



BEARDWINTER LLP

# Defender

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## What is an Economic Loss? The Appeal Courts Have Spoken

Slowly but surely the changes to the *Statutory Accident Benefits Schedule* are being interpreted by the Courts and Arbitrators. Since September 1, 2010 the interested parties have for the most part been left to our own devices to try and guess at how the Appeal Courts would interpret the new language. The Court of Appeal decision of *Henry v. Gore* (2013) and The Director's Delegate decision of *Simser v. Aviva* (2014) provide us with some guidance as to what an Economic Loss means. Yet, this guidance is far from clear. It is important to understand the basis for the reasons in these decisions in order to apply them to the cases that we are adjusting.

### *Henry v. Gore* (2013)

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.

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 a Form 1. The *Schedule* does not specifically limit the value of attendant care benefits to simply the hours to which the claimant would normally be at work. If the claimant cannot prove that an economic loss has been sustained, then he is not entitled to any attendant care benefits even if he was legitimately provided with the care.

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 than actual economic loss sustained by the claimant.

What has not been addressed in this case is whether the economic loss must be continuous and the nature of the loss. For instance, if a claimant paid an attendant care provider for assistance for just three months, is the claimant entitled to ongoing attendant care benefits thereafter? Even more substantially, if the claimant pays an attendant care provider a nominal fee such as \$50.00 a month,



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Your comments are appreciated and if there are any commercial or insurance related topics that you would be interested in reading about, please feel free to email us and we will certainly explore the possibility of writing an article. Contact: [defender@beardwinter.com](mailto:defender@beardwinter.com)

is he entitled to a Form 1 rate for attendant care benefits which may be significantly higher such as \$1,000 monthly? Similarly, if the claimant suffers an ongoing insignificant financial loss of say \$20.00 monthly, does that mean he is entitled to the full Form 1 rates or just the out-of-pocket expense? Does the claimant simply need to prove that he surpasses a nominal threshold requirement or does there have to be some level of proportionality to the actual amount being claimed. These will certainly be issues that will need to be addressed in one's cases.

## *Simser v. Aviva* (2014)

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. The latter is very important to consider when assessing one's files as a claimant must prove their legal theory. If they cannot prove their case, the claimant loses.

In part, the claimant testified that the ex-wife 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 unspecified, 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 an economic loss 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".

## Conclusion

These two appeal decisions provide us with some guidance as to what is meant by an economic loss, but they are far from an all-encompassing definition. In *Henry v. Gore* we are dealing with a sympathetic claimant situation and there was no dispute that an economic loss had been sustained. The key question was how do you calculate such a loss? The Court was not dealing with a situation in which the claimant had sustained a minor loss, (such as the cost of daily bus fair), and was now seeking to be indemnified for a substantial Form 1 benefit. This was a case in which the claimant's mother quit her job and was providing substantial care to her catastrophically injured son. *Henry v. Gore* does not adequately address the claims that we see involving questionable attendant care claims and less obvious economic losses.

*Simser v. Aviva* deals with a case in which the claimant made bald allegations of suffering an economic loss, but failed to provide proof to substantiate these claims. It appears that the hearing Arbitrator had serious reservations regarding the credibility of the witnesses and the lack of evidence in support of the claim for economic loss. Further, an 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 financial loss.

What we learn from these two cases is that there are lots of circumstances that have yet to be litigated regarding what is an economic loss. We know that the claimant must prove their case based on objective financial proof and that the subjective credibility of the witnesses still matter. The evolving definition of economic loss will continue to revolve around good adjusting and creative lawyering.

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