



FSCO A07-000989

BETWEEN:

MELANIE RYAN

Applicant

and

ING INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Before: Richard Feldman

Heard: July 14, 15, 16 and 17, 2008 and October 27, 28 and 29, 2008, in Windsor, Ontario.

Appearances: Melanie Gardin for Ms. Ryan
Brian Evoy-Smith for ING Insurance Company of Canada

Issues:

The Applicant, Melanie Ryan, was injured in a motor vehicle accident on November 13, 1998. She applied for and received statutory accident benefits from ING Insurance Company of Canada (“ING”), payable under the *Schedule*.¹ The Applicant and ING cannot agree on the amount of attendant care reasonably required by the Applicant as a result of this accident. The parties were unable to resolve their disputes through mediation, and Ms. Ryan applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The issues in this hearing are:

1. In accordance with paragraph 16(2)(a) of the *Schedule*, from April 25, 2006 onwards, what is the quantum of attendant care benefits to which the Applicant is entitled?
2. Is the Applicant entitled to interest for the overdue payment of benefits pursuant to section 46(2) of the *Schedule*?
3. Is either party liable to pay the other's expenses in respect of the arbitration under section 282(11) of the *Insurance Act*?

Result:

1. In accordance with paragraph 16(2)(a) of the *Schedule*, from April 25, 2006 onwards, the Applicant is entitled to attendant care benefits in the amount of \$649.52 per month.
2. The Applicant is entitled to interest on any overdue payments of these benefits pursuant to section 46(2) of the *Schedule*.
3. The decision on expenses is reserved, to be resolved in accordance with Rules 75 through 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

At the hearing I accepted into evidence a joint document brief and other documents filed by the parties and heard the testimony of Melanie Ryan, Deborah ("Deb") Crowe, Patricia Fleet, Kathleen Murphy, Dr. Harold Merskey, Celeste Ryan, Dr. Saadia Ahmad, Don Hebert, Tara Kehoe, Laine Hurst, Dr. John Strang, Dr. Lawrence Freedman, Matt Sutherland and Dr. Curt West.

Facts Not in Dispute

On November 13, 1998, the Applicant was a passenger in a motor vehicle. The driver apparently lost control of the vehicle and it spun off the road and into a ditch, rolling over in the process. The Applicant was thrown from the vehicle and suffered a number of injuries, including a fractured neck and traumatic brain injury. She was 16 years old at the time of the accident. An ambulance arrived at the scene of the accident and it was determined that the Applicant had a score of only 4-5 on the Glasgow Coma Scale (GCS). Based upon that GCS score and reported ongoing cognitive difficulties being experienced by the Applicant, on February 16, 2006, a Designated Assessment Centre determined that the Applicant did sustain a brain injury as a result of the accident that meets the definition of “catastrophic impairment” under section 2(1.1)(e)(i) of the *Schedule*.

In her teen years prior to the accident, the Applicant was having serious problems, both at school and at home. She was continually being moved from school to school and was suspended several times. She was abusing drugs and alcohol and was engaged in other risky behaviour. She was truant. She was volatile and angry. She was abusive towards family members. She stole thousands of dollars from her parents and was caught shoplifting. She also suffered the loss of a personal friend and was allegedly the victim of sexual assault. In the year before the accident, the Applicant had been diagnosed as having attention deficit disorder (ADD) and/or attention deficit hyperactivity disorder (ADHD), mixed anxiety-depression disorder (M.A.D.), dysthymia (relatively mild chronic depression) and, possibly, a personality disorder.² These conditions were sufficiently severe that they required treatment with medication (Ritalin, Paxel and Prozac).

In the ten years since the accident, the Applicant has accomplished quite a lot. She obtained her high school diploma. She went on to obtain a diploma in medical office administration from CDI College, graduating with an 84% average. She moved out of her parents’ home and lived independently (albeit, more often than not, with a roommate). She worked for extended periods

²Although there is no dispute that these diagnoses were made at that time, the Applicant did adduce evidence before me in an effort to now challenge some of those diagnoses. Some of the psychological experts who have examined the Applicant and/or reviewed the records subsequent to the accident have come up with alternative diagnoses of oppositional defiant disorder (O.D.D.) or conduct disorder. No one, however, questions that the Applicant’s conduct prior to the accident was both abnormal and risky.

of time at both part-time and full-time jobs. She obtained her driver's licence. She purchased a new vehicle. She drove herself to and from work. She formed new relationships and had a daughter of her own. Eventually³, she found that she was having difficulties coping and, together with her daughter, moved back into her parents' home. She then lost her job in or about October 2007 and has not worked since.

It is agreed that, physically, the Applicant is able to care for herself. She does not require assistance with such activities as: dressing, undressing, grooming herself, feeding herself, moving about, bathing or otherwise looking after her own hygiene. Thus, it is agreed that the only two categories on the standard Form 1 (Assessment of Attendant Care Needs) upon which the Applicant can rely are:

1. Severe Brain Injuries - client lacks ability to respond to an emergency or needs custodial care due to changes in behaviour; and/or
2. Financial Affairs - client requires assistance in managing financial affairs (maximum of one hour per week).

All medical professionals who have assessed the Applicant's need for attendant care agree that the Applicant does require at least some attendant care. For example, it is uncontested that the Applicant is unable to manage her financial affairs. In 2005, the Applicant received \$50,000 in partial settlement of a tort claim and squandered much of that money. She claims to have no recollection as to where almost \$20,000 of that total went. The Applicant's mother, Celeste Ryan, obtained a court order in 2006 appointing her as guardian of the property of the Applicant. Even the Insurer's assessor, Matt Sutherland, found in his Assessment of Attendant Care Needs⁴, that the Applicant requires assistance in managing her financial affairs and awarded the maximum time permitted of one hour per week. Mr. Sutherland also found that the Applicant required an average of two hours per day of attendant care to provide her with general assistance

³i.e., by the summer of 2006.

⁴Ex. 1, Tab 14.

in planning her activities and to check with the Applicant to confirm whether the Applicant has followed through with the day's planned activities.⁵

Issues Not in Dispute

The parties agreed on the following:

1. The hourly rate of compensation permitted for attendant care services incurred by this Applicant is \$10.07;
2. The Insurer is entitled to credit for attendant care benefits that have been paid to date;⁶
3. For the period of April 25, 2006 through September 27, 2007, the Applicant is not claiming entitlement to more than 16 hours per day of attendant care benefits (i.e., she is conceding that, during that period, she did not incur any expense for attendant care services during the hours that she was at work);
4. It is open to an arbitrator at the conclusion of a hearing such as this to determine the appropriate quantum of attendant care benefits based upon the evidence presented and calculated in accordance with the formulae set out in the Form 1, notwithstanding that an assessor may have expressed in a Form 1 a different conclusion as to the number of hours of attendant care required by an applicant;
5. The principle test for causation remains the "but for" test;
6. The "thin skull" principle applies in accident benefits cases; and

⁵Mr. Sutherland testified that, since no other category was applicable, he put that time under the heading "Severe Brain Injuries."

⁶If there is a dispute over the total amount of attendant care paid by the Insurer, the hearing may have to be resumed since no evidence was adduced on this issue.

7. The Insurer is not disputing that the attendant care benefits claimed (to date) have been “incurred” by the Applicant.

Causation: Has the Applicant suffered impairments as a result of the 1998 accident?

Since the accident of November 13, 1998, Ms. Ryan has consistently complained of memory impairments, difficulties in managing her time, difficulties in managing her money, difficulties in multi-tasking, difficulties in meal planning and preparation, distractibility, and frustration (with her abilities and her dependency on others). She has also complained of chronic intermittent neck pain, headaches, fatigue and problems with her sleep pattern. Since the theory advanced on behalf of the Applicant is that her need for attendant care is the result of cognitive impairments caused by the traumatic brain injury she sustained in the accident, I shall focus (as did the parties) on the evidence concerning her cognitive function.

Dr. Stewart Plotnick performed a psychological assessment of Ms. Ryan approximately three months after the accident. At that point, cognitively, Ms. Ryan was experiencing difficulties with attention, concentration, short term memory and was easily distractible. Given her prior history, however, Dr. Plotnick felt that, “it may be somewhat difficult to establish a baseline for her functioning overall.” Dr. Plotnick felt that Ms. Ryan was on the way to recovering from her brain injury but that much of her ongoing difficulties at that time (three months post-accident) stemmed from psychological/behavioural issues that pre-dated the accident.⁷

Dr. John Strang performed a neuropsychological assessment of Ms. Ryan approximately one year after the accident. While Dr. Strang agreed that Ms. Ryan’s need for a high level of structure, guidance and regular corrective feedback had been long-standing (i.e., pre-dating the accident), he concluded that the traumatic brain injury she suffered in the accident exacerbated the pre-existing problems and made everything “that much harder” for her. He attributed to the traumatic brain injury her continuing increased problems in multi-focus attentional deployment,

⁷Ex. 2, Tab 50, p. 12. Dr. Plotnick suggested Ms. Ryan’s impulsive conduct prior to the accident might have been the result of an abnormality with the frontal lobe of her brain and that, as she recovered from her head injury, she could be expected to return to her pre-accident impulsive and anti-social behaviour. Dr. Plotnick acknowledged in his report that this was merely a “speculative hypothesis.”

symbol processing speed and some visual-spatial skills.⁸ Dr. Strang prepared a follow-up report about one year later (November 2000) in which he concludes as follows:

Melanie's pre- and post MVA neuropsychological and other adjustment problems cannot be exactly separated. However, based on the nature of her accident, sustained injuries, and other clinical findings including her GCS (4) at the accident scene, it is almost certain that she is continuing to exhibit a range of increased neuropsychological deficiencies as a result of the MVA.

In January 2001, another neuropsychological assessment was conducted, this time by Dr. Michele Macartney-Filgate. Dr. Macartney-Filgate concluded that the Applicant had made a substantial recovery from the injuries she sustained in the accident but was still exhibiting residual difficulties with memory and concentration. Dr. Macartney-Filgate stated that, "I am unable, on the basis of the presently available information, to discriminate accident related neuropsychological difficulties from potential preexisting problems." Dr. Macartney-Filgate urged that there be a detailed review of Ms. Ryan's complete pre-accident academic and other records in order to confirm whether the diagnoses of ADD and ADHD were likely appropriate. If it turns out that these diagnoses were questionable, then Dr. Macartney-Filgate stated that Ms. Ryan's ongoing problems with concentration would more likely be attributable to the 1998 motor vehicle accident.⁹

In February 2003, a further neuropsychological assessment was conducted, this time by Dr. Byron Rourke.¹⁰ Dr. Rourke does not indicate what documents were available to him and does not review the history of this case. He found, as did other neuropsychologists, that Ms. Ryan's scores on *most* neuropsychological tests were in the average range, although she did exhibit difficulties in a few areas. Dr. Rourke concluded that, "[T]here was no clear or consistent evidence of deficits that would be consistent with the expected sequelae of a traumatic brain injury suffered more than two years ago."

⁸Ex. 2, Tab 52.

⁹Ex. 2, Tab 53, pp. 26-27.

¹⁰Ex. 2, Tab 55.

In June 2004, Ms. Ryan had a further neuropsychological assessment conducted in order to obtain a medical-legal report from Dr. Lawrence Freedman. Dr. Freedman found that the Applicant's major problem was one of depression. With respect to her cognitive abilities, Dr. Freedman stated that the tests he administered did not confirm the existence of any serious problems with cognitive function (specifically with respect to attention and concentration) and stated that any subjective complaints of cognitive deficits could be related either to Ms. Ryan's pre-accident history or to her depressed mood.¹¹

In January 2006, the Applicant's lawyers referred her to a neurosurgeon (Dr. John Girvin) for a medical-legal opinion. In his view, the Applicant's intermittent chronic neck pain would be her greatest barrier to carrying out meaningful employment and could give her difficulties with caring for her daughter and performing housekeeping tasks. With respect to her reported cognitive deficits, Dr. Girvin felt that, given the rapid improvement in her GCS after the accident, the traumatic brain injury suffered in the 1998 accident was not a severe one and he would not normally have expected to see any residual cognitive problems more than seven years after the accident (or, at least, no more than mild residual deficits), although there are rare cases where this does occur.¹²

To help Ms. Ryan with her reported cognitive difficulties, Brainworks, working in conjunction with Ms. Ryan's occupational therapist (Patricia Fleet) and case manager (Deb Crowe) proposed a treatment plan consisting of twelve 2-hour sessions in London.¹³ In May 2006, ING had Dr. Curt West conduct a psychological examination in order to get a second opinion about the reasonableness of the proposed treatment plan.¹⁴

Relying upon the neuropsychological assessments of Dr. Rourke and Dr. Freedman, Dr. West accepted their opinion that there was no compelling evidence of any significant ongoing

¹¹Ex. 2, Tab 58.

¹²Ex. 1, Tab 6.

¹³Ex. 1, Tab 8.

¹⁴Ex. 2, Tab 59.

cognitive impairment that could be attributed to the 1998 accident. He diagnosed Ms. Ryan as suffering from a pain disorder and recommended some treatment for that psychological condition, but not as extensive as that recommended by Brainworks (and to be done locally, not in London). In August 2007, following a second assessment, Dr. West diagnosed the Applicant as suffering from a chronic, unspecified, adjustment disorder.¹⁵

In September 2006, at the request of counsel for Ms. Ryan, Dr. Harold Merskey assessed Ms. Ryan and prepared a report in response to that of Dr. West concerning the proposed treatment at Brainworks.¹⁶ Dr. Merskey disagreed with Dr. West's diagnosis of a pain disorder in this case, since the Applicant had clearly suffered a significant traumatic brain injury, a neck fracture and other objective injuries and there was no reason to doubt that her chronic pain had an organic etiology. Dr. Merskey's examination of Ms. Ryan and his review of the medical documentation led him to conclude that Ms. Ryan suffered an injury to the frontal lobe of her brain, which affected her executive functions (i.e., the ability to organize and retrieve information, to focus and to remain on-task, to multi-task, to plan ahead, to initiate action and to follow-through on tasks). In the experience of Dr. Merskey, such an injury is not always immediately apparent and is not necessarily picked up by neuropsychological testing. He states that, "it is not uncommon for individuals who have suffered frontal damage to do quite well on neuropsychological tests but not to be able to manage their lives cognitively sufficiently nor with adequate responsibility either." As a result, Dr. Merskey supported the treatment that had been proposed by Brainworks.

Since Dr. Merskey had suggested that standard neuropsychological testing might not accurately reflect impairment of executive functions, a further neuropsychological assessment was conducted, with a view to focusing specifically on Ms. Ryan's executive functioning. This assessment was conducted by Dr. Saadia Ahmad in January 2007 (although her report was not released until November 2007).¹⁷ Also, in accordance with the recommendations of

¹⁵Ex. 2, Tab 59.

¹⁶Ex. 1, Tab 18.

¹⁷Ex. 1, Tab 27.

Dr. Macartney-Filgate, Dr. Ahmad obtained and reviewed Ms. Ryan's complete pre-accident educational record in order to assess the appropriateness of the pre-accident diagnoses of ADD/ADHD.

With respect to the pre-accident diagnosis of ADD/ADHD, Dr. Ahmad found that there were no problems noted in the academic records until a sudden change in Grade 7. According to Dr. Ahmad, this is *not* consistent with typical cases of ADD/ADHD. Typically, problems are noted by the age of seven and in more than one environment (at home and at school, etc.). Ms. Ryan's mother, who is a teacher, did not note attention deficit behaviour in Melanie prior to Grade 7. When problems began as Melanie entered her teen years, they tended to be more behavioural rather than cognitive in nature. Furthermore, according to Dr. Merskey, ADHD tends to be less problematic in adulthood, so even if the diagnosis had been correct, one would have expected the Applicant's problems with attention to have decreased over time. The fact that these problems have not decreased over time suggests that the diagnoses of ADD/ADHD may have been incorrect (or that the traumatic brain injury exacerbated the problem and/or prevented it from diminishing over time). Dr. Macartney-Filgate suggested that, if the pre-accident academic records did not support the diagnoses of ADD and ADHD, Ms. Ryan's ongoing problems with concentration would more likely be attributable to the 1998 motor vehicle accident. Dr. Ahmad concurs. Furthermore, the results of the neuropsychological tests administered by Dr. Ahmad (designed to test executive functioning), disclosed a pattern that suggests impaired executive functioning, which Dr. Ahmad attributes to the traumatic brain injury Ms. Ryan sustained in the 1998 motor vehicle accident.

Dr. Merskey then had an opportunity to review and comment upon the report of Dr. Ahmad.¹⁸ Dr. Merskey agrees with Dr. Ahmad's conclusion that Ms. Ryan's unique pattern of difficulties with attention is due to her brain injury (suffered in the accident) and not due to a pre-accident attention deficit based disorder.

¹⁸Ex. 1, Tab 31.

In their testimony before me, both Dr. Strang and Dr. Freedman made comments concerning the report and conclusions of Dr. Ahmad.

Dr. Strang did not object to the tests administered by Dr. Ahmad nor did he question the test results. He did, however, question Dr. Ahmad's interpretation of those results. Both Dr. Ahmad and Dr. Strang find that the Applicant has deficits in her executive functions but, unlike Dr. Ahmad, Dr. Strang attributes those deficits to the Applicant's pre-existing conditions. Dr. Strang conceded, however, that the traumatic brain injury may have adversely affected the development of the Applicant's frontal lobe and that this brain injury *exacerbated* the Applicant's pre-existing neuropsychological deficiencies.

Dr. Freedman also did not object to the tests administered by Dr. Ahmad nor did he question the test results. Dr. Freedman testified that he has no opinion with respect to the pre-accident diagnoses of ADD and ADHD. Dr. Freedman criticizes Dr. Ahmad, however, for failing to deal in her report with the fact that other neuropsychologists have come to different conclusions from her and the fact that the Applicant scored well on previous neuropsychological testing. For instance, Dr. Freedman also administered tests that he states are sensitive to frontal lobe impairment and the Applicant scored well on those tests. This is not mentioned in Dr. Ahmad's report. Dr. Freedman testified that Dr. Ahmad's opinion ought to be given little weight because of her inexperience. Dr. Freedman states that injury to the frontal lobe almost never affects long-term memories yet the Applicant reports difficulty recalling events from long before the accident or long after the accident. Dr. Freedman found these inconsistencies in the Applicant's reported ability to recall both pre- and post-accident events to be puzzling and found the failure of Dr. Ahmad to deal with this issue to be problematic. Dr. Freedman concludes that the Applicant's ability to drive, to maintain her composure, to do well in academic studies, to work, to raise a child, to live independently and so forth are all inconsistent with a significant frontal lobe injury. Dr. Freedman did not dispute that the Applicant has impairments; he merely attributes those impairments to psychological problems rather than to neurological ones.

I am not prepared to dismiss Dr. Ahmad's conclusions solely on the basis that she does not have as much experience as some of the other experts who have been involved in this case.

Dr. Ahmad was following the advice of experts who preceded her by focusing on executive function and by obtaining Ms. Ryan's complete educational records. While it is problematic many years after the fact to second-guess a diagnoses of ADD/ADHD, this line of questioning was suggested by Dr. Macartney-Filgate and, in this case, I believe it is reasonable for Dr. Ahmad to raise doubts about the appropriateness of the pre-accident diagnoses of ADD and ADHD. Dr. Ahmad is supported in this by Dr. Merskey. The failure of Dr. Ahmad, however, to acknowledge in her report contrary opinions or evidence that is inconsistent with her conclusions, makes her report less balanced and leads me to give less weight to Dr. Ahmad's opinion than I might otherwise have done. Nevertheless, her general conclusion as to the cause of Ms. Ryan's ongoing problems (i.e., cognitive impairments resulting from or exacerbated by damage to the frontal lobe of her brain that resulted from the 1998 accident) is consistent with the preponderance of the evidence and is supported both by Dr. Merskey and Dr. Young (see below).¹⁹ I find, however, that Dr. Ahmad has failed to acknowledge the achievements and abilities of the Applicant and has overemphasized her limitations and, as a result, I will be putting less weight on her opinion as to the *severity* of Ms. Ryan's impairment (which will be discussed in the following section of this decision).

In February 2007, Ms. Ryan was examined by a neurologist, Dr. G. Bryan Young.²⁰ Dr. Young agreed with Dr. Merskey's analysis and concluded as follows:

It is my opinion that Melanie suffered a significant head injury that compromised her frontal and temporal lobe function such that she has some difficulty with executive function and recent memory. Admittedly, she had behavioural problems before the accident of November 13, 1998, but many of these would have been expected to have resolved with maturation. Further neuropsychological testing in this regard may be helpful. Standard neuropsychological testing does not adequately assess executive (frontal lobe) function, which appears to be significantly impaired in her case. She has some features compatible with a post-concussion syndrome, with headache and nonrestorative sleep. It does appear that most of her complaints relate to neck pain. This could contribute to headaches and a chronic pain syndrome. This may be due to unresolved instability of her cervical spine and this does require further attention and investigation.

¹⁹and, given Dr. Ahmad's findings with respect to the pre-accident diagnoses of ADD/ADHD, is also supported by Dr. Macartney-Filgate.

²⁰Ex. 1, Tab 22.

I think that her current problems, which have continued now for 9 years, are unlikely to allow her to lead a normal life. She may be able to work part time, but she will not be able to achieve her full potential had the injury of November 13, 1998 not happened. Her main deficits in her ability to manage her household and to care for her child appear to be more in the cognitive (especially for executive functioning) than in the physical sphere. She requires supervision and guidance. Similarly her ability to do housework and care for a child would be compromised to some degree and she will require some assistance in the care of her daughter and household duties, shopping, planning, banking, etc. There is no doubt in my mind that these issues are related to the injury of November 13, 1998.

The neuropsychological testing recommended by Dr. Young (to specifically test for impairment of executive functioning) had in fact already been conducted by Dr. Ahmad in January 2007 but Dr. Ahmad's report was not available at the time that Dr. Young wrote his report.

While Ms. Ryan had a number of problems prior to the accident, the quality of her problems changed significantly after the accident. This conclusion is supported by the testimony of the Applicant's mother, Celeste Ryan, and of the Applicant's friend, Laine Hurst, who has known the Applicant since about 1995. It is also supported by the preponderance of medical evidence. Prior to the accident, the Applicant's problems were mainly with respect to her behaviour. The evidence suggests that after the accident, her behaviour improved markedly. As a result of the accident, however, Ms. Ryan suffered physical and cognitive impairments that continue to the present.

Since the accident, the Applicant has complained of an irregular sleep pattern (i.e., difficulty falling asleep and staying asleep) and difficulty waking in the mornings. These complaints, however, have not yet been investigated, there is no expert report setting out the exact nature of these problems and there is no expert opinion to support the Applicant's position that these problems are the result of the 1998 accident.

The Applicant's other impairments, however, are well-documented. Since the accident, Ms. Ryan's physical complaints have focused on her chronic neck pain, headaches and fatigue. Her cognitive deficits relate primarily to her executive functioning.

Dr. Strang concluded that the accident exacerbated the Applicant's pre-existing problems. Dr. Strang also testified that the accident likely resulted in new cognitive deficits that were not present before the accident and that would likely be permanent impairments. Dr. Macartney-Filgate had insufficient information to form an opinion on causation but stated that, if the Applicant's complete pre-accident academic records did not support the diagnoses of ADD/ADHD, the accident was the more likely cause of her ongoing cognitive difficulties. Dr. Freedman and Dr. West saw the Applicant's problems as being primarily psychological rather than neurological in origin. Dr. Young pointed out that many neuropsychological tests fail to capture impairment of executive function. Dr. Young concluded that the injury to Ms. Ryan's frontal lobe in the 1998 accident has impaired her executive function. This opinion is shared by Dr. Merskey. Dr. Young recommended more specific neuropsychological testing be conducted. This was done by Dr. Ahmad, together with the first review of the Applicant's complete academic record. Dr. Ahmad, Dr. Merskey and Dr. Young all conclude that the brain injury suffered by Ms. Ryan in the 1998 accident has impaired her executive function. I accept this conclusion. In the alternative, I find that the injuries the Applicant sustained as a result of the 1998 accident exacerbated her pre-existing cognitive and psychological problems.

In summary, while there is some conflicting evidence on the issue of causation, I find the Applicant has proven, on a balance of probabilities, that she continues to suffer impairments as a result of the 1998 accident.

Quantum: How much attendant care is reasonable and necessary for the Applicant as a result of these impairments?

The Applicant takes the position that, due to cognitive impairments she sustained as a result of the accident, from April 25, 2006 through September 27, 2007, she required 481.6 hours per month of attendant care (16 hours per day) and that from September 28, 2007 onwards, she required (and continues to require) 722.4 hours per month of attendant care (24 hours per day).

The Insurer takes the position that the Applicant is entitled to no more than 64.5 hours per month of attendant care (based upon the assessments by Matt Sutherland).²¹

The initial assessment of attendant care needs was performed by Patricia Fleet (occupational therapist) in March 2006.²² Ms. Fleet did not have much documentation at the time of this assessment and was unaware whether there had been any recent neuropsychological or neurocognitive assessments. At this time, the Applicant was living in her own rented premises (although spending quite a bit of time at her parents' home) and was relying upon daycare and her parents to look after her daughter when she was at work (four or five days per week) or otherwise as required. In preparing her report, Ms. Fleet relied almost entirely on what she was told by the Applicant and the Applicant's mother. Ms. Fleet acknowledged, however, that the Applicant was a poor historian. Ms. Fleet was informed that the Applicant had been found to have suffered a catastrophic impairment as a result of a traumatic brain injury sustained in a 1998 motor vehicle accident. Ms. Fleet was advised by the Applicant and her mother that the Applicant's pre-accident medical history was unremarkable and that, since the accident, she had become irritable, disorganized, forgetful and impulsive. Ms. Fleet testified that, based upon what she was told by Celeste Ryan, she was primarily concerned with the Applicant's ability to care for her child (and, to a lesser extent, her ability to function at work and to manage her financial affairs). The Applicant's main reported cognitive complaints were short-term memory issues and poor initiation. Based on this information, Ms. Fleet recommended supervision of the Applicant during all waking hours (i.e. 16 hours per day or 112 hours per week) but hoped that with appropriate devices (such as a Palm Pilot or day planner) and strategies, the amount of attendant care could be reduced over time. The Applicant's need for attendant care was put on the Form 1 under the heading, "applicant lacks ability to respond to an emergency or needs custodial care due to changes in behaviour."

²¹My understanding is that the Insurer has been paying attendant care benefits of \$649.52 per month based upon 64.5 hours of need, but I did not receive evidence as to the amounts that have actually been paid by the Insurer and I am therefore not making any finding on this issue.

²²Ex. 1, Tabs 9 and 10. Note that, based upon the date of this accident, Ms. Fleet used the wrong Form 1 with the wrong hourly rate of compensation.

In June 2006, ING had the Applicant assessed by an occupational therapist of its choice, Matt Sutherland.²³ By this point in time, the Applicant had moved back in with her parents largely because she was having difficulty managing her financial affairs, keeping appointments and caring for her daughter. The Applicant's mother (Celeste Ryan) was assisting the Applicant with scheduling and with financial matters but primarily helped her by caring for the Applicant's daughter, Tiana. The Applicant continued to work as a waitress approximately 23 hours per week. Mr. Sutherland did not consider it appropriate to include in the calculation of the Applicant's attendant care needs the time being spent by Celeste Ryan in caring for Tiana. Mr. Sutherland agreed with Ms. Fleet that the Applicant ought to be provided with an electronic organizer to assist her with scheduling and planning. Mr. Sutherland used the correct Form 1; this Form permitted a maximum of one hour per week for assistance in managing financial affairs and Mr. Sutherland recommended that the Applicant receive the maximum permitted attendant care for assistance with financial matters. With respect to other assistance, based upon his review of the documentation and his interview of the Applicant, her mother and the case manager, Deb Crowe, Mr. Sutherland was not convinced that the Applicant was unable to respond appropriately in an emergency or that she otherwise required constant supervision. She required some assistance with managing her time and Mr. Sutherland concluded that an average of two hours of assistance per day ought to be adequate (in conjunction with an electronic organizer and appropriate strategies) to help the Applicant manage her time and keep her appointments. Since no other category on the Form 1 was applicable, Mr. Sutherland also placed this need for attendant care under the heading, "client lacks ability to respond to an emergency or needs custodial care due to changes in behaviour." Based upon this assessment, ING sent the Applicant an OCF-9 Form (Explanation of Benefits) indicating that, effective June 13, 2006, it would be paying to her attendant care benefits of \$649.52 per month.²⁴

By way of rebuttal, the Applicant was then (in July 2006) assessed by another occupational therapist, Kathleen Murphy.²⁵ Ms. Murphy reviewed the documentation provided to her and

²³Ex. 1, Tabs 13 and 14.

²⁴Ex. 1, Tab 3.

²⁵Ex. 1, Tab 16.

interviewed the Applicant and her mother. Ms. Murphy also went to the Applicant's place of employment to observe her at work. Ms. Murphy found the Applicant to be forgetful and somewhat "scattered." Ms. Murphy was particularly troubled that, when the Applicant's parents were away on vacation, the Applicant felt unable to cope on her own and had a friend move in for the week. Also, during that week, the Applicant and her friends broke into an area of her parents' home that was off-limits (the door had been locked by her father before going on vacation). Ms. Murphy believed that this showed impulsivity on the part of the Applicant and poor judgment. Ms. Murphy was also concerned about reports by Celeste Ryan that, since the motor vehicle accident, the Applicant had done some dangerous things such as: leaving a key to her front door hidden in her mailbox, leaving candles unattended and leaving the stove unattended when in use. Ms. Murphy also cites examples of the Applicant's failure to deal appropriately with financial matters (such as squandering her pay and failing to pay for her car insurance on a monthly basis). At work, the Applicant was assisted in an informal way by her co-workers when she would forget or confuse orders or have difficulty making change. Ms. Murphy concluded that, "Ms. Ryan's memory, organizational and impulsive behaviours put her at risk if she were not living with another person." Consequently, Ms. Murphy recommends in her report one hour per week of attendant care to assist her with financial matters and 93 hours per week of general supervision (all waking hours, less the time she is at work and does not require formal attendant care). Ms. Murphy did not complete a Form 1.

In August 2006, Ms. Fleet again assessed the attendant care needs of the Applicant and found that there had been no significant change since her previous assessment. She still recommended 16 hours per day of attendant care.²⁶

On September 28, 2007, Ms. Fleet prepared a new Form 1 in which she assessed the Applicant's need for attendant care as being 24 hours per day, every day. Based on reports by Celeste Ryan that the Applicant has slept through her alarm clock, Ms. Fleet was concerned that the Applicant might not be awakened by the smoke detector and that this constituted a significant safety concern. For that reason, she added eight more hours per day of supervisory care in the attendant

²⁶Ex. 1, Tab 17.

care form.²⁷ Based upon this new Form 1, the Applicant is seeking 722.4 hours per month of attendant care (24 hours per day) from September 28, 2007 onwards.

In response, on November 7, 2007, Mr. Sutherland conducted a further assessment of the Applicant's attendant care needs.²⁸ Mr. Sutherland found no evidence to suggest that the Applicant was unable to wake and respond appropriately to a fire alarm or burglar alarm. He did find that the alarm clock in the Applicant's bedroom was across the room from the bed (rather than adjacent to the bed) and was set at a low volume level. In the absence of more compelling evidence, Mr. Sutherland was unconvinced that there was any real safety issue but suggested that if this was of concern to the Applicant that special alarms (extra loud, bright and/or vibrating) could be purchased. Mr. Sutherland's recommendations with respect to attendant care (one hour per week of assistance with financial matters and two hours per day of assistance with scheduling) remained unchanged and a new Form 1 was prepared accordingly.

At the request of Ms. Fleet, the Applicant's parents and boyfriend kept written records concerning behaviour exhibited by the Applicant that concerned them.²⁹ Based upon these comments, Ms. Fleet prepared a new report and Form 1 and, once again, Ms. Fleet recommend around-the-clock custodial care.³⁰

In February 2008, Dr. Ahmad was asked to review the attendant care reports prepared by Ms. Fleet and by Ms. Murphy and comment on their conclusion that the Applicant requires around-the-clock custodial care.³¹ Dr. Ahmad states that since life is unpredictable and may require the ability to multi-task or respond quickly to an unexpected or dangerous situation, given the Applicant's cognitive impairments, 24-hour-per day, 7-day-per week attendant care

²⁷Ex. 1, Tab 26, p. 6.

²⁸Ex. 2, Tab 63.

²⁹Ex. 6.

³⁰Ex. 1, Tabs 28 and 29.

³¹Ex. 1, Tab 32.

was warranted. Dr. Ahmad testified, however, that an occupational therapist would be in a better position than her to assess Ms. Ryan's specific attendant care needs.

Based upon the evidence presented, I do not find that the Applicant reasonably requires anywhere near the amount of attendant care that has been recommended by Ms. Fleet and Ms. Murphy. There are several reasons for this.

First, around-the-clock supervision has been recommended (from September 28, 2007 onwards), at least in part, because of the alleged problems the Applicant has with waking. Despite the issue of the Applicant's irregular sleep patterns and chronic fatigue having been raised several years ago and recommendations having been made to have this documented and investigated, there is no evidence before me that this has ever been done. There is no expert opinion by a qualified professional linking these problems to the 1998 accident. There is not even convincing evidence that it is a serious problem. Celeste Ryan has stated that her daughter sometimes sleeps through her alarm clock or hits the snooze button. The Applicant's boyfriend testified that Ms. Ryan is able to wake up on her own and get her daughter to school. Mr. Sutherland testified that, when he visited the Applicant's home, the alarm clock was far from her bed and the volume was set quite low.

The most dramatic evidence with respect to this issue came from Deb Crowe with respect to her visit to the Applicant's home in May 2006. According to Ms. Crowe, on that occasion, when she arrived, she found the front door wide open, Tiana sitting on the kitchen floor eating raw noodles out of a box and the Applicant asleep in bed. The stove was reportedly left on and candles were burning. Ms. Crowe testified that after trying unsuccessfully for 15 minutes to rouse the Applicant, Ms. Crowe telephoned the Applicant's mother, who came over to her daughter's residence. It reportedly took her mother another 20 or 30 minutes to finally get the Applicant to wake up. If true, this would be cause for concern and it is certainly the most compelling evidence of a serious safety issue presented during the hearing. The problem is, there is absolutely no mention of any of this in the written reports of Ms. Crowe and her story was not corroborated by either Celeste Ryan or the Applicant herself. Ms. Crowe was not able to offer any credible

explanation as to why this story came out for the first time at the hearing and appears nowhere in any of her reports. Given the lack of corroboration, I find this story to be incredible.³²

All-in-all, the evidence presented on behalf of the Applicant is not sufficient to establish that she requires supervision while she sleeps because she is unable to rouse herself in response to an emergency.

Second, the *main* concern of the Applicant's mother, the Applicant and the occupational therapists relied upon by the Applicant seems to be the Applicant's ability to care for her daughter (and, to a lesser extent, her ability to perform housekeeping activities). Attendant care benefits, however, are usually thought to cover the prescribed cost of reasonable and necessary services required to assist in caring for an insured person who cannot care for himself/herself.

The only case the Applicant could find to support her position that "attendant care" ought to include childcare costs was *Gray v. Macklin*.³³ In this civil action, the plaintiff sought damages as a result of having suffered a traumatic brain injury when thrown from a vehicle that had been driven by the defendant. In addition to many other types of damages awarded to the plaintiff, the court awarded to her an amount for the past and future costs associated with hiring someone to care for her child (who was born after the accident), since the plaintiff's abilities to care for her child had been impaired as a result of the accident. Although the judge calls this head of damages "past and future attendant care expenses," the judge is clearly not awarding "attendant care benefits" under section 16 of the *Schedule*. I am therefore not bound by this decision and find it to be of little assistance (despite some obvious factual similarities).

Normally, if, as a result of an accident, an insured person requires assistance in caring for a dependent, that person can elect to claim caregiver benefits under section 13 of the *Schedule*.³⁴

³²I also find that this raises broader concerns about the reliability of the evidence of Ms. Crowe.

³³[2000] O.J. No. 4603 (Ont. S.C.J.).

³⁴Alternatively, in certain special circumstances, it may be possible to frame a claim for the cost of childcare as a rehabilitation benefit under section 15 of the *Schedule*: see *G.B. v. Pilot Insurance Company*, 2008

To claim caregiver benefits, however, the person asserting the claim must, at the time of the accident, have been living with the dependent person and must have been that dependant's primary caregiver. Since Ms. Ryan did not have a child at the time of the accident, she is barred from claiming caregiver benefits under the *Schedule*. It appears to me that she may be seeking to obtain caregiver benefits under the guise of a claim for attendant care benefits and I find that this is not permitted under the *Schedule*. Ms. Ryan is not entitled to recover, as attendant care benefits, the cost of having someone else care for her daughter, Tiana.

Third, those who support supervision of the Applicant for 16 to 24 hours per day tend to underestimate the importance of the Applicant's significant pre-accident history and her post-accident accomplishments and abilities and overestimate her limitations. There is no compelling evidence that the Applicant's conduct puts her at risk or that recent instances of poor judgment she has shown are related to her brain injury.

The credible evidence suggests that, over the last ten years, on a couple of occasions, the Applicant has left her door unlocked and left the stove or lit candles unattended. She has spoken harshly to her daughter when angry. On occasion, she demonstrates less modesty than her parents would like.³⁵ She has forgotten to remove her laundry from the washing machine and has forgotten to remove her lighter from her pants before they went into the dryer. She has, on occasion, shown bad judgment (for example, breaking into the locked room when her parents were away). Based upon the evidence before me, I am not satisfied that the Applicant has proven that all of these incidents are related to her brain injury.

I take notice of the fact that people without brain injuries have been known to forget things and demonstrate lapses in judgment. In the Applicant's case, her family and those who form her support network (including Deb Crowe and Patricia Fleet) tend to attribute all such incidents to her brain injury. I find this conclusion to be unsupported by the evidence presented. Some instances of forgetfulness or poor judgment could just as easily be explained by the Applicant's

CarswellOnt 431, [2008] I.L.R. I-4675, 58 C.C.L.I. (4th) 23, 232 O.A.C. 356, 89 O.R. (3d) 228, 164 A.C.W.S. (3d) 863, (Ont. Div. Ct.). Ms. Ryan did not advance a claim for rehabilitation benefits in this application.

³⁵Walking around the house in her underwear or covered in a towel.

youth and/or the pressures of being a single parent. One incident that seemed to particularly concern Ms. Murphy was when the Applicant broke into the room that her father had locked before going on vacation. The Applicant's guests, however, assisted her in breaking into that room. These guests showed equally bad judgment in this instance but there is no evidence that any of them suffer from a brain injury.

As for the opinion of Dr. Ahmad, I find that she overestimates the extent of the Applicant's functional limitations. Dr. Ahmad glosses over the fact that the Applicant has undergone numerous neuropsychological tests over the years and has, on most tests, scored in the average range or better. The Applicant has scored well above average on some tests of cognitive ability that are quite difficult. The Applicant, with assistance, completed high school and went on to graduate from college with an "A" average. Dr. Ahmad could not explain the Applicant's excellent performance in college but admitted that she had not explored that issue any further. In her report, Dr. Ahmad purports to review the history of this case but she tends to pull out of previous reports only those parts that support her theory and omits those parts that are inconsistent with her conclusions. Dr. Ahmad testified that the Applicant might not be able to react appropriately to an emergency situation but conceded that the Applicant had been driving since the age of 19, that driving requires the ability to react immediately to sudden, unexpected situations and that no one (including Dr. Ahmad) had recommended that the Applicant stop driving or that her licence be suspended for medical reasons. Dr. Ahmad is concerned that the Applicant may be impulsive but has little evidence to support that conclusion. Such a concern also ignores the fact that, if anything, the Applicant's conduct has been much less impulsive since the accident than it had been prior to the accident.

The parties have agreed that, notwithstanding the Form 1's that have been produced to date, I retain the discretion to award the amount of attendant care benefits that I find appropriate. If I were to depart from the findings of the occupational therapists who conducted the attendant care needs assessments in this case, the number of hours of attendant care I find to be required by the Applicant would have to be based upon the evidence before me.

I reject as being unreasonable and unsupported by the evidence the Applicant's position that, from April 25, 2006 through September 27, 2007, she required 481.6 hours per month of attendant care (16 hours per day) and that from September 28, 2007 onwards, she required (and continues to require) 722.4 hours per month of attendant care (24 hours per day). While I find that the Applicant is still suffering from the lingering affects of an injury to the frontal lobe of her brain, I am not satisfied that her impairment is so significant that she requires the amount of attendant care that has been claimed.

This case is distinguishable from *Michalski and Wawanesa*³⁶, in which the Applicant, a wife and mother of two, functioned after a brain injury much like a two year old child and could not be left unattended and from *Morrison v. Greig*³⁷, in which the plaintiff's brain injury left him without the sense of smell, the ability to feel temperature or hunger or to control his anger and was found, if left unattended, to pose a danger to himself and others. Compared to Mrs. Michalski and Mr. Morrison, the residual cognitive and emotional impairments experienced by Ms. Ryan that can be attributed to the 1998 accident are relatively mild.

While there is evidence that Ms. Ryan's physical, psychological and cognitive impairments may have some impact upon her ability to work, to care for her daughter and to perform housekeeping tasks, the central issue before me in this application is Ms. Ryan's ability to care for herself and the amount of attendant care, if any, that she reasonably requires.

I find that the Applicant requires assistance managing her finances and that she requires assistance in planning her activities and keeping her appointments. This is consistent with the Form 1's completed by Matt Sutherland. As for the number of hours of attendant care that is reasonable, there is no evidence before me that would support finding that the Applicant requires a specific number of hours of attendant care different from (i.e., greater than) the amount recommended by Matt Sutherland. I therefore accept Mr. Sutherland's opinion as to the attendant

³⁶(FSCO A03-001363, December 13, 2005).

³⁷[2007] O.J. No. 225 (Ont. S.C.J.).

care benefits required by the Applicant, as set out in the Form 1's he prepared (i.e., \$649.52 per month).

Conclusion

For the foregoing reasons, in accordance with paragraph 16(2)(a) of the *Schedule*, I find that from April 25, 2006 onwards, the Applicant is entitled to attendant care benefits in the amount of \$649.52 per month. The Applicant is also entitled to interest on any overdue payments of these benefits pursuant to section 46(2) of the *Schedule*.³⁸

EXPENSES:

The parties made no submissions on expenses. If they are unable to resolve this issue, either party may make an appointment for me to determine the matter in accordance with Rules 75 through 79 of the *Dispute Resolution Practice Code*.

Richard Feldman
Arbitrator

February 17, 2009

Date

³⁸Since insufficient evidence was adduced on this issue, I am not making any finding at this time with respect to whether any attendant care benefits are (or have ever been) overdue.



FSCO A07-000989

BETWEEN:

MELANIE RYAN

Applicant

and

ING INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. In accordance with paragraph 16(2)(a) of the *Schedule*, from April 25, 2006 onwards, the Applicant is entitled to attendant care benefits in the amount of \$649.52 per month.
2. The Applicant is entitled to interest on any overdue payments of these benefits pursuant to section 46(2) of the *Schedule*.
3. The decision on expenses is reserved, to be resolved in accordance with Rules 75 through 79 of the *Dispute Resolution Practice Code*.

February 17, 2009

Richard Feldman
Arbitrator

Date