



FSCO A12-007443

BETWEEN:

MANGALESWARY ASOKUMARAN

Applicant

and

TD HOME AND AUTO INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Suesan Alves

Heard: Written submissions were received on January 30, 2014.

Appearances: Mireille Dahab and Niyousha Ghomashchi for Mrs. Asokumaran
Michael Bowlin for TD Home and Auto Insurance Company

Issues:

The Applicant, Mangaleswary Asokumaran, was injured in a motor vehicle accident on September 5, 2010. In this arbitration she claims caregiver benefits under section 13(2) of the *Schedule*,¹ and housekeeping and home maintenance benefits under section 23 of the *Schedule* from TD Home and Auto Insurance Company (“TD”).

Ms. Easan, the person who provided the caregiving and housekeeping, was a friend of the Applicant. Ms. Easan purchased bus tickets and/or passes to travel to the Applicant’s home. The Applicant submits that the purchase of these passes, in the amount of \$5,048, constitutes economic loss.

¹ *The Statutory Accident Benefits Schedule - Effective September 1, 2010, Ontario Regulation 34/10, as amended.*

TD disputes that the bus tickets and/or passes constitute economic loss. TD submits that the Applicant failed to establish that the expenses were incurred *as a result of* the provision of services and that neither housekeeping nor caregiving benefits are payable.

The preliminary issues as stated in the pre-hearing report are:

1. Did the Applicant's friend, Ms. Seetha Easan, who provided housekeeping and caregiving services, sustain an "economic loss" by purchasing bus passes or tickets for the purpose of attending at the Applicant's home? (Purchase of the tickets or passes is not in dispute)
2. Which party is entitled to expenses?

Result:

1. The purchase of the bus tickets and/or passes constitutes economic loss within the meaning of the *Schedule*.
2. I am unable to determine whether the bus passes were obtained *as a result of* the provision of services. That question may be addressed at a subsequent hearing.
3. If the parties are unable to agree on expenses, I leave that question to the hearing arbitrator.

ANALYSIS & FINDINGS:

Background

Ms. Asokumaran was injured in an accident on September 5, 2010. She alleges that Ms. Easan, a friend who provided housekeeping and caregiving services, sustained an economic loss of \$5,408 by purchasing bus tickets and/or passes to attend at her home to provide caregiving and housekeeping services between September 6, 2010 and September 4, 2012.

The *Schedule* permits a friend or family member to provide caregiving, attendant care and housekeeping services. If such services are provided outside of the course of the regular occupation or profession of the friend or family member, the insured person must demonstrate: that the goods or services were received; that the insured person either paid or promised to pay the expenses or is legally obligated to pay them; and that the service provider sustained an economic loss as a result of providing the goods or services to the insured person.

If no economic loss is sustained, an expense is not incurred, and the Insurer is not obliged to pay the relevant benefit. In this arbitration that would mean that the Applicant would be unable to recover the caregiver and housekeeping and home maintenance benefits she claims.

At issue in this hearing is the meaning of subparagraph B of subsection 3 (7)(e) (iii) of the *2010 Schedule*. That subparagraph states "... an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless ... the person who provided the goods or services ... sustained an economic loss as a result of providing the goods or services to the insured person." Thus, the insured person must establish the expenses are economic loss and establish that the loss is *as a result of* providing the goods or services to the insured person. Both appear to be in issue in this hearing. I will first deal with the question of economic loss, then the *as a result of* question.

Did the purchase of bus tickets and/or passes constitute economic loss?

Submissions of the Applicant

The Applicant submits that Ms. Easan incurred an economic loss within the meaning of paragraph (B) of subsection 3 (7) (e)(iii) of the *Schedule* by purchasing bus passes and/or tickets. The Applicant submits that any type of monetary loss including out-of pocket expenses, such as the cost of transportation associated with providing services to the insured person, constitutes economic loss.

The Applicant proposes that the term “economic loss” should be given its ordinary meaning, as defined in *Black’s Law Dictionary* (7th Edition). That definition states economic loss is “a monetary loss such as lost wages or lost profits. The term usu. used to refer to the damages recoverable in a lawsuit. For example, in a products-liability suit, economic loss includes the cost of repair or replacement of defective property, as well as commercial loss for the property’s inadequate value and consequent loss of profits or use.”

The Applicant submits that the above definition provides various examples of monetary loss, and that lost wages are simply used as an example or illustration. The Applicant submits that there is no rational basis on which to exclude transportation expenses, and that transportation expenses constitute economic loss.

Submissions of the Insurer

TD submits that out-of-pocket expenses, such as bus tickets and/or passes, do not constitute economic loss within the meaning of the *Schedule*. The Insurer submits that economic loss should be given a restrictive meaning, so that only a loss of income or lost wages by a service provider qualifies an insured person to receive reimbursement for caregiver benefits and housekeeping expenses. The Insurer further submits that unfairness would result from using a transportation expense as a determining factor because, in effect, the distance between the care provider’s home and that of the insured person becomes the yardstick in determining whether a benefit is payable.

For the following reasons, I find the funds expended by Ms. Easan to purchase the bus tickets and/or passes constitute economic loss.

In *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837, the Supreme Court of Canada held that in construing statutory language, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, the intention of Parliament and in a manner consistent with section 10 of the *Interpretation Act*. At the time, section 10 stated that every Act “shall be deemed to be remedial” and directed

that every Act shall “receive such fair, large and liberal construction as will best ensure the attainment of the object of the Act, according to its true intent, meaning and spirit”²

The question of economic loss under the *2010 Schedule* was addressed by the Ontario Court of Appeal in *Henry and Gore Mutual*, 2013 ONCA 480, in relation to attendant care benefits. In the case of *Simser and Aviva Canada Inc.*, (FSCO P13-00004, January 9, 2014), Delegate Blackman addressed economic loss in relation to attendant care and housekeeping and home maintenance benefits.

In the *2010 Schedule*, the legislature imposed the requirement for the first time, that family members and friends who provide services to insured persons incur economic loss. The *Schedule* does not define the term economic loss. In construing the intent of the legislature, the Court of Appeal considered the statutory objectives; the language used in the *Schedule*, as well as what the *Schedule* does not say; the scheme and logic of the *Schedule*; the legislative history; the positions of stakeholders; the position taken by the Financial Services Commission of Ontario in its Report on the Five Year Review of Automobile Insurance, March 31, 2009; arbitral jurisprudence, and that section 33 of the *Schedule* gives insurers the ability to verify claims of economic loss.³

The Court of Appeal held that the intent of the legislature in imposing the requirement of economic loss in the *2010 Schedule* was to provide a rough check on attendant care costs by requiring that the care provider sustain an economic loss.

² While the *Interpretation Act* has been repealed, section 64 of the *Legislation Act, 2006*, S.O 2006, c 21, Sch F, contains similar provisions, as follows:

64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

Same

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act. 2006, c. 21, Sched. F, s. 64 (2).

³ *Henry and Gore Mutual Insurance Company*, op.cit.

The Court declined to define the term “economic loss”, although it was asked to do so. The Court also declined to impose a *de minimis* financial or monetary loss or other restriction on economic loss.

In *Henry and Gore Mutual*, the Court of Appeal held that as the insured’s mother took an unpaid leave of absence from work in order to provide full-time care to her son, she incurred an economic loss. The Court held that the amount payable for attendant care was the amount in the Form 1 for 24 hour a day care, subject to the maximums and other safeguards prescribed by the *Schedule*, and not the amount of her wage loss for a 40 hour work week.

In *Simser and Aviva Canada Inc.*, (FSCO A11-004610, January 16, 2013), the hearing arbitrator adopted the definition of economic loss from *Black’s Law Dictionary* and held that economic loss as applied in the *Schedule* must relate to some form of financial or monetary loss. This conclusion was not disturbed on appeal.

At the *Simser* hearing, the applicant had significant evidentiary difficulties in establishing the various losses claimed. For example, the hearing arbitrator described the evidence adduced at the hearing as vague and lacking in detail, lacking documentary evidence from the service provider’s employer, despite numerous requests from the insurer, and that there was a failure to link the expense or loss to the attendant care claimed. With respect to some of the out-of-pocket expenses, the arbitrator held that they were *de minimis* and therefore did not amount to economic loss.

I am not persuaded that the expenditure of \$5,048 in this case is *de minimis*. The Court of Appeal in *Henry* rejected any *de minimis* requirement for an expense to qualify as economic loss. On this point, on appeal, Delegate Blackman noted that the hearing arbitrator in *Simser* adopted the *de minimis* approach taken by the trial judge in *Henry v. Gore Mutual*. However, the arbitrator did not have the benefit of the Court of Appeal’s decision rejecting the *de minimis* approach at the time he issued his decision.

What is clear from these cases is that a loss of wages or a loss of income will qualify as an economic loss. I am not persuaded by the Insurer’s submission in this case, that the term

economic loss should be read restrictively so that only those losses will qualify. Had the legislature intended to restrict economic loss to wage loss or loss of income, it could have so stated. Insurance coverage provisions are to be interpreted broadly, while coverage exclusions or restrictions are to be construed narrowly in favour of the insured.⁴

In my view, the Applicant has demonstrated that funds were expended by her friend and service provider in the amount of \$5,048 to purchase bus tickets and/or passes in order for her to travel to the Applicant's home. The purchases involved the expenditure of funds by the service provider, were a monetary loss to her and therefore qualify as an economic loss within the meaning of the *Schedule*

I have not been provided with copies of the bus tickets and/ or passes at this hearing. However, there is no dispute between the parties with respect to this documentation. For these reasons, I conclude that Ms. Easan has established that she sustained an economic loss and that she provided the Insurer with copies of the tickets and/or bus passes.

As a result of

The Applicant's submissions, which were the first to be filed, focus on whether the amounts paid for the bus passes constitute economic loss. The Insurer's responding submissions deal with this question and go on to submit that the Applicant failed to establish that the bus passes were obtained "*as a result of*" providing the goods or services to Ms. Asokumaran. In Reply, the Applicant submitted that by agreement, the sole issue to be determined at this hearing was that of economic loss. She suggested that the *as a result of* question should be determined at a subsequent hearing at which *viva voce* evidence could be adduced.

As I was not the pre-hearing arbitrator, it is unclear to me whether there was a misunderstanding between counsel as to the issue to be determined at this hearing, or whether the "*as a result of*" question was a new issue raised by the Insurer for the first time in its responding submissions.

⁴ *Monks v. ING Insurance Co. of Canada*, 2008 ONCA 269

The Explanation of Benefit Form was not filed and the pleadings are of no assistance in clarifying when this aspect of the dispute arose.

Based on their submissions, counsel appear to be of the view that the “*as a result of*” question is a live issue. They do not appear to view this as something to which they implicitly agreed, given the way in which they framed the issue.

I find that I am unable to decide the “*as a result of*” question because that determination involves the resolution of a factual dispute, at least in part. Neither party provided any evidence on this question. Neither party provided any submissions on the meaning of the phrase “*as a result of*”. In these circumstances, I believe that fairness requires that I deal only with the dispute as to whether the purchase of the bus tickets and/or passes constitutes economic loss. However, the parties may, as suggested by counsel for the Applicant, address the “*as a result of*” question at a subsequent hearing.

Expenses

If the parties are unable to agree on expenses, I leave that issue to the hearing arbitrator.

Order

1. The Applicant has established that Ms. Easan sustained an economic loss by purchasing bus tickets and/or passes.
2. The question of whether the economic loss was incurred *as a result of* the provision of caregiving and housekeeping services to the Applicant may be addressed at a subsequent hearing.
3. If the parties are unable to agree on the expenses of this hearing, I leave that issue to the hearing arbitrator

Suesan Alves
Arbitrator

May 30, 2014

Date



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BETWEEN:

MANGALESWARY ASOKUMARAN

Applicant

and

TD HOME AND AUTO INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mrs. Asokumaran's friend and service provider Ms. Easan incurred an economic loss by purchasing bus tickets and/or passes in the amount of \$5,048.
2. The question of whether the loss was incurred *as a result of* the provision of caregiving and housekeeping services to the Applicant may be addressed at a subsequent hearing.
3. If the parties are unable to agree on the expenses of this hearing, I leave that issue to the hearing arbitrator

Suesan Alves
Arbitrator

May 30, 2014

Date