ABI Network Conference

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# Tips for Favorably Advancing Attendant Care Claims

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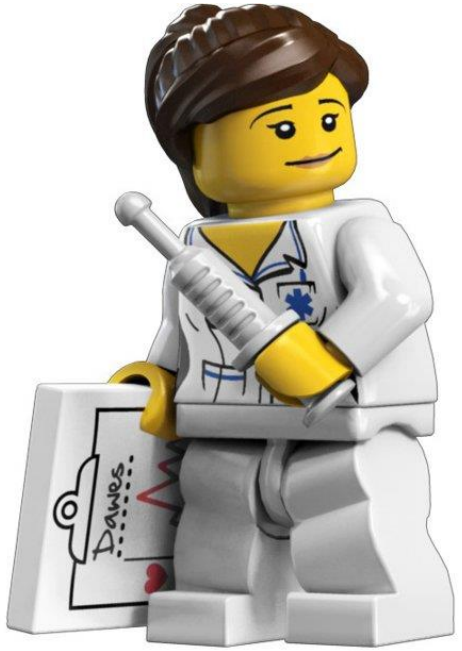
# After a Life Changing Accident



- Injured parties may be intitled to attendant care
- Legislated maximums set out in SABS
- Shall not exceed $6000/ month for CAT
- Plaintiffs can advance their claims in a tort action

# Four Themes

Four themes relating to provision of attendant care in case law:

1. Do not overreach
2. Select Appropriate evidence to establish attendant care
3. Plaintiffs are entitled to appropriate compensation
4. Select the Appropriate method of delivery

# Do Not Overreach

- Jurors increasingly more skeptical of PI claims
- Perception that plaintiffs exaggerate injuries
- Claiming unrealistic and aggressive future care costs
- Plaintiff's counsel alienates a jury which leads to lower awarded damages than if counsel initially presented a realistic assessment.
- Not all claims are 24/7 care claims!

# Evidence Required to Support Claims

- Avoid the perception of overreaching by providing lay person and medical evidence from family, rehab providers, doctors etc.
- *Frazer v. Haukioja* – Court held that without appropriate supporting evidence case was “exercise in sheer speculation”
- *Khelifa v. Ontario Corp* – Court rejected plaintiff future care cost due to errors and contradictions

# Plaintiffs entitled to full compensation

- Plaintiff counsel should ensure claims are reasonable and necessary
- Supreme Court of Canada held that if plaintiffs family provides attendant care, plaintiff still entitled to market value of these services
- *Matthews* – Court held the quality of the services provided should govern not who provide them

# Plaintiffs entitled to full compensation

- Full compensation requires damages awarded for futures costs put the injured person in the position he/she would have been before accident
- In *Andrews* – Supreme Court of Canada reasoned that the institutionalized setting was not proper compensation for the plaintiff "justice requires better"
- No duty on the plaintiff to mitigate or being forced to accept less than real loss

# Choosing Appropriate Model of Delivery

- Future care costs experts may recommend attendant care throughout the day
- Plaintiff may require assistance with dressing, bathing etc.
- Courts recognise that care providers do not provide "drop by services"
- *Rolley v. MacDonnell* – Court found that plaintiff required 4.22 hrs of care throughout the day but over a 10 hr period
  - Court awarded damages based on aggregate amount

# Examples of 24/7

- *Kwok v. Abecassis* – Court found plaintiff was subject to falls due to sleep deprivation, impulsive behaviour etc.
  - 24 hr care was awarded
- In *SM v Intact* – FSCO decided injured party could no longer respond to emergencies so around the clock care was needed
- SM v. MVAC – Plaintiff was a safety risk to himself and others and 24/7 (not 4 hours of daily care required)

# ASSESSMENT OF ATTENDANT CARE NEEDS (FORM 1)

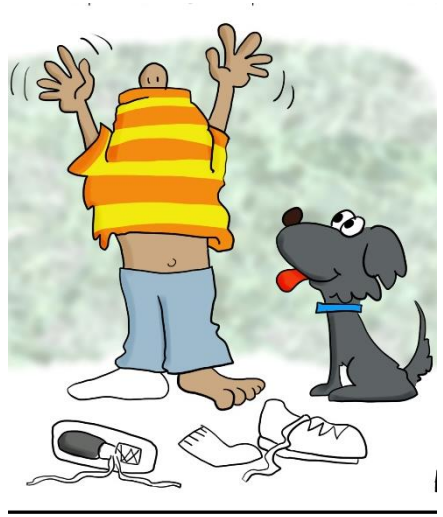
- ***Key Points:***
  - The Form 1 has **3 Levels of Care,** but the content on the Form 1 is not always understood as it pertains to acquired brain injury and/or psychological issues. *experience in the ABI field is KEY for these assessors to document this properly
  - The Form 1 completion can only be done by an OT or RN (subsequent to Sept. 2010)

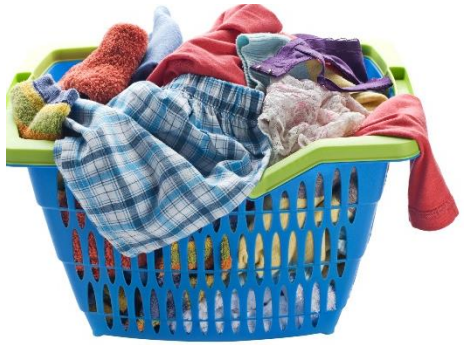
# 3 LEVELS OF CARE - FORM 1

- **Level 1** – Routine personal care
- **Level 2** – Basic supervisory functions
- **Level 3** – Complex health/care and hygiene functions

# FORM 1 - LEVEL 1

- Dressing, undressing
- Prosthetics, orthotics, grooming
- Feeding, mobility and extra laundry
- **ARE THESE AREAS CONSISTENTLY DONE INDEPENDENTLY OR ON THE CLIENT'S BAD DAYS, DO THEY NEED CUES OR HELP?





# FORM 1 - LEVEL 2

- Ensures comfort and security
- Basic supervisory care – “Applicant lacks the ability to respond to an emergency or needs custodial care due to changes in behaviour”
- i.e. unaware of safety, poor judgment, very heavy sleeper, responding to fire alarms
- AMOUNT of care needed – is it 24 hour, more than 8 hours per day?
- Co-ordination of attendant care – can they manage their own schedule?

# FORM 1 – LEVEL 3

- These are higher skilled areas of care such as genitourinary, bowel, tracheostomy, ventilator, etc.
- One aspect of care related more often to ABI is the final Skilled Supervisory Care – this area is related to safety-related concerns for persons hurting themselves or others
- Ensure your treating OT has familiarity with assessing & treating ABI; credentials of Insurer Examination OT's should be considered in that there should be a solid working knowledge and history of assessing and treating persons with ABI's, not just assessing

# WHAT ARE SOME OF THE CHALLENGES?

- COVID-19
- Assessments in rural areas – travel issues, shopping issues, proximity to amenities, do they want to be seen/confidentiality
- Financial restraints/time constraints
- Assessing OT's should have long-term knowledge of how an ABI impacts people on a daily basis, as function vacillates in ABI (Good days and bad days); FORM 1 should consider bad days so that time allotments are there for our clients
- Lack of collateral information OR unreliable collateral information; OT's can talk to one another and should so that the information is transparently discussed
- Prior poorly completed Form 1's – time allotments, no rationale for assistance or lack thereof

# QUESTIONS & COMMENTS AT THE END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I am ALWAYS happy to discuss a file so feel free to reach out.

# Attendant Care
# 24 Hour
# Supervision
# - T.ABI Network -

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# THE ISSUE

When is a person(client, claimant, plaintiff) at such risk to themselves, or to others that they require another person to watch over them and be available 24 hours a day and help them just in case.

Put another way ‘what is threshold of likelihood or level of risk that must be present for an individual to require the assistance of another person to be available 24 hours a day.

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# EXAMPLES

- If a client with a traumatic brain injury is comatose, 24 hour supervision,

- Traumatic Brain Injury leads to significant behavioral changes that could lead to high levels risk taking behavior,
  - Ex: (medication seeking behaviors) / addiction,
  - loss of capacity to make decisions (sometimes in multiple spheres),
  - Disorientation / high levels of confusion, wandering, etc.
  - OR "Unable to Respond to an Emergency Situation" / SABS form 1

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# 24-Hour Research - Part 1

Maranan, A., & Rose, M. (2017). Determining 24-hour supervision: A scoping review through a Canadian legal database. *Journal of Life Care Planning, 15*(4), 13–17.

PURPOSE: Find out what published research is out there.

METHODS:

a) LIT REVIEW - Current research on determination of 24 supervision - None at time of publishing (2017)

b) CANLii - Canadian Legal Database Review all legal decisions

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# 24-Hour Research - Part 1

RESULTS:

a) OT's are being increasingly relied upon to make a decision on a benefit potentially worth millions of dollars and there is no research on the subject.

b) The majority of legal decisions reviewed noted that 24 hour supervision was not indicated. Why ? Unknown maybe because the defense counsel are risk adverse and only take the cases to court that thing they have a good chance of winning or evidence presented simply is not conclusive.

a) The legal decisions did not explicitly state what process or methodology or tools the OT's used in arriving at the decision of 24-hour supervision.

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# 24-Hour Research - Part 1

## CONCLUSION

1) Further research required,

2) Growing issue.

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# 24-Hour Research - Part 2

Journal of Occupational Therapy in Healthcare 2020 - Publication Date TBD

PURPOSE:

Find out what clinical decision making process and tools Canadian OT's are using in practice to determine 24 hour attendant care Supervision

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# 24-Hour Research - Part 2

METHODS:

a) Completed updated LIT review, Still Nothing (2019)

b) Develop a survey from scratch, complete small pilot study to assess and improve validity.

c) Distributed a survey to all private practice OT's across Canada to find out how OT's are currently making this determination.

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# 24-Hour Research - Part 2

RESULTS:

a)OT's use a variety of cognitive, psychosocial, environmental and physical measures to make this determination.

b) 90 Participants completed the survey

c) 71% Ontario, 8% BC, 7% Alberta, 3% Nova Scotia, 2% Manitoba, 1% Yukon

d) 91% of participants indicated they had made a determination of 24 supervision

e) Three most commonly used tools / measures used are MOCA, Berg Balance and Rivermead Behavioral Memory

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# FUTURE

Project 3 - Interview 5 to 10 OT's and discuss in detail clinical reasoning process in various situations.

Project 4 - Develop Clinical Practice Guidelines or Tool for Risk Analysis and Best Practice.

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# SPECIAL THANKS to Co-Researchers

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# RIGHT CARE RIGHT PROVIDER

Attendant Care Provider Options

# Attendant Care as Defined by FSRA (FSCO)

- Level 1 : Personal Care
  - Routine, Maximum hourly rate 14.90
- Level 2: Supervision of hygiene and health needs
  - Routine, Maximum hourly rate 14.00
- Level 3: Complex health/care and hygiene functions
  - Equipment use, cleaning, maintenance
  - Monitoring behavioral needs in home or in the community
  - Maximum hourly rate 21.11

# Pay Rates in the Guidelines

- Clearly there are no PSW's or other attendants available at minimum wage. The guidelines say that insurers may pay more: Current PSW rates for community-based care must be no less than 16.50 and can go up to 19.00

- Pay rates in the FSCO guidelines are significantly behind the market, as much as 150% for some professions, but at least by 75% across the board

# Certified/Qualified Attendants: The PSW

- Personal Support Workers (PSW) have been taught confidentiality, safe mobility assists, hygienic practice, communication skills, and some documentation skills. They will have **little to no training** in ***mental health or neurological injuries.***
- They require clear care plans and should be alerted to report significant change in patient functioning, mood, or household/environment. They should be provided a documentation format. Special equipment should be demonstrated.
- As these paraprofessionals are alone with the client, and involved in intimate care, they are vulnerable to emotional transference. They should be reporting to a member of the client's professional team, not only their agency for their own support but also to maintain boundaries. PSW's often are asked by clients and families to perform duties far outside the care plan. These duties may be very needed, but as such should become additions to the care planning rather than absorbed by the paraprofessional.

# Another Option: DSW

- Disability Support Workers are similarly trained to PSWs but with **less emphasis on body mechanics and more on communication strategies** and **behavioral needs** as well as documentation.
- As with PSWs, DSWs need to know what is important to report, and a clear care plan. DSW's are able to do personal hygiene care and mobility assistance but may need an initial demonstration of equipment.
- DSW's are most often employed by agencies that provide support to individuals with intellectual delay, and so are more fluent with behavioral issues and are skilled in engaging clients who feel defensive about deficits in cognition, speech or autonomy.
- Contact with the DSW by at least one member of the professional team should be maintained for best support of client and worker. These workers present an advantage as they are also enculturated to protect autonomy.

# Consider the RSW (Rehab Worker)

- • Intention is to carry out therapeutic interventions
- • Re-learning personal hygiene and self care skills through teaching techniques
- • Promotes independence
- • College training for Occupational and Physiotherapy Therapy Aides
- • Understand care planning and documentation
- • Communication training
- • Expectation to be a team member

# Housekeeping

- Coverage for housekeeping and household maintenance is only available after Catastrophic status is secured
- UNLESS
- Client has purchased coverage as an addition
- Maximum to be paid is 100 per week

# Know Your Client and Milieu (a)

- While a competent professional probably has done a well-rounded assessment of the client's abilities, needs and maybe wants, the milieu is more difficult to determine, especially at a distance.
- The culture of the home, the culture of the community that the client is embedded in, and the culture of the worker should mesh.
- E.g.: MC is newly home after 7 months of surgeries and rehabilitation. She lives alone but had only recently moved into this apartment in a new town. Her main family support is her married sister. MC was gang involved, and her sister has a fear of MC's friends bringing drugs and stealing MC's drugs. MC's insight into this issue is clouded by a family culture of judgement (she is the black sheep) and hides information from the sister. Sister pressures workers and team for information. **What qualities should the attendant-carer bring to be able to navigate these waters?**

# Know Your Client and Milieu (b)

**Case study**

- MC is newly home after 7 months of surgeries and rehabilitation. She lives alone, only recently moved into this apartment in a new town. Her main family support is her married sister. MC was gang involved, and her sister has a fear of MC's friends bringing drugs and stealing MC's drugs. MC's insight into this issue is clouded by a family culture of judgement (she is the black sheep) and hides information from the sister. Sister pressures workers and team for information.

- **What qualities should the attendant-carer bring to be able to navigate these waters?**

# Rural *versus* Urban/Suburban

- Attendant care in rural areas is sparse, as are most services. Travel is sometimes the costliest portion of the plan. Assessments are extremely important and should be done in the client's home.
- Tap agencies as close to the client as possible who may be able to assign workers already in that geographical area.
- Check to see if there are registered HCAI provider facilities closer to the client. It may be preferable to use workers they are familiar with who have experience with ABI. It may also be preferable to refer the whole file given the cost of travel. I have found that clients have never been informed that there are services closer to their homes.

# Thank you!

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# Bringing it all together

- Legal tips (don’t overreach, obtain supporting evidence, look at the delivery model)

- Stickhandling Form 1 and IE assessments
- When is 24/7 appropriate?
- Choosing the right provider
- PSW v. RSW

# CONSTRAINTS

- Accident benefits rates are modest
- Incurred definition and Economic Loss
- Skepticism over family member care
- Documentation if often limited
- How do you demonstrate need in non MVA cases?

# Conclusion

- Given the importance of attendant care claims counsel advised to:
  - Thoroughly consider extent of clients claims
  - The possibility of intermittent or round the clock care
  - Ensure that clients are fully compensated using the appropriate care delivery model
  - Counsel should support these claims with ample evidence

# THANK YOU

We are happy to take questions now.


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