident happens. Since the accident occurred post September 1, 2010 the new regulations apply. In short, for transitional policies, a claimant is required to prove entitlement to benefits based on the new onus of proof of incurred and not the old law that lacked this obligation. Essentially the same result and reasoning is found in *Rajbhai v. State Farm* (2014).

Changes To The *Schedule* February 1, 2014

In what appears to be a reaction to the Court of Appeal decision of *Henry* the government enacted new legislation (Ontario Regular 347/13) which sets out to clarify the law. With respect to claims for attendant care benefits, the regulations states that "… the amount of the attendant care benefit payable in respect of that attendant care shall not exceed the amount of the economic loss sustained by the attendant care provider during the period while, and as a direct result of, providing the attendant care."

It is not clear if this legislation is designed for all accidents that occur post February 1, 2014 or for claims for benefits the occur after February 1, 2014 (such as an ongoing claim for attendant care benefits). The clear intention of the legislature is to insure that third party providers are paid on the basis of their actual economic loss and not the Form 1 rate. This would have the effect of directly overruling the decisions of *Henry* and *The Estate of Reumen Marcus*.

It remains to be seen as to how the Courts / arbitrators apply this section. On its face, the legislation appears to be inconsistent with Section 19 of the *Schedule* which states that attendant care benefits shall be paid in accordance with a Form 1. Indeed, the change to the legislation seems to call into question the necessity of a Form 1. The quantum set-out in the Form 1 may no longer be relevant, the only question is whether the claimant has a disability.

In addition, the new change to the legislation may in some circumstances increase the monthly quantum of attendant care benefits paid by an insurer. If a family member / friend who earns $36,000 annually takes a one year leave of absence from their job in order to provide attendant care to a claimant, she presumably would be entitled to receive $36,000 in tax free attendant care benefits (the maximum entitlement for attendant care benefits for a non-catastrophic loss). Meanwhile, the actual Form 1 rate may have only been $500 monthly. The new changes to the legislation do not specify that the monthly attendant care benefit is the lesser of the Form 1 rate or the actual economic loss.

Conclusion

The case law regarding an incurred expense is in its infancy. With respect to claims for attendant care benefits, *Henry* and *The Estate of Reumen Marcus* support the proposition that once the claimant passes an entitlement threshold the insurer is obligated to pay the Form 1 rate as opposed to the actual incurred rate. Yet, these are two cases involving significant injuries involving sympathetic claimants. It remains to be seen how an Arbitrator will deal with facts that are less claimant compassionate.

In *Simser* the Arbitrator called into question the claimant's credibility and found an adverse inference based on the lack of documentary evidence introduced to support an economic loss. The claimant's attempt to expand the definition of economic loss to something more general such as "loss of opportunity" was rejected. The message was sent that an economic loss should constitute an actual provable financial loss. On the other hand, in *Aidoo* the Arbitrator accepted the service provider's word regarding her economic loss, without requiring any documentary/supportive evidence. The Arbitrator seemed to accept that an economic loss also includes a future loss of a job opportunity.

In *Asokumaran* it was accepted that $5,408 expended in bus tickets would constitute an economic loss but no decision was rendered

as to whether this was incurred on account of the motor vehicle accident.

As per *Zaya* and *Rajbhai* it appears to be settled law that a claimant must prove an entitlement to an incurred expense for claims subject to transitional policies. This is of course subject to an appeal or later decisions to the contrary.

In a complete rebuke of the existing jurisprudence, the legislative change effective February 1, 2014 seeks to quantify attendant care benefits based on the actual economic loss and not the Form 1 rates.

Many questions remained unanswered. Does the claimant have to prove an ongoing monthly economic loss to prove an attendant care benefit or may this simply be a one off expense? Does the entitlement threshold addressed in *Henry* go so far as including the de miniminis cost of a $3.00 bus ticket? Does the loss of a potential future job constitute an economic loss? What constitutes an "unreasonably withheld or delayed payment of a benefit in respect of the expense" that would entitle a claimant to benefits as per section 3 (8) of the *Schedule*? Will the changes to the legislation effective February 1, 2014 stand-up to legal scrutiny?

What we do know is that the law is unclear and that we will be the ones who shape it into the future.

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