

**IN THE MATTER OF AN ARBITRATION PURSUANT TO  
Section 148.2(1) of the Revised Regulations to the Insurance (Vehicle) Act  
(includes amendments up to the BC Reg. 126/2014) and**

**AND**

**Arbitration Act, RSBC 2020, c. 2**

**BETWEEN:**

**RJ**

**CLAIMANT**

**AND:**

**INSURANCE CORPORATION OF BRITISH COLUMBIA**

**RESPONDENT**

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**QUANTUM AWARD**

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Dates of Hearing	November 12-13, 15, 18-20, December 5, 2024
Place of Hearing	Vancouver, BC
Date of Oral Submissions	December 19, 2024
Date of Award	February 14, 2025

## **A. Introduction**

1. This is a claim for compensation for injuries sustained by the claimant, Ms. RJ pursuant to underinsured motorist coverage (“UMP”) afforded by the *Insurance (Vehicle) Regulation*.
2. The motor vehicle accident which gives rise to this proceeding occurred on November 26, 2018. Ms. RJ was the driver of a vehicle that was travelling eastbound on 96<sup>th</sup> Avenue, near 120 Street-Scott Road-in Surrey, BC. Mr. was the driver of a vehicle that was travelling westbound on 96<sup>th</sup> Avenue. The accident occurred when Mr. FT turned left, and struck the claimant’s vehicle.
3. After a hearing in October 2023, I found Mr. FT solely liable for the motor vehicle accident. This award therefore addresses only quantum of damages.
4. A tort proceeding was commenced by the claimant. It was settled for the available insurance limits. The UMP claim proceeded with the consent of ICBC.
5. In making this award I have considered, but have not referred to, all the evidence that was put before me.
6. It was agreed that the issues regarding any applicable deductions pursuant to s. 148.2 of the *Insurance (Vehicle) Act* will be dealt with after this award, in a separate hearing if necessary.

## **B. Evidence of the claimant**

### **(a) Background, education and work history**

7. Ms. RJ was born in India on May 1, 1980. She immigrated to Canada in 2000. She is divorced, with no children. I only mention her marital status because the sequelae from the demise of her marriage may be of some import in this proceeding.
8. Ms. RJ's post-secondary schooling in India consisted of a year of economics at Guru Nanak Dev University in Amritsar, India. She was employed in India as an elementary school teacher at the time she immigrated.

9. Ms. RJ worked at various jobs since arriving in Canada, including as a greenhouse plant cleaner, on production lines, at a bakery, as a retail clerk at a corner store, packing vegetables and food, and at an electrical manufacturing company.

10. In 2005, Ms. RJ started a kitchen cabinet business with her now ex-husband. She left that business when they separated in 2007. The business manufactured, assembled and installed kitchen cabinets. She attended to most of the business side of the operation, including payroll, accounting, small onsite repairs, picking up supplies, and banking.

11. Ms. RJ worked for a co-operative housing management company from May 2013 to end of 2014. She was unable to work from May to August 2014 because of work related stress. She eventually left because she wanted a raise and they would not give it to her.

12. Ms. RJ worked in Marketing from January 2015 to November 2015. Her evidence was that she consulted her general practitioner for stress related issues arising from that job.

13. Ms. RJ's last employment prior to the motor vehicle accident was from September 2016 until March 2018. Her position was one with a measure of responsibility and was akin to an insurance claims person. Her evidence was that she does not recall any negative job performance evaluations.

14. However, she had many conflicts at work, principally due to the actions of one of her co-workers. The resulting stress caused her to seek medical attention. She was put on medication and received counselling. She requested time off, but that was not provided. Her employment was subsequently terminated. She retained a lawyer. Her claim was settled. Monies were paid to her, she received credit for her employment, and she received a letter of reference.

15. After leaving, Ms. RJ decided to become a real estate agent. She took three courses toward that end in March 2018. She then signed up for classes at UBC and at a private institution. She was applying for jobs at the same time. She had been advised that she could receive support from Employment Insurance for one year to allow her to re-educate herself for another job. She expected to write her real estate agent's exam in December 2018.

16. In September 2018, Ms. RJ enrolled at CDI College for a one-year (38 week) course in management and digital marketing. She delayed commencing that because of the accident. This was to conclude in May 2019.

17. Ms. RJ's pre-accident earnings were as follows:

Year	Employment income	Employment Insurance benefits	Total income
2013	\$40,249	\$1212	\$41,461
2014	\$9926	\$14,322	\$24,428
2015	\$33,562	\$6028	\$39,590
2016	\$13,518	\$16,039	\$29,557
2017	\$49,394	Nil	\$49,394
2018	\$32,905	\$18,771	\$51,676

18. I once again note that the accident was in November 2018.

19. Ms. RJ had an active recreational and social life prior to the accident. She hiked, played badminton, played with her niece and nephew, fostered two dogs, went to temple, sewed dresses for herself and family, sewed religious head coverings that she donated to others, and went to the gym. She also enjoyed cooking at home, for herself and others.

**(b) Pre-accident health and activities**

18. Ms. RJ suffered from depression and suicidal ideations after her marital separation in 2007, for which she sought medical attention, and as result of which she missed work. She took anti-depressants and received counselling. She continued to take anti-depressants on and off through 2018.

19. Ms. RJ suffered various forms of mental and physical abuse during and after her marriage. She was diagnosed with both post-traumatic stress disorder (“PTSD”) and depression as a result of the abuse in the marriage. It also appears that she attempted suicide the day she left the marriage, but the evidence surrounding that was not particularly clear.

20. There is some evidence that Ms. RJ suffered from headaches prior to the accident. These appear on the evidence to be infrequent, and not incapacitating.

21. In March 2018, following her departure from her employer Ms. RJ started taking different medications. She did not react well to the changes, and she checked herself into Surrey Memorial Hospital (SMH”) on March 23, 2018 as a result of suicidal ideations. The discharge summary from the SMH visit states, inter alia, “SITUATIONAL CRISIS... DISCHARGED WITH APPROVAL” [emphasis in the original].

22. Both one month prior to and one month following the SMH admission, Ms. RJ’s psychiatrist Dr. Gandhi noted that she was doing well. Her evidence was that she stopped taking anti-depressants altogether following the SMH admission. This is confirmed by Dr. Gandhi’s clinical note of November 29, 2018.

**(c) The motor vehicle accident**

24. The accident occurred about 230PM on November 26, 2018. Ms. RJ said that there were gaps in her memory following the impact. She recalls getting out of the car and walking to the closest area where she could sit down. She recalls someone yelling at her very loudly, and a fireman keeping that person away from her. She learned at some point that the person was the father of the driver.

25. She does not recall sustaining any cuts, abrasions or bruises in the accident. She does not recall striking her head.

26. Ms. RJ was taken by ambulance to SMH. She was extremely shaken. Her main complaints were her right knee and both shoulders. She does not remember what if anything was discussed at SMH regarding a loss of consciousness. The SMH records do not reference a head injury.

**(d) The claimant's post-accident employment, education and activities**

17. In the summer of 2019, Ms. RJ worked at various part time casual jobs, doing housecleaning and staging houses. Her evidence was that she was not able to work more than two or three hours at a time.

18. Ms. RJ returned to her CDI course at the beginning of 2020. She completed her diploma at the end of 2020. She did these courses online, and part time. She passed all her courses, with a 79% average. As part of her course, she did a practicum. She was graded well on her performance, and eventually was hired to work there.

19. In 2021, Ms. RJ worked for a financial services company. In 2022 she worked for a recycling company. All of these positions were part time. Her evidence was that she found the jobs "overwhelming". She last worked in November 2022.

20. Ms. RJ attempted to return to her real estate courses but was unable to write the Exams.

21. Ms. RJ applied for Canada Pension Plan disability benefits in 2022. She said that her application was denied, because she had employment income that year. She said that denial decision has been appealed.

22. Ms. RJ said that her activities had been severely curtailed as a result of the accident. Her evidence was that she was unable to cook, engage in regular physical activities such as the gym, badminton and the like, sew or socialise.

**C. History of the claimant's symptomology, and her current condition**

23. Ms. RJ immediate complaints post-accident were of pain in the middle of her back, jaw, and right knee. She said her fingers and toes were numb, and she had a

hard time holding her head up. Three days after the accident she told Dr. Mandeep Gill, her family doctor, that she was having memory issues. This has been a persistent complaint. Three weeks after the accident, Dr. Gill's notes indicate that he thought she had a likely concussion.

24. Ms. RJ suffers from chronic pain in her neck, back, and right knee. As well, she suffers from depression, anxiety, and cognitive issues, all of which further affect her ability to work, and participate in the various recreational and social activities that she participated in prior to the accident. She has frequent migraine headaches.

25. Ms. RJ said that it typically takes her about an hour and half to stabilise once she is awake. She said that after she is up and organised, she is exhausted. She finds it very difficult to clean her house. She said that she has been able to do so, but is too exhausted after to do anything else.

26. Ms. RJ said that she had difficulty determining her personal needs, and in processing speech. She said that she had balance issues, difficulty speaking, and stuttered. She said that she had blurred vision, and her sense of taste and smell are affected. She said that she has difficulty figuring out where she was when she went to medical appointments.

27. Ms. RJ says that she is not able to drive long distances. However, in the summer of 2021 she drove 400 kilometers both ways to Peachland, BC with people she had met on Facebook but did not know well. She said she had assistance navigating to Peachland, but drove entirely on her own on the return trip to Vancouver. I note that her return on her own came about as a result of some unfortunate interactions with her friends.

#### **D. The claimant's medical treatment post-accident**

28. Ms. RJ has had many medical attendances and treatments since the accident including,

- (a) 117 visits with Dr. Gill;
- (b) an MRI at Burnaby Hospital;
- (c) a dentist for jaw pain;
- (d) multiple attendances with two neurologists;
- (e) multiple visits with two psychiatrists;
- (f) numerous massage therapy treatments;
- (g) numerous chiropractic treatments;

- (h) numerous physiotherapy treatments;
- (i) numerous attendances with an occupational therapist;
- (j) trigger point injection and Botox therapies;
- (k) numerous attendances with a vocational rehab specialist;
- (l) hyperbaric oxygen therapy;
- (m) naturopathic treatments.

## **E. Lay evidence**

### **(a) RD**

29. Ms. RD is Ms. RJ's younger sister. She was born in India and immigrated to Canada in 2006. Ms. RJ sponsored her and her family when they immigrated to Canada. She lives with her fourteen- and eleven-year-old children and her husband.

30. Ms. RD said that prior to accident Ms. RJ was her mentor, and was her only family member in Canada. They saw each other three to four times per week, in each other's homes and elsewhere. They engaged in a variety of activities together including events and activities with the children, family celebrations, sports, games, and so on. Ms. RD described Ms. RJ as a second mother to her children. She would pick up the children when Ms. RJ worked late, and took them out to various activities.

31. Ms. RD said that Ms. RJ was very physically active prior to the accident. She said that her mental health was "perfectly okay". Ms. RJ did not tell her that she had attempted suicide twice, nor that she had been diagnosed with PTSD and anxiety issues. Ms. RD was aware that Ms. RJ was taking medication. Ms. RD was not privy to the details regarding the abusive marriage.

32. Ms. RD observed that Ms. RJ was not well after the accident. She complained about pain all the time. She stayed in a dark room. She was not active at all, and did not want to move out of the house. She would get angry very quickly. She said that Ms. RJ was overwhelmed with simple things.

33. Ms. RD said that Ms. RJ's relationship with her niece and nephew changed after the accident. She could not spend time with them.

34. Ms. RD said that she no longer saw Ms. RJ as much as she used to. She said that when they do get together, they don't do much except visit. They don't do much together other than visit.

**(b) TE**

35. Ms. TE, together with others, runs an organisation for vulnerable women and children which makes and deliver food hampers. Ms. RJ started volunteering with them in approximately the fall of 2023. She worked about once-a-week sorting produce

36. Ms. TE became aware that Ms. RJ had limitations. She often could not make it by the start time of 900AM. or would have to leave early. Ms. RJ said that she was visibly overwhelmed at work. Her words would drop off, she would become confused, and she slurred words.

37. Ms. TE did not know Ms. RJ prior to working together and could not comment on her condition before the accident.

**(c) EC**

38. Ms. EC lives in Ganinokway, ON. She previously lived in North Vancouver, BC. She moved to Ontario at the end of 2012.

39. Ms. EC met Ms. RJ in 2008. They worked together at a Retirement Residence from 2008 to 2012. She said that Ms. RJ was one of her “very best friends, almost like a family member.”

40. Before Ms. EC left BC, she saw Ms. RJ multiple times a week. They would cook together, and go on hikes and day trips. After she left BC, they kept in touch by phone, text, and video. Ms. EC visited Ms. RJ in BC once a year. They would spend two or three days together. She said that now they spend at most a day together because Ms. RJ is exhausted.

41. Ms. EC knew that Ms. RJ had a variety of jobs. She described her as “a go getter” and knew that she wanted to become a realtor.

42. She was not aware that Ms. RJ had any health conditions prior to accident. She was aware that she had been in an abusive relationship. She believes that Ms. RJ had some counselling regarding the abuse issues. She did not know that Ms. RJ had had suicidal ideations.

43. Ms. EC and Ms. RJ now generally speak about once a month. Ms. RJ is not as quick to respond as she used to be. They do not speak about issues as deep as the issues they discussed prior to the accident.

44. Ms. EC and Ms. RJ have taken walks together since the accident. They did a hike at Harrison in 2020 or 2021. Ms. RJ fell down two or three times on a mulched trail, that was not challenging. This was a completely different experience than prior to the accident.



45. Ms. EC said that they have also taken day trips since the accident. They went to a brewery/restaurant in Squamish in 2020 or 2021. Ms. RJ became quite overwhelmed and was very uncomfortable. On Ms. EC visit in 2023 they sat and visited in the dark.

46. Ms. EC has observed that Ms. RJ's home is not as organised as it was before the accident. When she has visited, she has helped her with dishes and observed that there was very little food in house.

47. Ms. EC has seen Ms. RJ in pain. She has seen her take medications, rub herself, and need to lie down and take naps. She said that there was very little left of the original Ms. RJ.

48. Ms. EC said at one stage after the accident that she had talked to doctor about MAID, and that she had been suicidal

49. Ms. EC confirmed that Ms. RJ was not as close to her family as she was prior to the accident.

## **F. Expert medical evidence on behalf of the claimant**

### **(a) Dr. Soma Ganesan**

50. Dr. Ganesan is a psychiatrist. He conducted an independent medical assessment of the claimant on August 17, 2022. He produced five reports.

51. In his report of August 20, 2022, he set out the following diagnoses:

“Post-concussion symptoms, followed by symptoms of mild traumatic brain injury...

Her symptoms now are still moderate.

She continues to suffer from light sensitivity, noise sensitivity, dizziness, balance issues, word finding difficulty, and stuttering. In addition to her memory difficulties she continues to have trouble with multitasking, as documented above.

...

Major depressive disorder, currently at the moderate to severe level. There was a history of adjustment difficulty with depressed mood prior to the motor vehicle accident because of ongoing issues and remarriage as well as pressure at work. However, when the pressures were removed she appeared to become symptom-free and function normally.

Generalized anxiety disorder, moderate to severe. There is no definite evidence of anxiety symptoms prior to the motor vehicle accident. It appears that the symptoms that develop [sic] because of relationship issues and work issues were more on the depressive spectrum.

Post dramatic stress disorder, which is currently moderate to severe. There was probable evidence of post traumatic stress related to her abusive relationship and work issues. However, she was able to overcome the symptoms when the stressors were removed.”

**(b) Dr. Zeeshan Waseem**

52. Dr. Waseem is a psychiatrist. He conducted an independent medical assessment of the claimant on August 20, 2022. He produced two reports. In his report of June 9, 2023 he opined as follows:

“It remains my opinion that Ms. RJ initially sustained a mild traumatic brain injury... sprain/strain soft tissue injuries predominantly of the cervical, thoracic and lumbar spines, and right knee and contusive injuries to her chest and arms as a result of the subject motor vehicle accident.

These injuries have resulted in chronic myofascial pain of the cervical, thoracic and lumbar spines, chronic posttraumatic headaches with migraine features and generalized deconditioning.

...

Ms. RJ has been experiencing symptoms of cognitive disturbance. In the setting of an initial mild traumatic brain injury, these symptoms are known to occur. Such non-specific symptoms can also occur chronically due to other reasons, such as pain, disrupted sleep and psycho-emotional issues.”

53. Dr. Waseem thought that there was a “plausible” biomechanical mechanism of a head injury, namely, Ms. RJ striking her face against the air bag. Based on the history he took, he was of the view that she sustained a momentary loss of consciousness. He agreed that there was no reference to that in the contemporaneous Surrey Memorial Hospital records.

**(c) Dr. Manu Mehdiratta**

54. Dr. Mehdiratta is a neurologist. He examined Ms. RJ on July 7, 2019. He produced three reports. In his last report dated July 17, 2023 made the following diagnoses:

1. traumatic brain injury (“TBI”);
2. post-concussion syndrome;
3. chronic migraines;
4. posttraumatic vestibulopathy;
5. sleep and mood disturbances, and;

6. chronic neck and back pain with reticular symptoms.

55. Dr. Mehdiratta was told that Ms. RJ had depression and PTSD prior to the motor vehicle accident.

56. Dr. Mehdiratta said that Ms. RJ met multiple criteria for a traumatic brain injury. He did not view it as necessary that she sustained a loss of consciousness to make that diagnosis. He also did not think that it was necessary that Ms. RJ had hit her head. He was of the view that acceleration and deceleration during the accident would be sufficient. Finally, he did not think that the Glasgow Coma Score correlated with the presence or absence of a head injury.

57. Ms. RJ reported to Dr. Mehdiratta that she had been diagnosed with a concussion. He said that he did not rely on that in coming to his diagnosis as it was not a clinical finding.

58. Dr. Mehdiratta's statement in his report that Ms. RJ had sustained a moderate to severe brain injury was a reference to its effect, rather than the injury itself. He was of the view that she sustained a mild traumatic brain injury.

## **G. Expert occupational and rehabilitation expert evidence on behalf of the claimant**

### **(e) Dr. Pieter van den Berg**

59. Dr. van den Berg is a registered psychologist and certified vocational rehabilitation professional. He saw the claimant on June 13, 2023, and conducted a vocational assessment. He provided a report dated June 30, 2023, and an addendum report dated August 14, 2024.

61 Dr. van den Berg was of the view that the claimant had "sustained a significant reduction in her vocational capacity, range of jobs, and competitive employability as result of her symptoms and functional limitations" from the accident. He went on to say that she was "precluded from working in any capacity in her current state". However, he was of the view that if she had a positive response to psychological, psychiatric, and a multi-disciplinary chronic pain program, she could return to select jobs in a part-time capacity. She would also require accommodations, and a supportive employer. He is of the view that she is not competitively employable.

61. Dr. van den Berg recommended that the claimant have additional psychological treatment, medication, and a multi-disciplinary pain program.

62. Dr. van den Berg did not disagree that Ms. RJ may have over-reported her symptoms. He noted that when pushed, Ms. RJ was “able to demonstrate increased memory and attention”.

63. Dr. van den Berg thought that Ms. RJ was currently unemployable, but could not rule out a return to work. He was of the view that proper treatment of her symptoms was most important.

**(f) Mr. Matt Cole**

64. Mr. Cole is a kinesiologist, with a practice focused on occupational rehabilitation. He completed two functional capacity evaluations of the claimant, He produced two reports.

65. Mr. Cole was of the view that the claimant showed a high level of physical effort during the tests that were conducted. He was therefore of the view that the assessment may be considered to be a “true and reliable” representation of her functional capacity.

66. Mr. Cole was of the view that the claimant suffered from psychological, cognitive, and physical limitations. Greater work volumes at her current employment could pose a problem to her. He thought that Ms. RJ was “partially disabled”, and that there may be limitation on her ability to work full time

67. Mr. Cole agreed with Dr. Mehdiratta that occupational therapy and housekeeping assistance was required.

68. Mr. Cole recommended various therapies including physiotherapy, chiropractic, active rehabilitation, vestibular therapy, occupational therapy, and hyperbaric therapy. He also recommended a multi-disciplinary pain clinic type program, as well as sessions with a kinesiologist. Mr. Cole provided an opinion as to the costs of the care he recommended.

69. Mr. Cole found that Ms. RJ self-reporting was consistent on some matters, but not on others. He found her reports of pain and disability to be “variable”. However, he found “other measures of reliability [to be] consistent with her behaviour and performance”.

**H. Expert medical evidence on behalf of the respondent**

**(a) Dr. Eugene Okorie**

70. Dr. Okorie is a psychiatrist. He assessed the claimant on August 12, 2022. He prepared three reports.

71. Dr. Okorie did not believe that Ms. RJ suffered a concussion in the accident. He diagnosed an Illness Anxiety Disorder (“IAD”) and Persistent Depressive Disorder

("PDD"). He thought she was misdiagnosed with a concussion, and that she became anxious about that condition. He said:

"Consistent with clinical literature evidence, it is my opinion that Ms. RJ ongoing cognitive concerns are more likely than not attributable to headache, pain, anxiety, depression, sleep disturbance, fatigue, and poor motivation rather than any organic brain pathology."

...

"It is not clear whether Ms. RJ depression and PTSD had remitted [without antidepressants] prior to the subject MVA. In my opinion, her prior depression and PTSD made her vulnerable to developing post-MVA mental disorders.

...

In my opinion, the subject MVA related psychological trauma, headaches/pain, and result in functional limitations aggravated her pre-existent depression [if she was still depressed when the accident occurred] or triggered a relapse of her depression [if she was not depressed at the time of the accident].

...

Pain including headache often intersects with depressive and anxiety disorders, and they relate to one another in a synergistic manner. Given the interdependence between her pain and her emotional syndromes, effective treatment or management of her headache and pain would positively impact her emotional disorders and vice versa."

72. Dr. Okorie recommended combined therapies to treat Ms. RJ IAD and PDD, including anti-depressants, cognitive behavioral therapy ("CBT"), an exercise program, occupational therapy, and pacing, adaptive, and ergonomic strategies to manage pain. He was of the view that these therapies would improve her condition and functioning.

73. Dr. Okorie opined that the longer psychiatric symptoms have existed, the more difficult they are to treat.

**(b) Dr. Russell O'Connor**

74. Dr. O'Connor is a physiatrist. He examined Ms. RJ on August 22, 2022, and prepared a report also dated August 22, 2022. Dr. O'Connor noted the same physical injuries noted by Dr. Waseem. He said:

"Neck Pain. The neck pain, in my opinion, is related to an initial musculoligamentous strain to the neck. This persists and she is still rating this

into anywhere from mild-to-moderate range on a daily basis and it is the typical thing that triggers her headaches.

Headaches. The headaches seem to be of two patterns. One is a chronic posttraumatic tension-type headache. This is something that is there daily and bothers her on a regular basis. She also has more intermittent migraines which have associated nausea and some vomiting once or twice per month, and sensitivity to light and sound.

Low back and midback pain. This mechanical pain, in my opinion, is soft tissue in nature and likely related to her deconditioning an initial strain to the mid and low back. This bothers her 2 to 3 days per week.

75. Dr. O'Connor said that it was possible that Ms. RJ had suffered from a concussion but could not say that with any certainty. If she had sustained a concussion, he agreed that this would more likely exacerbate pre-existing mood and depression issues. He agreed with Dr. Waseem that cognitive and memory complaints could be the result of a concussion, or could be the result of headaches, neck pain, and intense fear and anxiety.

**(c) Dr. Meera Gupta**

76. Dr. Gupta is a neurologist. She authored two reports.

77. Dr. Gupta thought it was possible that Ms. RJ had suffered a concussion, but considered that unlikely.

78. In her report of July 6, 2023 Dr. Gupta said:

“It is my opinion that Ms. RJ developed post-traumatic migraine headaches as a result of the subject MVA. She did have a pre-existing history of migraine but the frequency is uncertain. Despite this uncertainty, it does seem that there was a significant increase in headaches as a result of the subject MVA.”

79. Dr. Gupta opined that Ms. RJ reports of cognitive issues following the accident were predominantly due to psychological and pain issues, and not due to a brain injury.

**I. Expert occupational and rehabilitation expert evidence on behalf of the respondent**

**(a) Michael Smith**

80. Mr. Smith is an occupational therapist. He authored two reports. He assessed Ms. RJ in her home, over three days from September 7-9, 2022. The assessments totaled 22 hours.

81. Mr. Smith saw some inconsistencies regarding Ms. RJ view of her functional capacity to work. He noted numerous inconsistencies in her disability and pain rating. He was of the view that Ms. RJ success for future work would be dependent on the type and amount of cognitive stress required. He thought that Ms. RJ was capable of working as a realtor but questioned her ability to excel at that work.

82. Mr. Smith was of the view that Ms. RJ was capable of working. He thought that she was working full time.

83. Mr. Smith recommended certain future care for Ms. RJ and provided an estimate of the costs of same.

## **J. Expert economic evidence of behalf of the claimant**

### **(d) Mr. Robert Wickson**

84. Mr. Wickson is a consulting economist. He provided three reports.

85. Mr. Wickson is of the view that Ms. RJ's loss of earnings to the date of the hearing is between \$267,700, and \$275,000. The first figure is based on the earnings of a female with a non-university college diploma, and the second on the earnings of a female realtor. These figures are subject to various reductions for periods of unemployment, and the like.

86. Mr. Wickson opines that Ms. RJ's future losses are between \$922,20 and \$977,300. The first figure is based on the earnings of a female with a non-university college diploma, and the second on the earnings of a female realtor. These figures are subject to various reductions for periods of unemployment, and the like.

87. Mr. Wickson opined that the present value of the costs of future care recommended by Mr. Cole were between \$720,033 and \$879,334.

## **K. Expert economic evidence on behalf of the respondent**

### **(a) Thomas Steigervald**

88. Mr. Steigervald is an economist. He prepared five reports.

89. Mr. Steigervald opinion was that Ms. RJ's loss of earnings from the date of the accident to the date of the hearing were \$231,575. This figure is based on the earnings of a female with a non-university college diploma. This figure is subject to various reductions for periods of unemployment, and the like.

90. Mr. Steigervald's opinion was that Ms. RJ's future income was loss was \$872,000, based on the earnings of a female with a non-university college diploma. This figure is subject to various reductions for periods of unemployment, and the like.

91. Mr. Steigervald opined that the costs of future care recommended by Mr. Smith were between \$144,883 and \$227,446.

## **L. The nature and extent of the claimant's injuries**

92. This is the central issue in this case. It is my conclusion that Ms. RJ suffers from a mild traumatic brain injury, as opined by Drs. Ganesan, Waseem, and Mehdiratta. I note that this diagnosis is supported by the initial clinical observations of Dr. Gill. Further it could not be ruled out by Drs. Okorie, O'Connor and Gupta. This condition has severely limited Ms. RJ's ability to engage in day-to-day activities, including employment. I am of the view that these conditions were caused by the accident. In reaching these conclusions I have considered the claimant's evidence, the respondent's challenges to her credibility, the evidence of the other lay witnesses, and the expert medical evidence.

### **(a) Credibility and reliability**

93. Counsel have referred me to several cases, all of similar import, to assist me in determining the credibility and reliability of Ms. RJ evidence. A useful summary is found in *Julian v. Joyce*, 2016 BCSC 1417, affirmed 2017 BCCA 2017, as set out below:

[35] In order to assess the evidence, I must consider the credibility and reliability of the witnesses. The factors to be considered when assessing credibility were summarized in *Hardychuk v. Johnstone*, 2012 BCSC 1359 (citing *Bradshaw v. Stenner*, 2010 BCSC 1398:

[8] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398 (CanLII), as follows:

“Credibility involves an assessment of the trustworthiness of a witness’ testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11(SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness’ evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross—examination, whether the witness’ testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926], 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. [354] (B.C.C.A.) [*Faryna*]; *R.v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the



evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).”

[9] Where, as here, a Claimant’s case relies on subjective symptoms with little or no objective evidence of continuing injury the court must be exceedingly careful in examining the evidence and assessing credibility: *Price v. Kostryba* (1982), 1982 BCSC 36, 70 B.C.L.R. 397. If deliberate falsehood is established it may be difficult to disentangle truth from deceit and some truthful aspects of the Claimant’s testimony may lose their force, particularly in the absence of corroboration. That being said, when a Claimant is accused of deliberate deceit more than speculation or innuendo is required. A charge of deliberate deceit under oath is a serious attack on an individual’s integrity which should not be lightly treated or lightly made: *Halteren v. Wilhelm*, 2000 BCCA 2 (CanLII); *Edmondson v. Payer*, 2011 BCSC 118 (CanLII); *Vasiliopoulos v. Dosangh*, 2008 BCCA 399 (CanLII).

[10] The typical starting point in a credibility assessment is to presume truthfulness: *Halteren*. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness’s evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[11] The presumption of truthfulness will be displaced by convincing evidence of deliberate falsehood. Such evidence may take many forms. There is no hard and fast rule as to how falsehood on a Claimant’s part may be demonstrated in a personal injury action. In my view, however, in most such cases fairness will require that a Claimant be given an opportunity to respond directly to an assertion of deliberate untruthfulness before his or her credibility, as distinct from reliability, is successfully impeached: *R. v. Lyttle*, 2004 SCC 5 (CanLII); *Browne v. Dunn*, (1893) CanLII 65 (FOREP), 6R. 67 (U.K.H.L.).

94. The respondent points to several things to impugn Ms. RJ’s credibility. These include a misstatement on her resume as to her education, inconsistent evidence regarding the trip to Peachland, BC, and comments made regarding her effort or lack of effort during testing by Dr. van den Berg, Mr. Smith and Mr. Cole.

95. Ms. RJ's evidence regarding the misstatement that she had a college degree is troubling. However, I am not prepared to reject the rest of her evidence as a result of that. I agree that the drive to and from Peachland, BC is inconsistent with Ms. RJ's evidence regarding her ability to drive. However, in my view the drive took place under extenuating circumstances. Finally, none of Dr. van den Berg, Mr. Smith and Mr. Cole said that Ms. RJ was being dishonest.

96. Weighing against the matters particularly referred to by the respondent is the evidence of the other lay witnesses, Ms. RD, Ms. RE, and Ms. EC. They provide unequivocal corroboration of the claimant's evidence regarding her abilities and limitations. That these witnesses were not fully aware of her prior difficulties is not in my opinion an answer to their evidence regarding Ms. RJ's current limitations. Further, Ms. RD and Ms. EC both corroborated the claimant's evidence regarding the impact of her injuries on her.

**(b) Were the claimant's current difficulties caused by the accident**

97. I accept that Ms. RJ's current condition was caused by the accident. This is regardless of whether she suffered a head injury or not.

**(c) What is the claimant's prognosis**

98. I accept that Ms. RJ's prognosis is poor. I also accept that with the various therapies recommended by the various practitioners, there is room for improvement. However, the extent to which she might improve is in my view uncertain. I am certainly not persuaded that she will return to her pre-accident functional level.

**M. Damages**

**(a) Non-pecuniary damages**

99. I accept that before the accident, Ms. RJ was independent, outgoing and active, and employable. She most certainly had a history of depression and anxiety. Regardless, I accept that her life has been significantly altered because of ongoing pain and fatigue, and a consequent inability to work, which is markedly different than her pre-accident condition

100. The list of factors that I am to consider in making an award of non-pecuniary damages includes:

- The age of the claimant;
- The nature of the injuries complained of;
- The severity and duration of the pain;
- Disability;
- Emotional suffering;
- Loss of enjoyment of life;
- Impairment of family, marital and social relationships;

- Impairment of physical and mental activities;
- Loss of lifestyle; and,
- The claimant's stoicism.

101. See, for example, *Stapley v. Hejslet*, 2006 BCCA 34.

102. Counsel have provided me a number of cases which support their views regarding an appropriate award of non-pecuniary damages. Claimant's counsel said that an appropriate non-pecuniary damage award would be in the range of \$220,000 to \$280,000, or \$250,000. Respondent's counsel said that if I accepted that the claimant's current condition was caused by the accident, then an appropriate award of non-pecuniary damages would be \$50,000 to \$62,500, a reduction of 50% from \$100,000 to \$125,000, based on her "inherent baseline" pre-existing condition. See, for example, *Crane v. Balmforth*, 2014 BCSC 1899.

103. After considering all of the factors referred to in *Stapley*, supra, I conclude that a fair award of non-pecuniary damages is \$175,000. I am not persuaded that there ought to be a deduction on account of "inherent baseline". Unlike the *Crane* case, supra, I am of the view that the accident was the proximate cause of the claimant's current condition.

**(b) Loss of earnings**

104. The test for whether the claimant should be awarded damages for past and future income losses is the same: whether there is a real and substantial possibility of loss. See, for example, *Morlan v. Barrett*, 2012 BCCA 66, *Reilly v. Lynn*, 2003 BCCA 49, and *Brundidge v. Bolton*, 2018 BCSC 343. Assessing the claimant's damages is not a matter of calculation. Rather, it is a matter of judgement.

105. In *Rosvold v. Dunlop*, 2001 BCCA 1, [2001] B.C.J. No. 4, the Court of Appeal summarized the approach that a trier of fact should take in assessing damages for loss of income earning capacity:

[8] The most basic of those principles is that a Claimant is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a Claimant's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a Claimant's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

[9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leoneti* [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

...

[11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995) 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a Claimant's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the Claimant if the accident had not happened with the Claimant's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.); *Parypa v. Wickware supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

106. I am also mindful of the Court's review of the principles regarding contingent deductions in what is known as the "Grauer Trilogy": *Dornan v. Silva et al.*, 2021 BCCA 228, *Lo v. Vos et al.*, 2021 BCCA 421, and *Rab v. Prescott*, 2021 BCCA 345.

107. My task in assessing the claimant's future losses has been described as "gazing into a crystal ball". Above all else, I must strive to be fair. The process is more art than science. See, for example, *Shapiro v. Dailey*, 2012 BCCA 128.

108. To summarise the principles as set out in the foregoing cases:

- (a) My task is to put Ms. RJ in the same position she would have been in, not better, and not worse, but for the accident;
- (b) Ms. RJ's damages under this head are a matter of assessment, and not calculation;
- (c) Ms. RJ's earnings prior to the accident are a useful but not the only factor to consider;
- (d) There must be a "real and substantial possibility" that Ms. RJ's impairment has resulted and will result in losses;

(e) I may make contingency deductions from the loss of earnings award based on hypothetical events. Again, there must be a “real and substantial possibility” of the hypothetical events, and not a speculative possibility: see in particular the Grauer Trilogy. This is a two stage process. First, I must review the evidence to determine based on the evidence the likelihood of that event happening; and,

(f) Above all else, the award must be fair and reasonable.

109. With these principles in mind, I turn now to a consideration of the evidence. I do not think that the evidence establishes that Ms. RJ would have worked as a real estate agent but for the accident. There was no evidence before me as to the feasibility of that occupation, whether it was something that Ms. RJ was suited to, nor the length of time required to establish herself in that job.

110. As I have said Mr. Wickson is of the view that Ms. RJ’s loss of earnings to the date of the hearing is between \$267,700, based on the earnings of a female with a non-university college diploma

111. Mr. Steigervald’s opinion was that Ms. RJ’s loss of earnings from the date of the accident to the date of the hearing were \$231,575, based on the earnings of a female with a non-university college diploma

112. Without consideration of any possible negative contingencies not considered by the experts, I assess Ms. RJ’s lost earnings to the date of the hearing at \$250,000, less income actually earned of \$26,418 for a net loss of earning to the date of the hearing of \$223,582.

113. Mr. Wickson opines that Ms. RJ’s future losses are between \$922,200 and \$977,300, based on Ms. RJ either working as a female with a non-university college diploma, or a realtor.

114. Mr. Steigervald’s opinion, based on Ms. RJ being a female with a non-university college diploma was that Ms. RJ’s future income was loss was \$897,000.

115. Without consideration of any possible negative contingencies not considered by the experts, I assess Ms. RJ’s future loss of earnings at \$900,000.

116. I have considered Ms. RJ’s earnings prior to the accident. Because Ms. RJ was in transition at the time of the accident, they are not particularly helpful in terms of predicting future events, but they do assist me in determining whether I should apply a negative contingency deduction for unemployment due to pre-existing mental health issues. I note no significant mental health related absences in 2017, while she was employed at the most demanding job Ms. RJ had worked at, in a very stressful work environment. I also note however that Ms. RJ eventually sought medical attention for mental health issues arising out of that

employment. She had also previously sought medical attention for mental health issues arising out of her employment in two previous roles.

117. Applying the two-stage process outlined in the Grauer Trilogy, it is my view that there is sufficient evidence of recurring mental health issues before me to apply a negative contingency to Ms. RJ's income loss claims. I assess that negative contingency at 25%. Accordingly, I discount the loss of earnings to the date of the hearing to \$167,686, and Ms. RJ's future earnings to \$675,000.

118. I also apply a further negative contingency of 10% to Ms. RJ's future earnings to reflect a possible return to work in some form at some point in the future. Accordingly, I assess her further earnings claim at \$607,000.

### **(c) Cost of future care**

119. The test for recoverability of future care costs was set out by Madam Justice Garson in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Writing for the Court she stated:

I do not consider it necessary, in order for a Claimant to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.

120. I must assess, and not calculate, future care costs. See *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at paragraph 21.

121. As previously noted, Mr. Wickson opined that the present value of the costs of future care recommended by Mr. Cole were between \$720,033 and \$879,334. Mr. Steigervald opined that the costs of future care recommended by Mr. Smith were between \$144,883 and \$227,446.

122. The evidence was that Ms. RJ had spent \$131,178.34 on care, treatment, and medications in the six and a half years since the accident, and that \$96,324.23 had been reimbursed by the respondent in respect of same. These figures suggest that cost of care recommended by Mr. Smith is inordinately low.

123. The respondent says that only care costs causally related to the accident are to be considered. I agree with that. However, I have determined that Ms. RJ's current condition as described is causally related to the accident, and that her prognosis is poor. With these matters in mind, I accept Mr. Cole's assessment of Ms. RJ needs over Mr. Smith's assessment.

124. In all the circumstances, and having considered all the evidence, I assess Ms. RJ's future cares cost at \$720,033, the lower end of the range opined by Mr. Cole, and calculated by Mr. Wickson, as set out in Table D of Mr. Wickson's report of October 7, 2024.

125. It is my view that there is sufficient evidence of recurring mental health issues before me to apply a negative contingency to the claim for costs of future care. Once again applying the two-stage process outlined in the Grauer Trilogy, I assess that negative contingency at 25%. Accordingly, I discount the cost of future care claim from \$720,033 to \$540,024.

**(d) Special damages**

126. The claim for special damages was presented at \$34836.11. The respondent took reasonable issue with several items totalling \$844.09. I therefore assess special damages at \$33,992.02.

**N. SUMMARY**

125. In summary I make the following assessments:

- (a) non-pecuniary damages-\$175,000;
- (b) loss of earnings to the date of the hearing-\$167,686;
- (c) loss of future earnings -\$607,000;
- (e) cost of future care-\$540,024; and,
- (c) special damages-\$33,992.02.

126. These total \$1,523,702.02, and are subject to the deductions set out in s. 148.2 of the *Insurance (Vehicle) Act*.

127. Unless there is something of which I am not aware, the claimant will have her costs of the arbitration.

128. May I please hear from counsel within 30 days as to how they wish to proceed regarding deductions and costs.

*Mark Tweedy*

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Mark Tweedy, C. Med. C. Arb.  
Arbitrator

