



FSCO A04-000384

**BETWEEN:**

**BRADLEY MICHAEL MULHALL**

**Applicant**

**and**

**WAWANESA MUTUAL INSURANCE COMPANY**

**Insurer**

## **REASONS FOR DECISION**

**Before:** Jeffrey Rogers

**Heard:** October 25, 26, 27, 28 and 31, 2005, at the offices of the Financial Services Commission of Ontario in Toronto.

**Appearances:** Mr. David Zarek, solicitor for Mr. Mulhall  
Mr. Ian D. Kirby, solicitor for Wawanesa Mutual Insurance Company

### **Issues:**

The Applicant, Bradley Michael Mulhall, was injured in a motor vehicle accident on March 18, 2001. He applied for and received statutory accident benefits from Wawanesa Mutual Insurance Company (“Wawanesa”), payable under the *Schedule*.<sup>1</sup> Wawanesa disputed his entitlement to a non-earner benefit. The parties were unable to resolve their dispute through mediation, and Mr. Mulhall applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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<sup>1</sup>The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The issues in this hearing are:

1. Is Mr. Mulhall entitled to receive a non-earner benefit pursuant to section 12 of the *Schedule*?
2. Is Mr. Mulhall entitled to interest for the overdue payment of benefits pursuant to section 46(2) of the *Schedule*?
3. Is either party liable to pay the other's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*?

**Result:**

1. Mr. Mulhall is entitled to receive a non-earner benefit of \$185 per week, from September 18, 2001 to August 31, 2002.
2. Mr. Mulhall is entitled to interest for the overdue payment of the above benefits pursuant to section 46(2) of the *Schedule*.
3. If the parties cannot agree, the issue of entitlement and quantum of expenses will be resolved in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

**EVIDENCE:**

There is no dispute on the facts. There is no dispute that Mr. Mulhall falls within a class of persons entitled to a non-earner benefit if he suffered a "complete inability to carry on a normal life" as provided in section 12 of the *Schedule*. Mr. Mulhall was described either as "suspended" or "expelled" from school at the time of the accident. It was not alleged that he was not "enrolled on a full-time basis" as required by subsection 12(1)(3)(i) of the *Schedule*, and I heard no evidence that he was not.

The witnesses called to give factual evidence for Mr. Mulhall were Mr. Mulhall himself, his father Mike Mulhall, and Roberta Cullingham, a Child and Youth Worker who co-ordinated rehabilitation services for Mr. Mulhall. Cross-examination served only to expand and clarify their evidence. Their credibility was not put in issue.

There is no dispute that Mr. Mulhall suffered a serious brain injury, with permanent effects. The dispute is about whether Mr. Mulhall's post-accident impairment caused a "complete inability to carry on a normal life", as defined. Section 2(4) of the *Schedule* provides as follows:

... a person suffers a complete inability to carry on a normal life as a result of an accident if, and only if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.

## **The Accident**

Mr. Mulhall was 17 years old when the accident happened on March 18, 2001. He lived at home with his parents and his brother John, who is about 2 years younger. He does not remember how the accident happened. He does remember leaving home to share some Crown Royal with the driver, his friend Jessie Fraser. He remembers that Jessie told him he had 40 or 60 ounces. At around 1:00 a.m. his father heard him tell his mother that he was walking Jessie home. She wanted to be assured that Jessie was not driving. She thought they had been drinking. After Bradley left with Jessie, both parents went back to sleep.

The accident happened around 7:30 a.m. Shortly after that, there was a knock on the door. Mr. Mulhall had been taken to the Oshawa General Hospital. A friend with a connection to the hospital was there to inform his parents that their son had been in a bad accident. The police later told them that they had been speeding and had hit a lamp post and that they were all drunk. They had taken Jessie's mother's car. Mr. Mulhall was not wearing a seatbelt and there was massive damage where he had been sitting. The roof of the car was cut off to extricate the driver, before Mr. Mulhall could be reached.

## Injuries and Treatment

The initial assessment at the Oshawa General Hospital was that Mr. Mulhall had suffered a head injury with a haematoma at the left occipital area. He was bleeding from both ears. The results of a CT scan included a fracture of the skull, deformation of the brain in the left temporal lobe and left parietal lobe, and a subdural haematoma in that area. Blood tests showed alcohol content well above the toxic threshold.

Mr. Mulhall was quickly transferred to St. Michael's Hospital, arriving there by ambulance around noon on March 18, 2001. His parents were told that his survival was in doubt. A tube was inserted into his brain to monitor and decompress the swelling and to assess the intracranial pressure. When that procedure did not produce satisfactory results, emergency surgery was performed on March 26, 2003. The surgeon removed part of the skull and parts of the parietal and temporal lobes of his brain. The removed section of skull was stored in the subcutaneous tissue of his abdominal wall until April 19, 2003, when it was replaced. He was transferred from intensive care on April 25<sup>th</sup> and discharged to Bloorview MacMillan Children's Centre on May 15<sup>th</sup>. He remained at Bloorview, undergoing intensive treatment and therapy, until July 27, 2001 when he returned home, to be followed as an out-patient.

Mike Mulhall testified that, after the initial period of despair, his son improved rapidly. At first they were told that he would be in a wheelchair, fed through a tube for the rest of his life. Then he could eat, then he could walk. They said it was a miracle. By the time he went to Bloorview, he could do just about everything but he was still unsteady on his feet and looked like he would fall at any time. At Bloorview, his speech improved, although he still has problems naming things. His balance improved quite a bit, but is still not perfect.

Just prior to his leaving Bloorview, a neuropsychological assessment was conducted by Dr. Simone Kortstee. Dr. Kortstee's findings include IQ scores in the 2<sup>nd</sup> to 7<sup>th</sup> percentile range, severely reduced memory, continuing difficulty with language, with further need for intensive speech and language therapy. Dr. Kortstee also found that Mr. Mulhall had poor insight into his

own neurocognitive limitations and behaviour. A full time Child and Youth Worker was recommended to ensure safety and promote integration within the community. The Worker was also recommended to support Mr. Mulhall's plan to return to high school in September, because of "his memory difficulties, his below average academic skill development, and his pre-existing learning and behavioural difficulties..."

The Speech Language Pathology Discharge Summary indicates that upon leaving Bloorview, Mr. Mulhall's language skills were much improved. Upon admission his expressive language consisted of jargon, and his speech was apraxic. That is, he was unable to string words together. Upon leaving, he scored in the 80<sup>th</sup> percentile in auditory comprehension, the 70<sup>th</sup> to 90<sup>th</sup> percentile in naming and greater than 70<sup>th</sup> and 80<sup>th</sup> percentile in reading out loud. He continued to experience significant difficulty when labelling items, correctly identifying only 12 of 23 pictures.

The Physiotherapy Discharge Summary indicates that Mr. Mulhall had met and exceeded the goal of improving his overall fitness level and would require no further physiotherapy. However, he had difficulty focussing during the Community Balance and Mobility Assessment, rendering the results invalid. He had scored 78% upon admission. The physiotherapist believed that his impaired concentration would affect his ability to do things like riding a bike.

It appears from the Child and Youth Worker Discharge Summary that Mr. Mulhall was anxious to return home. A full-time worker had been assigned because he had threatened to run away. Although the threats were taken seriously, the worker saw them as a tool that Mr. Mulhall used in a manipulative way, when he did not get his own way. This discharge summary also indicates that Mr. Mulhall was spending weekends at home before he was finally discharged and that he had been going out with friends on Tuesday evenings.

## Post-Discharge Progress

Mr. Mulhall enrolled in high school in the fall of 2001. With the assistance of a Child and Youth Worker, he earned his Grade 12 diploma in February 2003, successfully completing a modified program. He attended school on a half-time basis. The Child and Youth Worker picked him up, took him to school, was with him during all school hours, and took him back home. The worker also assisted him in doing the work in class by explaining questions in written material and reviewing possible answers. In September 2003, he enrolled in the College Vocational Certificate program at Seneca College. The Seneca calendar describes the program as designed for students with learning difficulties. It is intended to assist in the development of academic skills, as well as skills for both independent living and working. Mr. Mulhall again had the assistance of Child and Youth Worker during all school hours.

When Mr. Mulhall enrolled at Seneca, the plan was that he would get there by public transit. When he found that the trip was an hour and a half each way, with a 20 minute walk to the bus, his mother complained and the arrangements were quickly changed. He was either picked up by the Child and Youth Worker, or taken by taxi. Concern for Mr. Mulhall's safety was also a factor in requesting the change. The route by public transit was complicated and he was concerned that he might get lost. Both Mr. Mulhall and his father testified that he restricts his use of public transit to local trips, but he demonstrated the ability to travel by public transit by October 2001 and, in cross-examination, he began to recount the complicated route he had to take to Seneca.

He successfully completed the program in December 2004, becoming the first college graduate in his family. Mr. Mulhall did not view the high school and college programs as competitive. He thought that they were designed to improve his self-esteem and committed himself to their successful completion, in order to give himself a sense of achievement. His post-accident high school marks were significantly higher than pre-accident, with no failures. Mr. Mulhall's father shares his view that the post-accident high school courses were not competitive. He also noticed that Mr. Mulhall was more motivated to be successful in school, after the accident.

After graduation from Seneca, Mr. Mulhall continued to have some assistance from a Youth Worker until June 2005. There were two sessions each week for four hours each. The aim was to assist in integration into the community. They went to the gym, worked on his résumé and on socializing skills. Mr. Mulhall terminated the arrangement because his schedule changed and he wanted more independence. He felt that he could go to the gym on his own and could go into the community on his own. The Youth Worker did not support that decision.

As part of the Seneca program, Mr. Mulhall was placed in a job at Bay Cycle, where he was trained to sell, assemble and repair bicycles. This was a full time job, four days a week. He attended classes on the fifth day. He went to work on his own and had no assistance there. Bay Cycle reported that he had successfully completed the placement and gave a reference indicating that he could assemble bicycles. They did not offer him a job. Mr. Mulhall's evidence was that he had not actually done what the letter of reference said he had done. He enjoyed being at work and was well liked. They gave him the reference just to help him out.

With the assistance of Career Dynamics, an agency Wawanesa hired, Mr. Mulhall was placed in a job at Lifestyle Home Improvement. Initially his job was assembling windows, and he enjoyed that. After a week, his supervisor assigned him to packaging windows instead. He disagreed with the change and approached his supervisor and asked to be returned to assembling. The supervisor's response was that he had himself been a packager, when he first started. Mr. Mulhall thought that he was not properly treated, so he quit.

Again with the assistance of Career Dynamics, Mr. Mulhall was placed in a job as a janitor that he started the week before the hearing began. His duties are to clean an office and washrooms. It pays \$10 an hour. He works three days a week, five hours a day. The days are flexible. Mr. Mulhall testified that he likes the idea of earning his own money and saw no restriction of his ability to do that job. He does not retain any money from it, because it gets deducted from his disability pension, but it keeps him from going out and getting into trouble.

Mr. Mulhall has been in trouble with the law twice since his discharge from Bloorview. In the summer of 2004, he was drinking in a bar and, realizing he was drunk, he went outside to get some fresh air. As he was sitting in the parking lot, a woman walked by. He thought she was the same woman he had been talking to inside and he slapped her on the butt. She was not. She kicked him in the teeth. The police were nearby and they came over. They threatened to arrest Mr. Mulhall for being drunk and disorderly. He took offence, feeling that he was the injured party. He spat at an officer and was charged with assault. He received a conditional discharge and was placed on probation for a year.

Then, a few months before the hearing, he was again out drinking and got into an argument with the cab driver on the way home. He testified that he had drunk “a couple of beers” but he did not think that he was “too drunk”. He wanted to go directly home but the driver chose to stop so that Mr. Mulhall’s friend could get a “sub”. They argued while the friend was in the restaurant. The driver told him to get out. Mr. Mulhall’s evidence was that he was outside the cab, yelling at the driver, when some patrons came out of the restaurant and told him to leave the driver alone. One attacked him. His friend came out and joined in the melee. Mr. Mulhall was charged with assault. The charges are still pending.

After his discharge from Bloorview, Mr. Mulhall wanted to start riding a bike right away. His parents were concerned. Because of his head injury and surgery, he had been cautioned to wear a helmet. His parents stressed to him the importance of wearing a helmet. He wore one for a week or two and then he stopped. It seemed to them that he was competent and careful on the bike and they did not think they could make him wear a helmet. He thought he looked like a geek. None of his friends wore helmets. He now uses his bicycle as his main means of transportation around Ajax, where he lives. In May 2003, he reported to Dr. Lo, his family doctor that he had fallen off the bicycle and landed on his head.

Although he does not now have as many friends as he did before the accident, Mr. Mulhall has resumed many of the social activities he enjoyed before the accident. He is dating, but has not had a steady girlfriend. As noted above, he was going out with friends even before he left Bloorview. He has returned to playing pool with his friends and has started playing snooker with his father. They play together once a week. His father thinks his game is improving, although Mr. Mulhall says that he does not have as good a stroke as he did before the accident. He plays video games and watches videos with his friends. When he attended the Bloorview follow up clinic in June 2002, he reported to Dr. Rumney that he was attending parties where he would drink alcohol.

He had returned to using alcohol no later than January, 2002. On January 22<sup>nd</sup> he had a discussion with Dr. Lo regarding his use of alcohol and marijuana, in conjunction with Dilantin. His mother had expressed concern to Dr. Lo. Mr. Mulhall had been prescribed this medication to combat seizures he had experienced at St. Michael's Hospital. He testified that he hated the Dilantin and did not think that he needed it. If he took it, he would be drunk after one beer and his friends could not calm him down. He would be too hyper. It made him feel lazy, in a fog. Without it, he had more energy and was more affectionate with his mother. If he took it and went out, he would be all worn out the next day.

He started not taking it if he was going out. In November 2002, he reported to Dr. Rumney that he had tapered his dose in August and stopped altogether in September. There have been no adverse effects. He reported that his alcohol tolerance had increased as a result, although it had not returned to pre-accident levels. He told Dr. Cancelliere in October 2005, that his practice is to have six or seven beers every Friday and Saturday night. Mr. Mulhall has also returned to smoking the occasional "joint", down from every couple of days, as he did before the accident.

For exercise, he plays road hockey occasionally or goes for walks in the forest. Before the accident he was an excellent skateboarder, enjoyed snowboarding and "freestyling" on a BMX bike. The feeling of flying through the air was exhilarating. He had his share of spills, but he got right up. He considered himself a daredevil, prepared to take risks doing death defying

manoeuvres. He has not returned to these activities. He testified that he no longer considers himself a daredevil and is not prepared to accept the risk of injury these pursuits present. After the accident, he tried snowboarding once, but fell because he has a diminished sense of balance. He knew he could not do it at the level he did before the accident, so he has not tried it again. I note that his loss of sense of balance is not extreme because he admits being able to ride a bicycle while drinking a pop.

### **Pre-Accident Life**

At the time of the accident, Mr. Mulhall was not attending school. He had been expelled in the fall of 2000 as a result of a verbal altercation with the principal. Since then, he had spent most of his time hanging out with his friends. He had many friends. He was affable and personable, but he did not like school much. His father's evidence was that he hated school. He barely got by from the time he entered Grade 1 and when he got to high school things got worse. There were attendance and behavioural problems, usually associated with his son talking back to teachers. School records show a pattern of poor performance, lack of effort, and lack of ability to focus, starting at Junior Kindergarten<sup>2</sup>.

Mr. Mulhall testified that there were some courses that he liked. However, there were none in which he excelled. Of the 20 high school courses taken before the accident, Mr. Mulhall scored D's in 13, C's in 2 and he failed 5. He was failing in every course, when he was expelled. He was often not in school at all and his parents would not find out until the report card came. He would leave for school but hang out with friends instead of attending. They would go to the community centre and play games, go to a pool hall, or hang out in the woods or at a friend's house.

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<sup>2</sup> Exhibit 2, Tab 10B.

Because of difficulties he experienced with the Grade 7 program, Mr. Mulhall was administered a standardized academic test. The results showed him to be performing poorly in all areas of testing except receptive vocabulary, and that result is not clear. Although he was found to be functioning at the 61 percentile in receptive vocabulary, his mental age was fixed at 6-6 or Grade 1 equivalent. His highest other scores were in math and auditory discrimination, where he achieved 40 and 49 percentile. In reading and vocabulary, he scored at 1 percentile. Ongoing support from Special Education personnel was recommended. He was exempted from core French in order to maximize the time available for improving English language skills. It was recommended that he regularly attend the Learning Strategies Program for support of a modified language program in a small group setting. It was also recommended that consideration be given in Grade 8 to identification of Mr. Mulhall as a student with special communication needs, in order to continue support as needed in the future.

The report on Speech Language Pathology Assessment, conducted at the same time is incomplete. The specific results are not available but the summary suggests that the 61 percentile score in receptive vocabulary may be accurate. The summary indicates that Mr. Mulhall had many age appropriate and well developing oral language skills. Weakness in story retelling was identified. The report recommends applying his strength in auditory learning to improve his written language skills.

Mr. Mulhall was placed in the Learning Strategies Program in Grade 7 and continued in Grade 8. When he entered high school, he was identified as requiring the support of an Academic Resource Teacher. His Grade 11 Individual Education Plan identifies written language, organization, reading comprehension and self-esteem as areas for growth. Recommended strategies include allowing extra time for assignments, shortening assignments to coincide with attention span, reducing amount of homework, instructing in self-monitoring and combining written instructions with oral instructions. It does not appear that Mr. Mulhall was taking advantage of this resource when he last attended school, before the accident. His evidence was that teachers would sometimes send him to Learning Strategies class, but they did not like to do that because, when they did, he would just leave school.

Mr. Mulhall had started drinking some time before the accident, but could not recall when. His parents knew that he drank, but did not know how much. His father testified that he knew he had a few beers on the weekends. He had not known about his son smoking marijuana until he had gotten into trouble with the police for possession of marijuana.

The Social Work Discharge Summary from Bloorview notes that Mr. Mulhall had more independence and freedom in terms of what he did and who he did it with, than many adolescents. There were frequent separations between his parents and that had an adverse effect on their ability to set limits for him. The social worker had the impression that the parents did not always agree on discipline, with the result that Mr. Mulhall often got his own way. Mr. Mulhall testified that at sixteen, because of conflicts with his parents, he moved out and shared a house with a friend for two months. He moved back home after someone broke into the house and stole all their belongings. His father's evidence was that he tried to set limits, but it did not work. Bradley just did what he wanted anyway.

Before the accident, Mr. Mulhall was healthy and very active. The only notable health concern was exercise induced asthma, for which he used a Ventolin puffer. In the summer, he spent a lot of time skateboarding and he was good at it. He had entered and won two tournaments. He also enjoyed doing tricks on his BMX bike. He liked to snowboard in the winter, although he was not as good as he was on a skateboard. He golfed, played roller hockey and football.

He had two paying jobs before the accident. The first was as a dishwasher, about 2 years before the accident. He did that for about 5 weekends, but he did not like it, so he quit. He also worked for his father for a few days between the time he was expelled from school and the accident. At that time, his father and uncle were in partnership in the business of moving heavy machines for companies in the garment industry. Mr. Mulhall liked working with his father. He thought that he might do it full-time at some future date and his father thought that was highly likely. The business failed after the accident because Mike Mulhall was spending so much time at the hospital that he could not service his clients. For Mr. Mulhall, part of the attraction of making a career with his father was that his father would not ask him for a Grade 12 diploma. He did not

look for other work between the time he was expelled from school and the accident. By Christmas, he started thinking he had to do something. When the accident happened, he was scheduled to start at Durham Alternative Secondary School, catering to students with a history of problems at other schools.

## **Expert Opinions**

Dr. Peter Rumney is a pediatrician with expertise in the rehabilitation of children with acquired brain injuries. He was the staff pediatrician at Bloorview when Mr. Mulhall was treated there. He testified for Mr. Mulhall, as did Dr. Ronnie Lo, Mr. Mulhall's family doctor and Dr. Andy Cancelliere, a neuropsychologist with expertise in acquired brain injuries in youths and adults. Dr. Cancelliere assessed Mr. Mulhall at his solicitor's request in September 2005.

Wawanesa called as expert witnesses, Dr. Anthony Hunt, a neuropsychologist with expertise in the behavioural expression of brain dysfunction, who assessed Mr. Mulhall for Wawanesa in July 2002 and October 2003, and Dr. Ross Roussev, a neurologist who also assessed Mr. Mulhall for Wawanesa in July 2002.

Dr. Rumney agreed that Mr. Mulhall made remarkable progress in Bloorview, for a person with his injuries, but anticipated that he would require assistance when he left. He anticipated problems with attention, concentration, impulsiveness, poor safety awareness and poor judgments. He expected that the injury would require modified return to school, with structure and support and a reduced course load. He expected that Mr. Mulhall would require constant supervision. He agreed that when he saw Mr. Mulhall in February 2002 and November 2002, he was doing well, for a person with his injuries. Although the Child and Youth Worker had only been with Mr. Mulhall while he was in school, he saw no problem with the absence of supervision at other times, because there was no indication that Mr. Mulhall had been getting into trouble.

When predicting the likely effects of the brain injury, Dr. Rumney was not aware of Mr. Mulhall's pre-accident academic record or his pre-accident problems with attention, concentration, impulsiveness, poor safety awareness and poor judgments. He was not aware of pre-accident behavioural problems or that Mr. Mulhall had been expelled from school at the time of the accident. He agreed that this information would have been useful in gauging post-accident achievement.

Dr. Lo has been Mr. Mulhall's family doctor since 1992. He confirmed that Mr. Mulhall had no serious health problems before the accident. He seemed like a normal teenager. In February 2002, Mr. Mulhall's mother asked him to fill out forms to support an application for a disability pension for Mr. Mulhall. He filled out an Activities of Daily Living and a Health Status Report. In all areas assessed in the Activities of Daily Living, Dr. Lo found a moderate or minimal impact on Mr. Mulhall's lifestyle. His assessment was similar in the Health Status Report. His assessment was based largely on assumptions of problems that might be caused by the kind of injury Mr. Mulhall had suffered. He neither conducted nor reviewed any tests. He knew little of Mr. Mulhall's pre-accident level of achievement and intellectual abilities. He assumed that Mr. Mulhall had been attending school at the time of the accident, and had no knowledge of pre-accident behavioural problems, or drug and alcohol consumption. His opinion was influenced by his knowledge that Mr. Mulhall had been drinking while on Dilantin, but he did not consider that Mr. Mulhall had been drinking while under the legal age, at the time of the accident.

Dr. Cancelliere conducted a standardized neuropsychological assessment, that had previously been done by Dr. Kortstee in July 2001, and by Dr. Hunt in July 2002 and October 2003. He did not repeat some aspects of the testing, because Dr. Hunt's testing had shown consistent results. Dr. Cancelliere also had the results of the standardized tests that Mr. Mulhall had done in Grade 7. His evidence was that comparison between pre-accident standardized tests and similar post-accident tests was the best way to assess the effects of the accident. His tests showed impairments with respect to aspects of memory and learning, naming, tactile motor problem-solving, receptive vocabulary, design fluency, speeded addition/concentration, right hand grip strength and constructional skills. The impaired working memory was reflected in conversational

lapses. Previous tests showed impairments in visual vigilance, vocabulary, verbal abstract thinking, judgment and written arithmetic.

The tests also showed borderline impaired performances in auditory attention/concentration, psychomotor speed, recognition memory for faces, auditory perceptual capacities for rhythm patterns and left hand grip strength. He noted that academic skills became progressively stronger across the assessments, with reading, spelling and arithmetic improving from quite impaired in July 2001, to low average or approaching average levels in 2003.

Dr. Cancelliere's tests were generally consistent with previous tests by Dr. Hunt. High average performances were recorded in manual dexterity and fine motor speed. Solid average scores were noted in abstract concept formation, recognition memory for words, cognitive estimation, verbal fluency and auditory perceptual capacities. Past testing showed good performances in visual pattern analysis and extrapolation, aspects of mental flexibility and basic auditory attention span.

Dr. Cancelliere attributed Mr. Mulhall's post-accident decision not to wear a helmet, his charge of assaulting a police officer, sustaining damage to his mouth and drinking to excess, to his brain injury. He did not know the reason Mr. Mulhall was not wearing an helmet, did not know of pre-accident contact with the police and did not know how often Mr. Mulhall drank before the accident. He thought that the damage to Mr. Mulhall's mouth came from his being involved in a fight, after being teased. He did not know it was the result of inappropriately touching a woman he thought he knew. Although he accepted that comparing standard test results was the best way to assess the effects of the accident and noted that Mr. Mulhall was the subject of a standard test in Grade 7, he did not indicate how the results of the Grade 7 test may be reflected in the post-accident tests.

Dr. Cancelliere did acknowledge that Mr. Mulhall had problems before the accident. He had the school records and noted the repeated references to behavioural problems, lack of concentration and lack of effort. He noted that the family did not place much value on education. He expected that Mr. Mulhall would not have gone to college and would not likely have completed high school, had he proceeded to Durham Alternative Secondary School, as planned. Possibly, like his father, he would have acquired his Grade 12 diploma, some time after dropping out. His opinion was that “Brad was probably more likely to phase into employment”. Perhaps, he would have ended up working in his father’s business. He may have gotten a job requiring manual labour, not high level work.

As noted above, Dr. Hunt’s test results were generally consistent with Dr. Cancelliere’s, so I will not review them. When Dr. Hunt saw Mr. Mulhall in July 2002, he noted significant improvement from the test results of Dr. Kortstee in July 2001. In July 2002 he concluded that Mr. Mulhall could return to pre-accident activities but needed stand-by supervision, at least within unfamiliar settings or in other novel situations. He found Mr. Mulhall to be partially disabled from return to educational pursuits because of various neurocognitive impairments, including enhanced susceptibility to mental fatigue, limited verbal memory and moderately impaired reading comprehension. The educational accommodation that Dr. Hunt recommended was a slowed pace of presentation, simplification and repetition of novel information and the assistance of a Youth Worker in the organization of his academic studies. Dr. Hunt summarized the results of the tests he did in October 2003 as remaining essentially unchanged from July 2002, with some circumscribed areas of improved cognitive function.

On his examination in July 2002, Dr. Roussev found nothing that completely disabled Mr. Mulhall from returning to his pre-accident activities, from a neurological perspective. The neurological impairments he found were moderately severe hearing loss in the left ear, mild expressive dysphasia and diffuse, subtle neurocognitive deficits. He noted that those deficits were to be interpreted with caution, given Mr. Mulhall’s pre-accident personality and levels of academic achievement.

## ANALYSIS AND FINDINGS

In his decision in *Cook and Pilot Insurance*<sup>3</sup>, Arbitrator Kominar neatly summarized the approach to determining whether an impairment has caused a complete inability to carry on a normal life:

Arbitrators and judges have clearly articulated that “normal life” cannot be simplistically reduced to a list of discrete activities which can then be summed up in two columns – Can Do/Can’t Do – to determine if the applicant is continuously prevented from engaging in “substantially all” of them. The test, in other words, is not solely quantitative.<sup>4</sup> Arbitrator Sandomirsky states in *Da Ponte and Motor Vehicle Accident Claims Fund*:

[“engaging in”] means more than isolated post-accident attempts to perform activities that an applicant was able to perform prior to the accident. The manner in which an activity is performed, or the quality of the performance, must also be considered. If the degree to which an individual can perform an activity is sufficiently restricted, it cannot be said that they are truly “engaging in” the activity. The activity must be viewed as a whole and should not be broken down into its constituent parts. An applicant who is merely “going through the motions” cannot be said to be “engaging in” an activity.<sup>5</sup> [footnotes omitted from original]

The analysis must also consider the provisions of subsection 12(7)(a) of the *Schedule*. It provides that an insurer is not required to pay a non-earner benefit for the first 26 weeks after the onset of the complete inability to carry on a normal life. Mr. Mulhall undoubtedly suffered a complete inability to carry on a normal life, immediately after the accident, but the first date on which he could receive benefits was September 18, 2001.

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<sup>3</sup> FSCO A03-001085, May 9, 2005, at page 6

<sup>4</sup> See the decision of Justice Brockenshire in *Walker v. Ritchie* [2003] O.J. No 18, as well as the decision of Arbitrator Sandomirsky in *Da Ponte and Motor Vehicle Accident Claims Fund*, (FSCO A01-000486, October 28, 2002)

<sup>5</sup> *Da Ponte and MVAC*, at page 5

Since Mr. Mulhall was 17 years old at the time of the accident, his life was not static. His post-accident activities must therefore be measured against his pre-accident potential and trajectory. The experts who opined on the issue agree that it is not possible to predict from the physical injury, the degree of impairment that Mr. Mulhall would suffer. There are a range of possible results which, when manifested, may be attributed to the brain injury. I accept that opinion. Examples of the frailty of predictions are found in the opinions that Mr. Mulhall would not be able to ride a bicycle and that he would require full-time supervision. For that reason, and because he knew hardly anything about Mr. Mulhall's pre-accident potential, I place little weight on the opinion of Dr. Lo, expressed in the Activities of Daily Living and Health Status Report he prepared. His opinion is based largely on assumptions as to the possible effects of the kind of injury Mr. Mulhall suffered.

The experts agree that Mr. Mulhall's post-accident achievement must be measured against his pre-accident potential and that the best way they can do that, is to compare standardized pre-accident testing with similar post-accident testing. I also accept that opinion. Nevertheless, none of the experts provided detailed evidence that considered Mr. Mulhall's pre-accident potential. Dr. Cancelliere did extrapolate average pre-accident intelligence from the unclear 61 percentile score in receptive vocabulary on the Grade 7 testing. However, he did not indicate how the other lower scores or pre-accident behavioural problems of which he was aware, may be reflected in post-accident testing. I therefore do not accept the opinions that the poor post-accident test results can be attributed solely to Mr. Mulhall's injuries. In any event, for a finding of complete inability to carry on a normal life, poor performance on the tests must be reflected in diminished performance in daily living.

I find that Mr. Mulhall continued to suffer a complete inability to carry on a normal life on September 18, 2001. Before the accident, the most important aspects of his life were his busy social life and his favourite sports of skateboarding, "freestyling" on his BMX, and snowboarding. True, he had planned to return to Durham Alternative Secondary School, but school was not high on his list of priorities, before the accident. In September 2001, Mr. Mulhall was about to return to school and had demonstrated some independence, but the evidence does

not indicate that he had resumed any of the activities that were high on his list of priorities, with anything approaching pre-accident quality. It was only a few months since his release from Bloorview and he was still on Dilantin. Its effects tempered the quality of his social life and must have affected all of his activities.

My finding that he continued to suffer a complete inability to carry on a normal life is based on the fact that school was of low pre-accident priority and his participation was tempered by the effects of Dilantin. I do not accept the submission that the school program was so modified that Mr. Mulhall could not be found to be engaging in that activity. Based on his academic record, Mr. Mulhall could have benefited from a similarly modified program, before the accident. In fact, Mr. Mulhall's below average academic skill development, and his pre-existing learning and behavioural difficulties, were among the reasons for recommending the assistance of a Child and Youth Worker. His Grade 11 Individual Education Plan was intended to provide assistance through an Academic Resource Teacher, that was very similar to the assistance that Dr. Rumney anticipated he would require and the Child and Youth Worker provided with school work.

I find that by September 2002, Mr. Mulhall no longer suffered a complete inability to carry on a normal life. By that time, in addition to his successful return to school, Mr. Mulhall had ceased taking Dilantin so that he could resume his pre-accident social life without that restriction. By then, he was also getting around on his bicycle, had demonstrated that he could use public transit and had long been independent with regard to self-care. He was back to playing pool, was dating, going to parties and bars, playing video games and watching videos with friends. His important social life was largely intact and he was doing well in school. He had resumed quality participation in enough of his pre-accident activities, that it could not be said that he was completely unable to carry on a normal life.

By September 2002, Mr. Mulhall was back on a trajectory that was not wholly inconsistent with his pre-accident potential. But for the accident, he would have started at Durham Alternative Secondary School, but he did not value education and, given his academic and behavioural history he would not likely have graduated. Having dropped out he may have phased into

employment, but, more likely, he would have done what he most liked to do: hang out with his friends. I do not find it likely that, like his brother who dropped out of school in Grade 10, he would have found steady employment in a competitive position. Except for quitting school, there is no evidence that Mr. Mulhall's brother shares his history, and Mr. Mulhall himself testified that he would not want to do the dirty and physically demanding job his brother holds.

I find that if Mr. Mulhall did find employment, it would most likely have been with his father. Were that option still available in 2002, I am satisfied that Mr. Mulhall could have taken advantage of it. Mr. Mulhall saw his best chance for employment where there was no competition. Mike Mulhall did testify that one has to be certified to become a machine mover, but there was no evidence that he would require his son to be so qualified, before offering further employment, or that Mr. Mulhall had the math skills necessary to acquire certification.

I am not satisfied that Mr. Mulhall's post-accident work experiences prove him to be unemployable. He was able to successfully complete the job placement at Bay Cycle. There is no evidence that he was not able to do the job at Lifestyle Home Improvement. He quit because he did not like what he was directed to do. This is consistent with his pre-accident decisions to quit his dishwashing job and not to attend school, and I am not satisfied that this behaviour was caused by the accident. Although he has only had it for a short time, there is no evidence that he is unable to do his current job as a janitor. These jobs are consistent with Dr. Cancelliere's opinion that Mr. Mulhall would likely have ended up in low level employment.

I am not satisfied that Mr. Mulhall's post-accident problems with the law can be attributed to his injuries. I find that alcohol consumption and an outburst of temper are the more likely cause. Both were evident before the accident.

Finally, I do not accept the submissions that Mr. Mulhall's circumstances are the same as the plaintiff's in *Walker v. Ritchie*<sup>6</sup>, or that the Court of Appeal gave guidance on determining the issue of complete inability to carry on a normal life, in its decision in that case<sup>7</sup>. The plaintiff had a serious brain injury at around the same age as Mr. Mulhall, but the similarity ends there. She suffered much more serious physical, mental and emotional impairment and she had demonstrated greater potential. She was an above average student, with no behavioural problems, a very active social life and an exceptional athlete. She was rendered completely unable to take part in competitive athletics, her social life completely evaporated and, despite massive assistance, she was doing poorly in school and her ability to complete her program was in doubt.

The relevant issue on appeal was deductibility of non-earner benefits from tort recovery. In ruling that non-earner benefits are awarded to compensate for loss of daily life functions, the Court shed no light on the issue of what degree of function must be lost, before finding complete inability to carry on a normal life.

Mr. Mulhall has certainly lost the ability to engage in the important pre-accident activities of skateboarding, snowboarding and "freestyling", but by September 2002, he had resumed quality participation in enough of his pre-accident activities, that he was no longer prevented from engaging in substantially all of the activities in which he ordinarily engaged before the accident.

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<sup>6</sup> See Footnote 4

<sup>7</sup> [2005] O.J. No. 1600

**EXPENSES:**

The parties asked me to reserve on this issue. If they cannot agree, they may request an appointment in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

\_\_\_\_\_  
Jeffrey Rogers  
Arbitrator

December 16, 2005  
\_\_\_\_\_  
Date



FSCO A04-000384

**BETWEEN:**

**BRADLEY MICHAEL MULHALL**

**Applicant**

and

**WAWANESA MUTUAL 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. Wawanesa shall pay Mr. Mulhall a non-earner benefit of \$185 per week, from September 18, 2001 to August 31, 2002.
2. Wawanesa shall pay Mr. Mulhall interest for the overdue payment of the above benefits pursuant to section 46(2) of the *Schedule*.

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Jeffrey Rogers  
Arbitrator

December 16, 2005

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Date