

# FOCUS ON

## PERSONAL INJURY LAW

# Plaintiff lawyers unhappy with attendant care changes

## Counsel changing advice on whether family members should assist

BY JUDY VAN RHIJN

For Law Times

Recent amendments that tie attendant-care benefits to economic loss have prompted personal injury lawyers to change their advice on whether families and friends should take on the care of their loved ones.

The diminution of attendant-care rates began in 2010 when it became necessary for caregivers to prove a loss of income before receiving compensation in accordance with Form 1. In *Henry v. Gore Mutual Insurance Co.*, the Ontario Court of Appeal recognized that proving an economic loss was only a threshold test and not the measure of the benefit. However, on Feb. 1, Ontario Regulation 347/13 came into force that reversed the decision and limited attendant-care benefits to the amount of the family member's actual economic loss.

The change occurred without warning or consultation. Robert Deutschmann of Paquette Travers & Deutschmann in Kitchener, Ont., was unhappy with the way the government introduced the regulation. "This legislation was clearly done without thought and certainly without any consultation with stakeholders other than Ontario's insurers."

Rikin Morzaria, a partner at personal injury law firm McLeish Orlando LLP, describes it as a small change that will have a dramatic impact on families. "It is a type of change that is quite difficult to understand unless you are in the field. It doesn't intuitively jump out at you as an unfair practice until you realize what you're

expected to do for a very small payment."

The Financial Services Commission of Ontario notes the regulatory change is an effort to help reduce costs and provide more certainty with the aim of making auto insurance rates more affordable for drivers. Maia Bent of Lerner's LLP's London, Ont., office questions the rationale. "If cost saving for the insurance industry was the goal, there were other ways to achieve that without harming the injured. It is a very unfortunate change that hurts the most vulnerable people who are so badly injured that they need attendant care. If a consultation was held, we would have worked something out."

Ralph Palumbo, the Ontario vice president of the Insurance Bureau of Canada, says his organization welcomes regulations that clarify the application of provisions in the auto insurance policy. "Nonetheless, experience with past reforms shows that there is always a risk of unintended consequences, particularly because it is difficult to anticipate how stakeholders will respond."

The Ministry of Finance was unable to comment on the lack of consultation. As a result, those involved in the area are struggling to understand the reason for the change. "If it is accepted that there is the potential to compensate for this service at the Form 1 levels, which already do not reflect the reality of the marketplace, what does it matter if the service is provided by a family member or a support worker?" asks Deutschmann.

"Each provides advantages

'It is a very unfortunate change that hurts the most vulnerable people who are so badly injured that they need attendant care,' says Maia Bent.



to the injured person, but now certainly one type of support has been severely limited."

In some cases, attendant-care benefits will equate to only a fraction of the minimum wage, particularly if the caregiver was working part time and is now providing almost full-time care. "Carers' lives are turned upside down already if they have effectively given up outside work," says Morzaria.

"They may have chosen for lifestyle reasons or health to work at reduced capacity but they don't have that choice anymore. If you are replacing the \$200 a week you got at work and providing 18 hours a day [of] care, that equates to \$1 to \$2 an hour."

Morzaria notes the Form 1 rates don't equate to wages. "The rates are lower than the average market rate of \$17 an hour. If you need 24-hour care, they equate to \$8 to \$11 an hour, so

you can only purchase a fraction of the care. You are left to find someone who will accept rates at some level less than minimum wage. Typically, you will end up doing cash under the table with unskilled workers. There is no other option. Either you are shortchanged on the amount of care required or you have to find a person who is less than ideal."

Palumbo notes there has been a concern that non-professional caregivers who suffer an economic loss, no matter how small, can access the maximum amount of attendant-care benefits available under the auto insurance policy. "The amount available can be as much as \$3,000 per month for non-catastrophic claims and \$6,000 per month for catastrophic impairment claims. Of course, the caregiver is still required to identify the care that is needed."

While FSCO notes the benefit still allows injured people the

choice to receive attendant-care services from professional providers, lawyers say the change will effectively force them to choose that option despite often preferring to get help from family and friends.

"Attendant care is typically provided by family and friends," says Bent.

"It is required at strange hours or for portions of the day. You can't get a professional in for 30 minutes of care at bedtime."

"Care is so personal and often quite intimate," says Morzaria.

"It is the one place where you want family members encouraged to help. Underpaying family members will eliminate choice."

There are also increased costs to insurers. In the April 14 KPMG LLP report on transparency and accountability, insurers suggested any cost saving from the changes would erode as people looked to private providers rather than their family members.

Morzaria confirms personal injury lawyers are advising people who are stuck in the system to hire an agency to provide attendant-care benefits in the future with family members providing additional help without compensation while maintaining their outside jobs. Those higher benefit levels will then factor into settlement amounts or filter down to tort insurers.

"We traditionally haven't put forward claims for the value of service provided in the past, but if family members are providing almost 24 hours [of] care for minimal to no compensation, we will."

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