CITATION: Lockyear v. Wawanesa Mutual Insurance Company, 2022 ONSC 94
DIVISIONAL COURT FILE NO.: 332/19
DATE: 20220111

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Lederer, Matheson, Sheard JJ.

BETWEEN:	
JEFFREY LOCKYEAR Appellant	*Robert Ben* and *Ava Williams*, for the Appellant
– and –	
WAWANESA MUTUAL INSURANCE COMPANY and LICENCE APPEAL TRIBUNAL – AUTOMOBILE ACCIDENT BENEFITS SERVICE Respondents	*Paul Omeziri*, for the Respondents
	HEARD: December 16, 2021, at Toronto (by videoconference)

LEDERER J.

Background

[1] On August 17, 2015, the Appellant Jeffrey Lockyear was involved in an accident. He was struck by a car, while riding his bike. A paramedic, Adam Drew, happened to be in an ambulance nearby. He witnessed the accident. He saw Jeffrey Lockyear fly over his handlebars a distance of 10 to 15 feet "before landing semiprone on the sidewalk". Adam Drew attended to Jeffrey Lockyear and rendered medical assistance. The paramedics filed an incident report. It was signed by Adam Drew. It indicated that Jeffrey Lockyear was unconscious "upon paramedic contact" but regained consciousness shortly thereafter.[1] This was noted and repeated in a "Triage Record-ER" prepared at the Toronto East General Hospital which noted:

> LOC [loss of consciousness] for appox 20 seconds witnessed by medics[2]

[1] Incident Report, prepared August 18, 2015, *Appeal Book and Compendium*, at Tab 9, p. 76 (Caselines A1022)
[2] Triage Report-ER dated August 17, 2015, *ibid* at Tab 10, p. 78.1 (Caselines A1026)

[2] As a result, counsel to Jeffrey Lockyear wrote to the Toronto Paramedic Services requesting answers to questions respecting the accident, addressing the observation that Jeffery Lockyear had been unconscious and, in particular, his "Glasgow Coma Scale"[3] score when he was first attended to.[4] An Ambulance Call Report had been prepared and signed by Adam Drew following the accident on August 17, 2015. This report records three separate Glasgow Coma Scale scores, one at 7:40, a second at 7:46 and a third at 7:50. In each case the demonstrated score was 15.[5] In response to the letter from the law firm Adam Drew prepared a further (a supplemental) Incident Report, this one dated November 20, 2015. It recorded a further Glasgow Coma Scale score. This one taken earlier than the other three, immediately upon the arrival of the paramedics at the scene. The recorded score was 8.[6]

[3] On August 24, 2016 an Application for Determination of Catastrophic Impairment (OCF119) was made on behalf of Jeffrey Lockyear. The request that he be identified as catastrophically impaired was founded on the criteria set in the Statutory Accident Benefits Schedule (colloquially "SABS") that was in effect on the date of the accident (August 17, 2015)[7]:

> 3 (2) For the purposes of this Regulation, a catastrophic impairment caused by an accident is,
>
> …
>
> (d) subject to subsection (4), brain impairment that results in,
>
> (i) *a score of 9 or less on the Glasgow Coma Scale*, as published in Jennett, B. and Teasdale, G., *Management of Head Injuries*, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or…
>
> [Emphasis added]

[4] The application was signed by Dr. Keith Meloff, a neurologist who "confirm[ed] that the applicant suffered a catastrophic impairment as described in the relevant definition attached to this application". The application, as found in the Appeal Book and Compendium, does not attach any definition; however, I assume it to be the definition then current in SABS. The application includes a handwritten notation apparently made by Dr. Keith Meloff:

> There is a report by a paramedic EHS 22198 who states that the initial GCS score at the scene was 8. [8]

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[3] The Glasgow Coma Scale is a neurological scale that measures a person's level of consciousness.
[4] Letter from Thomson, Rogers dated November 4, 2015, *ibid* at Tab 12, pp. 81-82 (Caselines A1032-A1033)
[5] Ambulance Call Report dated August 17, 2015, *ibid* at Tab 11, p.80 (Caselines A1029)
[6] Incident Report, November 20, 2015, *ibid* at Tab 13. P. 83 (Caselines A1035)
[7] Application for determination of Catastrophic Impairment (OCF-19), *ibid* at Tab 14, p.86 (Caselines A1039)
[8] *Ibid*

[5] Subsequent to the application, on September 15, 2017, Dr. Keith Meloff delivered a report. It notes that he had interviewed and examined Jeffrey Lockyear on two occasions (August 2, 2016 and May 31, 2017), provides a history, describes the complaints of Jeffrey Lockyear and the treatment he had received and concludes:

> …there is no doubt, based on a depressed Glasgow Coma Scale score of 8 as recorded at the time of the accident by a paramedic trained and experienced in this evaluation, and well-documented postconcussive symptoms characterized principally by fatigability, irritability, mental confusion, reduced work capacity, and disabling and interruptive migraine-like headaches, that Mr. Lockyer [*sic*] qualifies for an application for the determination of catastrophic impairment and fulfils this requirement based on the depressed GCS score.[9]

[6] The respondent, Wawanesa Mutual Insurance Company, retained its own neurologist, Dr. Sherali Esmail. He agreed that Jeffrey Lockyear sustained a brain impairment but not that it had been demonstrated that he was, as a result, catastrophically impaired:

> Although it is possible that the Glasgow Coma Scale at the scene was 8/15, as per the information in the second Incident report, the Ambulance Call Report signed off by *both* paramedics, reveals a GCS score of 15/15 at least three different time points [*sic*] and there was no recording in the official Ambulance Call Report of a Glasgow Coma Scale score of 8/15.
>
> It appears that Mr. Lockyear did sustain a brain impairment as evidenced by the loss of consciousness and subsequent development of post-concussive and concussive symptoms. He therefore meets the criterion for brain impairment. There is, however, a discrepancy in the Glasgow Coma Scale recorded at the scene. It would be prudent to review the original handwritten notes of the paramedics that documented the Glasgow Coma Scale at the scene to corroborate and confirm that indeed it was 8/15 at the time of the accident.
>
> I find therefore, that there is insufficient evidence in the file to conclude that Mr. Lockyear has sustained a catastrophic impairment based on Criterion (6) (i) of the OCF-19 under review, in accordance with the Statutory Accident Benefits Schedule.[10]

[7] Wawanesa denied the application for recognition that Jeffrey Lockyear was catastrophically impaired.

[8] I review all of this and, in particular, the quotations from Dr. Keith Meloff and the Dr. Sherali Esmail to demonstrate that both the application for a determination that Jeffrey Lockyear was catastrophically impaired and its refusal turn on the consideration of the Glasgow Coma Scale

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[9] Report of Dr. Keith Meloff, September 15, 2017, *Appeal Book and Compendium,* at Tab 15, p. 89 (Caselines A1043)

[10] Insurer Examination (West Park Assessment Centre), November 30, 2017, *ibid* at Tab 16, pp. 9-10 (Caselines A1055-A1056)

score of 8 that was said to have been undertaken and determined immediately upon the arrival of the paramedics on the scene. This remained the central issue.

Licence Appeal Tribunal

[9] Jeffrey Lockyear applied to have the Licence Appeal Tribunal resolve the dispute as to whether he qualified as being catastrophically impaired.[11] The hearing before the Tribunal took place over two days, November 21 and 22, 2018. The substance of this appeal is that there were three procedural determinations made by the Licence Appeal Tribunal at the hearing, all of which were confirmed on the subsequent reconsideration, that counsel for Jeffrey Lockyear submits demonstrates that those proceedings lacked the fairness the law requires. Those procedural determinations are as follows:

(i) refusing to admit a video of the accident into evidence;

(ii) permitting evidence of Dr. Sherali Esmail outside or beyond his report; and,

(iii) refusing to allow reply evidence in response to Dr. Sherali Esmail.

<u>The Video</u>

[10] Some months before the hearing the Toronto Police gave a security video, from a nearby gas station, to counsel for Jeffrey Lockyear. It showed the accident and the paramedic (Adam Drew) attending to Jeffrey Lockyear. At the outset of the hearing counsel for Wawanesa moved to exclude the video on the basis that it was irrelevant to the issue of whether the Glasgow Coma Scale score of Jeffrey Lockyear was 9 or less. The Tribunal did not review the video.[12] It relied on the submissions of counsel. It determined that the video was not relevant and that there were other opportunities that would assist the paramedic in recalling the events of the day in question:

> Evidence must be relevant and not unduly repetitious to be allowed in at a hearing. I agree with the respondent that the video footage does not relate to the determination of the issue before the Tribunal, but just reinforces that an accident took place. The footage has no relevance to the determination of the issue of whether the applicant suffered a catastrophic impairment. I also agree with the

[11] The *Insurance Act* R.S.O. 1990, c. I.18 s. 280 (1) and (2) note:

> (1) This section applies with respect to the resolution of disputes in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled. 2014, c. 9, Sched. 3, s. 14.
>
> (2) The insured person or the insurer may apply to the Licence Appeal Tribunal to resolve a dispute described in subsection (1).

[12] In considering how to approach this matter the panel considered whether we should view the video. We did not. We thought it best to approach the issue from the same knowledge base as the Licence Appeal Tribunal both in its initial decision and the reconsideration that followed.

> respondent that the Toronto Paramedic has reports written at the time to refresh his memory.[13]

[11] The Licence Appeal Tribunal is authorized to make rules establishing the procedures for its hearings.[14] The Rules which govern the procedures of the Licence Appeal Tribunal allow for reconsideration and set out the criteria that applies:

> 18.2 A request for reconsideration will not be granted unless the Executive Chair is satisfied that one or more of the following criteria are met:
>
> > (a) The Tribunal acted outside its jurisdiction or violated the rules of natural justice or procedural fairness;
> >
> > (b) The Tribunal made a significant error of law or fact such that the Tribunal would likely have reached a different decision;
> >
> > (c) The Tribunal heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result; or
> >
> > (d) There is new evidence that could not have reasonably been obtained earlier and would have affected the result.

[12] Jeffrey Lockyear requested a reconsideration and submitted that the Tribunal erred when it failed to admit the video footage. The Tribunal did not agree. It found that the video would not have been probative of the "ultimate issue." [15]

<u>Evidence of the expert outside or beyond his report</u>

[13] The rules of the Licence Appeal Tribunal prescribe that an expert witness is required to set out any conclusions to be given in evidence and the basis for those conclusions in a signed report in advance of the hearing:

> 10.2 A party who intends to rely on or refer to the evidence of an expert witness shall provide every other party with the following information in writing:
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> …

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[13] Decision of the Licence Appeal Tribunal, March 13, 2019 (Robert Watt, Adjudicator) *Appeal Book and Compendium,* at Tab 3 at para. 7 (Caselines A952))

[14] The *Licence Appeal Tribunal Act* S.O. 1999, c. 12 Sched. G at s. 6 begins:

> **6** (1) The Tribunal may make rules establishing procedures for hearings held by the Tribunal and the rights of parties to the hearings including…

The *Statutory Powers Procedure Act* R.S.O. 1990, c. S.22 at s. 25.1 (1) states:

> **25.1** (1) A tribunal may make rules governing the practice and procedure before it.

[15] Amended Reconsideration Decision of the Licence Appeal Tribunal, May 16, 2019 (Jesse Boyce, Adjudicator) *Appeal Book and Compendium,* at Tab 2 at para. 10 (Caselines A947))

> (d) A signed report that sets out the instructions provided to the expert in relation to the proceeding, the expert's conclusions, and *the basis for those conclusions on the issues to which the expert will provide evidence to the Tribunal;*
>
> [Emphasis added]

[14] A report was delivered by Dr. Sherali Esmail. Its stated conclusions were:

(a) the contemporaneous Ambulance Call Report showed Glasgow Coma Scale scores of 15/15;

(b) the Supplementary Incident Report prepared by the paramedic (Adam Drew) three months later indicated an initial Glasgow Coma Scale score of 8/15;

(c) the discrepancy was difficult to reconcile without having contemporaneous notes from the paramedic; and

(d) in the circumstances there was "insufficient information" to conclude that Jeffrey Lockyear satisfied the criteria for "catastrophic impairment" status.[16]

[15] The Glasgow Coma Scale is a neurological scale that measures a person's level of consciousness. There are three elements to the test:

(a) Eye response (evaluated on a scale of 1-4);

(b) Verbal response (evaluated on a scale of 1-5); and

(c) Motor response (evaluated on a scale of 1-6)

[16] As submitted by counsel for Jeffrey Lockyear, Dr. Sherali Esmail, in the evidence he gave at the hearing, over the objection of counsel for Jeffrey Lockyear, was permitted to comment on the specific values associated with the Glasgow Coma Scale score reported in the Supplemental Incident Report prepared by Adam Drew, dated November 20, 2015. Rather than simply asserting that there was insufficient evidence to arrive at a conclusion (the conclusion arrived at in his report), Dr. Sherali Esmail was permitted to undermine the credibility of the assessment by commenting on what he testified was an unusual combination of the determined values (Eye

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[16] Insurer Examination (West Park Assessment Centre), November 30, 2017, *ibid* at Tab 16, p. 10 (Caselines A1056):

> CONCLUSION:
> In summary, based on my review of the materials in this case, it is my opinion that:
> Mr. Jeffrey Lockyear's in Glasgow Coma Score record was noted initially to be 15/15 in the Ambulance Call Report. However, an Incident Report by the Toronto Paramedic Service, dated November 20, 2015, approximately 3 months following the accident, suggest that the Glasgow Coma Scale at the scene was 8/15. It is difficult to reconcile this discrepancy. I find, therefore, that there is insufficient information in the file to conclude that the claimant satisfies the criteria for Catastrophic Impairment.

response 1(no eye opening), Verbal response 2 (patient making sounds) and motor response 5 (localizing pain).[17] Dr. Sherali Esmail testified:

> That would be highly unusual in that the patient has enough brainpower to be able to make noises… language, making noises is a more complicated task than opening eyes. Eyes open reflexly [*sic*].
>
> Also, for him to localize pain, which means when painful stimulus was applied to a patient's arm or leg, he was able to grab the assessor's hand and take it off, or withdraw. That is also a much more complicated motor sensory, motor planning task than simply opening the eyes.
>
> So it would be highly unusual for someone who has a decline in their level of consciousness to not be able to open their eyes, but be able to perform more complicated maneuvers in the subsequent parts of the Glasgow Coma Scale.[18]

[17] This analysis of the unusual interaction between the 3 values was not raised in the report that demonstrates the parameters of the expected evidence. It is what was said by counsel to Jeffrey Lockyear to mark the entry into a new field contrary to the rules and was submitted by him to be procedurally unfair to his client. For his part, as reported in the Decision of the Licence Appeal Tribunal, Dr. Sherali Esmail explained his failure to include this evidence in his report:

> Dr. Esmail explained that he didn't add these comments to his report because he couldn't reconcile this issue of how the assessments were arrived at, because of the lack of written notes to explain the assessments in the November 20, 2015 Incident Report.[19]

[18] I pause to observe that this issue of whether Dr. Sherali Esmail testified beyond the scope of his report and beyond the rules was apparently not raised and was not referred to in the Reconsideration Decision. I will return to this later in these reasons.

<u>The refusal to allow reply evidence in response to Dr. Sherali Esmail.</u>

[19] Counsel for Jeffrey Lockyear, having completed his cross-examination of Dr. Sherali Esmail, sought to re-call Dr. Keith Meloff to provide reply evidence solely in response to the issue of whether the combination of Glasgow Coma Scale scores for the test reported in the supplemental Incident Report was, as Dr. Sherali Esmail had opined, "highly unusual". The foundation for the request was that those representing Jeffrey Lockyear had been taken by surprise:

> I should just say now that, Adjudicator Watt, before my friend re-examines, that nowhere in this doctor's report, and no time, were we told that the defence was going to take the position that a score of one, two and five is a highly unusual score.

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[17] Evidence of Dr, Sherali Esmail, Transcript, November 22, 2018, *Appeal Book and Compendium,* at Tab 7 at p. 60 l. 14-18 (Caselines A1004))

[18] *Ibid* at pp.60 l.18 -61 l. (Caselines A1004-A1005) and see: Decision of the Licence Appeal Tribunal, March 13, 2019 (Robert Watt, Adjudicator) *Appeal Book and Compendium,* at Tab 3 at para. 25 (Caselines A955)

[19] *Ibid* (Decision of the Licence Appeal Tribunal, March 13, 2019) at para.26 (Caselines A955)

> So we would like to call Dr. Meloff back for him to testify specifically on that sole issue, whether one, two or five is a highly unusual score. This amounts to an ambush here this morning.[20]

[20] The Tribunal refused to allow this:

> This witness has produced a report that basically reflects what he said today. So I don't see any reason to bring back Dr. Meloff. I don't think there is anything that Dr. Meloff can give that he didn't give yesterday, and there is nothing new that is not in the report. So I'm going to… I'm not going to grant you that.[21]

[21] On the Reconsideration the Tribunal found, in effect, that there was no need for reply. As the Tribunal saw it, Dr Sherali Esmail had done nothing other than comment on inconsistencies in the reports. He did not offer an opinion that was outside his area of expertise. On the other hand, counsel for Jeffrey Lockyear had failed to meet any of the tests the Tribunal applied to the request. He had not shown how the opinion evidence of Dr. Sherali Esmail was false or misleading "as was required by Rule 18.2 (c)" or how the evidence could "overcome the myriad other issues identified by the Tribunal in its reasons". Finally, he concluded that in the end the failure to allow this reply evidence did not matter because the evidence to which it was to respond to did not play a significant role in the Licence Appeal Tribunal's decision to find that Jeffrey Lockyear was not catastrophically impaired.[22]

The Issue to Be Decided

[22] The *Licence Appeal Tribunal Act* allows for an appeal from the Tribunal to the Divisional Court, albeit one restricted only to questions of law:

> 11(6) An appeal from a decision of the Tribunal relating to a matter under the *Insurance Act* may be made on a question of law only.

[23] The issue in this case is whether the proceedings, that is the initial hearing and the reconsideration, taken together, lacked procedural fairness. More specifically did the decisions:

(1) not to allow the video to be admitted as evidence,

(2) to permit Dr. Sherali Esmail's assessment of the unusual nature of the Glasgow Coma Scale scores from the supplemental Incident Report to be admitted, and yet

(3) to refuse to permit evidence, from Dr. Keith Meloff, in reply to that assessment

demonstrate that the process was unfair.

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[20] Submission by Mr. Furlong, Transcript, November 22, 2018, *Appeal Book and Compendium,* at Tab 7 at p. 66 l. 14-25 (Caselines A1010)
[21] The Adjudicator, *ibid* at p. 68 l. 17-25 (Caselines A1012)
[22] Amended Reconsideration Decision of the Licence Appeal Tribunal, May 16, 2019 (Jesse Boyce, Adjudicator) *Appeal Book and Compendium,* at Tab 2 at paras. 13-15 (Caselines A948)

Standard of Review

[24] It may be obvious to some, but bears noting that the issue of procedural fairness, while an issue of law[23], stands apart. This is not like the interpretation of a statute or the explanation of a common law principle. Procedural fairness is attached to a foundational right, a principle of natural justice, the right to be heard (*audi alteram partem*):

> The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard.[24]

[25] The right to be heard is fundamental to Canadian administrative law:

> From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" [25]

[26] The ultimate protection of this right rests with the courts:

> …a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process.[26]

[27] This being so, referred to as correctness or otherwise, the standard of review applicable to procedural fairness is absolute. A proceeding is either fair or it is not:

> …the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of

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[23] *Hamilton (City) v. Ontario (Energy Board)* 2016 CarswellOnt 17029, 2016 ONSC 6447, 272 A.C.W.S. (3d) 422, 59 M.P.L.R (5th) 234 at para. 4.
[24] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), 312 ACWS (3d) 460, [2019] SCJ No 65 (QL), 59 Admin LR (6th), 441 DLR (4th) 1 at para. 127 referring to *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, 89 ACWS (3d) 777, 174 DLR (4th) 193 at para. 28
[25] *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, 164 ACWS (3d) 727, [2008] SCJ No 9 (QL), 69 Admin LR (4th) 1, 291 DLR (4th) 577, [2009] 1 SCR 190 at para. 90
[26] *Ibid* at para. 129

> procedural justice which any person affected by an administrative decision is entitled to have.[27]
>
> …
>
> When considering an allegation of a denial of natural justice, a court need not engage in an assessment of the appropriate standard of review. Rather, the court is required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The court does this by assessing the specific circumstances giving rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly.[28]

Analysis

The Video redux

[28] The admissibility of evidence in any form is based on relevance. For administrative tribunals such as the Licence Appeal Tribunal, this is confirmed by the *Statutory Powers Procedure Act*, s. 15:

> **15** (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document *or other thing*,
>
> *relevant to the subject-matter* of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.
>
> [Emphasis added]

[29] It is trite to observe that legislation is to be deemed remedial, to be read as being directed to the public good and on that basis to receive a fair, large and liberal interpretation.[29] I note this

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[27] Cardinal v. Director of Kent Institution, 1985 CanLII 23 (SCC), [1985] 2 SCR 643, 23 CCC (3d) 118, 16 Admin LR 233, [1986] 1 WWR 577, 24 DLR (4th) 44 at para. 23

[28] *London (City of) v. Ayerswood Development Corp.*, 2002 CanLII 3225 (ON CA), 167 OAC 120, [2002] OJ No 4859 (QL), 34 MPLR (3d) 1, 119 ACWS (3d) 664 at para. 10

[29] *Interpretation Act* R.S.O. 1990, c. I. 11, s. 10:

> Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

to underscore that the word "may" as it appears in s. 15 of the *Statutory Powers Procedure Act* is permissive and not restrictive.

[30] The determination not to admit the video as evidence is contrary to this understanding. The video is silent and, thus, as perceived by the Licence Appeal Tribunal, not capable of confirming a Glasgow Coma Scale score of 8. On this basis the Tribunal found the video was of no probative value. This is not "liberal and large". It is narrow and restrictive. It may be that relevance and probative value are related but they are not synonymous. They may overlap but they are not the same. Relevance refers to the need for connection to the question at issue. Probative value refers to the significance or importance relevant evidence may have (colloquially the "weight") in addressing the issue. The video shows the accident and the immediate response of the paramedics who attended to Jeffrey Lockyear. What happened over those moments is clearly relevant. To my mind, its probative value could only properly be assessed, once viewed and commented on by those who were present or otherwise qualified, presumably by some established expertise, to do so. Dr. Keith Meloff reviewed the video. In a letter dated September 12, 2018 (approximately 5 weeks before the hearing) he wrote to counsel for Jeffrey Lockyer, he noted:

> I have reviewed a video that captured images of the plaintiff Mr. Jeff Lockyear, following his collision with a motor vehicle on August 17, 2015. The timeframe noted on the video reveals a man lying motionless and unresponsive for about 443 to 552 (seconds) which I calculate represents almost 2 minutes until the time he was put on a backboard. There is no evidence whatever that the claimant was aware of his surroundings or responsive during that time. I firmly believe, based on a careful and repeated viewing of this video, that any reasonably qualified person, including a paramedic, would conclude that Mr. Lockyear had a Glasgow Coma Scale score of nine or less, during that period of observation.[30]

[31] It is not clear whether this letter was placed before the Licence Appeal Tribunal. It is found in a Book of Exhibits included in the Record[31] but said to be "marked as Exhibit 1, Tab 5 but not admitted at the Licence Appeal Tribunal hearing".[32] Whether it was or was not, it demonstrates the possibility of a real and meaningful contribution this video could make to the understanding of what happened and to the question of whether Jeffrey Lockyear should be assessed as catastrophically impaired.

[32] In his evidence Adam Drew was asked about the Glasgow Coma Scale score of 8. After the cross-examination, he was examined by the Arbitrator. In the course of these questions Adam Drew indicated that it was an error not to include the Glasgow Coma Scale score of 8 in the Incident Report done the day after the accident.[33] The Adjudicator did not accept this answer. He asked whether, given the subsequent scores of 15 the score of 8 was an error.[34] Adam Drew continued to

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[30] Letter from Keith Meloff MD FRCPC to Ian Furlong, dated September 12, 2018, *Appeal Book and Compendium,* at Tab 18 at p. 105 (Caselines A1062)
[31] Exhibit Book, Volume 1 of 3- Appellant-Lockyear at Exhibit 1: Appellant's Brief of Documents, *Medical Documentation* Tab E, p. 12 (Caselines A29)
[32] Index, p. 3 *Appeal Book and Compendium* (Caselines A937)
[33] Evidence of A. Drew, Transcript, November 21, 2018, *Appeal Book and Compendium,* at Tab 6 at p. 46 l. 12- 19 (Caselines A989)
[34] Evidence of A. Drew, Transcript, November 21, 2018, *Appeal Book and Compendium,* at Tab 6 at p. 49 l. 23- p. 50 l. 7 (Caselines A992 -A993)

confirm the score of 8 was correct. The Adjudicator did not understand. This proceeds through several pages of the transcript and ends with the following:

> THE ADJUDICATOR: Just let me ask the question, so I understand this. I don't want to just… I've got part-way down at 7:40 and this is 7:33 but you didn't do the test at 7:33?
>
> THE WITNESS: I did do the test, but the… like, the point is that I didn't record the test, that is the problem.
>
> THE ADJUDICATOR: Oh, that's…okay, so you did the Glasgow, but not record?
>
> THE WITNESS: Yeah.[35]

[33] The Adjudicator found this difficult to accept:

> THE ADJUDICATOR: So, again, I'm just…you've got to educate me, because I've got to make a decision down the road.
>
> THE WITNESS: M'hm.
>
> THE ADJUDICATOR: How could you possibly remember, if you didn't keep notes, what the tests results were at 7:33
>
> THE WITNESS: Like I said…
>
> THE ADJUDICATOR: And I mean…because I have to know this, you see?
>
> THE WITNESS: Yeah.
>
> THE ADJUDICATOR: I'm not criticizing you.
>
> THE WITNESS: It's fair, I…the call itself was memorable to me at the time and I just remember specifics of it. That's the best I can tell you.[36]

[34] The adjudicator was not satisfied and went on to question why the supplemental (the second) Incident Report was prepared.[37]

[35] In his decision, the Adjudicator at the hearing, did not accept the evidence of Adam Drew and on that basis found that there was no credible Glasgow Coma Score of less than 9:

> I have issues however relating to the November 20, 2015 report. Why was the GCS of 8/15 as set out in the November 20, 2015 report, not noted in the Ambulance

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[35] Evidence of A. Drew, Transcript, November 21, 2018, *Appeal Book and Compendium,* at Tab 6 at p. 54 l. 21 – p. 55 l. 6 (Caselines A997-A998)
[36] Evidence of A. Drew, Transcript, November 21, 2018, *Appeal Book and Compendium,* at Tab 6 at p. 55 l. 7-23 (Caselines A998)
[37] Evidence of A. Drew, Transcript, November 21, 2018, *Appeal Book and Compendium,* at Tab 6 at p. 55 l. 24-58 l. 16 (Caselines A998-A1001)

> Call Report dated August 17, 2015? Why was the further incident report November 20, 2015 created, when Drew Adam [*sic*] had completed the prior Incident and Ambulance Call Reports, which could have been given to the applicant's lawyers when they requested more information? Drew Adam [*sic*] gave no credible answers to these questions when asked at the hearing. I can only assume because of his inexperience and his busyness with other calls, that he failed to make complete detailed reports as required of him as a paramedic of the alleged first GCS rating. I also question the accuracy of the November 20, 2015 report made three months after the accident, and made without reference to any written notes. Drew Adam [*sic*] admitted that he dealt with between 200 – 440 other calls during the three month period and we don't know if the GCS of 8/15 made on November 20, 2015, related to one of the other calls.
>
> …
>
> I find there is a credibility issue here relating to the November 20, 2015 Incident Report, both as to the accuracy of the ratings, and as to whether the GCS was ever completed, as alleged on the date of the accident. I find, based on the evidence of the circumstances leading up to the alleged assessment of the November 20, 2015 Incident report, the circumstance of the reporting of the alleged assessment three months later, the lack of a written recording of such an assessment at the time it was alleged to have taken place, and the actual assessment ratings found, *the alleged GCS assessment of 8/15 was never initiated at the time of the accident.* [38]
>
> [Emphasis added]

[36] The observations of Dr. Keith Meloff made with reference to the video indicate a possible confirmation that, in fact, Jeffrey Lockyear did, as a result of the accident, immediately following the accident, suffer such that his Glasgow Coma Score was below 9. As seen by Dr. Keith Meloff, this could be observed from the video itself, quite apart from any test undertaken by Adam Drew, to say nothing of the possibility that, with the assistance of Adam Drew, it could provide evidence that might confirm, contrary to the finding of the Licence Appeal Tribunal, that the test was "initiated".

[37] The Amended Reconsideration Decision says the following:

> After reviewing the decision, it is clear the Tribunal's reasons were based on conflicting medical reports and the credibility of Mr. Drew's testimony. There is *no disagreement that the test was administered* by Mr. Drew shortly following the accident.[39]
>
> [Emphasis added]

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[38] Decision of the Licence Appeal Tribunal, March 13, 2019 (Robert Watt, Adjudicator) *Appeal Book and Compendium,* at Tab 3 at paras. 32 and 35 (Caselines A956-A957)

[39] Amended Reconsideration Decision of the Licence Appeal Tribunal, May 16, 2019 (Jesse Boyce, Adjudicator) *Appeal Book and Compendium,* at Tab 2 at para. 10 (Caselines A947)

[38] As the italicized words in quotation above demonstrated, this is wrong. The Tribunal found the test was never initiated. The paragraph in the Amended Reconsideration Decision goes on:

> The disagreement lies in whether J. L. has a score of 15/15-*the score Mr. Drew registered three times immediately following the accident*-or a score of 8/15, which is the score that Mr. Drew registered in his report from November 2015, three months following the accident and on request of J. L.'s counsel. I find the admission of the video footage-which is not continuous, has no sound and does not alter the fact that the reports have conflicting scores, would not have been probative of the ultimate issue.

[39] This stands only as an acceptance of the analysis undertaken by the Licence Appeal Tribunal in its initial decision. It does not account for the immediate relevance of a video of the accident and the activities that followed, silent or otherwise. It limits its assessment of the probative value of the video to whether it could alter the fact that there were reports with conflicting scores. The Amended Reconsideration Decision identifies the submission of counsel for Jeffrey Lockyear as relying on rule 18.2(b) (an error of law or fact such that the tribunal would likely have come to a different decision). There was no effort to change "conflicting results" The tests were taken at different times, when the response of Jeffrey Lockyear was different and could be expected to be different. For the first, he was unconscious. At the second, he was not. The question was the credibility of the earlier test given that it was not reported until November 20, 2015, three months after the accident.

[40] I point out that the Amended Reconsideration Decision refers to the submission of counsel for Jeffrey Lockyear, as stating:

> "…under 18.2(b) that the Tribunal should have admitted video footage of the paramedic attending at the scene and *allegedly* administering the Glasgow Coma Scale test he recorded in a later report"[40]
>
> [Emphasis added].

[41] I wonder at the use of the word "allegedly". Given the understanding that the "test was administered" (see the quotation at fn. 38), the word "allegedly" can only refer to the suggestion that the video shows the test actually being applied. That would be highly probative. It would be consistent with and confirmed by the observation made by Dr. Keith Meloff following his review of the video and inconsistent with the conclusion of the Licence Appeal Tribunal, in its original decision, that the test was never initiated.

[42] The Amended Reconsideration Decision goes on:

> Further, even if the footage were was admitted, I fail to see how it would have changed the result since silent video cannot corroborate which Glasgow Coma Scale score was registered at the scene of the accident, which would not help J.L. meet his onus of proving catastrophic impairment.[41]

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[40] *Ibid* at para. 7 (Caselines A946)
[41] *Ibid* at para. 11 (Caselines A947)

[43] This proposes that the only means by which the video could corroborate the values set by each of the three components of a Glasgow Coma Scale test is if somebody announces them such that they can be heard. This again denies the possibilities raised by the observations of Dr. Keith Meloff. At the risk of relying on an overused cliché, if a picture is worth a thousand words, how many words is an appropriately described video worth?

[44] The paragraph which begins with the quotation, immediately above, continues and ends as follows:

> In submissions, J.L. does not offer a compelling explanation why he felt the footage was so needed, other than to aide in [*sic*] Mr. Drew's memory. In my view, it is unclear what value video footage would provide in the context either, since Mr. Drew testified that he recalls many details of the accident and prepared a contemporaneous report that could have aided his memory just as well. On these facts, I see no reason to interfere with the Tribunal's decision to exclude the video evidence.[42]

[45] The assertion that it was unclear what value the video would have, given its relevance, would stand in favour of, not against, its admission as evidence so that its probative value (its weight) could be tested. The proposition that Adam Drew's ability to otherwise recall what happened misses the point. Adam Drew's evidence was not accepted. His credibility was questioned. Could the video have served not just to help him remember but more importantly confirm what he otherwise said?

[46] Refusing to admit the video was a denial of the right of Jeffrey Lockyear to be heard and a breach of procedural fairness.

Evidence of the expert outside or beyond his report redux

[47] What is the rationale behind rule 10.2 of the rules applicable to the Licence Appeal Tribunal? Presumably, it is much the same as the policy behind rule 53.03 (1) of the *Rules of Civil Procedure* which sets out the requirement for an expert to provide a report and rule 53.03(2.1) which requires, for the matters to which it applies, that such a report outline not only the opinions of the expert but also the basis for them:[43]

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[42] *Ibid*

[43] *Rules of Civil Procedure* r. 53.03 (2.1) states that a report delivered by an expert "shall contain" among other things:

> 4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
> 5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
> 6. The expert's reasons for his or her opinion, including,
> i. a description of the factual assumptions on which the opinion is based,
> ii. a description of any research conducted by the expert that led him or her to form the opinion, and
> iii. a list of every document, if any, relied on by the expert in forming the opinion.

> In our view, these cases indicate that the "substance" requirement of rule 53.03(1) must be determined in light of the purpose of the rule, which is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. Accordingly, an expert report cannot merely state a conclusion. The report must set out the expert's opinion, and the basis for that opinion.

[48] There is some flexibility. It is understood that a witness will not be tied strictly to what is said in the report:

> Further, while testifying, an expert may explain and amplify what is in his or her report but only on matters that are "latent in" or "touched on" by the report.

[49] There are limitations that have been found to apply to rule 53.03 of the *Rules of Civil Procedure* and should have application to rule 10.2 of the rules applicable to the Licence Appeal Tribunal:

> An expert may not testify about matters that open up a new field not mentioned in the report.

[50] A judge and in this case the Licence Appeal Tribunal have discretion but the general policy rationale is to ensure that the opposing party is not taken by surprise:

> The trial judge must be afforded a certain amount of discretion in applying rule 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report. [44]

[51] In his report Dr, Sherali Esmail opined that it was difficult to reconcile the two reports and, on this basis said:

> I find therefore, that there is insufficient information in the file to conclude that the claimant satisfies the criteria for Catastrophic Impairment.[45]

[52] By evaluating the results of one of the tests which he said could not be reconciled, finding the results “unusual” and on that foundation implying that the other report was preferable, that is providing a basis for explaining the difference (reconciling them), he stepped outside his own report and offered an opinion that counsel for Wawanesa should have foreseen would surprise the other side. This is similar to the situation in *Hoang v. Vincenti.*[46] In that case an “accident reconstructionist” opined on the cause of an accident. He did note that the brakes of the vehicle were worn but only when he gave evidence, did he offer the opinion that the condition of the brakes was a contributing cause of the accident:

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[44] This quote and the 3 which precede it are found at: *Marchand v. The Public General Hospital Society of Chatham*, 2000 CanLII 16946 (ON CA), 43 CPC (5th) 65, 138 OAC 201, 51 OR (3d) 97 at para. 38
[45] For the full quotation see the quote at fn. 15 herein
[46] 2012 ONSC 1358

> I do not accept the argument that what counsel wishes Hrycay to do is to amplify or expand on his opinion as set out in the report. Hrycay's report clearly lists nine conclusions that he arrives at in this file and the operation of the brakes is not identified as one of the conclusions. To permit him to now offer this opinion to the Court would be a contravention of the requirements of Rule 53[47]
>
> ….
>
> The *Marchand* case, *supra*, does not assist counsel because in that case, the Court noted that while it was permissible for an expert to amplify the contents of the expert's report at trial, he or she could not open up a new field that was not referred to in the report. To allow Hrycay to opine on the functioning of the brakes would be opening up a new field, to borrow language from the Court in *Marchand.*[48]

[53] This issue, that is the concern that Dr. Sherali Esmail was permitted to testify outside the four corners of his report to the extent that he entered a new field offering a conclusion that was neither referred to directly, nor latent or touched on in his report, was not referred to in the Decision of the Licence Appeal Tribunal or the Amended Reconsideration Decision. It is raised in the Notice of Appeal and reviewed in the Appellant's (Jeffrey Lockyear's) factum but not mentioned in the factum filed on behalf of the Respondent (Wawanesa).

[54] Noting that the issue was raised within the appeal and remembering that there is no standard of review (a proceeding is either fair it is not) I would, if I were required to, find that the evidence of Dr. Sherali Esmail offered an opinion that went beyond what was in his report and opened a new field. In so doing it was in breach of procedural fairness. I would so find even though the issue was not raised as part of the reconsideration. As it is I do not have to make this finding. There are other ways in which this problem could have been dealt with. In similar circumstances, it is not uncommon that an adjournment is requested and permitted, sometimes for only a short period of time, on occasion longer, to allow for the surprised party to prepare for cross-examination. In other circumstances the concern could be dealt with by allowing the party to call evidence in reply. This was requested here and refused which takes these reasons to the third of the three indications of procedural unfairness raised on this appeal.

<u>The refusal to allow reply evidence in response to Dr. Sherali Esmail redux</u>

[55] The right to recall reply evidence is, as a general proposition intrinsic to adversarial proceedings in Ontario. The possibility that reply evidence could be called was recognized by the Licence Appeal Tribunal, at least as it referred to new issues. At the beginning of the second day of the hearing the Tribunal and counsel had the following exchange, just before Dr. Sherali Esmail was called to testify:

> THE ADJUDICATOR: They will have the option after you have finished, they want to call someone in reply in relation to any issue, new issue, that you have raised, but I don't… I'm not sure of that.

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[47] *Hoang v. Vicentini. ibid* at para. 12
[48] *Ibid* at para. 8 referring to *Marchand v. The Public General Hospital Society of Chatham, supra* (fn. 44).

> MR. FURLONG: I'm not anticipating that.
>
> THE ADJUDICATOR: I don't see it very often.
>
> MR. FURLONG: To the extent that the witnesses testifying within the four quarters of the report, but I mean, if something comes out of that's wholly…
>
> THE ADJUDICATOR: Different.
>
> MR. FURLONG: …new and not on the report, then I think we've got a problem.
>
> THE ADJUDICATOR: So subject to that, I think their case is closed.[49]

[56] Counsel for Jeffrey Lockyear sought to call evidence in reply to the opinion offered by Dr. Sherali Esmail indicating that the results of the component parts of the Glasgow Coma Scale test which resulted in the overall value of 8 (that is to say, less than 9) was "unusual" and in reply to the explanation that they did not fit together. This was refused and, yet, the evidence of Dr Sherali Esmail suggesting that the results of that Glasgow Coma Scale test were "highly unusual" was relied on by the Licence Appeal Tribunal in its decision:

> Dr. Esmail raised a further issue of the November 20, 2015 ratings. Dr. Esmail felt the assessments would be highly unusual because making noises, language, and localizing pain is a more complicated process than opening the eyes which was only assessed at 1 with the other two assessments being assessed at 2 and 5. He questioned the reliability of the assessments. He also indicated that if a person can make noises and mover [*sic*] their arms then the GCS would be greater than 9.
>
> I accept the evidence of Dr. Esmail over Dr. Meloff. The issues that Dr. Esmail raises relating to the assessment been reported months later, the reliability of the ratings are valid issues...[50]

[57] The overriding task of the Licence Appeal Tribunal was to ensure that the requirement of procedural fairness was adhered to. After permitting Dr. Sherali Esmail to open a new field by providing an assessment of the results of the Glasgow Coma Scale test that resulted in an overall value of 8 the Tribunal, rather than attempting to meet the concern, compounded the problem leading to procedural unfairness when it refused to allow Dr. Keith Meloff to provide evidence in reply. In the end, Dr. Sherali Esmail's evidence went uncontradicted and was relied on by the Licence Appeal Tribunal in finding the initial Glasgow Coma Scale test score of 8/15 was inaccurate. It was procedurally unfair to deny Jeffrey Lockyear an equal opportunity to address and reply to this new evidence.

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[49]General Discussion, Transcript, November 22, 2018, *Appeal Book and Compendium,* at Tab 8 at p. 70 l. 20- p. 71 l. 11 (Caselines A1015--A1016)

[50] Decision of the Licence Appeal Tribunal, March 13, 2019 (Robert Watt, Adjudicator) *Appeal Book and Compendium,* at Tab 3 at para. 33 and 34 (Caselines A957) see also para. 25 (Caselines A955)

Conclusion

[58] For the reasons reviewed, the appeal is granted. The matter is remitted to the Licence Appeal Tribunal for a new hearing to be conducted by an Adjudicator or Adjudicators other than those who conducted and decided the hearing and the reconsideration.

Costs

[59] As agreed to by the parties, costs are to be paid by the Wawanesa Mutual Insurance Company to Jeffrey Lockyear in the amount of $7,500.

_____
Lederer, J.

I agree _____
Matheson, J.

I agree _____
Sheard, J.

Released: January 11, 2022

CITATION: Lockyear v. Wawanesa Mutual Insurance Company, 2022 ONSC 94
DIVISIONAL COURT FILE NO.: 332/19
DATE: 20220111

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Lederer, Matheson, Sheard JJ.

BETWEEN:

JEFFREY LOCKYEAR

Appellant

– and –

WAWANESA MUTUAL INSURANCE COMPANY and LICENCE APPEAL TRIBUNAL – AUTOMOBILE ACCIDENT BENEFITS SERVICE

Respondents

REASONS FOR JUDGMENT

Released: January 11, 2022