

SUPREME COURT OF NOVA SCOTIA
Citation: *Hayward v. Young*, 2011 NSSC 294

Date: 20110718
Docket: Hfx No. 244134
Registry: Halifax

Between:

Craig Hayward

Plaintiff

v.

Matilda Young

Defendant

Judge: The Honourable Justice M. Heather Robertson

Heard: December 13, 14, 15, 16, 20, 21, 22, and 23, 2010 and
January 18, 2011, in Halifax, Nova Scotia

Written Decision: July 18, 2011

Counsel: Richard A. Bureau and Amanda M. Carew for the
Plaintiff
Jamie L. Chipman, Q.C. and Kate A. Marshall, for the
Defendant

Robertson, J.:

[1] This is an assessment of damages of the plaintiff Craig Hayward who was injured in an automobile accident on April 5, 2003, at twelve noon, at the corner of Wright Avenue and Windmill Road, at Burnside in the Halifax Regional Municipality, while driving his 1996 Volkswagen GTI.

[2] The defendant's vehicle struck Mr. Hayward's vehicle at the driver's side door, shattering the window and pushing the door inward against Mr. Hayward's left side. The damage to Mr. Hayward's vehicle was appraised at \$5,747. Liability is not an issue. Mr. Hayward was able to drive his vehicle after the collision, back to his office.

[3] Mr. Hayward's injuries include soft tissue damage to his shoulder, neck and lower back. As well Mr. Hayward says he also suffers from migraine headaches and received a traumatic brain injury as a result of impacting his head on the driver's side window. In 2006, three years following the accident Mr. Hayward had an MRI of the brain, which revealed some residual scarring to the inferior frontal lobe.

[4] The defendant says the claim of a traumatic brain injury can be explained by an earlier event, when in 1991 Mr. Hayward then age 19 was assaulted in downtown Halifax and remained unconscious on a sidewalk for approximately one-half hour. Medical records reveal that four days later he still could not remember the event.

[5] The defendant accepts that Mr. Hayward's injuries relating to the first reported complaints of neck, shoulder and lower back pain and says that general damages should therefore be assessed in the mid range of *Smith v. Stubbart* (1992), 117 N.S.R. (2d) 118 (N.S.C.A.). The defendant also says Mr. Hayward has no claim for loss of income or future lost income, as he has worked continuously since the day of the accident.

[6] Mr. Hayward's position is that as a result of the traumatic brain injury, he has made extraordinary efforts to continue to work since the accident but will soon be no longer able to continue his career.

[7] Mr. Hayward seeks:

General Damages (Past and Future)	\$150,000
Loss of Future Income	\$1,137,000
Costs of Future Care	\$75,000
Lost Housekeeping Capacity	\$50,000

and prejudgment interest and special damages for costs incurred in presenting his case.

[8] Mr. Hayward introduced the evidence of two family physicians Dr. Susan Lappin and Dr. Farah Kapur; physiotherapist Thomas Stanley; clinical neuropsychologist Dr. Wayne MacDonald; neurologist Dr. Alexander MacDougall; psychologist Dr. Erica Baker; actuary Ms. Jessie Shaw Gmeiner; as well as the evidence of Mr. Hayward himself; his wife Kimberley Hayward; father Gerald Hayward; friend Barry Brown; and work colleague Star Bayer. In evidence was the written report of Dr. Robert Mahar who diagnosed a whiplash associated disorder grade 2/4 and further documentary medical evidence of treatments received by Mr. Hayward.

[9] The defendant's sole witness was Dr. Yvon Toupin, a neuropsychologist who conducted an independent medical examination of Mr. Hayward on July 20 and 21, 2010.

[10] The defendant's position is that the evidence submitted by Mr. Hayward does not prove that the motor vehicle accident of 2003 caused Mr. Hayward's present complaint of traumatic brain injury. The defendant challenges the credibility of the accused on several matters submitting that:

1. Mr. Hayward did not seek medical treatment immediately after the accident.
2. Mr. Hayward did not inform his own medical experts of his earlier head injury of 1991 therefore calling the validity of their diagnosis into question.

3. Mr. Hayward did not reveal to these same medical experts that he had other motor vehicle accidents both before and after the April 5, 2003 event.
4. Mr. Hayward although complaining of severe physical distress that curtailed his activities, was the subject of surveillance at a rental property he owns in Truro, Nova Scotia, working long into the night March 5 and 6, 2010, doing heavy physical labour, painting walls and installing cabinetry in one of the rental units.
5. That the day following this work, Mr. Hayward attended physiotherapist Tom Stanley for a functional assessment and failed to mention this activity or its effect on him.
6. That Mr. Hayward has exaggerated his cognitive impairment and failed one of the two validity tests, when he was assessed by his own expert, neurologist Dr. Wayne MacDonald.
7. That Mr. Hayward's work related difficulties did not immediately arise following the accident.
8. That any cognitive difficulties, stress or anxiety from which Mr. Hayward clearly suffers, cannot be attributed to the accident and may indeed relate to issues surrounding depression and alcohol abuse.
9. That continued complaints of pain are complicated by injuries sustained in the motor vehicle accident of July 2010.

[11] The defendant relies on *Resurfice Corp. v. Henks*, 2007 SCC 7 and *Fallowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, where the Court affirmed the "but for" test as the primary test for causation.

Causation

[12] In *Resurfice, supra*, McLachlin C.J. stated at para. 20:

20 Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue

the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

21 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

22 This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, per Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant". Similarly, as I noted in *Blackwater v. Plint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, per Sopinka J.

[13] I must be satisfied on a balance of probabilities that Mr. Hayward's injury, a traumatic brain injury, would not have occurred but for the negligence of the defendant.

General Damages and Loss of Future Earnings

[14] Counsel have cited various cases on quantum. The defendant relies on the following cases: *Smith v. Stubbart*, *supra*; *Merrick v. Guilbeault*, 2009 NSSC 60; *O'Donnell v. Luddington* (1996), 151 N.S.R. (2d) 161 (NSSC), (1996), 152 N.S.R. (2d) 398 (NSCA); *Parsons v. Parker* (1997), 160 N.S.R. (2d) 321 (NSCA); and *Dorie v. Williams* (1994), 127 N.S.R. (2d) 29 (NSSC).

[15] Each case is of course distinguished on their facts but can be instructive as to a range of damages.

[16] In *Merrick*, the plaintiff has sustained a brutal assault, physical injuries, and psychological trauma. The Court awarded damages of \$52,000.

[17] In *O'Donnell*, an award of \$30,000 for pain and suffering was tempered by findings that the plaintiff had been less than forthright with various medical professionals who evaluated the extent of his injuries.

[18] In *Parsons*, the Court awarded general damages of \$31,000, in the face of soft tissue injuries that were accepted by the trial judge as being 90% attributable to the motor vehicle accident and not to prior accidents.

[19] In *Dorie*, an award of \$23,000 was made where a motor vehicle accident caused soft tissue back injuries that were “persistently troubling but not totally disabling.”

[20] The cases cited by the plaintiff were more instructive, in the area of brain injury: *Jodrey Estate v. Crowder Estate*, [1991] N.S.J. No. 183, 98 N.S.R. (2d) 116 (NSSC); *Mawdsley v. McCarthy's Towing and Recovery Ltd.*, 2010 NSSC 168; *Goguen v. British Columbia*, 2002 BCSC 1598; *Polovnikoff v. Banks*, 2009 BCSC 750; *Nagle v. Thomas*, 2009 NBQB 66, 342 N.B.R. (2d) 259; and *Vogler v. Szendroi*, 2010 NSSC 390.

[21] In *Jodrey*, the plaintiff was severely injured in a motor vehicle accident where a drunk driver drove head on into the plaintiff's vehicle, killing two and leaving the plaintiff with significant facial fractures, and a closed head injury with concussion. The plaintiff had no recollection of the accident following which the evidence showed that she suffered a mild to moderate loss of intellectual function and was employable although at a lower level.

[22] In *Mawdsley*, the plaintiff had his head and upper body crushed between two garbage trucks. The Court found that he suffered a mild cognitive deficit. His physical injuries were determined to be “troubling and persistent but not totally disabling.” The Court had difficulty assessing his brain impairments, in part because of conflicting evidence from the plaintiff at various times as to any loss of consciousness he suffered at the accident and in light of the “modesty of medical evidence”.

[23] The Court showed concern for the expert evidence of Dr. Erica Baker. At para. 78, the Court noted:

78 In her summary, Dr. Baker says: "Evidence of mild-moderate cognitive difficulties was obtained that was fairly consistent with an acquired mild-to-moderate traumatic brain injury." She conceded that "It is quite possible that some of the deficits presently observed may have pre-dated Mr. Mawdsley's 2001 injury. ... Mr. Mawdsley did not report cognitive inefficiencies prior to his accident and his neurocognitive profile suggests that mild-to-moderate traumatic brain injury, most likely, is contributing to his cognitive problems." Here Dr. Baker puts her finger on one of the difficulties for the court. There is no objective evidence to establish a "base line" with which to compare Mr. Mawdsley's test results as established by Dr. Baker. Essentially all that she had was her testing and Mr. Mawdsley's reported memory and concentration problems. She did not speak to Mr. Mawdsley's spouse, or mother, employers or co-workers about his pre-accident condition. At best, Dr. Baker can only offer the opinion that Mr. Mawdsley's "pattern of impairment" is consistent with people with mild-to-moderate brain trauma. She cannot say what his "pattern of impairment" was prior to 2001 or whether that "pattern of impairment" was caused by the accident. There is no clinical or investigative evidence contemporary with the accident suggestive of brain trauma.

and at para. 80:

80 Dr. Baker conceded that confusion, contemporary memory loss and/or loss of consciousness would be consistent with brain trauma -- although their absence would not be determinative. Likewise, when asked whether a detailed recall of events pre and post accident was a good sign of no brain trauma, she acknowledged "that helps." Dr. Baker agreed that with a traumatic brain injury victims are worse immediately after the accident and one should see some improvement thereafter. It was rare for someone to get worse over time. In the end, however, the fact that Mr. Mawdsley was alert post-injury, does not preclude the possibility that he had sustained some brain trauma.

[24] However, the Court finally accepted there were sufficient records indicating concentration and memory loss since the accident to conclude that the plaintiff suffered a "mild but permanent brain trauma".

[25] Mr. Mawdsley was rewarded \$100,000 in general damages and \$57,000 in diminished earning capacity.

[26] In *Goguen*, the plaintiff sustained serious facial and wrist injuries when thrown from a bicycle. After spitting out blood and teeth the plaintiff was in and out of consciousness and suffered retrograde and post-traumatic amnesia. The Court accepted that he had a mild traumatic brain injury and including memory deficits and personality changes, the plaintiff was awarded \$125,000 in non-pecuniary damages and loss of earning capacity of \$200,000.

[27] In *Polovnikoff*, the Court accepted that the plaintiff suffered a mild traumatic brain injury and suffered from cognitive impairment, despite a history of psychotic disorders. The Court awarded \$118,000 for non-pecuniary loss and loss of earning capacity of \$168,000.

[28] In *Nagle*, the plaintiff was involved in a serious car crash, in which the jaws of life were used to remove him from the vehicle. He was unconscious for up to ten minutes. He suffered hip and iliac fractures, broken ribs and pulmonary emboli. The Court accepted that the plaintiff had a mild traumatic brain injury that led to “a severe decline in his ability to perform the essential duties of his occupation.” He was awarded \$125,000 in non-pecuniary damages and \$585,000 for loss earning capacity. The plaintiff had run Nagle’s Fashions, a clothing store and had previously been considered “bright, articulate, capable and shrewd businessman” who through personality changes argued with and offended customers and engaged in such peculiar activity as contradicting customers on their own known shoe size. He was deemed a liability to the business and unlikely to ever succeed again in the retail sector.

[29] In *Vogler*, a 21-year old student ejected from a moving vehicle suffered a fractured skull, eye damage, fractured ribs and pelvis and was diagnosed with a severe traumatic brain injury with scans showing bleeding inside the frontal lobe. He suffered memory and attention problems, had lost his wit and had diminished social skills. The Court awarded Mr. Vogler \$150,000 in non-pecuniary damages and \$180,000 for loss of earning capacity.

[30] In light of the fact the plaintiff was young without any work record, Moir J. commented at para. 199 showing the art of global calculations:

199 Let us compare that projection with what Mr. Vogler has been earning these past ten years, then we have to make a prediction about what the future holds for him.

200 I have been using a round figure of \$50,000 for Mr. Vogler's income. That is above what he generally earned, which was between the low forties and the high forties. The fact that he lives in an expensive city does not affect the present calculation. That is about how he spends his money, not what he earns.

201 Had he followed the projected path of higher education, followed by interesting work, he would have earned substantially less than he earned in the last decade despite the injuries. Indeed, at the end of the decade an uninjured Mr. Vogler might well have found himself in an entry level job and paying on student loans.

202 So there is no quantifiable loss to this point, and Mr. Vogler is financially better off than if his most likely path had not been interrupted by the car crash.

203 Realistic hypotheticals for the future involve Mr. Vogler remaining with the kind of work he does now and earning about the same or returning to studies and eventually the possibility of more interesting work and a greater income.

204 There are real and substantial risks that a return to studies would not lead to improved income and would cost Mr. Vogler some years of income as well as the expenses. Mr. Vogler may succeed but find that new and interesting work pays the same, or less, than his present job. Or, he may, as Dr. Krane cautioned, find that his processing and memory impairments are too much for fine carpentry, or some other fields of study, despite his intelligence.

205 I think the following are reasonable hypotheses and predictions:

- * Mr. Vogler would have earned substantially less in his twenties than he actually earned.
- * He would have made about what he makes at Rainbow Grocery in his thirties, but there is an even chance that this will be his period of advanced education and he will earn substantially less than he now does.
- * He would likely have earned much more than he makes at Rainbow Grocery after forty, but there is an even chance that his income will greatly improve after advanced education.

I cannot add much meat to these bones. The hypotheses and predictions, even when discounted for the risks identified earlier, suggest a very substantial loss.

206 In my assessment, \$180,000 is a fair and adequate global award for loss of income earning capacity.

[31] In this case, Mr. Hayward has remained employed and is currently Vice-President of Business Development for Nova Communications. In the three years proceeding the accident Mr. Hayward earned between \$70,000 and \$131,000 from employment income and bonuses. In 2009, his employment income was \$103,000.

Loss of Future Earning Calculation

[32] Mr. Hayward engaged Jessie Shaw Gmeiner of Gmeiner Actuarial Services Inc. At p. 10 of her report she stated:

We understand that the plaintiff's earnings, including profit sharing, were \$103,000 in 2009. If he is not able to continue at his current employment (or very similar employment), we note that he will sustain significant loss of future earning capacity.

Dr. Erica Baker identified fifteen vocational options for the plaintiff's consideration, should he become unable to continue in his current employment. Using the average of the average hourly wage for these fifteen alternatives, and conservatively assuming that he will be able to find work on a full-time full-year basis (2,080 hours of employment per year), his residual earning capacity would be about \$34,819 per annum. Note that this calculation assumes that the plaintiff would commence earning the average hourly wage immediately upon commencement in the new occupation. It is likely that upon entry into a new occupation, his beginning wage would be considerably lower (see "Low Hourly Wage" in Dr. Baker's report, page 25).

If the plaintiff is unable to continue with his present employment (or very similar employment), it is likely that he will sustain a loss of future earning capacity of at least \$68,181 per annum (\$103,000 less \$34,819).

[33] Ms. Shaw Gmeiner calculated Mr. Hayward's loss of future earning capacity as follows:

Assuming net loss of future earning capacity for the plaintiff at the rate of \$68,181 per annum, present values of loss, assuming commencement of loss at some point over the next 5+ years, would be calculated as follows:

Loss Period	Annual Loss	Times Multiplier	Equals Present Value
Present - Age 62	\$68,181	16.6762	\$1,137,000
Age 39 - Age 62	\$68,181	16.3874	1,117,309
Age 40 - Age 62	\$68,181	15.4089	1,050,594
Age 41 - Age 62	\$68,181	14.4571	985,700
Age 42 - Age 62	\$68,181	13.5316	922,598
Age 43 - Age 62	\$68,181	12.6318	861,249

[34] Mr. Hayward's counsel submits:

Quite simply, Craig is unable to continue the pace at which he currently works to keep up with his job demands. His home life is suffering immensely and the stress exacerbates his depression and anxiety. He is unable to complete his job duties in a timely fashion and must return to the office for hours at night. He has grave difficulties multi-tasking or learning new tasks. He has been able to maintain his employment thus far because he has worked at Nova Communications since he was 13 years old. He will be unable to find another job paying over \$100,000 per year if he is unable to maintain his position at Nova Communications. Craig will have significant loss of income as a direct result of this accident.

[35] In this regard Mr. Hayward relies on *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 and *MacMillian v. Ontario (Minister of Transportation and Communications)*, [2001] O.J. No. 1891 (Ont. C.A.).

[36] Lastly, with respect to loss housekeeping, Mr. Hayward relies on: *Carter v. Anderson*, [1998] N.S.J. No. 183 (N.S.C.A.) and *Knott v. Hall* [2003] NSSC 289.

[37] I have considered these authorities in the light of the evidence before me in this case.

Background Information

[38] The plaintiff Craig Hayward is 39 years old. He resides in his own home at Hammonds Plains, Halifax, with his wife of 11 years Kimberley Hayward. They have three children: Kohen age 8, Taigen age 5 and Reis age 3. Kimberley Hayward teaches full-time.

[39] Mr. Hayward joined his father and mother's family business Nova Communications ("Nova") after he completed high school in 1991. He had already worked for the company, in high school on a part-time basis and during school breaks and summer holidays. Nova is a wireless system company in two-way communications specializing in mobile, cellular, wide area networks, paging and wireless internet connections.

[40] Mr. Hayward first worked at the service department for about one and a half years doing radio installation and repairs in vehicles and then moved into the administrative side of the business in 1993-94.

[41] He testified that his father and mother owned the company. His father was the president and his mother handled the financial side as chief financial officer. His sister Kim also worked in this business doing marketing and some sale support until the late nineties when she had her own family.

[42] Mr. Hayward's administrative work involved some basic accounting i.e. putting sale orders on the system, as well as inventory control functions and purchasing. He managed the inventory for the business.

[43] Nova's head office is in Burnside and it has four branch offices in New Glasgow, Sydney, Kentville, Nova Scotia and one in Prince Edward Island. By 1993, Mr. Hayward's duties grew with the business and he managed the inventory for all of the branch offices handling, purchasing, inventory controls, and hiring employees for the warehouses. He testified that the business peaked in the mid nineties with the Sable Offshore Project, when Nova was awarded contracts by Exxon Mobile for offshore wireless services, for which he worked on the equipment procurement for the project. By then, professional engineering staff were also hired to develop the communication systems required. Mr. Hayward worked with these engineers in building the systems. He testified that he worked from 8:30 a.m. to 5 p.m. daily and occasionally went into work on weekends if special projects demanded more of his time.

[44] In 2002, he assumed the title as Vice-President Logistics and Operations, responsible for inventory control and purchasing. His father and mother divorced in 2003 and his father sold the business in November 2003 to Andrew Boswell, the then common-law partner of his sister Kim. Mr. Boswell bought 80 percent of the company. Mr. Hayward's mother also retired and the family retained a 20 percent

interest in the company in a family trust. His father remains a director of the company and returned briefly to work on a single project in the spring of 2008. Mr. Hayward's parents arranged that he sign an employment agreement in November 2003, which provides for 18 months severance on termination. Mr. Hayward's employment with Nova has been continuous.

[45] In 2007, Mr. Hayward was made Vice-President of Business Development with a base salary of \$75,000 and a share in company profits earning \$100,000 in 2009. He testified he treated this as a demotion. Mr. Hayward described his duties as looking after the territory (branches) management, sales of equipment and systems. His role is to support the sales teams in system understandings and to travel the Maritimes to develop new business.

[46] With respect to any change in his current status Mr. Hayward testified he was asked by Mr. Boswell to move purely into sales with a role as an account manager with a base salary of \$30,000 plus commissions. His employment status was not further confirmed in evidence and Mr. Boswell was not called to testify. At the date of trial he retains his position as Vice-President Business Development.

The accident and aftermath

[47] Mr. Hayward was essentially t-boned at the driver's side door. Mr. Hayward testified that at impact he hit the side of his head on the window. He got out of the vehicle with some difficulty as the door was crushed in and the window shattered. He did however, drive back in the vehicle to his office. From there his father took him home. He describes being disoriented and nauseous. He testified that he did vomit later that day, which was Saturday. He did not seek medical help until "a few days after" when he went to his wife's general practitioner Dr. Susan Lappin.

[48] He testified that he was stiff and sore, had difficulty moving his neck from side to side, experienced dizziness, nausea, excruciating pain, in the whole of the upper neck, right side, upper shoulder on the left side and lower lumbar region. He was prescribed anti-inflammatory and muscle relaxants.

[49] Mr. Hayward also received physiotherapy and massage therapy from Burnside Physiotherapy following the accident, in 2003-2004 as set out in Exhibit 1, Volume 2, Tab 24. I note from the June 10, 2003 report under subjective

findings “Right shoulder went through driver’s window and shattered the window.”

[50] As is evidenced by the testimony of Dr. Lappin, Mr. Hayward’s injuries have developed into a long-term soft tissue injury from which he receives temporary relief with physiotherapy, massage and other treatments such as trigger point injections. These latter have been administered three to four times in the past eight years.

[51] Mr. Hayward testified that he recognized changes in himself although he was not specific in his evidence as to when he noticed the changes. He testified he did not recall conversations he had had with people and indeed argued with them that the conversations did not take place. He found himself to be moody, irritable, short of temper and chronically tired.

[52] He testified he became unable to meet the demands of his work, to learn new systems, to organize his day, to multi-task, or even express thoughts or feelings. He described how he began to miss project time lines, had difficulty writing complete and accurate proposals and put systems plans together with complete accuracy for the engineers. He testified that after the accident it took him twice as long to complete any task.

[53] In January 2006, Mr. Hayward saw neurologist Dr. MacDougall. Mr. Hayward eventually had the MRI on May 24, 2006. The report revealed “Focal gliosis inferiorly in both frontal lobes in keeping with old trauma. No acute process is demonstrated.” In other words the MRI revealed some scarring from an old injury.

[54] The time lines relating to Mr. Hayward’s post-accident medical complaints, his treatment and the subsequent difficulties he faced in the work place are important to the issue of causation. So are intervening events that also gave rise to stress and change in his life.

[55] Dr. Susan Lappin treated Mr. Hayward after the accident in April 2003. She thought she recalled seeing him in mid April at her home office in Lower Sackville, but testified that she forgot to bill this visit to MSI. The next appointment was May 1 although Dr. Lappin did not make any clinical note of the

visit. She testified that although seven years have passed, she remembered that Mr. Hayward complained of neck pain, back pain and a headache.

[56] The notations in her patient file of Mr. Hayward's visits are as follows:

May 8, 2003 feels worse seizing up back
 daily headaches . . .
 Plan - review n x-rays
 physio + massage therapy
 Neprosyn 250 mg.

Mar 10/04 neck should and some lower back
 worse with any activity
 still in physiotherapy
 problem missing work
 vacuuming laundry bath tub cleaning & cleaning kids,
 computer + + problems
 numbness shoulders arms hands with rest and exercise
 memory loss, migraines . . .

June 13, 2004. severe back pain + neck pain . . . plan to return to massage

She testified that this is unusual so long after the accident. She recommended Robaxacet for muscle spasms and massage therapy.

[57] On October 6, 2004, Dr. Lappin noted that the physiotherapy was not helping and her patient's headaches were worse. She notes he described some memory loss. She felt he may have occipital neuralgia "a pain from the back of the head over top of the scalp" and could benefit from an injected nerve block. Her patient said he could not take time off work, although she recommended it. She made appointments for Mr. Hayward see physiatrist Dr. Robert Mahar in October 2004 and neurologist Dr. MacDougall in October 2005.

[58] In Dr. Lappin's notes she uses the symbol of an arrow directed down or up to indicate deterioration or improvement.

January 12, 2005.	feel black cloud ↓ motivation anger ↓ energy not sleeping? due to neck feels tired when awakes needs adrenaline for excitement ↓ work performance ↓ sex drive ↓ appetite poor memory parents divorced job changed miserable at work marital strife persists with back and neck pain nervous re injections severe neck pain at times worsening ADD Effexor XR 375-75mg RTC 3wks
February 28, 2005.	doing well on meds continue
July 5, 2005.	on Effexor doing well Effexor XR 75mg OP pain headaches c/o confusion & issues with memory, . . . tenderness occipital nerves . . . trapezius spasm . . .

On October 4 and 12, 2005, Mr. Hayward returned to Dr. Lappin for prescription renewals.

October 25, 2005. Neck & back → worse
massage therapy,
Robaxacet Platinum
try Flexeril 10mg, prn.

She noted she had received a number of lawyer's requests:

- 1) CT scan head re memory loss
- 2) check on Dr. Mahar appt.
- 3) needs ergonomic assessment with orthopaedic technician
- 4) ✓ x-ray
- 5) refer Dr. MacDougall

She then prescribed Effexor XR 75 OD for her patient's depression.

November 29, 2005 ongoing back & neck pain
injection bilat occipital
+ trigger points ... excellent response

Dr. Lappin notes:

December 17, 2005 sore hands ...
O/E infected eczema ... Biaxin 250 mg BID ...

September 11, 2006 miserable with neck pain, headaches
++ issues dealing with everything
neck and back
continued pain
↓ disruption in mood
needs OT work ergo assessment
. . . psych re personality change mood swings
depression
isolationism
activity wiped out

Dr. Lappin notes:

November 21, 2006 Here with wife - needs refill of Effexor . . .
MVA chronic pain W
works OK ... depression ... Effexor 112.5mg x 3.

December 28, 2006 ++ concerns unable to function at work
help at home
unable to learn new tasks
poor short term memory
headaches daily, neck pain
not sleeping feels useless
unable to hold children any
length of time
++ depressed
contemplating suicide
- very passively

O/E flat affect
confused in time & space
eg. difficulty with when new
& baby's coming - (due Feb)
unable to choose right
direction to washroom on
3rd trip out of office

trapezius spasm. . .
hip worsening? as to depression
Plan - advised leave from work
- pt refuses.
rpt CT scan head & neck
refer psych
refer Dr. Joyce,
given referral for neuropsych testing

September 10, 2007 wishes permanent sterilization
refer to Dr. Bell
risks discussed
continues with neck pain and headaches
discussed

January 7, 2008 Effexon XR 150 mg OD doing well
Grinding R knee giving way . . .
hips . . .
Plan x ray

June 4, 2009 migraines from acupuncture
didn't return
no help
awaiting Dr. Curtis (psychiatrist) will refax request
off Effexor then restarted
unable to tolerate
Celexa 10 mg OD x 7 day
then 20 mg.
Dilaudid for neck pain
experiencing night sweats . . .

June 30, 2009 refill prescription

December 08, 2009 Seen specialists
Dr. King → Botox injections . . .
Dr. Mahar -
chiropractor
massage therapy
psychiatrists
psychologists
marriage counsellor
on Cymbalta 60 m 9
working well
refill Percocet x 60
✓ on pain clinic → try Dartmouth

June 07, 2010 continues issues with memory, mood, personality
pain clinic good x 1 week . . .

September 23, 2010 refer Sunnybrook hospital
pain clinic meds not tolerated
on Percocet
refill . . .
MVA slow reaction time
+ 3 beer
wrote off BMW
went to Alberta
++ pricey
? referral Sunnybrook

[59] As is apparent from Dr. Lappin's notes, Mr. Hayward was treated for a soft tissue injury after the 2003 motor vehicle accident. Dr. Lappin testified she used the usual prescriptions of Naproxen, a non steroidal anti-inflammatory, physiotherapy and massage therapy after the acute phase (April - May 2003 during which Mr. Hayward had as many as four appointments with her). She did not see Mr. Hayward again until March 2004.

[60] Dr. Lappin's did not treat Mr. Hayward for a traumatic brain injury but for soft tissue injuries, neck and back pain and resulting headaches of an occipital nature.

[61] Eleven months after the accident in March 2004, Mr. Hayward first complained of some memory loss. He is first treated for depression in January 2005.

[62] Mr. Hayward had a few appointments with Dr. Farah Kapur, who testified she was Mr. Hayward's sister's physician. Apparently frustrated at the lack of progress in seeing specialists and in light of the Mr. Hayward's worsening condition, Dr. Kapur facilitated an appointment for Mr. Hayward at the Pain Clinic

in the Dartmouth General, an assessment at the QEII Mental Health Services with Dr. Bhaskara a psychiatrist and monitored his prescriptions from August 5, 2009 to July 22, 2010.

[63] Mr. Hayward had five appointments with her over this one-year period. Her medical notes can be found in Exhibit 1, Volume 1, Tab 3.

[64] Dr. Kapur assumed that the 2003 motor vehicle accident had caused a brain injury as she noted “T-boned on the driver’s side and head hit the windshield.” She too was unaware of any earlier head injury.

[65] In September 2009, Mr. Hayward also attended a private clinic in Canmore, Alberta, Orion Health Rehabilitation and Assessment Centres. Their assessment is found in Exhibit 1, Volume 1, Tab 3.

[66] In the course of the assessment, Orion noted Mr. Hayward’s current medications and substance abuse risk. They noted:

Pertinent Medical History:

1. No past significant injuries prior to the accident
2. Sleep clinic review approximately 1.5 years ago. Low index sleep apnea. More snoring only.
3. Dyspopsia

Allergies:

Penicillin

Medication:

Current medications

1. Methadone 3mg PO 3x daily. No improvement in pain symptoms. Side effects; increased heavy snoring, Increased tiredness and constipation.

2. Cymbalta 60mg PO once daily. Mood improved by 20-30%. Less emotional lability-anger symptoms reduced.
3. Nexium 40mg PO once daily for dyspepsia.
4. Propecia for male pattern hair loss
5. Excedrine for migraine. Two tablets daily. Some relief of headache symptoms.
6. Lyrica for pain. 150mg per day. Has stopped for the past 3 weeks and no deterioration in pain symptoms.

Past medications:

1. Percocet for pain. One tablet daily. Significant pain relief for up to 4 hours. No side effects.
2. Tramacet for pain. No Improvement in pain symptoms.
3. Effexor 150mg for depression. No lasting improvement. Developed suicidal thoughts when on Effexor.
4. Celexa for depression. No improvement.

Substance Abuse Risk:

1. Ex-smoker. Quit 13 months ago.
2. Caffeine; 2 cups coffee/day, 2 cans of caffeine free "pop" drink through the day.
3. History of hazardous alcohol consumption. Up until two months ago was drinking half of a 750ml bottle of rum nightly and occasionally up to three quarters of a bottle. The alcohol was consumed for "self medication" as pain relief and relaxation. In the past two months Mr Hayward has stopped drinking rum and has the occasional beer to drink.
4. There is no history of marijuana or other illicit drug use.

The clinic recommended their own extensive treatment regime (30 days) at the Canmore clinic to help deal with:

Diagnosis

1. Chronic myofascial pain
2. Depressive symptoms
3. Life stressors; work, marital

They also recommended that Mr. Hayward attend daily Alcoholic Anonymous meetings, while at the clinic.

[67] The Orion report set out much of Mr. Hayward's self-reported history. They noted:

. . . symptoms of moderate to severe depression began four to five years ago when he was "just a mess" trying to deal with pain. . . .

The Plaintiff's Expert Witnesses

[68] Dr. MacDougall testified and his report is before the Court at Volume 1, Tab 6. He was qualified by the Court as "an expert in neurology." He assessed Craig Hayward on January 10, 2006. He made the following assessment and sent it on to Dr. Lappin.

[69] He wrote:

. . . He has chronic pain dating back to a motor vehicle accident almost 3 years ago. At that time he was driving through an intersection when his vehicle was t-boned on the driver's side by another vehicle. He suffered bruising to his left shoulder and hip area when the door came in on him and he did hit his head on the glass of the window, suffering some bruising on that side. He also developed over the next few hours quite marked stiffness in his neck. He did not have loss of consciousness. He did not suffer any broken bones. He was able to get out of the car by himself after the accident. Since that time he has experienced chronic neck pain and stiffness, worse on the right side, and he has had chronic headaches, mostly in the frontal temporal regions but also in the occipital area. He has also had upper back and shoulder pain. He has not had any impairment of

his normal functioning. He has been using medications to help him manage the pain including Robaxacet and Cyclobenzaprine. He has had extensive physical therapy, as well as some massage therapy and craniosacral therapy and has seen a naturopath for some therapy. Most recently he has had some trigger point injections in the should and neck. Despite all these measures he is having chronic disabling pain. He has become depressed and has gone on an antidepressant. He is not sleeping well. He has gained about 30lbs. and he is now snoring at night, disrupting his wife's sleep. He feels guilty about not being able to do chores and help out at home as much as he would like to. He has 2 young children aged 3 years and 6 months. He continues to eat well. He has not being doing much exercise. He used to work out weight lifting and was very active in outdoor activities but has pretty much discontinued most of that. He has also been concerned about memory lapses such that he will have discussions or people will tell him things and he will not recall anything about it later. He says he is using memos and reminders to himself on a regular basis now to help him get things done.

His health prior to this was excellent. He has no chronic medical problems. He has a negative family history of medical or neurologic problems. His grandmother died of cancer.

On examination today he was a cooperative man who was in no distress at rest. The mental status was normal. . . .

[70] Dr. MacDougall testified that by this he meant that a normal mental status is a summary of cognitive function. Mr. Hayward was alert, oriented, answered his questions, gave reasonable answers, provided a sensible history, cooperated with the physical exam and carried out all of his instructions. He concluded:

ASSESSMENT: This man has chronic myofuscial pain and muscle contraction headaches. I do not believe there is an underlying mental neurologic disorder here. I do not think he has any serious cervical pathology. I suspect his episodes of memory disturbance are multi-factored related in a large part of sleep disturbance but also to distraction from the pain, emotional stress, and possibly the effects of various medications. In terms of management, I reassured him that I do not find any evidence of an underlying neurologic disorder nor any evidence of serious disease or permanent damage. I will arrange for an MR scan of the head and o-spine to check things out thoroughly given the prolonged nature of his symptoms. I have encouraged him to work at improving his physical fitness and conditioning. I have suggested he back off the analgesics because I do not think they are helping much.

[71] Following the receipt of the MRI results Dr. MacDougall wrote to Dr. Lappin on June 20, 2006:

I saw this 34 year old gentleman in neurologic review today. I reviewed the results of his MRI scan which was done recently. The scan shows that he did suffer some contusions of the inferior frontal lobe bilaterally, a little worse on the left side. He has some residual gliosis in this region. No other abnormalities were seen in the brain. There were no abnormalities at the level of the cervical spine. Since I saw him last he has discontinued the medication he was on and has been making an effort to improve his general physical fitness and conditioning. He has brought his weight down a bit and he admits that he is feeling a little bit better. He is still having a lot of muscular pain in the head and neck area. He seems to be coping with this pain better and is using less analgesic medication. He is still having a lot of difficulty sleeping. He says that his sleeping has been so restless and disrupted that his wife has asked him to sleep elsewhere so that she can get a good night's sleep. He is still having some cognitive difficulty. Clearly this man did suffer a significant head injury and has some residual scarring in the interior frontal lobes bilaterally, worse on the left side. In the absence of any other history or injury or neurologic illness. I think we have to conclude this damage is the result of his motor vehicle accident. It is a significant factor in some of his complaints of chronic cognitive difficulty. However, I think poor quality sleep and deconditioning are aggravating things and I recommended a trial of sleeping medication to see if this will improve the situation. I have not recommended any further neurologic investigation at the moment. However, I did discuss with him the issue of possibly getting some counselling to help him deal with the significant and prolonged impact that the accident has had on his life.

[72] Dr. MacDougall testified that he asked Mr. Hayward if he had any other brain trauma and Mr. Hayward had said no. Dr. MacDougall testified "if there was no other history apparent of significant trauma in the past . . . ergo the injury could be attributed to the motor vehicle accident."

[73] He agreed on cross-examination that this was an assumption he had made. Dr. MacDougall also agreed he had not reviewed the family physician's file, any physiotherapy notes or massage therapy notes. Nor had he seen any photos of the vehicles involved in the accident.

[74] He was aware Mr. Hayward never lost consciousness. Dr. MacDougall testified that loss of consciousness would indicate a more severe injury.

[75] Dr. MacDougall testified that his objective findings showed no unusual neurological conditions. His finds were strictly normal. He testified, “I thought it was a soft tissue pain and he had muscular headaches.”

[76] He found no neurological disorder. He testified that memory problems are “multi-factored” relating to sleep disturbance, distraction from pain and can be caused by emotional disturbance as all three interact.

[77] The presence of scar tissue on the MRI led Dr. MacDougall to assume the motor vehicle accident caused a head injury. He characterized these contusions as old in keeping with an old trauma that could date back 15 years or earlier.

[78] Dr. MacDougall testified he was surprised by the finding of the MRI and its result caused him to re-evaluate. He offered the caution that in the absence of any other history or injury or neurological illness, he came to these findings.

[79] He agreed that on his first examination of Mr. Hayward, the results were normal. He also testified that he had then concluded Mr. Hayward may suffer stress which can cause a sleep disorder and that these are very common symptoms after a whiplash injury. On cross-examination, Dr. MacDougall testified that excessive use of alcohol can effect memory.

[80] Dr. Wayne MacDonald was qualified to testify as an expert in neuropsychology. His report is in evidence in Volume I, Tab 8 of Exhibit 1.

[81] Page three of his report outlines the battery of 27 tests taken by Mr. Hayward. These were administered by Ms. Mary Barrett his assistant psychologist.

[82] Dr. MacDonald testified he met with Mr. Hayward between 45 and 60 minutes at the beginning of the day, to conduct a general interview. Then Ms. Barrett tested Mr. Hayward for the balance of the day. Dr. MacDonald reviewed all of the test results in detail before the Court. Dr. MacDonald in preparing this opinion had read the two reports of Dr. MacDougall, reviewed the tests’ results Ms. Barrett had administered and scored, and relied on Mr. Hayward’s own recital of events.

[83] Dr. MacDonald premised his report on Mr. Hayward having a serious head injury from a motor vehicle accident where he broke the driver's side window with his head in 2003.

[84] He was unaware of any other accidents or injuries and was unaware of the assault of Mr. Hayward in 1991 that had rendered him unconscious on the street. Dr. MacDonald agreed that "if there was an earlier head injury that would be important."

[85] Dr. MacDonald found that Mr. Hayward's general level of intellectual functioning was within normal range. He went on to report:

. . . Accordingly to the Wechsler Test of Adult Reading, there has likely been a drop in his Verbal IQ and Working Memory Index, pre- and post-accident. His performance on the Halstead Category Test, a test requiring non-verbal reasoning, fell below normal limits, as did his performance on the second portion of the Trail Marketing Test. These two measures are thought to tap executive functioning skills. These skills are thought to be important in anticipating, planning, and organizing events in one's everyday life. We also detected possible subtle signs of response perseveration. This was also noted with his performance on the Conners Continuous Performance Test, a test requiring sustained attention and concentration, which was significantly impaired. Fine psychomotor coordination difficulties were noted with the right (non-dominant) hand. Difficulties were noted on a test for Verbal Fluency. His performance on the Verbal Selective Reminding Test fell below average, as did his performance on the Word List 1 subtest of the Wechsler Memory Scale, 3rd Edition. However, his performance on the Word List 2 subtest was within an acceptable range. There was no evidence of any worrisome sensory perceptual disorder.

On tests designed to assess effort, he passed one, but the second test raised concerns as to whether sufficient effort was being applied. It was my impression that this was not a willful attempt to mislead the Examiner, but may indeed be the result of frustration, depression, and an anticipatory negative bias towards certain memory tasks. Consequently, some caution is advised in taking individual test performance, particularly on memory measures, at face value.

[86] He also found:

It is also likely that this man is experiencing a major depressive disorder with anxiety, and it is strongly advised that he be referred for a psychiatric evaluation

with a review of his anti-depressive medication, since his current regimen does not appear to be achieving the desired end effects.

[87] Dr. MacDonald testified that persons suffering from depression can do poorly on tests for memory.

[88] Dr. MacDonald concluded his report by saying:

As Dr. McDougall stated, this is a complex, multi factorial case, with evidence of significant psychosocial stressors in a young man who has clear evidence of structural brain abnormalities following a motor vehicle accident of April 5, 2003. The lesions, according to Dr. McDougall's report are in the inferior frontal lobe, bilaterally, worse on the left side. We have obtained numerous neuropsychological test results, consistent with dysfunction in that region. This includes executive function deficits, examples of response perseveration, significant attention/concentration difficulties, verbal fluency problems, and reduced fine psychomotor coordination, particularly with his right hand. In marked contrast his basic sensory perceptual, tactile kinesthetic and visuo-spatial skills, which are thought to involve more posterior brain regions, appear to be intact. His memory performance was somewhat inconsistent, and the reliability of his performance, on those measures, is questionable.

From a cognitive rehabilitation perspective, this man may benefit from consulting a rehabilitation specialist who, if he is willing, could visit his home and work site to help him better plan and organize his daily work routine. As noted above, the man is also likely to benefit from a psychiatric consultation, including a review of his current medications, with a view toward improved management of his current depressive symptoms.

Finally, Mr. Hayward indicated that both he and his wife have considered marital counseling, but have not yet initiated this. I would strongly recommend such counselling as this is likely a significant factor contributing to the distress he is experiencing, in everyday life.

In the event that his symptoms of depression come under better control, it is possible that we may see a corresponding improvement in some of these above noted neuropsychological deficits. In the event that this should occur, I would be happy to re-evaluate him, at any time in the future.

[89] I found Dr. Wayne MacDonald to be a very empathic individual. Although he did not spend long hours with Mr. Hayward, he liked him and took him at face

value and felt concern for that which he believed were the effects on Mr. Hayward's life from a brain injury received in the 2003 motor vehicle accident.

[90] Dr. MacDonald made a choice not to discount the validity test that could determine if Mr. Hayward was faking, merely advising caution saying it "raised concerns that insufficient effort may be a factor in this examination, particularly on tests for memory."

[91] He agreed in cross-examination that it was possible Mr. Hayward was not applying his full effort in the testing.

[92] Dr. MacDonald testified that other neuropsychologists would reject the results of the examination or the basis of a single failed validity test. With respect to memory or other performance measures Dr. MacDonald agreed that he could not say when any of these issues arose and accepted what Mr. Hayward told him in this regard.

[93] What concerned me about the opportunity for assessment that Dr. MacDonald had was a serious lack of background information on Mr. Hayward that could have informed him better on Mr. Hayward's earlier years, and most certainly on his medical history.

[94] As pointed out by defence counsel on cross-examination, Dr. MacDonald did not have the following background information that was in fact available:

1. Access to Mr. Hayward's earlier education records. He was not provided any school records. He did not know Mr. Hayward failed grade 3. He did however know Mr. Hayward had a math tutor in high school. Dr. MacDonald assumed that there was no history of ADHD. Dr. Lappin's medical notes – Exhibit 1, Tab 1, p. 76 made reference to this on January 12, '05 "worsening ADD - Effexor . . ."
2. Dr. MacDonald was unaware of Mr. Hayward's earlier post- secondary education record at Mount St. Vincent University, a partially completed year in 1993-94 with three courses completed and the following grades 52, 59, 70.

3. He was unaware Mr. Hayward subsequently took one executive MBA course in 2004-05 and received an A- following the accident.
4. Dr. MacDonald had not been given any of the family physicians' records to review, or records from physiotherapy and massage therapy that detailed his progress after the motor vehicle accident in 2003.
5. Dr. MacDonald had not been given the opportunity to review discovery transcripts of Mr. Hayward's testimony.
6. In particular, he did not have the opportunity to view the medical records that describe the 1992 assault – Exhibit 1, Tab 5, p. 2 – that of Dr. Hilda Fox.

Craig assaulted while in downtown Halifax 4/7 ago. He was unconscious for 2 hr and still has amnesia of accident. He was treated at VG emerg, had sutures to mouth & lip. He had moderate concussion. He still feels nauseated and has pounding headache.

7. Nor had he seen the record of Dr. Christopher Mintern, D.D.S. consulted on May 6, 2006, regarding TMJ, who was uncertain of causative factors but noted headaches “I can't say definitely. I think it's more sinus related.”
8. Although assessing Mr. Hayward for his executive functioning skills, he did not have any detail as to Mr. Hayward's work history or job description, Dr. MacDonald could say that he only knew it was a family business.

[95] This lack of background information was a concern to me. This knowledge and expressed opinions of other medical personnel would in my view have better informed his examination. And, I dare say the report would have been significantly different, in its result.

The Defendant's Expert Witness

[96] The defendant engaged Dr. Yvon Toupin who the Court accepted as “an expert qualified to give opinion evidence in the field of neuropsychology.”

[97] His report is in evidence in Exhibit 1, Tab 45.

[98] He saw Mr. Hayward on July 20 and 21, 2010.

[99] The list of documents Dr. Toupin reviewed before seeing Mr. Hayward is extensive and shown on p. 2 of his report. It is needless to say, in contrast to the lack of information provided to Dr. Wayne MacDonald, an extensive review of all of the medical documentation and other records, that form the background documentary evidence in this case.

[100] Also unlike Dr. MacDonald, Dr. Toupin self-administered all of a similar battery of tests in his assessment of Mr. Hayward. He spent almost two full days in his company and had a significant opportunity to observe Mr. Hayward and interrelate with him.

[101] He testified that although professional psychometrists are often asked to administer this battery of usual tests, in his opinion it was important to stay with the subject being tested so as not to “miss all of the testing patient behaviour.” He also had Mr. Hayward answer a series of questions in writing to further observe his mental activity, attention to detail and writing skills.

[102] On page 2 of his report, Dr. Toupin detailed his very extreme review of medical files and other documents relating to this litigation. I note that Dr. Toupin refused to view the surveillance videos of Mr. Hayward working on his rental property because he testified he did not wish to commence the examination having any bias.

[103] Dr. Toupin also recorded Mr. Hayward’s personal account of events and was able to test those answers provided against all of the other medical reports and documents that were the subject of his review.

[104] Essentially, Dr. Toupin viewed his role:

. . . to rule in/out a Traumatic Brain Injury, as a result of the above cited accident, the 2003 MVA.

[105] It was Dr. Toupin’s finding that:

It is my opinion that Mr. Hayward's current symptomatology cannot be explained by an injury to his brain that could have been sustained in the Motor Vehicle Accident that happened on April 05, 2003. It is also my opinion that pain and psychological factors contribute to maintaining Mr. Hayward's symptomatology. My above opinion is "*objective*" and it is expressed with a high degree of certainty.

[106] Dr. Toupin testified about the available information concerning his status as a result of the accident.

- No loss of consciousness
- Did not report feeling "*dazed*"
- Drove his vehicle away by himself
- Got out of the vehicle by himself
- Declined any medical assistance when offered by the police
- Did not immediately visit any hospital or medical practitioner's office
- No evidence of Anterograde Amnesia
- No evidence of Retrograde Amnesia
- No evidence of Post Traumatic Stress Disorder

[107] Dr. Toupin accepted, having viewed the documentary records that Mr. Hayward's first date of treatment was May 01, 2003 where he notes in his report:

Dr. Lappin "*Date of the first treatment: May 01, 2003*".

Aviva-Automobile Accident Benefits Proof of Claim Forum, June 11, 2004.
Form signed by Mr. Craig Hayward: "*when did you receive the first treatment from a doctor: May 1, 2003*"

[108] Despite Dr. Lappin's above notation, we also have her testimony that she believed she saw Mr. Hayward a few days following the accident, evidence which I accept.

[109] With respect to Mr. Hayward's continuing employment Dr. Toupin noted:

Although Mr. Hayward reported that he was positively symptomatic for pain, concentration and memory difficulties, he did not stop working. Mr. Hayward started a new job after April 15, 2003. It is however unclear as to exactly when he started this new job. For instance, when he was asked directly, he did not provide an answer. A report named "Discovery Evidence", dated January 05, 2007 states that Mr. Hayward started a new job a couple of weeks ago and a note from Dr Lappin dated Jan 12, 2005 states, "*...job changed... miserable at work...*".

A note from Mrs. Jennifer Wayne, Massage Therapist, dated December 15, 2005 states: “...*job is stressful...*” A report from Capital Health-Mental Health Program-Brief assessment (Bedford/Sackville Mental Health Services –Karla Moore?), February 24, 2010, “*Craig’s life is more demanding since the MA: his job was less demanding & they only had one child...*”

[110] By asking Mr. Hayward to self-report in writing about his job responsibilities both before and after the accident, Dr. Toupin learned the following:

Table 2 of Toupin Report: Mr. Hayward’s self-description of work responsibilities he had on April 5, 2003

Dr. Toupin Question:

WHAT DID YOU DO AT WORK (BASIC TASK DESCRIPTION) JUST BEFORE THE ACCIDENT?

Plaintiff’s Answer:

- V.P. OPERATIONS & LOGISTICS
- * PURCHASING FOR 4 LOCATIONS
- * INVENTORY CONTROL
- * YEAR END PROCESS
- * PARTS & EQUIPMENT SOURCING
- * RENTALS
- * BUILDING OPS & MAINTENANCE
- * CELLULAR DEPT
- * PROJECT MANAGEMENT (PURCHASING & JIT IC)
- * JOB COSTING

Table 3A: Mr. Hayward’s self -description of work’s responsibilities he had after the accident.

Dr. Toupin Question:

WHAT DO YOU DO AT WORK (BASIC TASK DESCRIPTION

Plaintiff Answer:

- SALES
- A MANAGE PARTNER RELATIONSHIP
- RESPONSIBLE FOR LARGEST TERRITORY
- TRAIN A FAIR AMOUNT
- CHAIR SALES MEETING
- PROTECT MANAGEMENT FOR MY OWN SALES PROGRESS
- SALES SUPPORT
- ANSWERING LARGE AMOUNT OF E-MAILS & PHONE CALLS
- REPORTS TO OWNER
- MANAGE CORP CELLULAR DEPT.

Table 3B: Mr. Hayward's self-description of work responsibilities he had after the accident

Dr. Toupin Question:

WHAT A TYPICAL "WORK DAY" IS FOR YOU?

- * GOT UP @ 6:40 am - MY WIFE
- * My wife needs to be at work for 7:45 AM
- * I get ready for work
- * Get 3 kids ready - dressed & breakfast
- * Tidy Up
- * Get kids in car & off to school/daycare
- * Drive to work
- * Arrive @ work
 - Write to do lists
 - Speak w colleges re updates and what's on the go
 - Work on prospecting new business & old business
 - emails
 - Enter orders & order follow up
 - Review Call/make calls
 - work on reports
 - Project Management
 - Meetings
 - On the road travelling
 - Visit customers
 - Manage our New Glasgow office

- Manage Cellular Dept
- Sales Support
- Supplier Relationship Management
- Write up docs for projects
- Create purchase lists for projects.

Dr. Toupin noted:

As a result of his new position, Mr. Hayward stated on July 21, 2010 that he had to take a “*higher level of responsibility*”. For instance, Mr. Hayward disclosed on July 21, 2010 that “*his current responsibilities are more demanding and have timelines attached to them.*” The reader is referred to table 4 for more information.

Table 4: Increased level of responsibility as reported by Mr. Hayward on July 21, 2010

Dr. Toupin Question:

WHEN YOU GOT PROMOTED TO V.P. OF YOUR COMPANY YOU SAID THAT IT INCREASED “THE LEVEL” OF RESPONSIBILITIES. DOES IT MEAN ALSO MORE TIME IN THE OFFICE AND LESS TIME OUTSIDE?

Plaintiff Answers:

My responsibilities are more demanding & having timelines attached to them. My responsibilities I have know are higher level responsibilities & am required to report a lot to the president.

My current roll requires me to be on the road & in the office to generate business. I have a yearly quota that I must reach.

I do spend a lot of extra time at the office in the evenings or work for a hour or two most evenings. At home on my computer trying to catch up on things I did not get done off my list of to do’s.

Dr. Toupin noted:

It was also reported by Dr. Brenda Joyce, Physician Specialist in Physiatry on April 02, 2009 that:

“...he took increased responsibilities...”

[111] This evidence is directly in conflict with Mr. Hayward’s testimony at trial where he asserted that his new job responsibilities were in his view a demotion and less demanding than his pre-accident duties.

[112] Dr. Toupin cautioned against Mr. Hayward’s self-reported symptoms following his traumatic brain injury of 2003, saying that research shows a high correlation between psychological symptoms and musculoskeletal symptoms, suggesting that mental symptoms after whiplash injuries are quite common. This research was referenced at p. 10 of his report.

[113] Dr. Toupin also cautioned at pp. 15 and 16 of his report that if a plaintiff produces invalid results on one or a few word memory tests whose purpose it is to determine if sufficient effort was being applied, this “renders the other data doubtful as evidence of the patient’s true abilities.”

[114] He noted that Dr. Baker only used one formal measure of effort “The Advanced Clinical Solution Word Choice/Effort” test that only requires five minutes to administer, where at least two measures are recommended for a proper assessment of effort level.

[115] In light of the earlier medical history of head injury in 1991, as demonstrated in the MSI record (p. 17 of Dr. Toupin's report), Dr. Toupin noted:

12 oct 1991 Dr Douglass Sinclair	Open wound of head
12 Oct 1992 Dr Edward Cain	Contusion of head
16 Oct 1991 Dr Hilda Fox	Concussion
21 Oct 1991 Dr Hilda Fox	Open wound of Head

As a consequent, there is absolutely nothing that links the imaging findings done on May 24, 2006 and the accident in which Mr. Hayward was involved in on April 05, 2003.

Moreover, concerning other history of injury or neurologic illness, Mr. Hayward, when he was directly questioned, did not initially disclose being involved in any previous accident/fall/emergency room visit or any previous sickness before, except for breaking his collar bone, as displayed in Table 10.

[116] Dr. Toupin also expressed concern that Mr. Hayward when asked to list “all previous accidents - falls - emergency or hospital visits or any previous sickness before 2003” answered “none” with the exception of “broke clavicle when I was in my early teens.”

[117] This is in conflict with the evidence before the Court of the 1991 head injury following the assault, an accident on May 21, 1999 when Mr. Hayward hit a deer with his car which sustained considerable damage and one on June 12, 2002 which was of a more minor nature, rear-ending another vehicle while exiting a Tim Horton’s driveway. When confronted by Dr. Toupin with the information Mr. Hayward then recalled these other events.

[118] Dr. Toupin also pointed out the dichotomy between Mr. Hayward’s self-reported busy active life at home, at work and in leisure times (Tables 16 and 17) and the symptoms he outlined as being quite debilitating at Table 15 of the report.

[119] Dr. Toupin listed Mr. Hayward’s plethora of medication on Table 18 and noted the possible side effects of the medicine he takes at Table 19.

[120] Dr. Toupin also expressed concern at the indicator of Mr. Hayward’s alcohol usage. At Table 20 of his report, he shows extracts from the plaintiff’s medical records which contain various notations as to his alcohol use:

Dr. Farah Kapur	August 06, 2009	<i>“... Also admits to using alcohol daily. He now is drinking mostly on the weekend...”</i>
Capital Health-Mental Health Program- brief assessment (Cobequid Community Mental Health Centre)	September 15, 2009	<i>“... Increase ETOH. Was daily, now binge drinking... says was drinking almost daily but has cut back...”</i>

Capital Health-Mental Health Program- brief assessment (Cobequid Community Mental Health Centre	September 15, 2009	<i>"... Father alcoholic..."</i>
Dr. Farah Kapur	September 17, 2009	<i>"...advised alcohol in moderation..."</i>
Dr. Bhaskara	September 2009	<i>"... alc. binges (reluctant to give details)"</i>
Dr. D. King	November 17, 2009	<i>"...alcohol: social to moderate... (Page 2)"</i>

[121] Mr. Hayward's wife's evidence confirmed his alcohol use. After the 2003 accident she testified Mr. Hayward's drinking became a problem and that to deal with his physical pain he drank as much as 25 ounces of rum each evening.

[122] From the evidence before me, I also conclude that the serious car accident Mr. Hayward had on July 3, 2010, was alcohol related. Mr. Hayward left a neighbourhood party by himself and totalled his BMW on the way home. He left the scene on foot. When officers tracked him down at his home at short time later, Mr. Hayward denied being impaired at the time of the accident and testified that he quickly consumed two big drinks of rum when he arrived home. I simply did not accept this evidence as being truthful.

[123] Charges of impaired driving were laid and remained pending at the time of trial. Mr. Hayward's vehicle was a write-off and its loss valued at \$48,000.

[124] Dr. Toupin expressed the concern that alcohol consumption and the array of medication he took could have disastrous effects.

[125] Dr. Toupin expressed the opinion that in his own observation of Mr. Hayward, he was able to multi-task, wrote answers to questions, answered his blackberry, asked for paper to write down a message so he would not forget. He was able to write down what he did all day from his early rising, care for the children, getting them off to school and details of his own busy work day.

[126] Dr. Toupin testified that if Mr. Hayward had suffered from a traumatic brain injury, he could not respond as he did to the questions, to the ringing blackberry or to identify all his activities so precisely. He was responding at a high level, not as a brain-injured individual.

[127] Dr. Toupin pointed out that when one is unhappy at the workplace, work becomes hard to do. He also cautioned that individuals involved in litigation have a more present and constant sense of their pain and stress. He testified there is also a tendency to think of earlier times as being better and healthier times.

[128] Dr. Toupin's cautioned the Court not to simply to accept self-reported symptoms, but to look beyond and search for some objective medical findings of traumatic brain injury.

[129] His cautioned the Court, that in light of Mr. Hayward's pending litigation, to ensure there had been sufficient symptom veracity testing. In this case, it was shown that Mr. Hayward was making an insufficient effort in this memory testing.

[130] In Dr. Toupin's view, there were too many inconsistencies in Mr. Hayward's various responses to questions by health professionals which he documented throughout his report.

[131] Dr. Toupin testified the fact that Mr. Hayward did not change his work habits after the accident and indeed had greater responsibility and this is counter-indicative to a sustained traumatic brain injury. Dr. Toupin testified that you cannot hide a brain injury like you cannot hide a badly broken leg and that it would not be possible therefore that his boss could be unaware of Mr. Hayward's problems.

[132] In an overall assessment of all of Mr. Hayward's health records, which he had access to and spent many hours reviewing, Dr. Toupin concluded that Mr. Hayward, symptomatology and particularly his headaches could be caused by many things including his levels of stress and his excessive use of alcohol in combination with his medication.

Testing Conditions

[133] As he remained with Mr. Hayward during the testing, Dr. Toupin was able to assess all of his reactions. He noted testing took place from 08:30 until 16:00 over two days. Dr. Toupin reported:

It was astonishing to note that during the first day of testing, Mr. Hayward stated being bothered by small noises. For instance, he requested that the volume of our computer be lowered and he asked for permission to remove the battery that was on the hotel wall clock as “*it was ticking*”. No comments were made by Mr. Hayward on the second day of testing considering the “battery had been put back in the clock.” Mr Hayward was able to use the trial and error method and he did not encounter any difficulties self-correcting or finding strategies when it was required. He consistently double checked his responses.

No pain behaviour from Mr. Hayward was observed, except, at times, for when he needed to move. Verbal tasks appeared significantly less appealing to Mr. Hayward compared to visual ones. However, his level of collaboration on any task was without any problems.

Assessment of Validity

[134] Dr. Toupin’s writes that “the results show Mr. Hayward perceives his current difficulties as being worse than they really are.” Dr. Toupin administered the Green’s Memory Test and reported that the results suggested a lack of validity. “Mr. Hayward’s results are significantly worse (i.e. gray area) compared to people suffering chronic pain and people suffering a severe traumatic brain injury.”

[135] Quoting the author of the Green Word Memory Test, Dr. Toupin notes at p. 38 of his report:

... the Word Memory Test (WMT) contains measures that are very sensitive to exaggeration or poor effort, but insensitive to all but the most extreme forms of cognitive impairment. The WMT is unique among symptom validity tests because of its extensive validation in clinical forensic settings. It is admissible under “Daubert Challenge”, which are the most stringent criteria for USA Court of Law. The rationale is that neither depression, fibromyalgia, chronic pain, neurological diseases nor brain injury were able to explain the failure on WMT ...” “If a plaintiff produces invalid results on one or a few tests, **it renders the other data doubtful as evidence of the patient’s true abilities ...**”

Assessment of Attention

[136] Dr. Toupin reported that this test result was valid. He noted:

The above graphic shows that Mr. Hayward's reaction time is slow (T=67), and variable (T=89), suggesting that variability within his performance could be expected. Mr. Hayward is, however, not impulsive. The arousal level is quite low, although it could be also influenced by the medication Mr. Hayward takes. These could have devastating results on memory.

Concerning Mr. Hayward's divided attention or working memory, he obtained an Index Score of 60 at the Working Memory Index of the Wechsler Adult Intelligence Scale, Fourth Edition, Canadian Version, which is located in the "*Extremely Low Category*" compared to his peers. This result is statistically lower compared to all the other indices (Verbal Comprehension Index = Index Score = 88; Perceptual Reasoning Index = Index Score = 90; Processing Speed Index = Index Score = 77). In addition, using the USA normative data adds more information. For instance, the Verbal Working Memory Index = Index Score = 66 is significantly lower compared to the Visual Working Memory Index = Index Score = 85. These above results are confirmed by the Trail Making Test and by the Oral Trail. These low results are consistent with what has been reported by Mr. Hayward, as well as by his wife, concerning the difficulties multitasking. This weakness located within the domain of the working memory represents a significant weakness for Mr. Hayward (sic) and it explains, at least in part, most of the difficulties he encounters in his activities of daily living, such as problems maintaining more than one train of thought at the same time and a slow speed of information processing. These above difficulties, as noted in an earlier section of this report, could be highly (sic) influenced by symptoms of pain.

However, it is unclear as to which extent these attention difficulties could have been present before the accident, as it was documented earlier that Mr. Hayward received tutoring in Arithmetic at the time he was in school. For instance, research on working memory and Arithmetic reveal that working memory is related to mathematical performance in adults and in typically developing children with difficulties in math. (See K.P. Raghobar et al. / *Learning and Individual Differences* 20 (2010) 110-122; Passolunghi, M.C., & Cornoldi, C. (2008) Working memory failures in children with arithmetic difficulties. *Child Neuropsychology*, 14, 387-400; Passolunghi, M.C., & Siegel, L.S. (2001). Short-term memory, working memory, and inhibitory control in children with difficulties in Arithmetic problem solving. *Journal of Experimental Child Psychology*, 80, 44-57. Passolunghi, M.C., & Siegel, L. S. (2004), Seitz and Schurmann-Hengsteler (*EUROPEAN JOURNAL OF COGNITIVE PSYCHOLOGY*, 2000, 12 (4), 552-570).

The prefrontal cortex appears to be involved in human working memory. For instance, the dorsolateral prefrontal cortical areas is felt to contribute to the maintenance of both verbal and nonverbal information, whereas left frontal opercular regions appear to be involved specifically in the rehearsal of verbal material. See D Esposito et al. (1995) WORKING MEMORY & NEURAL SUBSTRATE. The neural basis of the central executive system of working memory *Nature*; Nov 16, 1995; 378, 6554; Fiez et al. (1996), A Positron Emission Tomography Study of the Short-Term Maintenance of Verbal Information. *The Journal of Neuroscience*, January 15, 76(2):808-822. See also *Neuroanatomy Through Clinical Cases* by Blumenfeld). The reader is reminded that the MRI findings on Mr. Hayward reveals positive findings located in both inferior frontal lobes.

Assessment of Visual Function

[137] Dr. Toupin testified Mr. Hayward has no special difficulty, a finding that accorded with that of Dr. Wayne MacDonald.

Brief Screening for Language Function

[138] Dr. Toupin noted:

The above results do not show any evidence of verbal difficulties. Mr Hayward's difficulties to retain information when he reads or to keep track of multiple conversations in a crowded situation could be better explained by working memory problems rather than verbal difficulty per se. On this aspect, one should also take into account the fact that Mr. Hayward, expressed at the time of the testing "I have *never been a fast reader*".

Assessment of Cognitive Function

[139] Dr. Toupin reported that his level of cognitive functioning was located in the average range of functioning.

Assessment of Learning and Memory

[140] Dr. Toupin noted:

The reader is advised that validity concerns are present within this section. More particularly, for learning and memory, a forced choice subtest embedded within the California Verbal Learning Test II (CVLT-II), alternate version, indicates that 99.5% of the people obtained a better score than Mr. Hayward at this subtest, which makes us doubt the general results of this test. On the other hand, Mr. Hayward obtained a good performance at validity measure embedded in the Wechsler Memory Scale, Fourth Edition (WMS-IV). Unfortunately, in order to go around the practice effect as much as possible, as this test has been previously administered by Dr Baker earlier, some scores were substituted with data from the CVTL-II, which have validity concerns.

Results from the Rey Complex Figure are not impaired, but practice effect could appear as Dr. MacDonald already administered this test to Mr. Hayward, which may inflate the results. As a consequence, the results will be taken globally.

Data suggests that Mr. Hayward's capacity to learn is not impaired. For instance, his learning slope of the CVLT-II test is at least average (-0.5 SD), he was able to learn new material through a different test (WMS-IV) and according to Mr. Hayward himself, he was able to learn a new job. However, there is a huge number of intrusions in the CVLT-II (SS=3), which could be the consequence of the impairment located within the working memory. As a consequence, in order to stay on the safe side, it seems reasonable to indicate that Mr. Hayward is able to learn, but he will need more time and more effort compared to an average man of his age.

Assessment of Executive Functions

Working memory difficulties were documented in the first section of this report, as well as difficulties with sustained attention, which in turn will certainly negatively affect Mr. Hayward's speed of information processing. However, a high amount of variability is present among the data measuring the processing speed.

As stated earlier, these difficulties will significantly interfere with Mr. Hayward's capacity to multitask and with his speed of execution. More qualitatively, it has been noted throughout the testing session that Mr. Hayward was slow. When he increased his speed, he committed more errors. Fortunately, taking into account the fact that he has a good capacity to learn from his errors and to use external feedback to adapt his way of responding, he was required to go back and self correct quite often. The reader is invited to review and appreciate, through the numerous tables presenting Mr. Hayward's writing sample, that several self corrections were made.

Clinical Impressions

[141] Dr. Toupin noted:

In the accident that occurred on April 15 (sic), 2003, it was documented that Mr. Hayward did not lose consciousness, he did not report feeling “*dazed*”, he drove his vehicle away from the scene and he got out of the vehicle by himself. He declined any medical assistance. No evidence of Anterograde or Retrograde amnesia exists and there is no evidence of Post Traumatic Stress Disorder. However data from different sources suggests that he sustained physical injuries, as a consequence of the accident. The data of this assessment documented a relatively preserved profile, with weaknesses located within the working memory.

Based on the above information, as well as to the data of the present testing, the evidence that Mr. Hayward sustained a Traumatic Brain Injury is extremely low. However, if he sustained any, research shows (see review in McCrae, M (2008) Mild Traumatic Brain Injury and Postconcussion Syndrome: The New Evidence Base for Diagnosis and Treatment) that most of the people suffering a Mild Traumatic Brain Injury recuperate within 90 days of the injury. An MRI has been done on Mr. Hayward. However, Dr. MacDougall is unable to directly link these findings to the accident.

It has been demonstrated throughout this report that on one hand, Mr. Hayward is currently very functional and on the other hand he is still symptomatic after 7 years. Research that directly links the type of injuries that Mr. Hayward suffered with psychological factors has been presented.

As a consequence, my opinion is that Mr. Hayward’s current symptomatology could not be explained by an injury to his brain that could have been sustained in the Motor vehicle Accident. Is my opinion that pain and psychological factors contribute to maintaining Mr. Hayward’s symptomatology. My above opinion is “*objective*” and it is expressed with a high degree of certainty.

[142] I now turn to the evidence of Mr. Hayward’s wife, father and friend Barry Brown and work colleague Star Bayer, who offer a more subjective and personal profile of Mr. Hayward’s symptomatology after the 2003 accident.

[143] Mr. Hayward’s wife Kimberley Hayward is 37 years of age and the mother of three children: Kohen age 8, Taigen age 5 and Reis age 3. She met Mr. Hayward in the mid 1990's and married him in 1999.

[144] I would describe her as an ambitious, energetic and motivated person. She has taught school for 11 years and apart from maternity leave, continued her full time career. In their early married life she also worked a second job at night at the post office after teaching all the day.

[145] She testified about their early married life together, being very active and including: hiking, camping, travelling, purchasing properties and finally building on their second lot at Hammonds Plains, Nova Scotia, which they cleared themselves. The house was completed for occupancy in late 2000.

[146] A colleague from her school, who was then a single parent of two boys ages 8 and 5, joined them for a year sharing the new house. Ms. Hayward testified that her husband was great with these little boys and she knew he would make a great dad. On cross-examination, it was apparent that Mr. Hayward spent less time with these children than she had first portrayed.

[147] However, she described a good and busy work and home life, and an active social life, as she and her husband hosted friends at barbeques and bonfires on most weekends.

[148] Ms. Hayward introduced her friend Barry Brown to Mr. Hayward in late 2001, knowing that both men loved the outdoors, cars and high performance driving schools. She testified this friendship blossomed in the winter of 2002.

[149] Ms. Hayward testified that she became pregnant in the spring 2002 and had her first born Kohen on December 21, 2002. Ms. Hayward testified that her husband was thrilled by the birth of their son and was a doting father and husband until April 5, 2003, when the motor vehicle accident occurred.

[150] She testified that when her husband become Vice-President of Logistics in late 2002, he sold his jeep (a recreational car he had personally restored) and wanted to move up in the company. She described him as the “go to person” in the company, not stressed out, thrilled with the challenge.

[151] I note this coincides with his parents’ break-up, the imminent sale of the company by his father in the summer of 2003, and his father’s departure from the

company, as he spent more time in South Carolina, pursuing a new personal relationship.

[152] Ms. Hayward testified everything changed after the motor vehicle accident. She described the nature of the injury, no cuts, bump on the left forehead, a little dizzy. She testified that the evening of the accident he threw up, but this was not a great concern as “he has a weak stomach . . . if he’s upset he often throws up.” He refused to go to the hospital on April 5, but Ms. Hayward testified he took muscle relaxants and put ice on his head and visited her doctor a few days later.

[153] Ms. Hayward testified that the biggest change occurred in his mood and demeanor about a month post-accident which she attributed to the pain he suffered following the accident. She testified that Barry did not come around as often, as Mr. Hayward suffered pain all the time to his neck and back as well as migraine headaches.

[154] Ms. Hayward testified that after Hurricane Juan destroyed trees on their property, her husband could not clean up the mess on his own and required help from the family, despite his earlier experience at clearing this very lot of trees before construction.

[155] By the fall of 2003, Ms. Hayward testified that her husband said he had to spend more time at work, pick up the slack of other employees, and was generally more taxed at the office.

[156] Ms. Hayward described a conversation she overheard in the garage in January 2004 between her husband and Barry Brown. She testified that she heard her husband telling Barry he was jealous of the new baby, their home and life. Mr. Brown was shocked by this and hurt and she testified that the friendship waned for over a year until she purposely rekindled it after Taigen’s birth in 2005.

[157] Ms. Hayward testified that she attributed the changes in her husband’s demeanor to a stage he was going through, because of the pain from the accident and all the medical appointments and the medicine he was on. She expected it would just be a temporary problem and improve in time.

[158] It is important to note however that Mr. Hayward had as many as four medical appointments with his general practitioner in April and May 2003 and did not see his physician again until March 10, 2004.

[159] By October 2004, Mr. Hayward was prescribed and as noted in the MSI chart in January 2005, “major depression recurrent NOS.” In the meantime, Ms. Hayward was expecting a second child in October of 2004. Taigen was born in June 2005.

[160] Ms. Hayward testified that her husband’s mental state deteriorated. Ms. Hayward testified that her husband could not then be trusted to look after both children. She testified that by 2005, he now hated his work, worked three or four nights a week, and was bombarded with more work. Since his parents departure from the company, she testified everyone came to him with their problem. She testified that he was really feeling the effects of the change in ownership. She described that his situation was spiralling out of control in 2005 - 2006.

[161] Ms. Hayward testified she blamed her brother-in-law Andrew for the change in Craig because the business was failing. She testified that Craig was devastated by this and just kept working harder. By June 2006, Ms. Hayward testified she was pregnant with her third child, (Reis was born in January 2007). She did not know how they could continue to function as a family.

[162] In May 2006, Mr. Hayward had an MRI and this appears to be the moment when Mr. Hayward’s family and friends seized upon the view that Mr. Hayward had suffered a traumatic brain injury in the motor vehicle accident of April 5, 2003 and that such a serious injury was the only explanation for his behaviour.

[163] By now, Ms. Hayward testified that she had to do everything, look after the children, pay all the household bills, rely more and more on Barry Brown to look after household chores.

[164] Ms. Hayward testified that by 2007, Mr. Hayward was advised by Dr. Lappin to stop work and go on disability for awhile, however he refused. Ms. Hayward accounts for this refusal as Mr. Hayward’s pride, his wish to continue working to provide for his family.

[165] In November 2006, Ms. Hayward testified that her husband went into a deeper depression. Andrew Boswell had appointed Craig the Vice-President of Sales for Nova Communications, a position then viewed as a demotion from the earlier role as Vice-President of Logistics.

[166] I note that descriptions of Mr. Hayward's work, as Vice-President Sales to his physicians and Dr. Toupin, appear to indicate a contradictory view, that he in fact assumed greater responsibility at work.

[167] Mr. Hayward's description to Dr. Toupin of his own busy day, also contrasts with his wife's testimony about his lack of care-giving of the children. Indeed Mr. Hayward seems to have continued to get the children ready for school and daycare and took care of them each morning before work, as his wife left for school early each day.

[168] Ms. Hayward testified that in 2008, Barry Brown and Craig invested in a rental property in Truro. This is the same property that is shown in the surveillance tapes of March 5 and 6, 2010.

[169] Just as Ms. Hayward's evidence chronicles her husband's difficulties from the summer of 2003 onward, Mr. Barry Brown's evidence reinforces her testimony. As I noted, he carefully chronicled the same events in Mr. Hayward's life from 2003 forward.

[170] He had only met Mr. Hayward in late November 2001, he testified. They restored cars together, finishing his Mustang restoration in the spring of 2002, went to BMW driving school in June and September, 2002 and 2003. However, he testified that after the accident in 2003, as Mr. Hayward's pain got worse and worse they saw much less of one another.

[171] Barry Brown recalled the five or six months after the accident. They had an argument about why Mr. Hayward did not call or see him any longer. He recalled Mr. Hayward's accusations of his jealousy of he and his wife and their life together. He testified he was shocked by this. This may have in fact been in January 2004. Mr. Brown also confirmed that after Taigen's birth in June 2005, they resumed their friendship and he played an even more important role in helping Ms. Hayward, around the house.

[172] Although they have remained friends and Mr. Brown has since married in August 2009, Mr. Brown confirms that Mr. Hayward is not the carefree, engaging man he first met in November 2001.

[173] Mr. Brown testified that he and Mr. Hayward volunteered at Beaver's and that Ms. Hayward had to do the preparation and planning for the nights Mr. Hayward was in charge of the group.

[174] He also testified as to their business enterprise, the ownership of the apartment building in Truro and the disproportionate role he played as Mr. Hayward seemed unable to manage the tasks he was given related to this project.

[175] Mr. Brown testified that although he and Mr. Hayward worked long into the night during renovations on March 5 and 6, 2010, when the surveillance was conducted at the Truro apartment, Mr. Hayward was constantly taking pills and Mrs. Hayward was massaging his neck.

[176] They also took an Executive MBA course together. Mr. Brown testified he had to help Mr. Hayward throughout. Mr. Brown received an A grade, Mr. Hayward an A- grade.

[177] Mr. Brown recounted the vacations he took with the Haywards including a disastrous one in August 2009 when while at a campsite Mr. Hayward was upset about fearing he had lost one of his children, soon found, but he then took an overdose of analgesics and went off into the woods. Mr. Brown and Ms. Hayward both treated this as a suicide attempt. In spite of this experience there were many other shared vacations and outings.

[178] Both these witnesses, attribute Mr. Hayward's decline to the motor vehicle accident of 2003. Both believe that the bump on his head, received on April 5, 2003, resulted in a traumatic brain injury.

[179] I accept that both Ms. Hayward and Mr. Brown want to help the plaintiff in this law suit. I did find it slightly disconcerting that their evidence was at times identical in their use of words to describe events. They were obviously well-prepared witnesses, in terms of having made notes, sorted out time lines and reviewed these before testifying. Mr. Brown agreed he was a well-prepared witness and had "come to do what I need to do."

[180] Mr. Gerald Hayward, was not much in Mr. Hayward's life after the autumn of 2002, following the collapse of his marriage and sale of the company in 2003.

[181] His evidence concerning his son's lack of concentration and focus in the spring of 2008, confirms that Mr. Hayward was having trouble at work, coping with the responsibility of his new position. Mr. Gerald Hayward also assumes that the MRI result is a complete explanation for his son's troubles.

[182] Ms. Star Bayer, who came to work at Nova in 2006, is a friend and work colleague from Nova, who testified as to her role in assisting Mr. Hayward, in doing his job, as he struggled with a seeming lack of organization, ability to concentrate and memory issues.

[183] She also describes her role driving Mr. Hayward across the province to do his work, after his last motor vehicle accident and driver's suspension in 2010.

[184] There is contradictory evidence however, concerning the extent of Mr. Hayward's dependence on her to complete work assignments and whether he in fact gave her gifts in cash or kind for her frequent assistance. She recalled only one gift certificate.

[185] Dr. Erica Baker, a neuropsychologist performed a vocational assessment on Mr. Hayward in May 2010, significantly influence by work done by Dr. Wayne MacDonald in his neuropsychological assessment.

[186] She too accepted that the 2003 motor vehicle accident had resulted in a brain injury. Her report is found at Exhibit 1, Volume 2, Tab 19.

[187] She interviewed Mr. Hayward. She noted:

. . . Mr. Hayward taken on increased responsibility as Vice President of Business Development for his company, Nova Communication. With his increased responsibilities, Mr. Hayward also became increasingly aware of his cognitive difficulties. Although he is presently managing in his position, given his cognitive difficulties, physical pain and fatigue, Mr. Hayward has some concern about his ability to continue working at his present pace.

[188] Dr. Baker's role was to provide an opinion on suitable employment alternatives for Mr. Hayward should he be unable to continue working in his present position at Nova Communications.

[189] She also noted Mr. Hayward had no significant medical problems pre-accident.

[190] The symptom survey she administered was completed by Mr. Hayward with the help of his wife. Mr. Hayward agreed with Dr. Baker to use "his best efforts" in completing her battery of tests. These included readministering some tests Mr. Hayward had completed before for Dr. MacDonald, in areas of intellectual functioning, language, reading, mathematics, clerical speed, memory, executive functioning and attention. These results are detailed within the report and Dr. Baker gave detailed evidence of her findings.

[191] She noted:

Mr. Hayward's current aptitude profile is not consistent with what would be expected for success in his present job as Vice-President of Business Development. Although Mr. Hayward is presently experiencing relative success in his job at Nova Communications, there are several underlying variables that are probably contributing to his ability to manage in this position. Mr. Hayward has been employed at Nova Communications for approximately 25 years. He has worked his way through the family run company and therefore is very familiar with the company. Mr. Hayward is very knowledgeable about the products that he is responsible for and this consolidated knowledge is unlikely to have been significantly disrupted post-accident. Mr. Hayward is most likely to experience difficulty when he has to learn new information, particularly when he has limited existing knowledge of the to-be-learned material.

[192] Dr. Baker provided a list of suitable alternate careers on page 28 of her report. They were diverse, from parts clerk to crane operator, farm supervisor or fishing master to glass process operator.

[193] All showed a reduced level of income, with an average hourly wage between \$15.00 to \$20.00, suggesting a reasonable estimate of annual wage to \$34,819.00, as compared with Mr. Hayward's current income of \$103,000.00.

[194] She concluded:

Mr. Hayward was injured in a motor vehicle accident on April 5, 2003. A Traumatic Brain Injury, Whiplash Associated Disorder — Grade II/V, and psychological distress appear to have resulted from the accident. Mr. Hayward continues to experience significant cognitive problems, symptoms of depression and anxiety, and physical pain post-accident. Although Mr. Hayward returned to work at Nova Communications post-accident, he has experienced changes in his functioning. When asked about changes that have occurred post-accident, Mr. Hayward described that he has had to increase the number of hours he works; he has had more difficulty with time management, multi-tasking and organization; his learning curve is longer when picking up new skills or job duties; and he has more trouble understanding directions and what is expected when new learning is required. Mr. Hayward now relies upon compensatory devices such as his Blackberry, sticky notes, and “to-do” lists. Mr. Hayward reported that he thinks that if he keeps up his performance and works hard he will be able to maintain employment at Nova Communications. However, given his struggle to keep up with job expectations and the fatigue he experiences, Mr. Hayward has some concern about how much longer he will be able to continue working at his present pace.

Mr. Hayward is presently in a fairly senior managerial position at Nova Communications. Unless he was able to obtain employment within another wireless communications industry, it is probable that Mr. Hayward would not be able to secure future employment in a managerial position. Mr. Hayward’s neurocognitive and vocational profiles suggest that he would have difficulty “catching-on” to new tasks, instructions and underlying principles; mastering self-instructional texts used in training and understanding reference materials; completing tasks that involve arithmetic operations quickly and accurately; and with working memory, attention, efficient information processing, organization, multi-tasking, and shifting easily between tasks or activities. These areas of weakness appear to be largely associated with Mr. Hayward’s 2003 accident.

As mentioned above, it is recommended that Mr. Hayward be provided the services of a Vocational Rehabilitation Counsellor if it becomes necessary for him to choose (from Table 10) an occupational title that best fits his interests and abilities.

[195] Quite frankly, Dr. Baker’s evidence was not very helpful. It depended greatly on self-reported information from Mr. Hayward and was speculative about his future prospects not even assisting Mr. Hayward in the selection of the most appropriate type of work, a task for a subsequent vocation specialist. If engaged in the same industry, Mr. Hayward may do well in a management capacity. If not he

would have to choose a new career from the diverse list offered, jobs that pay far less, presumably due to his cognitive deficits, all assumed to be solely attributable to the 2003 car accident.

[196] The fact is Mr. Hayward has continued to work at a job where his responsibilities were increased since 2003. He has worked continuously, although suffering from chronic pain. He knows his industry well and I am not satisfied that his job is in peril. He testified his employer was unaware of his difficulties, as he had only spoken to him recently about this law suit. He has carried on through pain, depressive episodes, substance abuse and an additional significant car accident of July 2010.

[197] Despite the evidence of these lay witnesses who were close to Mr. Hayward, at work and at home, I cannot conclude or accept that the only reasonable explanation for Mr. Hayward's deterioration is the fact of a traumatic brain injury suffered on April 5, 2003.

[198] On all the evidence before me, I have concluded that the plaintiff has been unable to prove causation in this case.

[199] I am not satisfied on the balance of probabilities that the motor vehicle accident of 2003, caused or materially contributed to the plaintiff Mr. Hayward's complaint of a brain injury. There is insufficient medical evidence to establish that Mr. Hayward suffered from anything other than serious soft tissue injuries that developed into chronic pain as a result of the accident. Indeed, I am satisfied on a balance of probabilities that the earlier assault of 1991 is the most likely explanation for the scar tissue, as shown on the MRI of May 2006. Further, I am satisfied on the balance of probabilities that the presence of the scar tissue from this old injury is not the cause of his present behaviour.

[200] There are other plausible explanations such as stress, the plethora of medications, alcoholic abuse, and dramatic changes in Mr. Hayward's work and family situation to account for the complaints of memory loss and lack of concentration or diminution in executive functioning. This is not only evident in the lay witnesses' testimony but also in the testimony of the plaintiff's own medical experts and in the records of his physiotherapists.

[201] I acknowledge that Mr. Hayward's present situation is not good, but one hopes that with the resolution of litigation and with continued treatment for depression and substance abuse issues, he will improve in time.

[202] His chronic pain, as a result of soft tissue injuries, is more likely than not the primary cause triggering depressive episodes, as he tried to cope, with the aftermath of the accident.

[203] Since the 2010 accident, Mr. Hayward testified that he has not been drinking. This is bound to help his situation.

[204] His counsel has offered the explanation that because Mr. Hayward suffered from a traumatic brain injury as a result of the 2003 motor vehicle accident, he is unable to testify clearly, as to his cognitive deficits or to chronicle them accurately in time, in any significant detail.

[205] I do not accept this circular argument. Mr. Hayward has been subjected to rigorous testing by Dr. Baker, Dr. MacDonald and Dr. Toupin. Particularly, Dr. Toupin observed the detailed answers Mr. Hayward was able to provide, his multi-tasking, and his capacity to check himself for the accuracy of his answers. I also note from my own observations of Mr. Hayward at trial, he had few observable memory difficulties and remembered dates and events better than other witnesses.

[206] I accept Dr. Toupin's evidence that were Mr. Hayward to have had a brain injury he would not present as he did. Of concern to me was the result of the veracity testing, that showed a lack of effort and brought the total assessment into question.

[207] I have also previously reviewed the lack of information the plaintiff's medical witnesses had respecting his background and previous medical history, allowing them all to assume that the only event that could account for the MRI results was the 2003 motor vehicle accident. Even Mr. Hayward's own medical witnesses agreed that the 1991 assault was significant, when they learned of it.

[208] Mr. Hayward appeared less than forthright about his past medical history on numerous occasions. This has been a concern to me.

[209] However, I find that Mr. Hayward damages for the soft tissue injuries he did suffer in the 2003 motor vehicle accident should be assessed at the high end of *Smith and Stubbert*, considering the resulting depressive episodes and continuing disturbances in his life.

[210] I am making an award of \$120,000 for pain, suffering and loss of amenities.

[211] Mr. Hayward has no loss of income claim. He has been consistently employed and also able to engage in at least two other business ventures, including the rental income property in Truro, Nova Scotia. Notwithstanding, chronic pain, he is able to do significant physical labour, as seen in the video surveillance of March 2010.

[212] Any suggestion of a loss of future income is entirely speculative. There is simply no foundation for a claim of loss of earnings and no evidence that he cannot continue in his present employment into the foreseeable future. I do not accept that the plaintiff has proved this claim.

[213] With respect to loss of valuable service, the plaintiff Mr. Hayward carries on most of his pre-accident activities including household duties. Both the Haywards have busy lives and careers and manage to bring up three small boys. Mr. Hayward plays a significant role on a daily basis in child care. Like other couples they hire a little help, and both carry on household chores, although Mr. Hayward may not be able to do chores such as cutting wood, with the same energy he demonstrated in the past. I find there is no significant reduction in his capacity to do this type of unpaid work.

[214] In other daily activities, Mr. Hayward continues to travel on family holidays, business trips, engage in hobbies such as camping and boating and visits to the family cottage.

[215] Mr. Hayward has incurred some out of pocket expenses, not covered by his or his wife's insurance policy, which set limits on physiotherapy and massage and do not cover certain prescription medication. I therefore assess the figure of \$10,000 for loss of future care to offset those continuing treatments he may require in excess of insurance limits. It was argued that Mr. Hayward could lose this health insurance and that this claim should therefore be greater. I do not find on the evidence that this is the case.

[216] Ms. Hayward testified that they had planned to send Mr. Hayward to the Canmore Clinic in Alberta for a six-week intensive programme. I am not satisfied that this is required for his rehabilitation from his injuries.

[217] The plaintiff shall have his out-of-pocket expenses, those special damages as outlined in the plaintiff's brief, and pre-judgment interest at 2.5%.

[218] In the absence of agreement on costs, I will be happy to hear submissions in writing.

Justice M. Heather Robertson