CHANGES TO THE ATTENDANT CARE BENEFIT DO NOT APPLY RETROSPECTIVELY: *DAVIS V. WAWANESA*, 2015 ONSC 6624

The payment of attendant care to family members of injured people is a thorny issue for the insurance industry. Before September 2010, a family member of an injured person was entitled to receive compensation for attendant care services provided without showing any economic loss. The insurance industry lobbied the government to change this and in September 2010 the law was changed to require a family member to prove an economic loss before receiving the attendant care benefit. Under the September 2010 changes all that was required was to prove some economic loss and the full attendant care benefit could be paid. Further lobbying by the insurance industry resulted in a further change to the law under which the amount paid to a family member for attendant care was limited to the family member's actual economic loss. This change was made by Ontario Regulation 347/13 (the "Regulation") which came into force on February 1, 2014.

Some insurance companies have taken the position that the Regulation applies to claims for attendant care for accidents that occurred before February 1, 2014. Other insurance companies accepted that the Regulation only applied to claims for accidents that occurred on or after February 1, 2014. This created great uncertainty for accident victims and their family members. A person leaving a part-time job to take on the full-time job of providing attendant care to a seriously injured family member did not know how his or her insurance company would compensate him.

This uncertainty in the law has now been put to rest by the decision in *Davis v. Wawanesa Mutual Insurance Company*, 2015 ONSC 6624 (released October 27, 2015). Justice Quinlan of the Superior Court of Justice ruled that the changes to the attendant care benefit only apply to accidents occurring on or after February 1, 2014.

The ruling in *Davis v. Wawanesa* determines that the Regulation created a new limit on attendant care benefits and changed the law as it previously existed. It does not apply to pre-existing claims for accident benefits, as the substantive right to accident benefits crystallized on the date of the accident. In Ms. Davis' case, her rights crystallized before the Regulation came into effect.

Ms. Davis was catastrophically injured in a motor vehicle accident on November 15, 2013. Ms. Davis' claim for accident benefits was governed by the *Statutory Accident Benefits Schedule — Effective September 1, 2010,* O. Reg. 34/10 (the "2010 SABS"). Under the 2010 SABS, Ms. Davis could choose to have a family member provide attendant care and have the full benefit paid, so long as her family member suffered some economic loss. Under the law as it existed when this accident occurred, a family member could leave a 7-hour a day job to take on the responsibility of caring for a loved one for 24-hours a day and be compensated appropriately.

The law changed on February 1, 2014, when the Regulation came into force. The Regulation significantly changed the payment of attendant care benefits for

seriously injured people. The Regulation did *not* indicate that it was intended to apply to accidents occurring before February 1, 2014.

Rather than paying the full $6,000 monthly benefit, Ms. Davis' insurer took the position that it only needed to pay Ms. Davis an attendant care benefit of $4,061.16 – the amount of the economic loss sustained by her non-professional care provider. Ms. Davis' care provider, her daughter-in-law, had taken a leave of absence from a 35-hour per week job in order to provide Ms. Davis with round-the-clock care.

Through her counsel, Troy H. Lehman of Oatley Vigmond, Ms. Davis brought a summary judgment motion to determine whether her insurer could apply the Regulation to her claim for attendant care benefits. The issue turned on whether the new Regulation could apply retrospectively to Ms. Davis' pre-existing claims for accident benefits.

Legislation is "retrospective" if it reaches back and attaches new legal consequences to an event that occurred in the past prior to its enactment. Retrospective legislation changes the effect of those past events after the legislation comes into effect. In other words, a retrospective statute operates forwards and looks backwards to attach new future consequences to a past event. In this case, if the Regulation applied retrospectively, it would apply as of February 1, 2014 to all pre-existing claims for attendant care benefits arising from accidents occurring before that date.

In Canada, there is a presumption against applying new regulations retrospectively if doing so impacts vested, substantive rights. Amendments which are purely procedural will apply immediately. In *R. v. Dineley*, 2012 SCC 58, the Supreme Court held that retrospective effect of legislation is "exceptional" and, where substantive or vested rights are impacted, "retrospectivity has been found to be undesirable." The key issue is whether new amendments affect substantive rights. Where substantive rights are affected, new legislation only applies retrospectively where there is evidence of a clear legislative intent for it do so.

Claims for accident benefits crystallize or vest on the date of the accident.

Mr. Lehman argued that since the changes to the 2010 SABS affected Ms. Davis' substantive right to attendant care benefits, they could not apply retrospectively to accidents before February 1, 2014, without clear evidence of a legislative intent to interfere with those rights. The legislation itself was silent on the issue.

Counsel for Wawanesa raised several arguments, including that the Regulation's amendments to the 2010 SABS were procedural and ought to apply immediately; the amendments merely clarified the Legislature's intentions regarding how attendant care benefits were to be calculated; and, in the alternative, if the Court found that the amendment was substantive, it ought to apply retrospectively as it was intended to fix ongoing mischief created by the provisions in the 2010 SABS.

Justice Quinlan determined that the Regulation did not apply retrospectively to accidents occurring before February 1, 2014. Justice Quinlan noted that under the 2010 SABS, a non-professional attendant care provider only needed to prove that he or she had sustained *an* economic loss as a result of providing care to obtain the full amount of the Form 1 entitlement. She followed the Court of Appeal decision in *Henry v. Gore*, 2013 ONCA 480, which established that the requirement to prove *an* economic loss had been sustained was a threshold issue for entitlement to the benefit.

At paragraph 26 of the *Davis* decision, Justice Quinlan found that, in limiting entitlement to attendant care benefits to *the actual* amount of the economic loss, "the Regulation changes the law".

Justice Quinlan determined that the Regulation affected a claimant's right to access the full amount of attendant care benefits available in accordance with the Form 1 and, in doing so, had a substantive impact on the right to attendant care benefits:

> **[29] Regulation 347/13 limits the benefit payable to a family member to the amount of economic loss sustained by the family member. It affects the right of the claimant to the full amount of attendant care benefits as detailed in the Form 1 upon proof of an economic loss incurred regardless of the amount of their actual economic loss. It affects the content or the right to attendant care benefits. The requirement that attendant care benefits be restricted to the quantum of the economic loss sustained has a substantive impact on an insured's right to attendant care benefits, whether that requirement is considered to be procedural or not (*Rajbhai v. State Farm Mutual Automobile Insurance Co.,* 2014 CarswellOnt 1632 (F.S.C.O.) at para. 18). As such, the Regulation interferes with substantive rights (*J. (R.) v. Dominion of Canada General Insurance Co*., 2013 CarswellOnt 13685 (F.S.C.O.) at para. 65).**

Justice Quinlan rejected the insurer's position that claimants only have a right to benefits as they exist from time to time, as is the case for legislated benefits, such as E.I. and disability support payments like ODSP.

Instead, the Court accepted Ms. Davis' position that the right to attendant care benefits was a contractual right. Justice Quinlan quoted paragraph 65 from the conclusion of *Federico v. State Farm Mutual Automobile Insurance Co*., 2013 CarswellOnt 6437 (F.S.C.O.) that, as of the date of the accident, an insured had "tangible, concrete, vested and materialized rights…" for benefits he was receiving under the SABS, and this right was "…a crystalized private contractual right."

Justice Quinlan also rejected the insurer's argument that the Regulation was remedial and ought to apply retrospectively as a result. At paragraph 34, she relied on two Court of Appeal judgments (from British Columbia and Ontario) – *R. v. Evans*, 2015 BCCA 46 and *R. v. Bengy*, 2015 ONCA 397 and applied the logic of the Courts of Appeal from those cases: "if the need for immediate reform of the law were so pressing, why would the legislature not have explicitly made the law retrospective?" Without clear evidence that the legislature intended the Regulation to apply to pre-existing claims for accident benefits, it would only apply to new accidents occurring after it came into force on February 1, 2014.

The decision in *Davis v. Wawanesa* is the first and only decision which clarifies that the Regulation does not apply retrospectively to accidents occurring before February 1, 2014. The Regulation cannot apply retrospectively to affect the substantive right to attendant care benefits, which vested on the date of the accident, as there is no evidence that the legislature intended the Regulation to apply to those claims.