Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-003291
FSCO A15-003292
FSCO A15-003293

BETWEEN:

HAYLEE TIERNEY, MICHAEL TIERNEY & KEEGAN TIERNEY

Applicants

and

NORTH WATERLOO FARMERS MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: James Robinson

Heard: March 28, 2017, in London, Ontario.

Appearances: Emily Foreman for Jocelyne Wilson, the personal representative of Haylee Tierney, Michael Tierney and Keegan Tierney, minors
Bruce A. Keay for North Waterloo Farmers Mutual Insurance Company

Issues:

The Applicants, Haylee Tierney, Michael Tierney and Keegan Tierney, were injured in a motor vehicle accident on March 17, 2013. They applied for and received statutory accident benefits from North Waterloo Farmers Mutual Insurance Company ("North Waterloo"), payable under the *Schedule*.[1] Disputes arose between the parties with respect to the payment of attendant care benefits. The minor parties were unable to resolve their disputes through mediation, and their personal representative applied on their behalf for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The issue in this hearing is:

1. Was an attendant care claim "incurred" with respect to these applicants, pursuant to Subsection 3(7)(e)(iii)B of the 2010 *Schedule,* because Ms. Jocelyne Wilson sustained an economic loss as a result of the accident?

Result:

1. An attendant care claim was "incurred" with respect to each of these applicants, pursuant to Subsection 3(7)(e)(iii)B of the 2010 *Schedule,* because Ms. Jocelyne Wilson sustained an economic loss as a result of the accident.

2. In accordance with the partial settlement entered into between the parties with respect to quantum, the following all-inclusive amounts shall be paid for attendant care benefits up to the date of the hearing:

Keegan Tierney	$100,000.00 all-inclusive
Haylee Tierney	$35,000.00 all-inclusive
Michael ("Hunter") Tierney	$20,000.00 all-inclusive

EVIDENCE AND ANALYSIS:

The applicants are the minor children of Jocelyne Wilson, who is their custodial parent. She is separated from the children's father, Joshua Tierney, but Mr. Tierney enjoys and exercises generous access. On the day of the accident the applicants were seat-belted passengers in their father's van when he was involved in a serious motor vehicle collision. At the time of the accident Michael Tierney (known as "Hunter") was eleven years of age, Keegan Tierney was seven and Haylee Tierney was six.

At the commencement of the hearing I was advised that the following amounts, to the date of the hearing, were agreed by the parties, to be due for attendant care if the applicants were successful on the issue of entitlement:

Keegan Tierney	$100,000.00 all-inclusive
Haylee Tierney	$35,000.00 all-inclusive
Michael ("Hunter") Tierney	$20,000.00 all-inclusive

I accordingly heard the matter on the basis that the sole matter for my determination, apart from the issue of expenses, was the issue of entitlement and, in particular, the question of whether the applicants could satisfy the onus upon them to show that their mother, in providing attendant care, had sustained an economic loss as a result of the accident.

I am of the opinion that the parties, by entering into a partial settlement on the issue of quantum, also removed from my consideration the question of continuing economic loss.[2] In other words, if I find that the requirements of subsection 3(4) have *once* been met, that will be determinative of the issue of liability. The effect of the partial settlement is to create a tripwire which, if triggered, will result in the agreed awards.

Applicants' Injuries and Need for Care

The injuries suffered by the children were severe. Hunter suffered a broken nose, a chipped tooth and a broken arm. In addition he suffered significant psychological injuries. He has had a subsequent episode of self-harm associated with the aftermath of the accident. Haylee suffered a concussion, dental injury with tooth loss and complicated deep facial lacerations requiring 57 stitches to close. She continues to suffer emotional problems, including but not limited to regressive behaviour. Keegan is catastrophically impaired. He suffered left side facial and scalp

[2]This case is therefore to be distinguished from *Keeping and Aviva Canada Inc.* (FSCO A14-003770, October 31, 2016), where both entitled and quantum were live issues before the arbitrator, and continuing economic loss was therefore a matter for consideration.

injuries, and experiences continuing headaches, finger numbness and dental pain. His psychological injuries also include irregular and regressive behaviour.

Jocelyne Wilson, who is the mother of the three minor applicants and the provider of their attendant care, was the sole witness at the hearing. She testified that the children were staying with their father, her former spouse, at the time of the accident. Ms. Wilson, who had recently married, was away on her honeymoon in the Carolinas when she and her husband received news of the accident and immediately returned home to Canada.

Ms. Wilson is the primary custodial parent of the three children. Although the children's father has generous rights of access, he does not always fully exercise them on the weekends or holidays. It does not appear from the available evidence that he paid child support. I am satisfied on the available evidence that Ms. Wilson, in the post-accident period, was for all practical purposes the exclusive caregiver for the children. Her husband, the children's stepfather, did not perform any active parenting role at the material time although he was available to supervise the children on those occasions when Ms. Wilson needed to be out of the home. Ms. Wilson's elderly grandmother also lives in the home but has no active caregiving role.

The regimen for child care in the immediate post-accident period was a demanding one. Ms. Wilson testified that in the period immediately after the accident the children required around-the-clock attention. Administration of medications and dealing with the aftermath of bed-wetting meant that care was required through the night for all three applicants. There was abundant evidence to confirm the children's ongoing needs for physical, social and psychological aid and support.

Invoices for attendant care prepared and submitted by Ms. Wilson were prepared retroactively, using the retrospective Form 1 documents as *aides-memoire*. Errors of duplication and repetition were identified and freely admitted in her cross-examination. The invoices themselves have

limited evidentiary significance since the issue of the quantum of benefit had been settled by the parties.

Ms. Wilson's Employment

In order to understand the applicants' case for economic loss, it will be necessary to outline briefly the employment history of their caregiver. Ms. Wilson is a high school graduate. Early in her adult life she trained as a Personal Service Worker but became pregnant with her first child and never worked professionally in that field. Later, in early 2004, she began work with Starwood Resorts as a call centre employee. At first this was essentially minimum-wage employment but Ms. Wilson succeeded well at the work and was ultimately assigned to a more responsible, second-tier position dealing with escalated calls. She also received merit-based pay increases.

In September 2012 Ms. Wilson left Starwood Resorts. At that time she was earning $13.00 an hour. Ms. Wilson, pursuing a vocational ambition, began a course of training at Westervelt College. It was her expectation that upon graduation from her one-year program she would obtain a job in a hospital setting as a medical records administrator. Her preliminary research had satisfied her that the demand existed, that a co-operative placement in a hospital would be available, and that Westervelt had a high success rate in placing its graduates. She testified that the salary expectations for such a position were in excess of $20.00 an hour. In order to undertake this training, Ms. Wilson applied for and received a student loan from the Ontario Student Assistance Plan (OSAP).

It was within the final few months of her academic program that the accident occurred. Counsel for the insurer suggested that Ms. Wilson's attendance and academic record did not suffer unduly in the aftermath of the accident. The evidence of this was not unequivocal. What was central, however, was Ms. Wilson's testimony about her co-operative job placement. Her evidence was that as a result of the accident she was compelled to take a cooperative job placement with a local medical practitioner in St. Thomas, close to her home and to her children's school. It also

offered flexible hours so she could take her children to appointments with doctors and social workers and to their extra-curricular activities. There was ample evidence that this was exactly what she did during that period. Ms. Wilson's evidence was that because she was compelled in the aftermath of the accident to take this inferior job placement, she suffered an economic loss.

The Applicant's Submissions

Ms. Wilson's testimony was that a cooperative placement in records management at a London region hospital or health facility would have been available to her in 2013 through Westervelt College as part of her program. Her testimony on this point was unambiguous and uncontradicted. Her evidence was that such a placement represented the very opportunity for which she had planned and strategized in enrolling in this program. She testified that not only was such a placement available but that Westervelt students had a high success rate in securing full-time employment after graduation from the institutions where they had been placed. That evidence was unchallenged by the insurer.

Ms. Wilson's submission was that her economic loss crystallized when she was compelled, by virtue of the attendant care needs of the children, to accept a career placement in a small-town medical office rather than in a hospital or health facility in the greater London area.

Another aspect of the matter that bears attention arises from the OSAP indebtedness incurred by Ms. Wilson in order to register at Westervelt. I may take judicial notice of the fact that OSAP loans become repayable commencing six months after completion of an academic program.

At least twice in her testimony Ms. Wilson referred to the pressure she was under from OSAP in late 2013 to begin repayment. She identified this as an important factor in her approach to Drake Personnel when she finally returned to the workforce after the children's accident. Throughout her testimony Ms. Wilson's tone of desperation on the subject was evident. It was clear that she urgently needed to find employment that could offer her flexible hours in order that she could both care for her children and commence repayment of her OSAP loans.

The Insurer's Submissions

The insurer took Ms. Wilson to be arguing that she incurred an economic loss in or about the time she returned to the workforce after the applicants' injuries had sufficiently resolved to permit her to do so. He suggested that there was a deficiency in the evidence because, for instance, no labour market surveys were adduced to show that employment as a medical records administrator was even available in the area at that time. On that argument, the best employment available to Ms. Wilson was the job that she actually ended up taking when she eventually returned to her job as a call-centre employee with Starwood.

Clearly that was not the applicants' argument. The position of the applicants was that the economic loss occurred at a somewhat earlier date.

I was referred by insurer's counsel to a number of authorities on the issue of economic loss. Only two of those decisions are binding upon me. The decision of the Ontario Court of Appeal in *Henry v. Gore Mutual Insurance Company*[3] gave consideration to the concept of economic loss in the following terms.

> "If no such loss is sustained no attendant care benefits are payable in respect of care provided by the family member, even if the family member provides care that would otherwise be provided by someone in the course of their employment, occupation or profession…"

It is notable that the Court of Appeal in *Henry* specifically declined to provide a judicial gloss on the term "economic loss," in order to narrow its meaning. The court merely observed that it was of the view that the test had been met in that particular case insofar as the applicant's mother had given up full-time employment to provide around-the-clock care for her son. The court's refusal to create a hard-and-fast definition is instructive.

[3] 2013 ONCA 480

In Simser v. Aviva Canada Inc. and Financial Services Commission of Ontario[4] the question of economic loss came before the Divisional Court of Ontario. In that case counsel for the applicant argued that the term "economic loss" encompassed an opportunity cost. The court disagreed, in the following terms:

> "If the broad definition advanced by the applicant's expert were accepted, namely that any loss of time equals an economic loss, then the distinction between professional and lay service providers contemplated by s. 3(7)(e)(iii)(A) and (B) would be redundant. Nor does the definition of "economic loss" as requiring a financial or pecuniary sacrifice eliminate all opportunity costs. For example, a student might sustain an economic loss where she defers graduation in order to provide attendant care, resulting in postponement of paid employment. Of course, this type of economic loss would need to be established by a proper evidentiary foundation."

The remainder of the decisions cited by counsel for the insurer were decisions of other FSCO arbitrators on cases that are distinguishable from the one under consideration. *Ungaro and Aviva Canada Inc.,*[5] and *Aidoo and Security National Insurance Company/Monnex Insurance Mgmt. Inc.*[6] were, in my view, decided upon principles consistent with those enunciated by the Divisional Court in *Simser. Josey and Primmum Insurance Company*[7] and *Shawnoo v. Certas Direct Insurance Company*[8] were both decided pursuant to Subsection 3(7)(e)(iii)(A) of the *Schedule,* and therefore not in any direct way relevant to the present case. As I have previously observed, in view of the fact that the issue of quantum was taken out of my hands by the parties prior to the commencement of the hearing, *Fernandes and Certas Direct Insruance Company*[9]

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[4]2015 ONSC 2363

[5](FSCO A14-007429, July 18, 2016)

[6](FSCO A13-001238, September 26, 2014)

[7](FSCO A13-005768, October 31, 2014)

[8]2014 ONSC 7014

[9](FSCO P06-00030, February 14, 2008)

and *Keeping and Aviva Canada Inc.*[10] have no relevance to anything I must actually decide in the present case.

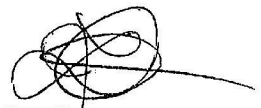
I am satisfied on the basis of the available evidence and on the balance of probabilities that Ms. Jocelyne Wilson suffered an economic loss within the meaning of subsection 3(7)(e)(iii)B of the *Schedule*. The nature of the loss was twofold. First, she lost the ability to obtain a placement through Westervelt College as a medical records administrator. She credibly testified that such a placement would have been available to her and that, had she been in a position to take it, would likely have led to an offer of employment. There was nothing in the available evidence to suggest that Ms. Wilson would not have succeeded in doing so, had the accident not occurred.

Second, Ms. Wilson's losses were not purely a matter of opportunity cost. She had financed her training by incurring an Ontario student loan through OSAP. She therefore had the burden of repaying the loans while having lost the opportunity to improve her financial circumstances by obtaining more remunerative work than that of a call-centre employee. It was evident from the summary income tax returns filed in evidence that Ms. Wilson had commenced repayment of her OSAP loans. She was therefore in a position, as a direct result of the accident, which was materially worse than she had been before she commenced her studies. This was an economic loss consistent with the principles enunciated in the *Henry* and *Simser* decisions hereinbefore cited.

[10]See footnote 2, *supra.*

EXPENSES:

The applicants shall have their expenses for this application and hearing. If the parties are unable to agree upon quantum they may apply to me for an expense hearing, within the time periods prescribed by the *Dispute Resolution Practice Code.*



James Robinson
Arbitrator

May 25, 2017
Date

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HAYLEE TIERNEY, MICHAEL TIERNEY & KEEGAN TIERNEY

Applicants

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NORTH WATERLOO FARMERS MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act,* 2014, and *Ontario Regulation 664*, as amended, it is ordered that:

1. An attendant care claim was "incurred" with respect to each of these applicants, pursuant to Subsection 3(7)(e)(iii)B of the 2010 *Schedule,* because Ms. Jocelyne Wilson sustained an economic loss as a result of the accident;

2. The following all-inclusive amounts shall be paid for attendant care benefits up to the date of the hearing:

Keegan Tierney	$100,000.00 all-inclusive
Haylee Tierney	$35,000.00 all-inclusive
Michael ("Hunter") Tierney	$20,000.00 all-inclusive

3. The applicants shall have their expenses of this application.

James Robinson
Arbitrator

May 25, 2017
Date