CITATION: Shawnoo v. Certas Direct Insurance Company, 2014 ONSC 7014
COURT FILE NO.: 8334-12
DATE: 2014/12/30

ONTARIO
SUPERIOR COURT OF JUSTICE

2014 ONSC 7014 (CanLII)

RE: Misty Shawnoo (Plaintiff)

And:

Certas Direct Insurance Company (Defendant)

BEFORE: Justice M. A. Garson

COUNSEL: Andrew C. Murray, for the plaintiff

Philippa G. Samworth, for the defendant

HEARD: November 26, 2014

ENDORSEMENT

Introduction

[1] This is a motion brought by the plaintiff, Misty Shawnoo ("MS") for a determination before trial of the following questions of law raised by the pleadings:

(i) Has MS incurred expenses for attendant care services within the meaning of section 3(7)(e) of the Statutory Accident Benefits Schedule for Accidents on or after September 1, 2010 ("SABS-2010")?

(ii) Do attendant care services provided indirectly, in the form of telephone calls, emails, FaceTime, text messaging and other similar electronic means, qualify as attendant care services within the meaning of ss. 19(1) and 19(2) and ss. 42(1) and 42(2) of SABS-2010 (O.Reg. 34/10)?

[2] The motion is brought pursuant to Rule 21.01(1)(a) which is available where parties agree that determination of legal questions may dispose of all or part of the action, substantially shorten the trial or result in a substantial savings of costs.

[3] The relevant evidence was presented by way of an Agreed Statement of Facts and a Joint Documents Brief.

[4] Counsel for the parties were civil, cordial, respectful and well-mannered. They did everything they could to narrow the issues and identify the relevant authorities. Their submissions were a model for how such determinations under Rule 21.01 should be presented. I commend them for their professionalism in this regard.

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Background and facts

[5] I will provide a brief outline of the facts at this point and expand upon the facts as is necessary in my analysis.

[6] MS, born August 27, 1990 suffered a catastrophic brain injury ("CBI") from a motor vehicle accident that occurred on December 12, 2010 ("the accident").

[7] She has been in receipt of statutory accident benefits ("SAB") as the result of her policy of insurance with the defendant, Certas Direct Insurance Co. ("Certas").

[8] Cheryl Benn ("CB") is MS's mother. She is also a certified healthcare aide, having obtained her professional certification from St. Clair College of Applied Arts and Technology on or about January 31, 1994. Her certification is often referred to as that of a personal support worker ("PSW").

[9] CB had not been employed as a PSW earning remuneration for at least two years prior to the accident, and was in receipt of Ontario Works payments immediately prior to the accident.

[10] CB does not live with MS. She resides in the nearby First Nations community of Kettle Point. Since 2009, CB has been assisting a relative diagnosed with schizophrenia. Her work in that regard has been without payment or other forms of remuneration.

[11] Chenoa Plain ("CP") is a certified child and youth worker ("CYW") who obtained her professional certification from Lambton College in 2007. At all material times, she was also the roommate of MS and provided attendant care services to MS.

[12] Prior to the accident, MS lived independently. As a result of the accident, MS developed issues regarding impulsivity and risk-taking, such that she required constant monitoring and supervision.

[13] The parties agree that neither CP nor CB incurred an economic loss within the meaning of section 3(7)(e)(iii)(B) of SABS-2010.

[14] Both CB and CP provided some attendant care services to MS including some services by way of electronic communication such as telephone calls, emails, FaceTime, text messaging and other electronic means, for the years 2011, 2012 and January to July 2013.

[15] A Form 1 Re-Assessment of Attendant Care Needs, completed February 28, 2012, some 14 months after the accident, confirms that MS was re-admitted to the hospital for mental health issues on three occasions over the previous year. In particular, there was evidence of suicidal ideation and planning.

[16] A subsequent Form 1 completed almost 18 months post-accident confirms that MS was texting her parents daily and constantly texting her rehabilitation worker (Cydney Simpson) if the latter was not with her.

[17] The vast majority of attendant care provided by CP was during evenings and weekends, as CP was employed during the daytime with John Howard Society as a CYW.

Issues

[18] In order to answer the questions of law raised by the parties, I must decide having regard to the provisions of section 3(7)(e)(iii)(A) of SABS-2010:

(a) whether CB, a trained and certified PSW and the mother of MS, who at the time of the accident was not working in a paid position as a PSW, provided attendant care "in the course of the employment, occupation or profession, in which she would ordinarily have been engaged, but for the accident";

(b) whether CP, a trained and certified CYW, who at the time of the accident was employed as a CYW with the John Howard Society, provided attendant care services "in the course of the employment, occupation or profession in which she would ordinarily have been engaged, but for the accident"; and

(c) whether in the context of section 3(7)(e)(iii) determinations, attendant care services can be provided remotely by way of electronic means?

Background to SABS amendments-2010

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[19] The legislative history makes clear that the SABS-2010 was intended to limit compensation payable to family members.[1]

[20] SABS-2010 was designed to provide a system of checks and balances on attendant care, and address concerns about historical abuses by family members with respect to the provision of attendant care services.

[21] The leading case dealing with the SABS-2010 interpretation appears to be the Court of Appeal's decision in *Henry v. Gore Mutual Insurance Co*.[2] In that case, the Court of Appeal considered section 3(7)(e) of SABS-2010 which reads as follows:

> 3(7)(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,
>
> (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 the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or*
>
> (B) sustained an economic loss as a result of providing the goods or serves to the insured person. [Emphasis added.]

[22] The case involved the interpretation of section 3(7)(e)(iii)(B), and the issue of whether an expense was "incurred" by the insured respondent with respect to attendant care services provided by his mother outside, of her normal work hours.

[23] The Court of Appeal spoke to the principles applicable to the construction of such insurance coverage provisions, confirming that coverage provisions are to be

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[1] See *Henry* case, *infra*; at footnote 2, para. 26
[2] 2013 ONCA 480

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interpreted broadly, while exclusions or restrictions are to be construed narrowly, in favour of the insured.[3]

[24] In the case before me, the parties agree that the requirements of subsections 3(7)(e)(i) and (ii) have been met and that the focus is therefore solely on the provisions of section 3(7)(e)(iii) (A).

[25] There is no dispute that MS has received the services in question and has either paid, promised to pay, or incurred an obligation to pay the related expenses.

[26] Thus, the focus is not so much on MS, but rather on her mother CB and her roommate CP.

[27] However, before going further in my analysis, I make the following observations:

(1) The decision as to who should provide attendant care services was a decision made by MS. She chose her mother and her roommate to do that.

(2) There is evidence before me in the Joint Documents Brief (by way of attendant care expenses claim forms found at Tab D, pages 49-53) that Certas accepted and paid the expenses of Cydney Simpson for attendant care services provided to MS during the months of June to August 2012 and that such expenses included 7.7 hours of text time in the month of June, 14.5 hours of text time in the month of July and 10 hours of text time in the month of August 2012.

(3) In assessing the extent of her injuries, the OT Progress Report #1, dated April 18, 2011 (at page 3) notes the CT scan report indications that MS was diagnosed with:

1. subarachoid hemorrhage;

2. nondisplaced fracture involving the right occipital bone with extension to the base of the skull;

3. large subcutaneous parieto-occipital hematoma; and

4. blood within the spheroid sinuses bilaterally.

[3] See *Henry*, *supra*, at p. 9, para. 21

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(4) The same progress report also confirmed a very fragile emotional state as well as impulsivity of thoughts and decisions, all of which precipitated significant safety concerns.

(5) In a further OT progress report dated February 28, 2012, it was noted, (at page 7), that MS currently required "24-hour attendant care as safety is a primary concern given medication overdoses, history of suicidal intention/plans and ideation, poor-decision making, judgment and impaired impulse control as well as addiction issues."

(6) In that same report, (February 28, 2012), under the heading "Current Functional Status", the writer indicates that MS reported:

> Increased use of her cell phone/PDA…since the motor vehicle accident. She has had to establish alarms for her medications, appointments and finds herself relying on text messages, e-mails to help her recall information, etc. This device is being used to contact attendants (on a 24-hour basis recommendation) as well as for appointment related information.

(7) At the time of the February 28, 2012 report, MS apparently was taking at least three prescribed medications, and relied on alarms on her cell phone for medication administration and to track medical appointments.

(8) In a further OT progress report dated May 30, 2012 the OT makes the following recommendation, at page 28:

> As per Dr. Jeffries' report, it is the therapists opinion that Ms. Shawnoo does not require continuous monitoring, especially when sleeping, nor direct supervision as it relates to her motor vehicle accident related injuries. Dr. Jeffries indicates *that as a result of the motor vehicle accident, the evaluee requires some monitoring/supervision described as "checking in" through telephone calls and texting. The evaluee has supports who include her parents, roommate and her rehabilitation worker*. [Emphasis added.]

(i) Claim in relation to services provided by CP

[28] I have difficulty accepting the position that CP provided her services "in the course of her employment, occupation or profession in which she would ordinarily have been engaged, but for the accident."

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[29] Her profession which occupies her during regular work day hours, is that of a CYW. In that regard, she provides supervision and support for troubled youth. She does not possess qualifications as a personal support worker or healthcare aide.

[30] The services CP provided personally to MS included assistance with feeding and basic supervisory care because MS needed custodial care due to changes in her behaviour as a result of the accident.

[31] While some of these services were provided by CP in the physical presence of MS, some were also provided from a distance via phone calls, texting and other similar electronic means.

[32] The assessment of attendant care needs is a prescribed form under the SABS. Level 2 attendant care is described as being "for basic supervisory functions" and provides for circumstances where that type of care is warranted.

[33] For the purpose of this motion, only the fourth circumstance is relevant, which reads:

> Applicant lacks the ability to respond to an emergency or needs custodial care due to changes in behaviour.

[34] Can a professional CYW working to provide services to her roommate during evenings and weekends with no qualifications as a PSW or healthcare aide, provide attendant care services in the manner required for the purposes of section 3(7)(e)(iii)(A) of SABS-2010?

[35] I take into account the information before me as to the work that CP does by day, as set out in her *curriculum vitae* found at Tab B of the Joint Documents Brief, which indicates:

> Planning and implementing required programming for youths ages 12-17 years on probation. Completion of client reporting regarding their attendance and participation; daily, weekly and discharge reporting. Also developed and facilitated Aboriginal Cultural Awareness Program.

[36] Further on in her résumé under the heading "Skills" CP lists the following:

> Microsoft Office 2003 and 2007, 65.5 and 70 wpm average, organized creative, outgoing, people person, works well in team setting, minimal understanding in the Ojibwe language.

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[37] Applying a broad interpretation to the legislative provisions in question and accepting that the goal of the legislation is to reduce hardship on accident victims, I am still unable to conclude that CP possessed the appropriate professional qualifications to provide the attendant care required by MS in the sense require by section 3(7)(e)(iii)(A) of SABS-2010.

[38] In reaching this conclusion, I am mindful of the fact that CP was the roommate of MS and that CP neither trained in the field of healthcare nor has any prior work history or experience in the field. Although I acknowledge that CP provided valuable and much needed attendant care services for MS, I am not satisfied that she did so in the course of the employment in which she would ordinarily have been engaged, but for the accident.

[39] While I commend CP for her extensive support of MS during these difficult times, the legislation is such that her efforts are not something in respect of which payment can be provided through SABS benefits.

(ii) Claim in relation to services provided by CB

[40] The situation in relation to the services provided by CB is somewhat different. As noted above, she does not reside with MS but resides in nearby Kettle Point.

[41] She is trained as a healthcare aide and has been employed in that capacity in the past.

[42] She has not been employed for remuneration in that capacity since 2006, and immediately prior to the accident was in receipt of Ontario Works. However, since 2009, she has been providing support in that capacity to a relative.

[43] CB submitted OCF-6 forms for attendant care services provided in person to MS as well as for services provided to MS from a distance by electronic means, including phone calls and texting.

[44] Certas argues that because CB was not employed for remuneration at the time of the accident, her services do not meet the requirements of section 3(7)(e)(iii)(A) of SABS-2010, which requires the service provider to have been acting "in the employment occupation or profession in which she would ordinarily have been engaged, but for the accident."

[45] I am mindful of the need to give such fair and liberal interpretation to this wording so as to best ensure the attainment of the objects of SABS-2010.[4]

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[4] See *Legislation Act, 2006,* S.O. 2006, c. 21, Schedule F; s. 64

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[46] In that regard, our Court of Appeal noted in *Monks* ING[5] that courts have rejected a narrow interpretation of the phrase "incurred" in this context and that a broader interpretation is consistent with the policy objective that accident victims properly receive benefits to which they are entitled.[6]

[47] Moreover, the statutory provisions must be interpreted in their entire context, having regard to the grammatical and ordinary sense of the provisions, harmoniously alongside the scheme and object of the Act, and the intention of the drafters.[7]

[48] Counsel could find no case under SABS-2010 that has dealt with a situation where a family member providing such services was also a properly qualified professional service provider, albeit one not engaged in that capacity for remuneration at the time or times in question.

[49] I am mindful of the need to prevent a member of an insured's family, not ordinarily an income earner working outside the home, from profiting from an attendant care benefit payment, in the sense that such persons would likely have been at home anyway and would have looked after the insured without compensation.[8]

[50] Certas relies on the *Simser v. Aviva Canada Inc.*,[9] a decision of Director Delegate Blackman, for the proposition that the relevant service provider must have provided goods or services in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged.

[51] There can be little doubt that the intent of the drafters of SABS-2010 was to reduce the threshold or eligibility for attendant care benefits.

[52] Applying a broad interpretation to the legislative provisions in question and accepting that the goal of the legislation is to reduce hardship on accident victims, I am still unable to conclude that CB provided her services "in the course of the employment occupation or profession she would ordinarily have been engaged in, but for the accident".

[53] Prior to the accident, she was not employed for remuneration as a PSW or healthcare aide. There is no evidence she was actively seeking such employment or likely to receive an offer for such employment.

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[5] 2008ONCA 269 (CanLII)
[6] *Monks, supra,* at para. 49-51
[7] See *Rizzo v. Rizzo Shoes Ltd.* 1998 CanLII 837 (SCC) [1988] 1 S.C.R. at para. 27
[8] See *Henry v. Gore Mutual Insurance Co. 2012* ONSC 3687 (S.C.J.) at p. 3, para. 7 per Ray J.
[9] FCSO A13-005768 Arbitrator Fadel, Oct. 31, 2014 at pp.5-7

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[54] I am not satisfied that, but for the accident, CB would ordinarily have been engaged in healthcare services employment.

[55] Although I need not determine the issue of whether a recent February 1, 2014 amendment to SABS-2010 applies for claims to attendant care prior to February 1, 2014, I am able to rely on this amendment for clarification as to the intent of the drafters of the legislation.

[56] The amendment with respect to the issue of attendant care reads as follows:

> Despite paragraphs 1, 2 and 3, if a person who provided attendant care services (the attendant care provider) to or for the insured person did not do so in the course of the employment, occupation or profession in which the attendant care provider would ordinarily have been engaged for remuneration, but for the accident, 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.

[57] This amendment makes clear that persons who are not ordinarily engaged in healthcare services employment, prior to the accident, are required to show an economic loss in order to receive SABS benefits for their attendant care services.

[58] Certas further argues that I should follow the decision of Arbitrator Fadel in *Josey and Primmum Ins. Co.*, where he held that the professional care provider must be a professional in the health care industry. In particular, considering the SABS-2010 amendments, Arbitrator Fadel concluded that they represent a distinct and deliberate shift in the determination of entitlement to attendant care. More to the point, he found a concerted legislative effort to exclude family members from reimbursement through SABS benefits without showing an economic loss.

[59] In that case, Arbitrator Fadel held that a "stay-at-home" spouse was not an arm's length professional attendant care service provider, and therefore not eligible for reimbursement for such services. In particular, the services in question were provided by the spouse of the injured and insured party, and prior to the accident the spouse was a stay-at-home mother for their three children.

[60] Arbitrator Fadel opined that for the purposes of SABS benefit eligibility, services must usually be provided by an arm's length individual. He concluded at page 7 of his ruling that section 3(7)(e)(iii)(A) refers to a person who is trained in and/or working in the health care industry for remuneration.

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[61] On the facts before me, CB was not working outside the home as a healthcare aide or PSW for remuneration. I agree with Arbitrator Fadel that she must be excluded from receiving SABS benefits without showing an economic loss.

[62] Although I am sympathetic to the plight of those healthcare professionals who may be recently unemployed due to work shortages or injury, I am left to conclude that section 3(7)(e)(iii)(A) requires that family members must prove that they have sustained an economic loss in order to be reimbursed for attendant care services from the accident benefit insurer.

[63] I do not see this conclusion as a non-payment windfall to the insurer. Rather, it is a recognition of the concerted effort of the drafters of SABS-2010 to exclude family members and friends from eligibility for payment for attendant care services unless they suffer an economic loss**.**

[64] The love and affection of a family member is critical in the recovery of an accident victim**.** I do not intend any of my conclusions in this regard to in any way discourage the involvement and support of family and friends in helping accident victims recover from injuries.

(iii) Indirect electronic attendant care services

[65] There appears to be no authority addressing the question of whether, for the purposes of section 3(7)(e)(iii), services may be "provided" from a distance via electronic means and devices, rather than in person. I find this surprising given the proliferation of cell phones and texting in society today.

[66] Section 19(2) of SABS-2010 provides that the amount of a monthly attendant care benefit is to be determined in accordance with an "Assessment of Attendant Care Needs" form referenced in section 42 of SABS-2010.

[67] The only section in the assessment form under which attendant care is allocated for electronic services is that dealing with supervisory "custodial care" due to changes in behaviour.

[68] Other than a requirement that a requested benefit must be reasonable and necessary, there do not appear to be any guides to assist in interpreting the form.

[69] The form is used in the context of the SABS-2010 scheme to ensure the coordination and maximization of benefits.

[70] Where cognitive or behavioural impairment is at issue, an attendant may be required to cue, remind or prompt a person to perform certain activities, such as

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attending appointments or other activities that the person would not partake of on their own.

[71] But does custodial care require the personal presence of the attendant *via-a-vis* the injured person?

[72] Custody is defined in the Concise Oxford English Dictionary (12th Edition)[10] as "the protective care or guardianship of someone or something."

[73] In Black's Law Dictionary,[11] the definition of custody carries with it the idea of a person or thing:

> being within the immediate personal care and control of the person to whose custody it is subjected.

[74] For the purposes of interpreting the meaning of "custodial care" on the facts before me, I focus on whether the provision of such care is protective of the person and allows the care provider to look after the person.

[75] I am not convinced that such care requires the provider to stand over the person or be within their immediate physical presence.

[76] In that regard, the parties provided me with the decision of Arbitrator E. Boyefsky of the Financial Services Commission of Ontario in *T.N. and Personal Insurance Company of Canada*, dated July 26, 2012, where the issue of providing attendant care benefits by phone was addressed. At page 39, the Arbitrator said this:

> the applicant was not physically with someone at all times and that the people around her have attempted to go about their daily lives, leaving the applicant alone during the day and evenings. In my view, this does not mean the applicant was not in need of care and supervision. The applicant's family and companions remained in touch with her despite their absence… *The applicant had various people she could call for assistance. I find that this is essentially the type of continuous care envisioned by the other three practitioners*. [Emphasis added.]

[77] We live in a world where we can Skype our relatives across the planet and appear in court by way of closed-circuit television or telephone.

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[10] Oxford University Press at p. 354
[11] Revised 5th Edition, West Publishing Co., p. 347

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[78] Tele-health Ontario offers an array of services to Ontarians by phone and many remote communities benefit from virtual meetings with medical specialists in larger urban centres.

[79] Simply put, there is an abundance of legal and medical services appropriately proffered and received by electronic means in 2014.

[80] I couple these observations with the evidence before me in this matter, which include confirmations and/or indications that:

(i) MS required constant care and supervision because of her behaviour arising from the accident;

(ii) MS relied heavily on her cell phone for sending and receiving texts, to and from her family, friends and rehabilitation workers, and for setting reminders and alarms for important events;

(iii) Certas paid some of the expenses of Cydney Simpson, the rehabilitation worker, which includes time for texting MS; and

(iv) Dr. Jeffries' report speaks to monitoring and supervision by MS through "checking-in" via telephone calls and texting, and is accepted and recommended in the May 30, 2012 OT assessment.

[81] In all of the circumstances before me, including the age of MS, the proliferation of cell phones and texting as a way of effectively communicating, the accepted position of Certas on paying for such expenses in relation to Cydney Simpson, the nature of the illness of MS and assorted treatment requirements, I conclude that attendant care services may be "provided" in the form of phone calls, e-mails, texting, FaceTime and other similar electronic means, for the purposes of SABS-2010.

Conclusions

[82] For the reasons above, and in an effort to balance the need to avoid payment or non-payment windfalls, as the case may be, I answer the questions as follows:

(i) Has MS incurred expenses for attendant care services within the meaning of section 3(7)(e) of SABS-2010?

Answer – No for CB
No for CP

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(ii) Do attendant care services provided indirectly in the form of telephone calls, emails, FaceTime, text messaging and other similar electronic means qualify as attendant care services within the meaning of sections 19(1) and 19(2) and section 42(1) and 42(2) of SABS-2010?

Answer – Yes.

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Costs

[83] In the event that the parties cannot agree on an appropriate cost disposition, I will receive written submissions in that regard, not to exceed three pages (exclusive of Offers to Settle and Bills of Costs) from MS by no later than January 17, 2015 and from Certas by no later than February 14, 2015. As the parties have enjoyed divided success on the motion, my preliminary observation is that there may be no cost consequences arising in this regard.

"Justice M. A. Garson"
Justice M. A. Garson

Date: December 30, 2014