
CANADA / JUDGMENT

Payne v. Miles

2013 BCSC 1545

COURT

Supreme Court of British Columbia

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2013 BCSC 1545 Payne v. Miles

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Payne v. Miles,

2013 BCSC 1545

Date: 20130826

Docket: M095789

Registry: Vancouver

Between:

Brittani Donna Rose Payne

Plaintiff

And

Isla Rebecca Miles

Defendant

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial/Hearing:

Vancouver, B.C.

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Place and Date of Judgment:

Vancouver, B.C.

August 26, 2013

Introduction

- [1] This action arises out of a motor vehicle accident that occurred on March 9, 2007 (the "Accident"). Ms. Payne, who was 16 years old at the time, was struck in a marked crosswalk.
- [2] The case is somewhat unusual in that the evidence of both parties, properly analyzed, is relatively consistent on most issues. Liability for the Accident was admitted on the second day of trial. The plaintiff's credibility is not challenged. The plaintiff had no relevant pre-existing medical history. There are no relevant intervening factors of any substance. Causation for both the plaintiff's physical injuries and her psychological and cognitive difficulties are effectively conceded. The plaintiff's mitigation of her losses is not an issue.
- [3] The primary issues on which there is significant divergence between the parties are:
 - 1) the degree of cognitive and other forms of psychological impairment suffered by Ms. Payne as a result of the Accident and the resulting impact of such impairment on Ms. Payne's future employment prospects;
 - 2) the degree of ongoing care that Ms. Payne is likely to require, in particular, in relation to the need for a) one on one rehabilitation assistance and b) child care assistance.

Overview and History

- [4] Ms. Payne was born and raised in the Gibsons area. She has a large extended family in the area. Her father was diagnosed with multiple sclerosis when she was a young child and her parents divorced shortly thereafter. Though her relationship with her father was good, she was raised by her mother. She is close to her mother and has always enjoyed a good relationship with her. She also has a younger brother.
- [5] At the time of the Accident, the plaintiff was a grade 11 student at Elphinstone Senior Secondary in Gibsons. She was a healthy and happy young person. Although quiet by nature, she was popular and had a circle of good friends with whom she enjoyed various activities. She had, in the past, belonged to a running club and she regularly went to the gym with her

friends. In grade 11, she was involved in a "Leadership" class which had a student council component to it and which was described as being for "high functioning kids" who contributed to their school.

- [6] Though Ms. Payne had no specific career plans, she was taking courses which would enable her to attend university. She had been an honor roll student in grade 10. She was described by more than one witness as an average and conscientious student. Her academic transcripts as well as the evidence of her high school teacher and counselor support this description.
- [7] Though Ms. Payne's upbringing and pre-Accident circumstances are, for the most part, unexceptional, there is one component of her personality and activities that is important and unusual.
- [8] The plaintiff started working part-time in Grade 9 with a local dentist doing office administration. She apparently obtained the job because she had won a citizenship award in Grade 7. Thereafter, in Grade 10, she worked at the Roberts Creek store twice a week for three to four hours each shift. She took the bus to get to work after school. In the summer of 2006 (after her grade 10 year) she worked at a YMCA summer camp working in the kitchen and doing dishes. She said she liked the job because it was social. In the fall of 2006, in her Grade 11 year, she began to work at a local Subway store as a sandwich maker and customer service attendant. She regularly worked 16-20 hours a week - an amount of work that warrants some reflection.
- [9] The then owner of the Subway store, Ms. Griffiths, remembered the plaintiff well. She said she was always on time and required little direction. She said the plaintiff was not a typical employee in that she worked harder, was more responsible and was more inquisitive than her workmates. She noted that the plaintiff had been promoted and was to start in her new role on the day after the Accident. The plaintiff would have been responsible for opening the store and for cash at the store.
- [10] In a similar vein, the plaintiff started helping with cleaning around the home and with meal preparation when she was nine years old. By age 13, she made simple meals for the family. She prepared her own lunch and did her own laundry.
- [11] These descriptions of the plaintiff reveal a young person who displayed unusual initiative, diligence and independence.
- [12] The Accident occurred when the plaintiff was out with two friends. An ambulance and the police attended the scene of the Accident. Ms. Payne was originally taken to St. Mary's Hospital and she was then transported, by hovercraft, to Vancouver General Hospital. She was induced into a coma for three days and she remained in the hospital for a week.

- [13] After she was discharged, a rehabilitation team, comprised of various persons including physicians, representatives from her high school and counselors, was established to assist her. One member of that team was Ms. Karmali, an occupational therapist. Ms. Karmali was involved with and oversaw Ms. Payne's rehabilitation for the next six years or so.
- [14] The plaintiff suffered various mild physical injuries from the Accident, most of which abated relatively quickly and virtually all of which resolved in the months or years that followed. Her early difficulties included some pain in her jaw, shoulders and knees, altered vision and taste sensation, sensitivity to noise and light, dizziness and headaches. At present, Ms. Payne continues to sleep poorly on occasion and to have headaches from time to time. Very little of the plaintiff's case was directed to these injuries or difficulties. She is not presently on any pain medications.
- [15] However, other more significant and enduring difficulties were apparent almost immediately. Ms. Payne became quite withdrawn and interacted with her friends in a fundamentally different way. She returned to her part-time work at Subway relatively shortly after the Accident, albeit in a much reduced capacity, both in terms of the amount and nature of the work she was capable of performing. Ms. Griffiths said the plaintiff now worked in the back and that she had difficulty with customers, was tired all the time and was easily frustrated.
- [16] She also returned to school, though again in a limited capacity. She took a reduced course load and was provided a tutor to assist her. That tutor identified that Ms. Payne had trouble focusing on material, organizing her work, completing her work and managing her time. An early report of Ms. Karmali also described Ms. Payne's behavior as marked by anxiety, lack of confidence, frustration, irritability and feeling overwhelmed. Similarly, Ms. Karmali identified that Ms. Payne presented with cognitive difficulties that affected her ability to prioritize tasks, plan and organize.
- [17] I have identified and emphasized these early difficulties because it is these difficulties, amongst others, that Ms. Payne struggled with for years and continues, to a lesser degree, to struggle with today.
- [18] In the summer leading to grade 12, she continued with her tutoring. She attended a Leadership Camp for a week that summer but did not participate in all activities. The teacher who oversaw the camp, and who knew Ms. Payne prior to the Accident, described her as more anxious and emotional than she had been. She became easily frustrated, would reach her capacity to achieve some object and then become bewildered.
- [19] Ms. Payne was also assigned a rehabilitation therapist who helped her structure her days and who ensured that she included activities, such as going to the gym, in her day.
- [20] Counsel for the defendant, in his questions to various witnesses and in his submissions, sought to focus on the fact that Ms. Payne graduated from grade 12 on schedule. That does not properly or adequately describe what took place. Ms. Payne, who had more credits than

she required going into grade 12, took a much reduced course load. She made use of a tutor and was given a Special Education teaching assistant in each class. She took an easier math course. She opted out of her provincial biology exam. She dropped her French class and replaced it with an art class. She was excused from having to write her Law 12 exam. She became more and more reclusive and by the second term of that year was not, for all practical purposes, going to class. She said, and I accept, that the school's academic expectations of her were significantly reduced. She was exempted from having to go to class. She was not required to do all assignments. And she was permitted to redo her work.

- [21] Her special-education support teacher described her as "emotional, anxious and panicky". She said that, as the year progressed, it was clear the plaintiff was faced with various limitations and with her "new reality".
- [22] In the spring of her grade 12 year, or about a year after the Accident, she experienced some suicidal thoughts and attended at the emergency department of her local hospital. Her family doctor diagnosed her with depression and she was prescribed antidepressants. She continued to struggle with mood swings, fatigue, and anxiety and had difficulty sleeping in the period that followed. She spent less and less time with friends.
- [23] Though Ms. Payne applied to and was accepted at Thompson Rivers University, she decided, together with her mother, to defer that acceptance for a year. She was concerned about her ability to manage the workload and to cope in a new environment. That decision was supported, in concept, by her high school special education teacher and her high school counselor--each of whom were concerned about the plaintiff's ability to transition to a post-secondary academic environment without significant support.
- [24] Instead, Ms. Payne chose to stay in Gibsons and, over the next 18 to 24 months, worked in a variety of jobs. She cleaned homes on a part-time basis. She worked at a theater part-time. It is noteworthy that she reported to Ms. Karmali that she enjoyed this latter job because "there were less people to deal with". She also began to work at a gym called Cross Trainers that she had been going to. The owners of the gym were aware of her limitations and initially hired her on a part-time basis. Her hours at the gym increased over time as did her responsibilities. In the summer of 2009, she also worked at a coffee and muffin shop called Wheatberries that was located at the ferry terminal.
- [25] Though the evidence about how much Ms. Payne worked at different times was inconsistent, I am satisfied that she did, at times, through a combination of some of these jobs, work on a full-time or more than full-time basis.
- [26] In the spring of 2009, or about two years post Accident, Ms. Payne continued to see her family doctor, her counselor Ms. Lang and Ms. Karmali. She periodically saw a psychiatrist. She continued to struggle with low mood and low confidence, with making decisions, with problems sleeping and with feelings of being overwhelmed. She also had hallucinations. The dosage of her various medications was increased. In May 2009, she was referred to Dr. Unger, a psychologist, to assist with her various difficulties and, in particular, her ongoing

low mood.

- [27] During this period of time, she also moved into and out of several apartments or homes where she tried to live alone or with a roommate. These endeavors were inevitably of short duration. She would feel stressed, anxious, struggle with her roommate's habits and return home.
- [28] In January 2010, she registered in a single course at Capilano University in North Vancouver while she continued to work at Cross Trainers. She was unable to complete the course. Almost immediately thereafter she endeavored, without success, to take a real estate course.
- [29] In the spring of 2010, or some three years after the Accident, Ms. Karmali reported that the plaintiff was struggling significantly with emotional instability. Dr. Unger testified that the plaintiff's description of her circumstances and situation at this time was "dark and bad" and that the plaintiff was angry.
- [30] In June 2010, the plaintiff and her mother met with her family physician, as well as with Ms. Karmali, to address the significant emotional difficulties in terms of low mood, anxiety and anger that the plaintiff was encountering. That same month, the plaintiff began to work with a rehabilitation assistant, Ms. O'Brien.
- [31] In August 2010, the plaintiff received a medical note excusing her from work for a period of three months and she thereafter obtained a further note excusing her from work on an ongoing basis. She has not sought work of any sort since that time.
- [32] It seems clear, and I find, that the next six to nine months were extremely difficult for the plaintiff. This conclusion is based on the evidence of Ms. Payne as well as the evidence and reports of Ms. Karmali, Dr. Unger and Ms. O'Brien. Dr. Unger, by way of example, said the plaintiff was "really despondent" and "really struggling". She had problems with sleep, depression and anxiety and was "in a lot of distress".
- [33] Starting in November 2010, and for about one year following, Ms. Payne, with the support of Ms. Karmali, met with a speech therapist, Ms. Salamon, to assist with various learning difficulties that she had encountered. Such assistance had been recommended by Dr. Coen, a neuropsychologist, following two separate sets of neuropsychological assessments. Ms. Payne and Ms. Salamon met somewhat regularly on alternate weeks for perhaps two hours on each occasion.
- [34] It is useful to step back and consider the level of support and assistance that was considered necessary and appropriate for Ms. Payne. She was seeing her family doctor from time to time. She saw and spoke to Ms. Karmali monthly. At times, she saw each of Dr. Unger and Ms. O'Brien weekly. She saw, as I have said, Ms. Salamon, on alternate weeks. Some of these appointments required that she travel to Vancouver.

- [35] Her living arrangements continued to be erratic and she tried, without success, to live independently on a sustained basis without any emotional deterioration. During the period from November 2010 to November 2012, she lived in six different homes. She alternated between living alone and then returning home. Some aspect of this may be attributed to stress associated with her home environment. Her mother's partner had three sons whose behaviour sometimes upset Ms. Payne. On balance, however, I am satisfied that the instability of her living situation is attributable to this Accident. Ms. Karmali observed that such behaviour is common among people who have suffered a brain injury.
- [36] During this time, with the assistance of Ms. O'Brien, the plaintiff sought to develop and maintain a schedule that would accommodate her appointments, some level of exercise and some activity of value. Together they worked at finding Ms. Payne some volunteer work and, after some time, were able to do so. Initially, this was at the SPCA. Later, it was at a facility for the elderly.
- [37] Gradually the level and intensity of the support that Ms. Payne received diminished. She stopped seeing Dr. Unger in May 2011. Dr. Unger said that patients get "therapy fatigue" and she accepted that this was a valid response to extended therapy. Dr. Unger did not accept that she and Ms. Payne had made improvements in "most" areas that they had endeavored to address. She did confirm, however, that Ms. Payne was more emotionally stable and happier when they parted and that she had learned some self-care. She was also less angry.
- [38] Ms. Payne stopped seeing Ms. Salamon in January 2012. They had had approximately 30 sessions together. Ms. Salamon was of the view that the plaintiff had made some improvement in various areas of difficulty but that much of this improvement was in the contained and controlled context of a counseling session. She considered that Ms. Payne's difficulties with reading comprehension, processing abstract information and/or filtering out background noise would be much more pronounced and would continue in a public setting such as a classroom.
- [39] Ms. O'Brien went on maternity leave in early 2012. She was not replaced. Instead, Ms. Karmali picked up aspects of her duties. Ms. O'Brien's primary functions had included assisting Ms. Payne both with establishing a structured and balanced schedule of activities and with developing low mood, stress and anger management techniques. Ms. O'Brien did not consider that she had observed much improvement in Ms. Payne achieving these objectives during their time together.
- [40] Ms. O'Brien said, and I accept, that she had sought to work with Ms. Payne at least twice a week but had been told by Ms. Karmali there was not enough funding. She believed, and I accept, that their inability to meet more frequently impeded Ms. Payne from making the progress that she might otherwise have made. More recently, Ms. O'Brien has started to see Ms. Payne again as a mentor or advisor. These meetings occur every few weeks on Ms. O'Brien's own time. Ms. O'Brien said that she does so because Ms. Payne does not have friends whom she trusts with her emotions.

- [41] In November 2012, the plaintiff moved to North Vancouver to live with her aunt. She has few friends there and spends most of her time alone. Most days, she walks her dog and goes to the gym. It is a diminished and limited existence. She has explored and considered various possible careers and educational opportunities but accepted that this litigation has impeded her from moving forward as energetically as she otherwise would have with these objectives.
- [42] Ms. Karmali filed her discharge report in late February 2013. That report recognized that Ms. Payne was living with her aunt who provided her with support and that she had no immediate goals. The report also recognized that, if Ms. Payne chose to live on her own, or chose to return to school or work, she would likely require a variety of different forms of support.

Credibility

- [43] The Defendant has not questioned the plaintiff's credibility. I consider that the plaintiff was careful, forthright and, if anything, understated. The full measure of her difficulties became apparent from the evidence of third parties.

The Plaintiff's Injuries, Her Present Condition and Her Prognosis

A) The Plaintiff's Brain Injury and the Significance of Her Age at the Time of that Injury.

- [44] The medical experts agree that Ms. Payne suffered a moderate to moderate-severe brain injury. Her CT scans and MRI results depict changes that are consistent with an injury to the right temporal lobe.
- [45] The experts also state that the Accident occurred at a critical time in her development as she was preparing to make the transition from adolescence to independent adulthood (Dr. Anton); that it occurred at a time that negatively impacted her educational and vocational potential (Dr. Mok); and that an injury "in these formative years has a significant impact on [the plaintiff's] ability to establish her own self-identity" (Dr. Foti).
- [46] There was consensus that the brain's plasticity in youth allows it greater flexibility to recover from injury. At this point, more than six years after the Accident, this latter consideration is of limited significance.

B) Physical Limitations

- [47] Ms. Payne accepts that she recovered relatively quickly from most of her physical injuries. She continued to struggle with headaches and sleep for a more extended time. These difficulties have also largely resolved, though she periodically takes medication to help her sleep.

C) Emotional Difficulties

- [48] Dr. O'Shaughnessy, a forensic psychiatrist called by the defendant, accepts that Ms. Payne developed i) possible personality change secondary to brain injury which was manifested in complaints of irritability and anxiety, ii) a major depressive disorder that is now in remission with medication; and iii) a cognitive disorder manifested in ongoing impairments in concentration and memory. He concluded that all three of these conditions were a direct consequence of the Accident. These conclusions are not contradicted in the evidence and they align with the evidence of Drs. Anton and Foti, each of whom was called by the plaintiff.
- [49] Though Ms. Payne's depression is in remission, she continues to suffer from periods of low mood. Ms. Karmali reported, as recently as this past spring, that these periods occur a minimum of twice a year for perhaps two weeks at a time.
- [50] Ms. Payne also periodically has what each of Dr. O'Shaughnessy and Dr. Foti described as "catastrophic type reactions to stress" and what others, including her mother and aunt, have described colloquially as "meltdowns". These are instances where Ms. Payne becomes overwhelmed by anxiety or some other emotion and is incapable of functioning for a period of time.
- [51] Further, Ms. Payne experiences irritation and anger at relatively minor provocation. This is supported by her evidence, the evidence of her mother and her aunt and by the records and evidence of caregivers such as Dr. Unger, Ms. O'Brien and Ms. Karmali.

D) Fatigue

- [52] Dr. Anton, a specialist in physical medicine and rehabilitation, confirmed that persons who have suffered a traumatic brain injury often struggle with fatigue. He met with and tested Ms. Payne for fatigue both in November 2008 and February 2012. Though they improved over time, Ms. Payne's test scores were above the 95th percentile on both occasions. (The higher the percentile, the more the subject suffers from fatigue). Importantly, he said that Ms. Payne's emotional and cognitive function would deteriorate when she was fatigued. This latter conclusion is supported by numerous witnesses including by Drs. Coen and Foti. It is a conclusion that is uncontradicted.
- [53] Dr. Hirsch, an expert in physical medicine and rehabilitation called by the defendant, opined: "Ms. Payne has been dealing with mental fatigue since the subject motor vehicle accident. It is my opinion that her fatigue is organically based and reflects a change in her mental efficiency".
- [54] These opinions are also consistent with observations of numerous persons including Dr. Unger, Ms. Salamon and Ms. O'Brien, all of whom commented on or observed Ms. Payne's difficulties with fatigue. They are further supported by the evidence of Ms. Payne's aunt, with whom she now lives, and by the evidence of her closest friend, Ms. Chong. Both

described how Ms. Payne is commonly tired, how she is limited in her ability to do several things on the same day, and how she regularly goes to bed at 9:30 in the evening. I accept the foregoing evidence, am satisfied that the plaintiff's difficulties with fatigue are significant and ongoing and consider that those difficulties are directly relevant to her emotional and cognitive functioning.

E) Social Interaction

- [55] One of the dominant themes in the evidence from Ms. Payne, her mother, a prior employer and several former friends and high school teachers was how positive and outgoing Ms. Payne had been prior to the Accident. She had a relatively large circle of friends who were important to her and with whom she interacted regularly in a wide range of activities.
- [56] The plaintiff now leads an extremely solitary existence. Her withdrawal from her friends was discernible almost immediately following the Accident. Her former friend, Ms. Lutes, observed this near immediate withdrawal and commented that Ms. Payne would frequently cancel plans they made. Ms. Chong, who appears to be Ms. Payne's closest friend at present, commented that this tendency to cancel plans persists to the present time.
- [57] When Ms. Payne does meet with a friend, it tends to be with a single person at a time. Ms. Salamon commented that this is common among brain injured individuals who often struggle to follow the multiple conversations that occur in a group.
- [58] Dr. Hirsch has commented: "[a]s a result of her brain injury, Ms. Payne has become somewhat withdrawn. Her lowered frustration threshold, changes in mood and [in]ability to control her emotions at times make it difficult for her to form/maintain meaningful relationships".
- [59] In addition, Ms. Payne and her friends, when they do meet, tend to meet at her home and stay in. They will generally watch a movie and then the friend will leave relatively early. This is not to say that they do not go out from time to time for a meal or to go shopping--it is simply infrequent.
- [60] Ms. Payne's aunt commented that the plaintiff will often spend entire days by herself with the shades drawn and leave the house only to walk her dog or to go to the gym.
- [61] Finally, there was no reference to Ms. Payne having any romantic relationships, other than in the spring and summer of 2012. At that time, she met and briefly lived with a 49-year-old man. In retrospect, Ms. Payne accepts that this relationship was inappropriate.

F) Cognitive Impairment

- [62] The parties disagree on the degree to which the Accident impaired the plaintiff's ongoing cognitive functioning. It is an important issue because it bears directly on the plaintiff's future wage loss claim.

- [63] Dr. Coen, a neuropsychologist called by the plaintiff, had the plaintiff undertake a series of tests on three different occasions--in March 2008, in November 2009 and most recently in January 2013. Ms. Payne's results varied and generally improved over time. Consequently, I have focused on Dr. Coen's most recent report. In that report, he opined that Ms. Payne remains diagnosable with cognitive impairments due to brain injury. Specifically, there remains evidence of impairments in select motor skills, concentration, verbal fluency, and some select aspects of visual scanning as well as select aspects of executive function. Dr. Coen also opined that, because Ms. Payne is quick to tire while performing cognitive testing, there is some likelihood that her negative test findings would increase as the length of the test battery deployed increased.
- [64] The defendant led evidence from Dr. Williams, also a neuropsychologist, whose report contests both Dr. Coen's methodology and his conclusions. Dr. Coen accepted the validity of certain finite and modest aspects of Dr. William's criticisms. In the main, however, he disputed the validity of those criticisms.
- [65] I am satisfied with and accept Dr. Coen's general conclusions for several reasons.
- [66] First, Dr. Williams did not independently test Ms. Payne. What his report does, for example, is question the adequacy of the tests used by Dr. Coen, or suggests that other tests would have been more appropriate. He argued that certain sample sizes in the existing literature, relied on by Dr. Coen, were not adequate to be reliable. He argued that Dr. Coen had misused certain norms and that Dr. Coen had concluded Ms. Payne was "impaired" when she was, based on the data, only "borderline".
- [67] Dr. Coen explained in his cross-examination that some of the literature relied on by Dr. Williams was dated and had been overtaken by more recent studies. Dr. Williams did not respond to this assertion in his evidence. Dr. Coen, an extremely experienced neuropsychologist, had never used some of the tests proposed by Dr. Williams and had chosen not to use others. I am satisfied with the basis for his decisions. Dr. Coen explained that Dr. Williams had misapprehended which norms he used in his work--an assertion that Dr. Williams could not contest. The suggestion that Ms. Payne may only be "borderline" as opposed to "impaired" on certain types of testing, even if accurate, would be sophistry. What this would mean is that Ms. Payne might have scored in the bottom 6-8% on certain specialized tests, as opposed to the bottom 4% of all persons tested. Dr. Williams accepted that, in real terms, both these conclusions would identify a person who struggles significantly in a particular area.
- [68] Second, the physical nature of Ms. Payne's brain injury is entirely consistent with the conclusions of Dr. Coen's testing. The report of Dr. Foti, a neurologist whose practice involves primarily the evaluation of cognitive and behavioral disorders in the context of neurological disease, explained and developed this thesis at some length. Dr. Foti opined that: "Ms. Payne has significant persistent and limiting cognitive deficits. These cognitive changes are entirely consistent with her traumatic brain injury, especially with greater

damage to the right hemisphere". Dr. Foti's report further explains that one of the most common forms of injury that results in loss of consciousness is diffuse axonal injury ("DAI"). DAI, in turn, "results in a number of cognitive and emotional difficulties, including, but not limited to, slowness of information processing, memory retrieval problems, poor concentration, poor organizational skills, irritability, and anger outbursts." I emphasize that these are among the very areas of difficulty that Dr. Coen identified and that other witnesses addressed.

- [69] Dr. Foti's conclusions closely align with the opinions of Dr. Hirsch who said: "[i]t is my opinion that Ms. Payne not only suffered focal brain damage to her right temporal lobe, but probably in addition diffuse axonal injury to account for her reported and documented neurocognitive and behavioural changes subsequent to the motor vehicle accident".
- [70] Third, Ms. Payne has been treated by numerous health and other professionals over the years. The evidence of Dr. Unger, Ms. Karmali and Ms. O'Brien made consistent reference to Ms. Payne's problems with memory, concentration, prioritizing, multitasking and organization. The focus of Ms. Salamon's work was to assist with Ms. Payne's difficulties with language, processing abstract concepts and auditory comprehension. Such extensive and ongoing assistance would not have been necessary absent certain significant deficiencies on the part of Ms. Payne.
- [71] In a similar vein, each of Drs. O'Shaughnessy, Hirsch, Foti and Anton opined that the plaintiff suffered some degree of cognitive impairment with that impairment being manifested in a variety of ways.
- [72] Fourth, Ms. Payne has been unsuccessful in her various academic endeavors and in aspects of her employment no matter how modest those endeavours have been. She initially failed to obtain a fitness certificate while working at Cross Trainers. She succeeded, with assistance, on her second attempt, though she was reluctant to try to obtain any further such certificates. Her employer later described that his 15-year-old son had been able to obtain the same certificate without difficulty. Similarly, while at Cross Trainers, she was unable to master a relatively rudimentary computer program that was added to her responsibilities. She was unable to complete the single course she took at Capilano University, in part because of the anxiety associated with commuting and in part because of her inability to filter out background noise. Ms. Salamon testified that this latter difficulty is quite common among persons with brain injuries. Ms. Payne also failed an online real estate course though she had been very excited about taking that course. These various sources of additional evidence, directly and indirectly, support Dr. Coen's conclusions.

G) Prognosis

- [73] There is very significant consistency in the medical opinions that were tendered and that addressed Ms. Payne's prognosis. I consider that the following statement from the opinion of Dr. Hirsch accurately captures these conclusions:

Recovery following a brain injury can be long and drawn out. The majority of neurological recovery is thought to occur within the first one to two years following the injury. Subsequent improvement in function is thought to relate to "learning or using" compensatory strategies developed over a period of years. In view of the time which has transpired since the subject motor vehicle accident, it is my opinion that Ms. Payne's neurologic recovery with respect to the traumatic brain injury she sustained in the subject motor vehicle accident has plateaued. How she will be able to cope with and adapt to her difficulties over the years waits to be seen, but can be influenced by further practice of judicious treatment intervention, if necessary, and supportive services.

Causation

- [74] I am satisfied that the plaintiff's various physical, emotional, psychological and cognitive difficulties were solely caused by the Accident. The test for causation in Canada is the "but-for" test: *Bradley v. Groves*, 2010 BCCA 361 at para. 37; *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-22; *Blackwater v. Plint*, 2005 SCC 58 at para. 78; *Clements v. Clements*, 2012 SCC 32 at para. 8; and *Ediger v. Johnston*, 2013 SCC 18 at para. 28.
- [75] There was some limited evidence relating both to Ms. Payne having hit her head on a weight in the gym where she worked and her having been involved in a minor motor vehicle accident. Both of these events post-dated the Accident. There is no suggestion in any of the expert evidence that these events influenced either her ongoing condition or her recovery in any significant way and I find that they did not.

Non-Pecuniary Damages

- [76] Non-pecuniary damages are intended to provide plaintiffs with reasonable "solace" for their pain and suffering and loss of enjoyment of life from the date of the injury to the present as well as into the future: *Scoates v. Dermott*, 2012 BCSC 485 at para. 170.
- [77] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, Justice Kirkpatrick identified the following non-exhaustive considerations that are relevant to an award of non-pecuniary damages: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's degree of stoicism.
- [78] Many of the foregoing considerations are directly engaged in the present case. Prior to the Accident, the plaintiff was an independent, hard-working and cheerful young person. She had good friends. She was active. She was involved with her school. She was ambitious, albeit without any specific focus.
- [79] The Accident has fundamentally transformed and diminished Ms. Payne's life. She lives a largely solitary existence. She has struggled with her sleep and with headaches as well as with serious depression and anxiety. Though these conditions have, in the main, either

resolved or are in remission, she continues to have periods of low mood. She has periodic hallucinations. She sleeps with both the lights and television in her bedroom on as a means of dealing with these hallucinations. And she struggles with anger, irritability and periodic outbursts.

- [80] She has and will continue to have various forms of cognitive impairment. She has difficulties with memory, concentration and various forms of executive function. She has difficulty processing information. She is limited in her ability to read to periods of perhaps ten minutes. She struggles significantly with mental fatigue which, in turn, limits what she can achieve and which exacerbates her cognitive and emotional difficulties. She becomes overwhelmed and has meltdowns.
- [81] Her difficulties influence the most commonplace of activities. Though she drives without difficulty, she becomes anxious in new places. While she can use her computer and her cell phone without difficulty, relatively rudimentary computer programs have proven to be beyond her.
- [82] She has consistently failed or struggled in her academic endeavors. She has been constrained in her employment efforts to low or entry-level employment. These struggles and failures have influenced her confidence and self-image.
- [83] Her career and educational prospects are diminished. I will develop this evidence when I address Ms. Payne's wage loss claim. At this point, I am focusing on the pleasure a person derives from school and from finding employment that is rewarding or fulfilling.
- [84] Her ability to live independently is impaired. She will have to be assisted on an ongoing basis with the various changes that life will inevitably bring. She will, for example, require assistance if she has children. In saying this I am addressing the loss of freedom and independence, so often taken for granted, that Ms. Payne will suffer.
- [85] Though her recovery has plateaued, she is at risk of further and ongoing difficulty. Dr. O'Shaughnessy opined that persons who have suffered from a major depression are at a 50% risk of suffering from a further period of depression. She is at greater risk of mood disorders and anxiety, of seizures, of bipolar disorders and of illnesses such as Alzheimer's. She is more likely to get divorced. If she were to suffer a further brain injury or stroke, her "cognitive reserves" are depleted beyond what they would otherwise be. Simply put, she would be in a poorer position to respond and recover. Each of the foregoing conclusions arises directly from the opinions I was provided. None of these conclusions was challenged.
- [86] Dr. Anton opined that there is some risk, though relatively small, of further declines in her cognitive functioning. He also stated that, while some decline in function is associated with normal aging, Ms. Payne is at risk of a more rapid decline in such function.
- [87] All such risks or eventualities would further diminish Ms. Payne's enjoyment of life.

- [88] There is relatively little difference in the amounts that the parties consider appropriate for this head of loss. The plaintiff asserts that her non-pecuniary losses should be assessed at \$225,000. The defendant says that \$175,000 is appropriate. To the credit of both counsel, the cases they relied on in support of their respective positions partly overlapped.
- [89] Each of the authorities I was provided and that I reviewed inevitably contains various distinguishing characteristics. In *Sirna v. Smolinski*, 2007 BCSC 967, the plaintiff suffered a mild brain injury of less sweeping consequence, but she also suffered from ongoing physical difficulties. She was awarded \$200,000. In *Roussin v. Bouzenad*, 2005 BCSC 1719, the plaintiff, who was 40 years old, and who was awarded \$200,000 for her non-pecuniary losses, suffered a mild brain injury with complications and various physical injuries. She was independent in her living, had successfully taken university courses and was able to perform some kinds of meaningful work. In *Hodgins v. Street*, 2009 BCSC 673, the plaintiff, who was almost 16 at the time of her accident, had a significant pre-accident medical history. She suffered a moderate brain injury and experienced fatigue, headaches, emotional problems and forgetfulness. At the time of trial, she was living with her boyfriend and working part-time as an administrative assistant. She was effectively awarded \$220,000 in non-pecuniary damages.
- [90] In the result, and having regard to the foregoing authorities as well as the additional case law I was provided, I consider that an award of \$210,000 fairly and reasonably compensates the plaintiff for her non-pecuniary loss.

Wage Loss

- [91] The plaintiff has advanced a claim for both past and future wage loss. Both pre-trial and post-trial losses may be viewed as a loss of income earning capacity; *Ibbitson v. Cooper*, 2012 BCCA 249. In addition, the standard of proof for hypothetical events, past and future, is the same - a "hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation"; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 18; and *Smith v. Knudsen*, 2004 BCCA 613 at para. 29. If a "real and substantial possibility" is demonstrated then "[t]he task of the trier of fact is to assess the likelihood of such events and reflect that likelihood in the assessment of damages"; *Lines* at para. 18.
- [92] In the recent case of *Morgan v. Galbraith*, 2013 BCCA 305, Justice Garson, for the court, said:
- [53] As already noted, in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach (rejected by the trial judge here) or the capital asset approach, as described in *Brown* (the approach adopted by the trial judge) to determine Mr. Morgan's lost earning capacity, given Mr. Morgan's career path was uncertain at the time of the accident.

[93] The parties agree that a figure of approximately \$14,200 properly compensates the plaintiff for her pre-trial wage loss. I am satisfied with the basis for that figure and award that sum to the plaintiff.

[94] The plaintiff's future wage loss assessment turns on a number of disparate considerations.

A. Would Ms. Payne Have Gone to University?

[95] In this case, given Ms. Payne's age at the time of the Accident, it is not surprising that she was uncertain of her future career path. Her future wage loss claim is influenced by a consideration of whether she would have, absent the Accident, pursued post-secondary education - though for reasons I will explain, I consider that, in this case, this issue has been excessively emphasized.

[96] I consider that there is a substantial possibility that Ms. Payne would have started and completed a university degree in the period since the Accident. She was taking the courses necessary to go to university. Her mother had been putting money into an RESP for years to enable her to go to university. She was described as a diligent and conscientious student. Virtually all of the friends that she went to high school with went on to pursue their educations at various universities in different parts of the country. She applied to and was accepted to Thompson Rivers University.

[97] The defendant emphasized the plaintiff was not a strong math student in high school. This is true of many students who enter and complete university. The defendant also emphasized that none of the members of her mother's family, or their children, had gone to university, though both of her aunt's children will be entering university this coming fall. The evidence before me established, as a statistical matter, that this made it somewhat less likely that Ms. Payne would have gone on to or would have completed university.

[98] I also consider that there is a substantial possibility that Ms. Payne would not have gone straight through university but may have taken a year or two out to pursue other options as some of her friends have. Further, I consider that there is some possibility that Ms. Payne may have decided to focus on a one or two-year diploma or certificate program in college. She did not strike me as, nor did she profess to be, particularly academic. Instead, she was hard-working, personable, and responsible. I have described the considerable initiative and independence that she demonstrated before the Accident. She had good judgment, a good work ethic, a loving family and good friends. These are often the cornerstones of future success.

[99] She was also keenly interested in financial independence. Making money was a focus in her evidence and in her dealings with, for example, Dr. Unger and Ms. O'Brien.

[100] It is for this reason that I consider excessive emphasis on whether Ms. Payne would have gone to university somewhat misplaced. There are many routes to financial success. Ms. Payne's mother, who does not have a university degree, is an example of this. She works as a financial administrator for a car dealership. She has earned between \$85,000 and \$100,000

over the last five years - an amount that considerably exceeds the earnings of the average university graduate. Ms. Payne has also shown some interest in becoming a realtor, a matter I will return to. The statistical data I was provided indicates that an average real estate agent earns more than an average female who holds a four-year university degree.

[101] Accordingly, as one aspect of my assessment of Ms. Payne's wage loss claim, I consider that there is a substantial possibility that Ms. Payne would have achieved some form of employment which paid more than the average income earned by women holding a university degree.

B. Is Ms. Payne's Ability to Go to University Diminished?

[102] It seems clear, and I find, that Ms. Payne's ability to pursue a post-secondary education is significantly diminished. This is Dr. Mok's opinion. Mr. Lawless - a vocational rehabilitation consultant who assessed Ms. Payne - and Dr. Foti also indicate that such education is beyond Ms. Payne, though Dr. Foti raised the prospect of Ms. Payne possibly engaging in some form of hands-on vocational training. Dr. Hirsch's report states that it is "questionable" whether Ms. Payne would be successful in pursuing a college or university degree and opines that, if she were to pursue such education, she would require a reduced course load, special accommodation and the assistance of tutors and therapists.

[103] Importantly, the foregoing opinions align with Ms. Payne's experience and with her earlier efforts to pursue different forms of training or education subsequent to her finishing high school.

C. Is Ms. Payne Capable of Full-Time Work?

[104] The plaintiff wishes, in the future, to work on a part-time basis. She would like that job to be meaningful in some way. She accepts that this litigation has impeded her efforts to move on and find work.

[105] The evidence, on balance, indicates, and I find, that there is a very substantial possibility Ms. Payne will be limited to working on a part-time basis in the future. Indeed, the evidence indicates that this is likely the case. Dr. Anton has opined that Ms. Payne will likely be "restricted to part time work given her ongoing issues with fatigue". He testified that the plaintiff's emotional reserves are in the nature of "a bank account" that can become depleted with full-time work. Mr. Lawless shared the view that Ms. Payne would be limited to part-time work. Drs. Foti and Hirsch have expressed the following conclusions- each of which I believe properly capture Ms. Payne's situation:

Dr. Foti -

Ms. Payne has been able to work on a full-time basis in a job that requires little decision-making, cognitive skills, or physical demands. However, working on a full-time basis has resulted in a restriction of recreational and social pursuits based on the fatigue that she experiences. Although Ms. Payne is capable of this work, it is not favourable for her development as an individual over the long-term.

Dr. Hirsch -

From a physical perspective, Ms. Payne is able to work full-time in any occupation she desires. Her future employability, however, is affected adversely by her reduced cognitive function and persistent fatigue. It is my opinion that Ms. Payne probably can work at least part-time and possibly full-time in some capacity, provided her job does not over-tax her mentally.

[106] Mr. Kerr, a work capacity evaluator who prepared a report for the defendant, said:

From a physical perspective Ms. Payne does not present with any major functional limitations other than avoiding prolonged moderate to extreme stooping demands. Based on this it is my opinion that she is capable of full time work demands provided the cognitive demands are within her abilities. Having said this I do think there are limitations with respect to mental fatigue. She demonstrated deterioration in cognitive function during end of day repeat testing (attentional/working memory/divided attention) and showed other clinical signs of mental fatigue.

[107] These opinions are, once again, entirely consistent with Ms. Payne's experience. Thus, counsel for the defendant placed much emphasis on the plaintiff's physical ability to work on a full-time basis and, on an even more than full-time basis, in the period leading to January 2011. That period is highly instructive, but for different reasons than the defendant emphasized. The plaintiff, though capable of working, was struggling emotionally. She was not capable of coping, or maintaining the other aspects of her life, in a healthy way.

[108] This is also apparent from her interaction with each of Dr. Unger, her family doctor, Ms. O'Brien and Ms. Karmali in the period prior to August 2011 when she stopped working. Some of these individuals had met as a group to discuss the plaintiff's difficulties and her deteriorating mood. There appears to have been clear and widespread recognition that something had to change and that what the plaintiff was doing was not sustainable.

[109] Still further, the cost of future care opinions that were filed by each of the plaintiff and the defendant, and to which I will return, suggest the need for an ongoing level of care and interaction with various health and rehabilitation consultants that would militate against Ms. Payne's ability to work on a full-time basis. Finally, if Ms. Payne is to have children in the future, which is her wish, the energy and demands associated with caring for her children, together with her emotional fragility and her depleted energy level, would again militate against her ability to work on a full-time basis.

D. Ms. Payne's Career Options

[110] A further aspect of my assessment turns on the range of career opportunities that remain open to Ms. Payne. I consider that these options are much diminished. The medical and other expert evidence that pertains to this conclusion is, again, relatively consistent with a few outliers.

[111] The following opinion from Dr. Mok is useful because it succinctly captures Ms. Payne's various limitations:

"Ms. Payne's cognitive deficits, changes in her personality due to frontal lobe executive damage, emotional lability, low distress tolerance, physical fatigue, distractibility, poor attention span, inability to multitask, difficulty with word-finding, and her proneness to exacerbation of her depressive illness presented very significant barriers to her being competitively employable".

I note, however, that this description should properly refer to "mental fatigue" rather than "physical fatigue".

[112] Mr. Lawless, whose opinions I accept, described a variety of entry-level and low-wage positions that Ms. Payne may be suited for. I consider that Mr. Lawless' opinions are consistent with the full range of difficulties that Ms. Payne labors under, as well as with the medical and psychological opinions that were filed. Mr. Lawless' opinions also deal with both the consequences of such difficulties on Ms. Payne's employment prospects as well as with Ms. Payne's earlier work experiences.

[113] Ms. Payne appeared to function well at Cross Trainers when her hours and duties were modest in nature. As her duties increased she was unable to perform. She struggled with the kind of ongoing education that her employers would have preferred she undertake and with a new computer program. Each of her employers saw her crying at work. One of her employers said he would not hire her back. The other could not comment.

[114] The same general profile was true during her short stint at Wheatberries. When things were relatively quiet Ms. Payne performed well. When things were busy she became overwhelmed. She could not multitask. She could not be put on a busy shift by herself. Her friends had to pick up part of her work load. Her employer said he would not hire her back.

[115] In addition, the plaintiff worked for a short period of time at her mother's place of business. Again, this was with limited duties and with access to additional assistance if she required it.

[116] The defendant filed a report from Dr. Magrega, a psychologist and vocational evaluator. I consider that Dr. Magrega's opinions of Ms. Payne's capabilities and future prospects are unrealistically optimistic and not in keeping with most of the evidence I have heard. For example, he initially described Ms. Payne's ability to work as a realtor with her aunt, who is also a realtor, as better than 50-50. Ms. Payne, however, failed her attempt to pass the realtors' course. Her aunt has only recently become a realtor and has sold a handful of

homes. There is no reason to believe that she can or would work with Ms. Payne. Dr. Magrega admitted that, if Ms. Payne could not work with her aunt, her prospects of working as a realtor would be diminished. He also accepted that this goal was likely unrealistic if Ms. Payne could only work part-time. Importantly, his report acknowledges that, if Ms. Payne can only work on a part-time basis, "then her vocational prognosis is significantly bleaker".

[117] I return to the guidance and structure of Morgan. I am satisfied that Ms. Payne has proved there is a real and substantial possibility that her earning capacity has been impaired. In assessing Ms. Payne's loss, and given that Ms. Payne's career path was uncertain at the time of the Accident, I have relied on the capital asset approach to assess her loss. I have considered the factors described by Justice Finch, as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.):

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all opportunities which might otherwise have been open to [her], had [she] not been injured; and
4. [t]he plaintiff is less valuable to [herself] as a person capable of earning income in a competitive labour market.

[118] Each of these considerations is engaged in this case. Though it is these considerations that guide me, I consider that there is also some value, perhaps in the form of signposts, in turning to the more precise calculations that are found in the expert reports of the economists that were filed by the parties. Aspects of those reports generate very similar conclusions. Using normal labour market contingencies, the present value of the future income of a female with a bachelor's degree, who worked to age 65, would be approximately \$1 million. Using those same considerations, the future income of a female with a two-year college degree would be approximately \$800,000. The future income of a female who works on a part-time basis (approximately 20 hours per week) to age 65, at an entry-level salary of \$12 per hour is somewhat in excess of \$200,000.

[119] There are a few positive contingencies that pertain to Ms. Payne's circumstances. The plaintiff may, with assistance, succeed with some training or education and, in turn, find better or more lucrative employment. There is some modest prospect that aspects of her condition will improve which would, in turn, expand the type of work available to her. The evidence before me indicates that there are some instances where persons with a brain injury outperform expectations.

[120] I consider that a broader range of negative contingencies are relevant. Ms. Payne may not be able to continue to work on a part-time basis. Mr. Lawless' report states:

Although these are modest offerings that I'm mentioning for Ms. Payne, I think she'll still be challenged to realize them. Disabled people experience more unemployment and underemployment than non-disabled generally, and that's especially true if they are young, female and less educated. There is also research indicating that disabled people who've been out of the workforce for two years usually don't ever return, and Ms. Payne has been without work nearly three after years of largely flailing vocationally in the wake of her accident. Her case is particularly challenging because she has a brain injury that affects her personality and executive functioning, and those can be more disabling than strictly physical and cognitive issues. Psychosocial dysfunction following brain injury can include emotionalism, depression, lack of initiative, poor interpersonal skills, poor anger management and social isolation, all of which have been noted for Ms. Payne. People with such issues can often find work without too much difficulty, since they present well and are unimpaired in other areas. They find it harder, though, to retain employment since they are vulnerable to failures and frustrations at work, especially if they have impaired self-awareness, which was also noted for Ms. Payne and which I saw myself. Thus they can develop a pattern of successive periods of short-term employment followed by spells of unemployment. Over time the work periods become shorter and more sporadic, and they settle into prolonged joblessness. This may be happening now.

[121] If Ms. Payne has children her ability to work part-time may be affected. She is susceptible to major depression and anxiety. She regularly has periods of low mood. These considerations would affect her ability to work in a sustained way. The various other difficulties that Ms. Payne is now, potentially, susceptible to, such as seizures and cognitive deterioration, would also affect her ability to continue to work in the longer term.

[122] The foregoing considerations and contingencies, together with the economic signposts I have identified, satisfy me that Ms. Payne has suffered a loss of earning capacity. I assess that loss at \$800,000.

Future Care Costs

[123] The legal principles that govern this head of loss are straightforward. The test for determining the appropriate award for the costs of future care is an objective one based on medical evidence. For an award of future care: 1) there must be a medical justification for claims for costs of future care; and 2) the claims must be reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.). In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22, while addressing the assessment of costs of future care, Chief Justice McLachlin confirmed that courts rely on "evidence as to what care is likely to be in the injured person's best interest", and that the measure of such care is "objective, based on the evidence". That same test was recently reaffirmed in *Shapiro v. Dailey*, 2012 BCCA 128 at para. 51. Finally, some case law suggests that there should be evidence that a plaintiff will actually incur the expenses being claimed before damages will be awarded; *Izony v. Weidlich*, 2006 BCSC 1315 at paras. 73-74.

[124] The application of the foregoing principles is straightforward for many of the care items being sought by the plaintiff. The following chart identifies the values ascribed to various items by the experts for the plaintiff and the defendant respectively:

ITEM

Plaintiff's Expert:

JANICE

LANDRY

Defendant's Expert:

GERALD KERR

A. Psychological Consultation

\$67,911

\$60,704

B. Psychiatric Consultation

\$0

\$0

C. One-To-One Rehabilitation Assistance

\$598,051

\$60,330

D. Pharmaceutical Requirements

\$22,573

\$22,573

E. Speech and Language Therapy Consultation

\$8,562

\$0

F. Educational Requirements

\$14,148

\$12,052

G. Physical Conditioning/Physical Activation

\$34,887

\$16,990

H. Rehabilitation Case Manager

\$66,650

\$61,829

I. Vocational Consultation

\$17,408

\$4,422

J. Live-In Child Care Assistance

\$382,882

\$228,358

K. Associated Travel Costs

\$45,903

\$0

L. Financial Management

\$0

\$0

TOTAL

\$1,258,975

\$467,258

[125] The chart reveals substantial agreement on various line items and significant disagreement on a few finite categories. I have focused on those care items where there is some meaningful degree of difference between the parties. But for one item - "Associated Travel Costs" - which I will return to, each of the categories of care being sought by the plaintiff is supported by medical evidence. The fact that the defendant accepts the need for such types of care further simplifies matters. Thus, the issue for almost all categories of care turns not on the threshold question of whether such care is appropriate but on how much care is reasonable.

A) Psychological Consultation

[126] The difference in the amounts advanced by the experts is modest. Mr. Kerr has opined that other professionals can assist in monitoring Ms. Payne's needs. I agree with that assertion and accept Mr. Kerr's figure of \$60,704.00.

B) Rehabilitation Assistance

- [127] The opinions of the two experts diverge most significantly for this care item. This category of assistance is intended to provide Ms. Payne with various types of support including help maintaining a weekly schedule, and assistance with budgeting, time management and cognitive strategies. The medical evidence, from multiple sources, supports Ms. Payne's need for such assistance. Ms. Landry's cost estimate is premised on Ms. Payne being provided with one to one rehabilitation assistance for eight to ten hours a week. This far exceeds the amount of such assistance that Ms. Payne has received at any time since the Accident. It works out to about two hours a day or to two half days per week. It considerably exceeds the level of such assistance that I consider Ms. Payne requires.
- [128] I observe that, for more than the past year, Ms. Payne has neither obtained nor sought such assistance. In saying this, I am mindful of the evidence of both her mother and her aunt who addressed the degree of ongoing daily assistance and support that they provide to her as well as the evidence of Ms. O'Brien which pertained to the progress Ms. Payne made when they worked together.
- [129] Ms. Landry's estimates are, however, inconsistent with Ms. Payne needing help with such matters as her physical conditioning--an area where Ms. Payne has functioned independently for some time. The extent of assistance that Ms. Landry proposes also has the prospect of impeding Ms. Payne's ability to participate in other forms of meaningful activity including employment. Multiple witnesses addressed the salutary benefits of Ms. Payne being engaged in some form of activity that would provide her with independence and confidence.
- [130] I also consider that, though the future assistance provided by various caregivers to Ms. Payne would, in the main, be specialized, there would also be some overlap in such assistance. For example, the care plans of both experts contemplate some level of ongoing kinesiology training for Ms. Payne. Similarly, the care plan of both experts contemplates some child care assistance. A child care assistant would also likely help Ms. Payne with meal preparation, a matter that Ms. Landry envisions falling within the bailiwick of the rehabilitation assistant. The care plans of both experts contemplate Ms. Payne receiving ongoing assistance from a psychologist and an occupational therapist. These various disciplines, in combination, would form part of the personal "safety net" that Dr. Anton opined would optimize Ms. Payne's functioning and that both Ms. Landry and Mr. Kerr consider appropriate.
- [131] At the same time, I consider that Mr. Kerr, who stated that Ms. Payne will require an hour of assistance on alternate weeks plus additional assistance when Ms. Payne struggles with any acute need, has somewhat understated Ms. Payne's future needs. Though Ms. Payne has not had access to rehabilitation assistance for some time, this has occurred while her life, for practical purposes, has been on hold. As she moves forward with various education and work opportunities, as she has children and/or as she adds other content to her life, I am

satisfied that she will require more regular ongoing assistance.

[132] The evidence of Ms. Payne's mother and aunt is also important. At present, Ms. Payne cannot be said to be living independently. Indeed, there has never been any sustained period, post-Accident, when she has lived independently. Her "safety net", to an unsustainable degree, presently comes from her family.

[133] I consider that weekly visits of perhaps an hour and a half each, together with the contingency proposed by Mr. Kerr, would be reasonable and would better accord with the evidence. The future cost of such care would be approximately \$120,000.

C) Pharmaceutical Requirements

[134] The parties agree on this cost.

D) Speech and Language Therapy

[135] Mr. Kerr accepted that, if Ms. Payne seeks to pursue some form of training or education, such therapy would be helpful. This is also consistent with the evidence of Ms. Salamon and the opinion of Dr. Hirsch. I consider that the amount of \$8,562, proposed by Ms. Landry, is reasonable and necessary.

E) Educational Requirements

[136] The difference in the costs proposed by Ms. Landry and Mr. Kerr, respectively, is modest and arises from the level of ongoing assistance that Ms. Payne would require. The medical experts, such as Dr. O'Shaughnessy, consistently spoke to the importance of Ms. Payne succeeding in her next endeavor. I consider this modest level of extra care reasonable in order to advance this object and would award Ms. Payne the amount of \$14,148.00 for this care item.

[137] I would award this amount even if Ms. Payne only pursued a one year vocational program. The evidence of Ms. Chong, pertaining to how many hours of class and how much homework such a program might entail, suggests that Ms. Payne may have to complete even a one year program over a longer period of time.

F) Physical Conditioning

[138] The difference in the calculations of the two experts stems largely from the level of ongoing assistance that Ms. Payne requires from a kinesiologist and the cost of her belonging to a gym. I consider that the \$16,990 figure proposed by Mr. Kerr and the explanation of that figure contained in his report are reasonable.

G) Rehabilitation Case Manager

[139] The modest difference in the figures advanced by the two experts stems from their perception of what level of care Ms. Payne will require at different times. I consider that there will likely be numerous significant changes in Ms. Payne's life in the next several years and that Ms. Landry's accommodation for this period of time is more appropriate. I, therefore, accept Ms. Landry's care estimate of \$66,650.00.

H) Vocational Consultant

[140] The difference in the figures advanced by the two experts stems from the issue of whether Ms. Payne will require periodic vocational testing. I consider the issue somewhat artificial. Mr. Lawless opined that Ms. Payne may require the assistance of a job placement specialist, experienced with clients who have a brain injury, from time to time. Mr. Kerr accepted that this was so. Neither Ms. Landry nor Mr. Kerr has made provision for the cost of such a placement specialist. I consider that the amount of \$17,408 is reasonable, whether it pertains to ongoing vocational assessments or to periodic job placement assistance.

I) Live-in Child Care

[141] There are numerous differences that account for the disparity in the figures advanced by the two experts. One significant component of this difference stems from the amount of ongoing child care assistance the plaintiff would require if she had one or more children. Mr. Kerr's report acknowledges how difficult this issue is:

Consideration of parental support services is complex and challenging particularly involving persons with brain injuries. There are a wide range of factors that influence the type and duration of assistance required and unfortunately these are unknown at this time. Some of these factors include:

Whether she will be a single or cohabitation parenting [sic];

Whether she has sole or shared custody;

Whether she is working or non-working;

The health and behaviour of the child;

Ms. Payne['s] response to parenthood.

[142] In Hodgins at para. 132, the court identified some of the foregoing considerations as well as other relevant contingencies--including the prospect that the plaintiff may not have children.

[143] Furthermore, Mr. Kerr properly observes that, absent the Accident, had Ms. Payne been able to work full-time, she would have incurred some child care costs. This factor was not identified by Ms. Landry.

- [144] Recognizing the significant unknowns that arise from this care expense, I consider that the various considerations and scenarios that underlie Mr. Kerr's report and the care costs he generates for them are more reasonable than those advanced by Ms. Landry. In particular, I consider that the level of child care assistance proposed by Ms. Landry is excessive. Counsel for Ms. Payne, in his closing submissions, effectively conceded this.
- [145] Having said this, Mr. Kerr's calculations are premised on Ms. Payne only having one child. Mr. Kerr also accepted that his calculations were premised on Ms. Payne having a live-in nanny and that the cost of a live-out nanny would be 50% higher. Mr. Kerr did not reference the fact that, if Ms. Payne marries, she is more likely than the average person to get divorced--a factor which would tend to increase the burden of caring for a child. There are, then, various further contingencies which justify fixing Ms. Payne's future child care costs at \$275,000. I consider that this amount is reasonable and that it is supported by the medical evidence, in particular by the opinion of Dr. Anton.

J) Associated Travel Costs

- [146] Ms. Landry has opined that Ms. Payne is likely to need her rehabilitation assistant or a friend to accompany her when she travels. There is no medical support for this expense in the record and the plaintiff has withdrawn her claim for such support.
- [147] Based on the foregoing considerations, as well as the balance of the care items contained on the chart I referenced at paragraph 124 of these reasons, I have awarded Ms. Payne a total of \$602,035 for her future care costs.

Special Damages

- [148] The parties have agreed that Ms. Payne's special damages are \$6,799.83.
- [149] The parties have also stated that they will endeavor to agree on all relevant tax issues as well as on applicable management fees. If they are unable to do so, they will return to seek my assistance.

Summary

- [150] I have determined that the following awards are appropriate:

Non-Pecuniary loss

\$ 210,000.00

Past Wage loss

14,200.00

Future Wage Loss

800,000.00

Costs of Future Care

602,035.00

Special Damages

6,799.83

TOTAL:

\$ 1,633,034.83

[151] I consider that the sum of \$1,633,034.83 properly reflects the plaintiff's losses and that the sum is reasonable in all of the circumstances. Absent circumstances of which I am unaware, and counsel wishing to bring such matters to my attention, the plaintiff is to receive the costs of this action.

"Voith J."

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