

Damages For Attendant Care In Catastrophic Cases

By: J. David Lindsay
Gluckstein & Associates

DAMAGES FOR ATTENDANT CARE IN CATASTROPHIC CASES

Bill 164 and Bill 59 created a new world for attendant care benefits. As with other categories of benefits under Bill 59, higher monetary levels of benefits are payable for longer periods of time if an impairment is “catastrophic”. Prior to Bill 164 (OMPP), the care benefit was described as a “care benefit”. The care benefit was paid for the cost of a professional attendant or for lost income of a family member who cared for an insured.

Under Bills 164 and 59, the attendant does not have to be a professional. An attendant can be a family member. Quantification of the benefit revolves around Form 1.

Form 1 outlines three levels of attendant care:

1. Routine personal care;
2. Basic supervisory care;
3. Complex health care functions.

Under each category are several tasks which may require the assistance of an attendant. Once tasks are identified, the number of minutes of assistance is determined. The minutes are added for each of the three categories and converted into a number of hours per month. Each level of attendant care holds a legislated hourly rate. For level one, it is \$9.00 per hour, level two, \$7.00, and level three, \$15.00. If injuries are catastrophic, the maximum amount payable is \$6,000.00 monthly with an overall monetary limit of \$1,000,000.00 available over the insured’s lifetime.

Examples of *level one* routine personal care include dressing, grooming, feeding, basic mobility, extraordinary cleaning and application of prosthetics and orthotics. *Level two* examples include cleaning related to hygiene and safety, clothing care, supervision, intermittent care, light meal preparation, and managing financial affairs to a maximum of one hour per week. *Level three*, the complex health care level, includes genitourinary care, bowel care, tracheotomy care, ventilator care, physical exercise, skin integrity care, medication and bathing.

Sometimes there is confusion about the attendant care benefit when it looks like another benefit. For example, “cleaning” on Form 1 is for day-to-day hygiene and safety purposes. It is not for normal housekeeping which is found under the housekeeping and home maintenance benefit. Rehabilitation expenses found under Section 15(5) for life-skills training, family, social rehabilitation and financial counselling, and vocational assistance, are not attendant care. The distinction is seen when rehabilitation is viewed as goal-oriented, with continuous monitoring of the insured person’s progress. In contrast, attendant care activities are those outlined under Form 1. While some attendant care activities might incorporate strategies used in rehabilitation, the person providing attendant care does not assume the role to “rehabilitate” the insured.

Often in catastrophic cases involving severe neurological impairments, family members spend vast amounts of time providing emotional support to the insured. Attendant care benefits are not designed to provide compensation for this kind of care. The attendant care benefit is for the

needs of the injured person within their home environment. It does not address required activities outside the home unless these activities require supervision under Form 1, level two.

Attendant care benefits do not provide complete monetary compensation for incurred costs. Hourly rates under the various levels for attendant care fall below the costs of a professional attendant. Form 1 does not provide for professional services which impose a minimum number of hours, and travel time is an additional cost. Often, an insured person with severe brain or spinal cord injury may have a monthly attendant care benefit in excess of the statutory monthly limit.

Another problematic area with attendant care benefits is how deductions should be quantified for time that a person did not utilize or require the attendant care. In many cases, an insured or family members may be unaware that attendant care benefits are available. Many years may pass until attendant care needs are investigated. Surprisingly, this happens often for persons who have brain injuries. It is difficult, though possible, to make claims for past attendant care benefits that have already been “incurred”.

Other problem areas include the lack of guidelines for health care professionals conducting attendant care assessments. Errors are frequently made because of the lack of guidelines or misinterpretation of the intent of the attendant care benefit. Sometimes, attendant care assessments provide for more hours in a day than the twenty-four that occur. It is imperative that the person assessing the attendant care actually observe the insured in their environment in addition to conducting interviews with family members.

Attendant care assessments must also be performed reliably and with objectivity. Often, different methodologies are employed in completing the assessment and the assessments are sometimes varied, to the frustration of claims adjusters.

Several measures can be taken to maximize the accuracy of an attendant care assessment. Such measures include timeliness and a need-based assessment that is comprehensive in utilizing observation, interviewing, and knowledge of the insured’s medical condition. Other measures include being able to identify extraordinary needs and recognizing some of the subtle, yet pervasive, effects of neurological injury. Personal injury lawyers can assist by identifying situations that require attendant care assessments, especially when time has elapsed and attendant care has been “incurred” but not yet claimed.

The personal injury lawyer can also obtain detailed histories of payments by the insurer to ensure accuracy in the quantum and payment of the benefit. Lawyers can also ensure that attendant care resources are appropriately utilized in conjunction with medical and rehabilitation resources and that the insurer properly account for the benefits in accordance with the appropriate funding category.

Experience has shown that the attendant care benefit is complex. There is need for further expanded guidelines for Form 1. Such guidelines are imminent under the auspices of the Minister’s DAC Committee. In some cases, the attendant care benefit can be one of the largest heads of damages in personal injury litigation. Many people who sustain catastrophic injuries

may be under-compensated. It is advisable that the personal injury lawyer be familiar with Form 1, its basic levels of care, subcategorization, and the methodology for calculating the attendant care benefit.

BIOGRAPHY:

J. David Lindsay practices civil litigation with Gluckstein & Associates in Toronto. He thanks Kim Doogan for her assistance with this article.