

## NON-EARNER BENEFITS

### The Qualitative Guide to Success

Adam K. Wagman  
Brad Moscato  
Howie, Sacks & Henry LLP

The non-earner benefit has been a part of the Ontario no-fault automobile insurance system, in some form, since the system was radically overhauled in 1990. This weekly benefit is the sole source of regular compensation for most injured accident victims who were not “employed” or “caregivers” at the time of a motor vehicle collision. There is usually a lot riding on a victim’s entitlement to such benefits – it will provide some support to pay for daily necessities such as food and shelter, and if successful, the benefit is likely payable for life. The potential lifetime nature of the benefit usually results in insurers fighting as hard as possible to deny an injured accident victim’s claim.

The test to qualify for a non-earner benefit is a tough one, likely the harshest disability test that a lawyer or injured accident victim will come across. Most disability tests focus solely on the injured person’s ability to work. The test to qualify for the non-earner benefit goes beyond work, to an evaluation of all of the injured person’s daily activities. In most cases, the injured person faces an uphill, but not impossible, battle against an insurer to qualify for the benefits. This paper will focus on the test for entitlement to non-earner benefits, and provide some useful practice tips when dealing with this type of claim.

#### I. RATIONAL BEHIND THE NON-EARNER BENEFIT

The non-earner benefit has been described as a means to compensate an individual for loss of enjoyment of life.<sup>1</sup> Generally speaking, it provides compensation to those individuals who are unable to engage in the activities they ordinarily performed prior to a motor vehicle accident.<sup>2</sup>

##### (a) Defined

Section 12 of the *Statutory Accident Benefits Schedule* (hereinafter the “Schedule”)<sup>3</sup> provides that an insurer shall pay a non-earner benefit to “any person who has suffered a complete inability to carry on a normal life as a result and within 104 weeks of the motor vehicle accident.”

---

<sup>1</sup> *Walker v. Ritchie*, [2005] O.J. No. 1600 (Ont. C.A.).

<sup>2</sup> *Ibid.*

<sup>3</sup> The *Statutory Accident Benefits Schedule* - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended. Section 12 of the Schedule is attached to this paper.

The injured person may receive a non-earner benefit if they fall within one of the three qualifications contained in section 12 of the Schedule.

First, a non-earner benefit is payable to a person who has suffered a complete inability to carry on a normal life and is not entitled to an income-replacement benefit: subsection 12(1).1.

Second, a non-earner benefit is available to a person who was a caregiver at the time of the accident but who is no longer a caregiver because there is no person in need of care. A former caregiver is entitled to a non-earner benefit only if they suffer a complete inability to carry on a normal life as a result of an accident: subsection 12(1).2.

Third, a non-earner benefit is payable to an insured person who suffers a complete inability to carry on a normal life and was enrolled on a full-time basis in elementary, secondary, or post-secondary education at the time of the accident, or completed his or her education less than one year before the accident but was not employed in a job that reflected his or her education (“the education test”): subsection 12(1).2(i) and (ii).

#### **(b) 26 Week Delay Before Payment**

Section 12 of the Schedule provides that an insurer is not required to pay a non-earner benefit for the first 26 weeks after the onset of a complete inability to carry on a normal life: subsection 12(7)(a).

This part of the Schedule is more draconian than similar sections under previous regulations. Section 13 of the Bill 68 regulation (also known as O.M.P.P.)<sup>4</sup> and section 19 under the Bill 164 regulation<sup>5</sup> provided only a one-week holdback period before the insurer was required to pay such benefits. Further, an insured could meet the test under Bill 68 and Bill 164 one week after the accident by meeting the easier “substantial inability” test, which would then change to the “complete inability” test two years after the accident.

#### **(c) Age Restrictions**

A non-earner benefit is not payable to an injured person until they reach 16 years of age: subsection 12(7)(b).

A person who receives a non-earner benefit and *then* turns 65 years of age will see the benefit reduced to 2% of the benefit amount, multiplied by the number of years during with the person qualified for the benefit (to a maximum of 70% of the benefit). A person who becomes entitled to a non-earner benefit after the age

---

<sup>4</sup> The *Statutory Accident Benefits Schedule*, Ontario Regulation 672/90, as amended.

<sup>5</sup> The *Statutory Accident Benefits Schedule*, Ontario Regulation 776/93, as amended.

of 65 will have their benefit reduced every year over a period of 208 weeks, at which time the benefit will cease: subsection 12(8).

#### **(d) Amount of Benefit**

The amount of the non-earner benefit is \$185 for each week that the insured person is eligible to receive the benefit<sup>6</sup>: subsection 12(2).

If a person qualifies for a non-earner benefit under the education test, and more than 104 weeks have passed since the onset of the disability, the amount of the non-earner benefit is \$320 for each week: subsection 12(3).

Although an insured can purchase additional coverage for most of the benefits available under the Schedule, there is no option to increase the limits of coverage for non-earner benefits. Further, these benefits are not indexed.

#### **(e) Deductibility**

Non-earner benefits can be reduced by collateral benefits that are received or available to the injured person under an income continuation plan or under the laws of any jurisdiction: subsection 12(4). It is arguable that the non-earner benefit cannot be reduced by any income earned by the injured person, although it would be the rare case where the accident victim could earn money and still meet the “complete inability” test.

## **II. THE “COMPLETE INABILITY” TEST**

### **(a) Defined**

The level of disability required for entitlement to a non-earner benefit is set out in subsection 2(4) of the Schedule. That section defines the term “complete inability to carry on a normal life” as follows:

(4) 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.

Taken together, the regulation and the case law make it clear that only the most severe disabilities will entitle an injured person to a non-earner benefit.<sup>7</sup> The non-earner benefit is not intended to compensate an insured person for having to

---

<sup>6</sup> Subject to the age subsection cited earlier.

<sup>7</sup> *Cook v. Pilot Insurance Co.*, [2005] O.F.S.C.D. No. 51 [hereinafter *Cook v. Pilot*].

engage in post-accident activities with pain and discomfort, unless that pain becomes “continuously disabling in its own right.”<sup>8</sup>

## **(b) Interpretation of the Test**

The test for entitlement has been variously described as being a “strict one” and an “onerous” threshold.<sup>9</sup> To meet it requires a “significant degree of impairment and a marked, measurable impact on levels of function and consequent ability of the insured person to continue in their pre-accident activities.”<sup>10</sup>

Given the strict interpretation of the test, it is not surprising that, in most cases in which Arbitrators have applied the non-earner benefit provision of the Schedule, Applicants have failed to establish entitlement to the benefits.

## **(c) Practice Tips**

As noted, a non-earner benefit will be provided as long as the insured proves, on a balance of probabilities, that he or she suffers a complete inability to engage in substantially all of their pre-accident activities as a result of the accident.<sup>11</sup>

Each case must be decided on its own facts.<sup>12</sup> Thus, the test must be approached in a case specific, individualized manner.<sup>13</sup> Accordingly, it is crucial for counsel to present evidence showing a detailed list of the insured’s pre-accident activities, as compared to the post-accident activities in which they engage.<sup>14</sup>

Proper and successful presentation of these difficult cases does not just involve comparing the list of pre- and post-accident activities. The case law has held that the examination of these activities is not merely quantitative in nature.<sup>15</sup> As stated in the *Cook v. Pilot Insurance Co.* case, a person’s “normal life”<sup>16</sup> cannot be reduced to a list of activities that can be neatly summarized in two columns – can do/can’t do.<sup>17</sup>

---

<sup>8</sup> *Ibid.*

<sup>9</sup> *Kellar v. Halifax Insurance Co.* [1999] O.F.S.C.I.D. No. 75 [hereinafter *Kellar v. Halifax*]; *Cook v. Pilot Insurance*; *Todd v. Sate Farm Mutual Automobile Insurance Co.* [2003] O.F.S.D. No. 167; *Mulhall v. Wawanesa Mutual Insurance Co.* [2005] O.F.S.C.D. No. 164.

<sup>10</sup> *Buccellato Estate v. Allstate Insurance Co. of Canada*, [2004] O.F.S.C.D. No. 50.18.

<sup>11</sup> *Morelli v. Zurich Insurance Co.* [2000] O.F.S.C.I.D. No. 5.

<sup>12</sup> *Kellar v. Halifax*, *supra* note at 7; *Cook v. Pilot Insurance*, *supra* note at 5. *Buccellato Estate v. Allstate Insurance Co. of Canada*, [2004] O.F.S.C.D. No. 50; *Kanareitsev v. TTC Insurance Co.*, [2005] O.F.S.C.D. No. 86.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Kellar v. Halifax*, *supra* note 7. *Sheppard and Personal Insurance Company of Canada* (OIC A97-000460, October 31, 1997); appeal *C.L. and Zurich Insurance Company* (FSCO P98-00043, March 24, 1999).

<sup>16</sup> *Cook v. Pilot Insurance Co.*, *supra* note at 5.

<sup>17</sup> *Ibid.* *Sheppard and Personal Insurance Company of Canada* (OIC A97-000460, October 31, 1997); appeal *C.L. and Zurich Insurance Company* (FSCO P98-00043, March 24, 1999).

When considering the insured's post-accident functioning, a qualitative analysis ought to be undertaken and each activity should be looked at in its own right. Arbitrators and courts have accepted this approach.<sup>18</sup>

Using the qualitative method, it may be said that an injured person who continues to perform an activity, but with severe restrictions and/or significant delay, is still continuously prevented from participating in that activity.<sup>19</sup> In addition, an "isolated attempt" at an activity is not enough to conclude that the person can engage in the activity.<sup>20</sup>

In *Urquhart and Zurich Insurance Company*,<sup>21</sup> Arbitrator McMahon adopted the qualitative analysis approach. He stated that if the degree to which an individual can participate in an activity is sufficiently restricted, it cannot be said that they are truly "engaging in" the activity.<sup>22</sup>

In *Da Ponte and Motor Vehicle Accident Claims Fund*,<sup>23</sup> Arbitrator Sandomrisky wrote:

[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.

Arbitrator Sandomrisky also noted that an applicant who is merely "going through motions" cannot be said to be engaging in that activity.

### **III. RECENT AND RELEVANT CASE LAW**

#### **(a) General**

The Financial Services Commission of Ontario ("FSCO") cases dealing with non-earner benefits establish a number of principles that are helpful when counsel are assessing their client's entitlement to benefits, and should act as a guide when preparing for any hearing in this respect. Many of these cases were decided under previous accident benefits regimes; however, the definition of

---

<sup>18</sup> *Ibid.* See also *G. and Allstate Insurance Company of Canada* (OIC A-013283, December 7, 1995).

<sup>19</sup> *Urquhart and Zurich Insurance Company*, [OIC A96-00368, June 4, 1997] [hereinafter *Urquhart*]; *Cook v. Pilot*, *supra* note at 5. *Todd v. Sate Farm Mutual Automobile Insurance Co.* [2003] O.F.S.D. No. 167.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Urquhart*, *supra* note at 16.

<sup>22</sup> *Ibid.*

<sup>23</sup> [2002] O.F.S.C.I.D. No. 155.

“complete inability” has remained the same.<sup>24</sup> The cases therefore continue to be relevant.

The evaluation of a person’s ability to engage in certain activities is rarely straightforward. The “easy” cases, where the injured person has sustained a severe brain or spinal cord injury, are not usually contested. Far more often, counsel will be faced with a situation where, following an accident, the injured person can perform some activities that he or she did previously, but not to the same extent or with the same proficiency as before the accident. As such, the resolution of many non-earner benefit disputes turns to a significant degree on the insured’s credibility and the medical evidence supporting their claim.<sup>25</sup> These claims should also be bolstered by lay witness evidence, wherever possible.

While the insured’s evidence alone may not be determinative of the ultimate question,<sup>26</sup> an insured’s credibility is fundamental in deciding their level of pre – and post-accident functionality.<sup>27</sup> The weight of the case law leads to the conclusion that the injured person cannot win the case on their own, but they can lose the case on their own. Preparation and briefing of the witness is therefore paramount.

It is also important to ensure that any medical report produced on behalf of the insured specifically details the activities he or she was able to do before the accident and compares and contrasts those activities with their post-accident capabilities. Arbitrators frown on medical reports that simply reiterate the definitional requirements contained in the Schedule.<sup>28</sup> In order to assist the medical experts involved in the case, the injured person should prepare and discuss the list of pre-accident activities with the expert, in addition to talking about their post-accident limitations. The expert will then be well armed to prepare a report and give evidence directly on point.

## **(b) The Cases**

In ***Cook v. Pilot Insurance Co.***<sup>29</sup>, the Applicant, Mrs. Leona Cook, was involved in an accident on October 2001. While driving her vehicle another car, traveling in the opposite direction, veered towards her. She lost control of her car and ended up crashing in a roadside ditch.

Mrs. Cook's position at the Arbitration was that her life after the accident was not normal anymore, in any meaningful sense, when compared with her life prior to

---

<sup>24</sup> Note that section 3 of Bill 164 and section 13(8)(b) of Bill 68 both define “complete inability” in identical terms to section 2(4) of Bill 59 and section 2(4) of Bill 198.

<sup>25</sup> *Buccellato Estate v. Allstate Insurance Co. of Canada*, [2004] O.F.S.C.D. No. 50.18.

<sup>26</sup> *Kellar v. Halifax*, *supra* note at 7; *Kanareitsev v. TTC Insurance Co.*, [2005] O.F.S.C.D. No. 86.

<sup>27</sup> *Lok v. State Farm Mutual Automobile Insurance Co.*, [2002] O.F.S.C.I.D. No. 97; *Todd v. Sate Farm Mutual Automobile Insurance Co.* [2003] O.F.S.D. No. 167.

<sup>28</sup> *Ibid.*

<sup>29</sup> [2005] O.F.S.C.D. No. 51.

the accident. She alleged that she suffered significant psychological affects and serious physical fall-out as a result of the accident.

Mrs. Cook, a homemaker before the accident, was presented as an “an active, engaged and enthusiastic person” prior to the car accident. She did, however, require use of a cane due to significant pre-existing medical conditions, including serious back problems.

#### ANALYSIS OF PRE – AND POST-ACCIDENT ACTIVITIES

PRE-ACCIDENT ACTIVITIES	POST-ACCIDENT ABILITY
Made the beds; changed the linen.	Difficult to make the beds.
Cooked	Continued, but had to pace herself.
Cleaned	Continued, but had to pace and monitor herself.
Laundry	Stopped using laundry machine on farm and went to daughter’s house or Laundromat.
Dancing with husband	Unable to go dancing any longer.
Devout Jehovah’s Witness - attended services three days a week	Continued to attend services, but not as often. Attendance declined “somewhat.”
Door-to-door ministry two days a week	Continued, but “painful.”
Haircuts to sisters in the congregation	Continued, but reduced the number of haircuts.
Helped sisters in the congregation with housekeeping and grocery shopping	Unable to carry grocery bags to and from the car. Stopped driving others to do groceries. Stopped helping others with housekeeping.

Arbitrator Kominar found that Mrs. Cook was “not simply going through the motions” after the accident. Rather, based on the evidence and the witnesses before him, the Arbitrator found that Mrs. Cook was “adapting her life, as best she could, to the pain and discomfort she was experiencing.” It appears that the Arbitrator equated “adapting” with “engaging”.

The Arbitrator also found that many of Mrs. Cook’s psychological complaints had to do with her pre-accident marital problems and breakdown, and not as a result of the accident. Therefore, causation, as it related to several of her functional limitations, was not proven. The non-earner benefit was denied.

In *Mulhall v. Wawanesa Mutual Insurance Co.*,<sup>30</sup> the Applicant, Mr. Mulhall, sustained significant injuries as a result of a March 2001 motor vehicle accident.

---

<sup>30</sup> [2005] O.F.S.C.D. No. 164.

He sustained 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.

Mr. Mulhall's chance of survival was in doubt. A tube was inserted into his brain to monitor and decompress the swelling and to assess the intracranial pressure. Emergency surgery was next performed. The surgeon removed part of the skull and parts of the parietal and temporal lobes of his brain.

Mr. Mulhall beat all odds. Soon after the accident, he could eat; then he could walk. Within a short period of time he was functioning relatively well, though he was still somewhat unsteady on his feet.

Mr. Mulhall was 17 years old when the accident happened. He lived at home with his parents. He was suspended from school at the time of the accident.

It was clear that Mr. Mulhall suffered a complete inability to carry on a normal life immediately after the accident. The first date on which he could receive benefits, however, was September 18, 2001.

Arbitrator Rogers found that Mr. Mulhall continued to suffer a complete inability to carry on a normal life on September 18, 2001. The dispute centered on whether Mr. Mulhall's post-accident impairment caused a "complete inability to carry on a normal life" on an ongoing basis.

#### **ANALYSIS OF PRE – AND POST-ACCIDENT ACTIVITIES**

<b>PRE-ACCIDENT ACTIVITIES</b>	<b>POST-ACCIDENT ABILITIES</b>
Skateboarding	Unable to continue.
BMX bike riding	Continued one year after the accident.
Snowboarding	Unable to continue.
Roller hockey	Unable to continue.
Football	Unable to continue.
Suspended from school	Returned to school in the months following the accident.
Used public transit	Continued one year after the accident.
Dated	Continued one year after the accident.
Played pool	Continued one year after the accident.

According to Arbitrator Rogers, "one year later, in September 2002, Mr. Mulhall no longer suffered a complete inability to carry on a normal life." His social life was important to him, and it was largely intact.

Accordingly, Arbitrator Rogers ruled that Mr. Mulhall “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.”

Although Mr. Mulhall “certainly lost the ability to engage in the important pre-accident activities of skateboarding, snowboarding and free styling, 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.”

This case involves the rare example of an injured person who initially qualified for the non-earner benefit, but continued to improve to the point where the benefit was no longer payable.

With the benefit of hindsight, two areas of the evidence were problematic in this case. The physicians who gave evidence on behalf of the injured person were unaware of his pre-accident problems in school and with the law. The Arbitrator was therefore not able to give much weight to their opinions regarding Mr. Mulhall’s disability. Further, no lay evidence was called regarding Mr. Mulhall’s social activities after the accident (other than his own evidence and that of his father). Given the important role that Mr. Mulhall’s social life played in his overall daily activities (and in the decision regarding his entitlement to non-earner benefits), it would have been helpful to call some of his friends to give evidence about the change (if any) in his social functioning. While it may not have made any difference to the ultimate decision, evidence from “independent” witnesses should be used to support the evidence of the injured person wherever possible.

In *Kanareitsev v. TTC Insurance Co.*,<sup>31</sup> the Applicant, Stanislav Kanareitsev, was injured in a car accident in July of 2001. He was riding his bicycle and was struck by a streetcar. He lost consciousness. He suffered headaches and pain to his eye. He also experienced neck pain, back pain, right elbow and right arm pain, chest pain and right leg and knee symptoms.

#### **ANALYSIS OF PRE – AND POST-ACCIDENT ACTIVITIES**

<b>PRE-ACCIDENT ACTIVITIES</b>	<b>POST-ACCIDENT ABILITIES</b>
Studied English from 9am to 3pm	Unable to continue.
Cooked	Unable to continue.
Cleaned	Unable to continue.
Changed beds	Unable to continue.
Washed dishes	Unable to continue.
Laundry	Unable to continue.
Grocery shopping	Unable to continue.
Repaired things in apartment	Unable to continue.

---

<sup>31</sup> [2005] O.F.S.C.D. No. 86.

Independent with personal care	Required help.
Exercised daily, and walked frequently	Required assistance to walk. Needed an electric wheelchair.
Rode his bicycle to school	Unable to continue.
Attended the library regularly	Unable to continue.
Visited friends frequently	No longer socialized.
Went to monthly concerts	Unable to continue.
Writing an autobiography	Unable to continue.

This case was largely about causation, as Mr. Kanareitsev had some relatively significant pre-accident medical problems. Further, he was not forthcoming about these pre-accident problems to many of the physicians who he met with after the accident. It appears that he was able to overcome these potentially damaging issues through the evidence of credible lay witnesses, who gave consistent evidence about his pre-accident level of function as compared to his post-accident limitations. One is left to wonder whether or not Mr. Kanareitsev would have been successful with this case in the absence of those lay witnesses.

The surveillance conducted by the TTC supported Mr. Kanareitsev's evidence and that of his witnesses in respect to the limited nature of his post-accident activities. Arbitrator Killoran found that Mr. Kanareitsev met the complete inability test and was entitled to non-earner benefits.

In ***Lok v. State Farm Mutual Automobile Insurance Co.***,<sup>32</sup> the Applicant was 67 years old when she was seriously injured in a motor vehicle accident. She was a pedestrian crossing an intersection when a vehicle hit her.

As a result of the impact, Ms. Lok lost consciousness for a short period of time. She also suffered a contusion of the left parietal region with swelling and a cut. She also had bruising on her left arm and left leg. X-rays later revealed that she fractured the public ramus.

Ms. Lok claimed non-earned benefits from August 12, 1999 to March 1, 2000.

Prior to the accident, Ms. Lok described herself as being in reasonably good health. However, she had been receiving therapy for many years for an arthritic knee and a "trigger finger" in her right hand. X-rays taken immediately before the accident revealed degenerative changes in her neck.

At the time of the accident, Ms. Lock was an active homemaker.

---

<sup>32</sup> [2002] O.F.S.C.I.D. No. 97.

## ANALYSIS OF PRE – AND POST-ACCIDENT ACTIVITIES

PRE-ACCIDENT ACTIVITIES	POST-ACCIDENT ABILITIES
Cleaned	Unable to continue.
Cooked	Unable to continue.
Laundry	Unable to continue.
Shoveled snow	Unable to continue.
Tended to her garden	Unable to continue.
Took out the garbage	Unable to continue.
Enjoyed playing the mahjong	Unable to do.
Babysat her grandchild.	Unable to do.

This case largely turned on the credibility of the Applicant and her witnesses. The evidence, taken together, was inconsistent and lacked a “ring of truth,” according to Arbitrator Muir. Further, the medical reports were not sufficiently detailed, and the conclusions (regarding her “complete inability”) were inconsistent with the findings. The most troubling part of Ms. Lok’s evidence was the inconsistency between the documentary evidence and her oral testimony. She denied having pre-accident pain in her neck and back, despite records from her G.P. to the contrary. She denied having chiropractic therapy before the accident, despite a detailed OHIP summary showing over 20 visits just before the accident. These problems are almost impossible to overcome without objective medical evidence of significant functional impairment, and serve to highlight the importance of briefing the witnesses thoroughly before they appear at a hearing.

Arbitrator Muir found that, six months after the accident, Ms. Lok was no longer “continuously prevented from engaging in substantially all of her pre-accident activities. Her injuries from the accident were serious, but after six months, she was on the way to recovery.”

Entitlement to non-earner benefits was denied.

In ***Morelli v. Zurich Insurance Co.***,<sup>33</sup> the Applicant was a 67 year-old widow at the time of the subject 1996 accident. She suffered headaches, restricted neck movements, insomnia, and reactive depression as a result of the accident.

The accident-related injuries prevented Mrs. Morelli from performing the heavy housework such as laundry and vacuuming, she said.

At the time of the accident, Mrs. Morelli was not working and was receiving a Canada Pension Plan benefit because of a car accident she had in 1989.

---

<sup>33</sup> [2000] O.F.S.C.I.D. No. 5.

At the time of the 1996 accident, Mrs. Morelli was still limited in her activities from the injuries of her first accident. She could not work. She could not do heavy housework. She was also suffering from chronic pain and was limited in the activities she was able to engage in as a result of her 1989 accident. However, it was argued that her reactive depression, in combination with her physical limitations, caused her to suffer a “complete inability” as a result of the 1996 accident.

Following the 1996 accident, video surveillance was conducted. It showed that Mrs. Morelli was able to carry out most of her pre-1996 accident activities. This case highlights the importance (and potentially devastating effect) of surveillance, even when dealing with psychological disability cases. After reviewing the surveillance, the Arbitrator must have concluded that Mrs. Morelli didn't appear to be “depressed” on the video tape. While this is not quite a scientific analysis of the level of disability, impressions formed by viewing surveillance can be very difficult to overcome.

As a result, from both a physical and psychological perspective, the Arbitrator found that Mrs. Morelli did not suffer from a complete inability to carry out a normal life as a result of the 1996 accident.

#### **IV. CONCLUSION**

The cases reviewed in this paper provide a sampling of the different types of issues that must be dealt with at a hearing to prove entitlement to non-earner benefits. It is clear from all of the cases that the test for entitlement to non-earner benefits is a difficult one to meet. However, there are steps that counsel can take to generate and present the best possible evidence to support the injured person's claim.

It is imperative to have specific medical evidence supporting the insured's condition. The medical evidence must specifically delineate the insured's pre- and post activities and abilities, and the medical experts must be provided with all pre-accident and post-accident medical records so that they have a full picture of the injured person's medical history. A general conclusion that the person suffers a “complete inability” will not withstand scrutiny without this more detailed analysis.

As always, credibility is also fundamental in advancing a successful case. This is particularly important for a non-earner benefits claim which is so subjective in nature. All of the witnesses, but especially the injured victim, ought to be properly briefed to maintain as much consistency as possible between the oral and documentary evidence.

Lay witnesses are often able to tip the scales to the side of the injured victim in a borderline case. Counsel should be prepared to call several such witnesses to deal with all of the various areas of function that are alleged to have been

seriously impacted by the accident. While family members are helpful, friends, neighbours and others who are more independent of the injured person are often considered more reliable by Arbitrators.

Counsel should begin to generate the necessary evidence to support a non-earner benefit claim as early as possible in the process. An application for such benefits at the 26 week mark, without any prior suggestion of a severe disability and without any evidence being provided along with way, will almost certainly be met with resistance by an insurer. On the other hand, if it is made clear early on that the injured person will be seeking the benefit, and if evidence (both medical and lay) is provided to the insurer on an ongoing basis, it is far more likely that the claim will be approved without going through a hearing. At the very least, it should help the insurer set appropriate reserves, which may be helpful when it comes time to settle the claim.

Finally, before taking a non-earner benefit dispute to Arbitration it is crucial to keep in mind that the insured's disability must result in a "significant degree of impairment and a marked, measurable impact on levels of function and consequent ability to continue in their pre-accident activities".<sup>34</sup> Trying to prove that minor impairments in the injured person's functioning meet the test is an exercise in futility.

Non-earner benefits are difficult to get. The bar was intentionally set very high when the Schedule was drafted. Although each case will turn on its own specific facts, the suggestions made throughout this paper will hopefully help counsel to maximize the chance of success at a hearing, and help the injured victim to obtain benefits that they so desperately need.

Adam K. Wagman, Partner  
Brad Moscato, Associate  
Howie, Sacks & Henry LLP  
Personal Injury Law

Fighting Words and Phrases  
Ontario Bar Association  
October 4, 2006

---

<sup>34</sup> *Buccellato Estate* at para. 18.