IN THE MATTER OF THE UMP ARBITRATION

PURSUANT TO Section 148.2(1) of the Revised Regulations to the *Insurance (Vehicle)* BC Reg 447/93) and The *Arbitration Act*, RSBC 1996, c.55 (the "Act")

BETWEEN:

KT

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

DECISION

Counsel for the Claimant, [redacted]	Michael A. Huot and Mi Sun Cho
Counsel for the Respondent Insurance Corporation of British Columbia	C. Peter Collins
Date of Hearing:	October 5, 6, 7, 8, 9, 13, 14, 15 and 16, 2020
Place of Hearing:	Video Conference
Arbitrator:	Donald W. Yule, Q.C.
Date of Decision:	November 30, 2020
Date of Revised Decision:	January 11, 2021

INTRODUCTION

1. This arbitration is to determine the underinsured motorist ("UMP") compensation to which the Claimant is entitled as a result of a motor vehicle accident that occurred on January 2, 2015 on Highway 17 in Delta, British Columbia. Liability for the accident is admitted. The parties have agreed that the amount of applicable deductible amounts is to be determined either by agreement or by further hearing after delivery of these reasons for judgment. All heads of damage are contested.

2. By way of an Agreed Statement of Facts (Exhibit 1) the parties agreed to multiple facts. With respect to the accident, the Claimant was seated in the right rear seat of a northbound stopped vehicle. A driver and two other passengers were in the vehicle. The Claimant's vehicle was rear-ended at high speed and was pushed forward colliding with a taxi in front. Both the Claimant's vehicle and the taxi were written off. Photographs of the three vehicles are annexed as exhibits.

3. With respect to the Claimant's educational background, she attended Camosun College from September 1998 to April 1999. From September 1999 to April 2004 she attended Emily Carr University and BCIT earning a bachelor degree in industrial design. From September 2015 to December 2015 she attended Langara College and completed an Adobe InDesign Level I course. In September 2017 the Claimant returned to Emily Carr University and BCIT for the Communication Design Essentials certificate program. Although the program is a 12 month full term program the Claimant took two years to complete it, graduating in October 2019.

4. With respect to employment, the Claimant commenced working at [redacted] on February 1, 2012 as a full time design and fabrication team member. Her starting salary was $16 per hour which has increased to $20.50 per hour by the time of the accident. Her duties included vinyl application, design layout, supervision and project management. Prior to the accident the Claimant had been offered a management position at [redacted] as print production manager but she did not return to work after the accident. The Claimant also was self-employed doing design consulting

work through [redacted] which she has continued to do on a minimal basis since the accident.

EVIDENCE OF THE WITNESSES

The Claimant

5. The Claimant was born on June 12, 1979 in Poland. She is now 41 years of age. She came to Canada with her parents at age 8 and learned English in Canada. She has a very close relationship with her older sister. The Claimant currently lives in Victoria in a common-law relationship with [redacted].

6. As a youth she was very active physically. She played volleyball on a BC representative team and also engaged in tennis, badminton, swimming, cycling, snowboarding and skiing. She was also interested in the visual arts visiting museums, looking at art and drawing. She graduated from high school in Victoria in 1998. She graduated from Emily Carr in 2004 with a degree in Industrial Design. She worked for a number of years assisting her mother, who had been in a car accident, in a Polish deli called [redacted]. She moved to Montreal for two years to experience the city even though she did not know French. In February 2012 she obtained employment at [redacted]. This was heavy work including loading giant 30 lb. rolls of vinyl onto machines as well as computer work and talking to customers. There was a lot of bending and lifting but she had no problem with the physical aspects. She enjoyed the teamwork, the design aspect as well as dealing with customers. She at times worked overtime and on weekends. Shortly before the accident she accepted a promotion to print production manager effective January 4, 2015 at an annual salary of $50,000 plus benefits and bonus opportunities. (Exhibit 1 – Tab E). There was a possibility of further promotion to operations manager at an annual salary of $65,000. The management positions would continue to require performing some physical work. While at [redacted] the Claimant had performed a supervisory role coordinating work on the [redacted]. The Claimant had a good relationship with the owner of [redacted], enjoyed the work there, and intended to continue with that company in the future. Her partner is a professor of environmental studies at the University of Victoria. The two had

separate careers and they thought they could work things out if [redacted] changed universities. After the accident [redacted] did accept a position at the University of British Columbia because it offered higher pay, although both the Claimant and her partner preferred to be on Vancouver Island. They did not plan to have children. The Claimant loved working and wanted to do so until her body gave out. sports and recreation as well as a social circle were big parts of her life. She enjoyed hiking and had hiked the West Coast Trail, Golden Ears Park and local mountains. She had gone surfing with friends, gone rock climbing and done yoga with her sister. She was energetic, ambitious, "happy and ready to go". She had an excellent relationship with her partner. They split the rent equally and split the housework. Prior to the accident she had been diagnosed with celiac disease and low bone mass density. She had some emotional issues communicating with her mother when she "came out". None of her pre-accident health issues caused her to miss work, slow her recreational activities, or caused psychiatric issues.

7. The accident occurred on January 2, 2015. The Claimant was the right rear seat passenger in a Mazda 4-door hatchback. The vehicle was stopped at a traffic light. There were three other women in the car. The Claimant was wearing a seatbelt. She recalls looking at the ocean on her right, hearing a loud bang and seeing the heads of her friends in the car moving about. A blackness came to her face. When she woke up she was looking at her feet. There was excruciating pain in her back and tingling in her feet and legs. Her body was twisted to the right. Her right arm was locked. She wiggled her toes. The driver said "I think we have been in an accident". She unbuckled her seatbelt. Outside the vehicle people came running to the car. She could see fear in their eyes. The driver of the vehicle who rear-ended them came up and apologized. Ultimately ambulances came. Her friends were taken away first. She could not open her passenger door. She was taken out of the vehicle on a stretcher and a brace put on her neck.

8. She does not know whether she suffered a loss of consciousness. Her last recollection prior to the accident is seeing the ocean. Her first recollection after the accident is looking at her feet. She does not remember feeling an impact. When she opened her eyes there was a blackness coming towards her head. She identified various photographs showing

the extensive damage to the Mazda and the other vehicles. She also identified photographs showing bruising on her body.

9. She was taken to Richmond General Hospital in excruciating pain. The pain was in the low back, left shoulder, right arm and neck and head. She remained at hospital a few hours. No x-rays were taken. She was not given medication on discharge. She took a cab to Vancouver General Hospital where one of the other vehicle occupants had been transported and they were picked up by a friend and taken to a home for the night.

10. That night she was not able to sleep and the pain got worse. She had a huge headache. There was tingling in her feet and legs. The next day the father of one of the other occupants came to pick them up and take them back to Victoria. She went the same day to Royal Jubilee Hospital where she was given morphine and x-rays were taken, but she was not kept in overnight.

11. Over the following days she had sharp, burning, throbbing pain in her low back and tailbone, as well pain in the mid-back and left shoulder. She was not able to extend her right arm. There was a throbbing headache, blurry vision, tingling in her legs. She felt in shock, confused and scared. She had a hard time describing to her partner what she was trying to say. For the next six weeks she stayed in bed as much as she could. She had issues with balance and cried a lot. She was drugged up because she was in so much pain.

12. At present she has chronic daily low back pain. It is aggravated if she sits or stands for too long. Sometimes the pain is sharp; sometimes it is numbing or throbbing. There has been no recent improvement.

13. The pain in her neck is primarily on the left side. Previously it was through the whole neck. At times it prevents her from doing anything.

14. With respect to headaches she has migraines every one to three days. She has “ice pick” headaches or sudden pains so sharp she has to stop what she is doing. The “ice pick” headaches occur at least three times a week. There has been a little improvement in the headaches although pushing herself would precipitate headaches.

15. She has pain in her left hip daily. It does not last too long. It is a sharp pain down the leg. This occurs a few times a day, particularly stepping down on a step.

16. With respect to her left shoulder she has daily sharp "rock like" pain which she feels constantly.

17. With respect to her right arm it has healed the best. Sometimes there is tingling in the little and ring fingers of the right hand.

18. She has jaw clicking and jaw pain if she chews something hard which never occurred before the accident.

19. She saw Dr. Bentley on two occasions for independent medical examinations ("IMEs). Dr. Bentley reported degrees of "improvement" in symptoms. The Claimant found the reports confusing explaining that she may have misunderstood the questions or, because the pain varies from day to day, she may have had a good day. There has however been no substantial improvement in her low back and left shoulder. She does not recall telling Dr. Bentley on the second IME that her left hip had resolved. It has not. She continues to have daily tingling in her feet and upper legs which is worse if she sits too long. If she focuses too long on a computer screen she may have blurriness. She has noticed that she sometimes has to read the same line over. She has some sensitivity to bright lights and loud car noise. She is apprehensive on hearing an ambulance.

20. She is currently taking medications for physical pain namely Vimovo, Tylenol #3, extra strength Tylenol, ibuprofen 400. She has previously taken Pregabalin for nerve pain and Zopiclone for sleeping.

21. In terms of treatment she has taken physiotherapy, kinesiology, chiropractic, massage, trigger point injections, acupuncture, pool therapy, occupational therapy and clinical pilates. She has a tens machine which helps. The most effective, although temporary treatment, has been chiropractic, massage and pool therapy.

22. She identified the list of special damages (Exhibit 1 – Tab N).

23. She identified a list of medications and vitamins she is currently taking as well as treatments she would like to take as well as the cost of them (Exhibit 3).

24. She no longer has trouble sleeping unless the chronic pain is bad.

25. She continues to have anxiety both driving a vehicle and as a passenger. It is worse as a passenger and so she has pushed herself to drive. She is not as anxious if she is in control. She constantly checks the mirror for cars behind and is apprehensive of vehicles moving beside her or cutting her off.

26. Her nightmares are better. Once in a while she has a feeling of blackness coming towards her.

27. With respect to her mood she has been dealing with depression and anxiety. She no longer has the same energy or stamina. She tries to think positively and be hopeful. She struggles to stay positive.

28. With respect to cognitive issues it is hard to focus and concentrate. She has difficulty finding the right words. Sometimes she stutters. It is hard to retain information when she is in pain. Prior to the accident she could multi-task, retain information better, focus better, and work at the computer longer.

29. With respect to stamina she gets tired more often and needs to take breaks after half an hour or an hour of activity. She has to plan her day and take time after an activity to rest or stretch or take medication.

30. She is taking counselling respecting communication issues with her partner. She has a hard time talking to her partner. She is frustrated with herself and feels guilt and shame that her partner has to care for her.

31. In a typical day she often awakes really early and has coffee. She does stretching or goes for a walk. In the morning she tries to focus on work, reading emails or using the

computer. Between 11:00 and noon her pain increases. She has a bath a noon. In the afternoon she often has rehabilitation sessions. In the evening she goes for a walk.

32. Prior to the accident she was awake a 6:00 in the morning and went to work by 7:30. She worked a full day. After work she would meet friends. She was socially active, playing squash, running, biking or helping her mother with gardening. She has done no sports since the accident.

33. She has increasing pain if she sits or stands for too long. She cannot lift or bend. Loud sounds stress her. She cannot multi-task and she has neck pain and headaches.

34. In September 2017 she went back to Emily Carr to do the Communications Design Essentials course. She was trying to do something, and be positive. Graphic design is more 2-dimensional than industrial design. Graphic design leads to web designing, designing brochures, corporate letterhead and posters. One simply needs a computer and can work remotely setting your own hours. The Emily Carr course was supposed to be a full time 12 month course. She sought out and received accommodation to do the course in 24 months. She also obtained some extensions and had an altered schedule to avoid back to back classes. She was given a standup desk and allowed whatever breaks she needed. She graduated "with distinction" and was really proud. She worked hard through pain. Sometimes she had to take days off because of headache or back pain after a day of an intense class. She limited her computer time to half hour or one hour stretches. Ideally she would like to work in a graphic studio with others but thinks that with her limitations now she can only do freelance work. She has no existing clients and no network in the community. She identified a resume that she circulated to various potential clients but received no call backs and has had no interviews. She made reference in her resume to the motor vehicle accident because she thought that a prospective employer would notice the gap in employment and ask about it anyway. She is currently continuing to look for part time, flexible work. She can possibly work four to eight hours per week.

35. She has done some freelance design work post-accident through [redacted] for friends and family. These jobs itemized at Exhibit 1 – Tab F have earned her less than $10,000. They did not involve time deadlines.

36. Her social life is completely different. She does not socialize as often or if she goes out she does not stay as long. She sometimes has to leave events because of headache or back pain. She takes painkillers before dinners out and sometimes must go to the washroom to stretch.

37. Her relationship with her partner has changed completely from what was intended. Her partner is now supporting the two of them. Their intimate life has been adversely affected. At one point her partner had to take time off her work because of stress. Currently the Claimant does light dusting and some meals and they have hired someone to do heavy housekeeping work once every two weeks at $60 to $100 per visit. The Claimant has not made beds or washed floors or tubs since the accident.

38. She has been on a number of trips post-accident. She went to Vernon to visit her partner's grandmother when she was alive. She flew to Invermere to see her sister. She has driven to Nanaimo to visit her mother. She went to Poland once for her father's birthday. It was a difficult trip and she took a lot of pain medication. She went to Mexico once and to Hawaii for a rehabilitation session on Vasper machines. She has visited San Jose to meet with [redacted] and did some design work for him.

39. Post-accident she has had no significant income apart from disability benefits from ICBC.

40. She is not the same person either physically or mentally as she was before the accident. She has chronic back pain. Her energy, stamina and ambition are not the same. She has difficulty focusing. Her symptoms worsen during the day. The symptoms have affected her social life and her relationship with her partner. She was previously excited about life and is now uncertain. She misses physical sports which were part of her identity. She views herself as a young woman in an old body.

41. On cross-examination the claimant agreed she had a distinct recollection of unbuckling her seatbelt. She also recalls the driver's curly hair flying in the air at the time of impact. She does not recall feeling a second impact. She wiggled her toes so as to know she was not paralyzed. She recalls another passenger saying that she thought her arm was broken. A man and woman came from the right side of the car and told them the accident was not the fault of the driver of the Claimant's car. An oriental man apologized for the accident. She does not recall what she told either the ambulance attendant or the hospital staff at Richmond General Hospital as to whether she had lost consciousness. She has no sense of time as to how long she was at Richmond General Hospital or at Vancouver General Hospital. The main area of her injury at the time was the low back.

42. At the time of the accident the Claimant's partner was nominated for a position at the University of Vancouver Island in Nanaimo. That nomination was pending. If her partner obtained that position then the two of them would work out how to adjust their relationship with working in different places. After the accident the Claimant's partner took a higher paid position at the University of British Columbia and they both moved to Vancouver.

43. At [redacted] prior to the accident the Claimant's management experience was primarily supervising the [redacted] Project. [redacted] had six to seven total employees and at least two other managers.

44. After the Claimant obtained her industrial design degree in 2004 from Emily Carr she could not find work in that field and so worked for her mother and sister in their food business.

45. She started [redacted] just before she went back to Emily Carr in September 2017. This was her own graphic design business. She agreed [redacted] had an actual graphic designer. While in Montreal she worked in a bakery.

46. In the graphic design course at Emily Carr in September 2017, she worked hard, with accommodations and got almost all A's. Most of the work was on the computer.

47. Post-accident in 2016 she flew to San Jose and stayed a week doing some interior design building concepts for [redacted]. She went to Palm Springs in 2018 for three to four days with her partner. She travelled to Powell River in 2018 to reconnect with friends there. She went to Poland in 2019 for her father's 71st birthday.

48. She recalled that in November 2014 she had complained of a "foggy brain" which was possibly connected to iron poor blood or difficulty with her mother regarding her sexual orientation. She was possibly diagnosed with iron deficiency in 2012 – 2013 and did go for iron infusions. She did not always use iron supplements. In 2006 her ferritin level was very deficient.

49. Her Bachelor in Industrial Design degree is now outdated because it was based on programs that are now outdated.

50. She is having counselling for relationship and communication issues with her mother and with her partner, the latter because of some sexual ambivalence, although she says this issue was resolved a year ago.

51. She identified herself in a photograph at the Reel-to-Reel festival on April 11, 2017.

52. She identified herself and her activities in some video surveillance taken in April 2017 and March 2020. The videos include walking along the beach at UBC, driving a car in traffic on Cambie Street and on Fraser Street, and lunching at Cardero's Restaurant in Coal Harbour.

53. At present the Claimant takes on average one to two Tylenol #3 a day but does not recall talking to a doctor about reducing this quantity.

54. On re-examination the Claimant added that the "brain fog" did not prevent her from working full time or her other recreational activities. She considered that the surveillance shows her moving more slowly than previously and walking "like an old lady".

[redacted]

55. Ms. [redacted] is the Claimant's older sister. Ms. [redacted] is a friend for the past 20 years. Both generally confirmed the active, vibrant nature of the Claimant pre-accident and the great restrictions in her activities and psychological change post-accident.

56. Ms. [redacted] gave evidence that prior to the accident the Claimant was very active physically and outgoing with lots of friends. She was on the high school volleyball team. She skied and snowboarded. She went biking and rock climbing. The sisters went dancing together and did yoga together. The Claimant went on several big hikes. Mentally she was very sharp and witty, "on the ball" and able to multitask. She was happy with lots of spark in her. The Claimant helped Ms. [redacted] in her food truck business and in the [redacted] business when both family businesses were in need. After the accident, when the Claimant moved to Vancouver Ms. [redacted] saw her sister two to four times a month; usually the Claimant travelled to Victoria. Ms. [redacted]i gave evidence that the Claimant worked hard on her recovery and coping with pain which got a little better but left her significantly restricted. To Ms. [redacted]'s observation now the Claimant is not "driven" nor as outgoing; she has been depressed and lost that "spark" for life. She does not sit for long periods of time and it is horrible to be in a car with her especially as a passenger. The Claimant prefers to drive otherwise she is very stressed. She sometimes has difficulty with finding words and sometimes stutters. Since Ms. [redacted] moved to Invermere in August 2017 the Claimant has only visited once in 2020. Post-accident the sisters have walked together but generally on roads and for no longer than 20 to 30 minutes. Ms. [redacted] did accompany the Claimant on the flight to Poland but says it was very difficult for the Claimant who had to stand up a lot and took heavy pain medication.

[redacted]

57. Ms. [redacted] described the Claimant's personality pre-accident as independent, engaging, outgoing, reliable and spontaneous. The Claimant went dancing and was interested in music shows, art galleries and restaurants. In 2014 both the Claimant and Ms. [redacted]

lived in Victoria and saw each other at least once a week. The Claimant had no physical difficulties and no psychological issues. Post-accident the Claimant has not returned to any of their activities. The Claimant became depressed and hard to get a commitment from. Ms. [redacted] noticed a difficulty with word finding and a struggle with comprehension. To her observation the Claimant's life revolves around pain management and ultimately they drifted apart.

[redacted]

58. Mr. [redacted] is the owner of [redacted] with his wife. It is in the sign business with major clients such as [redacted] and [redacted]. Its business was to manufacture and supply all types of internal and external signage including vehicle wrap. He described the work the Claimant did prior to the accident. It involved some heavy lifting of rolls of film between 150 lbs. or 200 lbs. as well as a lot of bending over and computer work. The normal hours were 8:00 a.m. to 4:30 p.m., although there was sometimes overtime to meet timelines. Mr. [redacted] described the Claimant as trustworthy, focused, dependable, a team player and enthusiastic. In his words she was "looking after [redacted]". Mr. [redacted] confirmed the position of print production manager offered to the Claimant and its salary. He thought it was very likely that in three to five years the Claimant might have progressed to the position of operations manager. He confirmed that his philosophy was to have managers continue to work side by side with other employees. Mr. [redacted] had ambitious plans to expand his business.

59. Mr. [redacted] last saw the Claimant 2½ weeks ago at a Tim Horton's restaurant. To his observation the Claimant was not the same person. Her attention span was not the same. She avoided eye to eye contact. She seemed to be searching for the correct words. She was fidgeting and not comfortable. She looked tired.

60. On cross-examination Mr. [redacted] confirmed that his expansion plans did not pan out and that he had to close a gallery. He has sold one building and now operates the business from his home premises along with a large container at his sister's property. There are now only 2½ employees, namely Mr. [redacted] another longtime manager, and one person

who only works three days a week. The deterioration in the business started around the time the Claimant had her accident.

[redacted]

61. Ms. [redacted] is an instructor at Emily Carr and has worked since age 19 as a freelance graphic designer. Last year was the first time that her main source of income came from her freelance work. The Claimant was a student in Ms. [redacted]'s major project one class at Emily Carr. The classes were three hours in length from 6:00 p.m. to 9:00 p.m. She expected students to work out of class for six hours for every three hours in class. The work was mostly computer. She confirmed that the Claimant received accommodation such as a stand-up desk, extension of some deadlines, and the ability to take frequent breaks. The Claimant was a great student, eager and respectful. In Vancouver the graphic design business is very competitive and very demanding. It requires lots of hours on a computer. There are lots of freelance graphic designers and to be successful long hours are required as well as networking to obtain a source of clients. What matters is reputation through word of mouth. Starting out one may experience periods of no work for up to four months. A starting rate of $20 to $25 per hour is customary. Timelines are important. When Ms. [redacted] moved from Alberta to Vancouver she sent out 85 applications and had no work for 9½ months. She now is able to charge $75 to $100 an hour and has [redacted] as a client.

[redacted]

62. Ms. [redacted], age 43, is the common-law spouse of the Claimant. Ms. [redacted] is a professor of environmental studies at the University of Victoria. She has a PhD in Geography.

63. She met the Claimant more than eight years ago. They moved in together approximately eight months later. Her area of interest is indigenous concerns. She is a First Nations person from northern Vancouver Island. Both she and the Claimant had strong work ethics. In the fall of 2014 she was nominated for a Canada Research Chair position at Vancouver Island University in Nanaimo. This was a federally funded position requiring federal approval. In the meantime, Ms. [redacted] was the scholar in residence at the

University in Nanaimo. She had rented accommodation in Ladysmith. As the Claimant was working full time at [redacted] in Victoria the two discussed how things would work out if one were working in Nanaimo and the other in Victoria. They concluded that they could work it out.

64. In late January 2015 Ms. [redacted] applied for a position at the University of British Columbia. This was post-accident and it was not clear when the Claimant would be able to return to work. In addition, there was a lengthy waiting period before it would be known whether she would receive the research chair position in Nanaimo.

65. Prior to the accident the Claimant was very active and outgoing. She was rarely not doing something. She went hiking, visited art events and music festivals, helped with her family businesses and went on road trips. She liked to be a host and put on large elaborate meals for friends. She played squash, tennis and went ice skating. Ms. [redacted] was aware that the Claimant had been diagnosed with celiac disease. Ms. [redacted] was also gluten intolerant and the two them followed the dietary requirements. Prior to the accident they did yoga together, did bicycling and went on long walks. The Claimant's mood was positive, warm and outgoing. Housework was split approximately equally. Both enjoyed cooking.

66. On the day of the accident Ms. [redacted] phoned the Claimant after receiving a message. The Claimant was sobbing, confused and in shock. The following day the Claimant returned to Victoria. She went immediately to hospital where x-rays were taken and she was given morphine. Mentally she was "out of it". Over the next few days she lay on a couch or bed in pain taking medication. She could not remember the chain of events following the accident and thought she had been at the White Rock Hospital. She seemed very confused, trying to figure things out. For weeks she needed help dressing and bathing. Her back pain made everything difficult. Within a month or so she began to stutter quite badly which lasted for a year or two. In the weeks following the accident she was tired and confused. The Claimant relied on Ms. [redacted] to do everything. Ms. [redacted] took her to treatments, including physiotherapy, massage therapy and chiropractic treatment. The pain shifted around, became less acute but not really better. Ultimately her right arm did straighten out. She could not sit or stand or lie for any length of time and had to

intersperse activities. Her memory and focus got worse. She became muddled if she received too much information. She would go to the store to get one item but come home with a different item. The Claimant gets frustrated and angry with herself. She is very nervous in the car and now prefers to drive so as to be more in control. She sometimes takes the bus to avoid driving at all. Ms. [redacted] is now responsible for doing everything at home.

67. At present the Claimant cannot make beds or wash the tub. She wants to contribute but is restricted by pain. She will cook dinner with an ice pack and then lie down afterwards. Someone has now been hired to come in once every three weeks to wash floors.

68. Prior to the accident the Claimant did not talk about a career in graphic design. She wanted something with security. She was enthusiastic about work at [redacted]. When it was clear she would not be able to return to work at [redacted] she pursued her interest in graphic design. At the Emily Carr program she received various accommodations but often the day after class the Claimant would just rest. She would do her homework about an hour at a time, otherwise she would lose mental focus. The Claimant continues to have a restricted ability to retain information and restricted comprehension. It was a real struggle for her to finish the Emily Carr program.

69. Ms. [redacted] took stress leave herself a couple of years ago. The Claimant's injuries have challenged their relationship. Ms. [redacted] now has more responsibility than she signed up for and she cannot count on the Claimant to remember things. They use a shared calendar and the Claimant makes notes.

70. With respect to the Claimant's design work through [redacted], it takes a long time to complete a design. The Claimant can work two to three hours a day doing design work but her brain becomes muddled and she is in pain. The Claimant and Ms. [redacted] have taken several trips together but Ms. [redacted] has taken other trips alone where she would otherwise have been accompanied by the Claimant.

71. Everything about the Claimant has changed since the accident. There is so much she cannot do. She used to be working full time, and then busy in the evenings taking trips and hosting dinners, but now she is tired and dependent on Ms. [redacted].

72. In Ms. [redacted]'s view the future is simply unknown. Ms. [redacted] has obtained a new job at the University of Victoria in July 2020 where she is an assistant professor at an annual salary of $145,000. She hopes that the Claimant will improve in managing her pain and determine how much she can contribute to the household.

EXPERTS

73. At the outset let me say that all of the experts gave their evidence in a professional manner, in keeping with their duty to assist the arbitrator and making concessions where appropriate.

Steven Pivnenko

74. Mr. Pivnenko was accepted as an expert labour economist. He prepared two reports both dated September 15, 2020, one addressing economic loss and the other addressing cost of care multipliers. He calculated past income loss in Table B of his first report based on specified assumptions. He provided estimates of future earnings without the accident based on three different specified assumptions. He also provided a table of present value multipliers.

75. In the cost of care report he provided a table (Table 1) of cost of care multipliers.

Dr. Todd Bentley

76. Dr. Bentley was accepted as an expert for the Claimant as a medical doctor with a special interest in physical medicine and rehabilitation. He conducted IME's on May 14, 2018 and October 29, 2019. He produced three reports dated June 14, 2018, December 6, 2019 and a rebuttal report dated March 13, 2020, all of which were filed as exhibits. The vast majority of his practice, approximately 80%, involves patients with chronic pain. He typically sees patients after they have received orthopaedic treatment or where

orthopaedics are not able to treat the problem. He reviewed the Claimant's pre-accident medical records of Dr. Conway. There was nothing relevant with respect to the musculoskeletal system. The Claimant reported that she was uncertain whether she sustained a loss of consciousness in the accident. The Claimant reported various percentages of improvement in her different symptoms since the accident. The symptoms of headache, neck and mid-back, right arm, rib and visual disturbances, low back pain and shoulder symptoms and jaw symptoms all reportedly had improved 50% or more since the accident. The presenting symptoms included headaches, neck pain, jaw pain, mid-back pain, left shoulder pain, lower back pain and left hip pain. The Claimant was asked to grade the pain on a scale of 1 to 10 with 10 being the most severe pain they could imagine. The Claimant rated her low back pain in a range between 7/10 to 11/10. Dr. Bentley agreed a rating of 11/10 is physically impossible but indicated it reflected psychological factors or some other real cause. Similarly, in the description of areas of most and least improvement, what mattered to him was not so much the numerical number as the ranking. In the Claimant's case the symptoms of headache, low back and left shoulder improved the least. The Claimant reported anxiety when driving and avoiding driving where possible and either walking or using public transportation. She also reported recurring nightmares related to the accident and disturbed sleep.

77. On physical examination there was no indication of non-organic signs. The Claimant appeared genuine and gave full effort on range of motion and strength testing. There were no abnormal neurological complaints. There was restricted range of motion through the cervical spine and the left shoulder. The left shoulder joint itself was unremarkable. There was restricted ranged of motion in the thoracic spine. Rotation of the lumbar spine was limited by 50% to the left. Hip flexion resulted in low back pain bilaterally. Neurological examination of both the upper and lower extremities was normal.

78. Based on the clinical examination and presentation Dr. Bentley's clinical diagnosis was as follows:

> "Whiplash Associated Disorder II with cervicogenic headache – impairment in cervical spine range of movement, secondary restriction

> left shoulder range of movement, no intrinsic left shoulder pathology, normal neurological examination
>
> Thoracic sprain/strain – impairment in range of movement
>
> Lumbar sprain/strain – impairment in range of movement, negative neural tension, normal neurological examination, secondary restriction bilateral hip flexion
>
> Left sacroiliac joint sprain – impairment in range of movement, underlying pelvic obliquity
>
> There was no indication of pain focused behaviours or non-organic signs."

79. At the time of his initial examination the Claimant remained disabled across multiple domains. The left shoulder and neck symptoms limited her ability to engage in repetitive and/or sustained overhead activity such as lifting and reaching tasks. The thoracic, lumbar, bilateral hip and left sacroiliac joint impairments impaired her abilities with prolonged sitting and standing, repetitive and/or sustained bending/stooping, twisting, running, squatting and heavy lifting. The cervical impairment contributed to her limitation with prolonged sitting and sustained cervical flexion postures. The prognosis for full recovery was guarded. The Claimant had not yet reached maximum medical improvement and Dr. Bentley made several recommendations for ongoing treatment.

80. At the time of his second IME, the Claimant reported no further improvement since the prior assessment. The current complaints included headaches, neck pain, left shoulder pain, mid/low back pain and left hip pain. The intensity was however less than previously reported. From a functional point of view the Claimant was pretty much the same.

81. On physical examination the major changes were improved neck and left shoulder range of motion, some improvement in mid-back range of motion and resolution of the left

sacroiliac joint sprain. There was no improvement in the report of pain on functional status. Again Dr. Bentley found no non-organic causes or exaggeration and observed no visual or audio expressions. His diagnosis remained the same with the exception of the resolution of the sacroiliac joint sprain. He concluded that the Claimant was unable to sustain anything but a sedentary occupation. She had both impairments and pain with associated persisting disability. After more than five years since the accident the likelihood of significant functional or symptom improvement was poor. He thought that the Claimant had achieved maximum medical improvement and the focus needed to be managing her activity on a week to week basis. The accident related impairments resulted in ongoing disability spanning the domains of housekeeping, participation in recreational and leisure activities and employment and were anticipated to be indefinite. The provision of maintenance massage therapy and chiropractic therapy one to two times per month was reasonable in addition to participation in ongoing restorative pilates and an independent water based exercise program. Dr. Bentley recommended a trial change of medication to Pregabalin and Cymbalta. In his rebuttal report Dr. Bentley took issue with the conclusion of the defence expert. He considered that Dr. Horlick missed the spinal malalignment issue and missed some physical examinations. He also thought that Dr. Horlick did not properly take into consideration the impact of pain itself on mood and how they affect ability and function.

82. On cross-examination Dr. Bentley agreed he was neither a psychiatrist, nor a treating doctor and that he did not do a functional capacity evaluation. While x-rays did show that the Claimant had scoliosis, Dr. Bentley agreed that the degree of scoliosis matters and that the Claimant's measurements were less than the degree that requires either surveillance or bracing or other medical intervention. Dr. Bentley agreed that he found no neurological impairment or nerve impingement. He also found no allodynia. Dr. Bentley asserted that on his examination he found both mechanical pain and myofascial pain. With respect to the degenerative changes shown on the January 10, 2018 MRI, he thought they had probably been rendered symptomatic to some extent. He agreed a diagnosis of WAD II means there is no neurological component. He agreed that an estimate of pain of 11/10 is unlikely to be accurate and logically impossible and "a bit over the top". It

needed to be retranslated. He was aware of the potential for an exaggerated pain response in a litigation context and was careful to match complaints with his physical examination. He understood that the Claimant was performing almost all her pre-accident household chores although with pain. His practice was not to confront a patient on an IME with inconsistent responses but to absolutely include any such inconsistencies in his report. He agreed that the Claimant should try to reduce her intake of Tylenol #3, although the Claimant's current dosage was not toxic.

Dr. Stephen Wiseman

83. Dr. Wiseman was accepted as an expert for the Claimant as a psychiatrist. He has a special interest in chronic complex pain. He has worked at the Complex Pain Center at St. Paul's Hospital since 2009 and was the medical director of that Center for two years. All patients at the Center have some psychiatric condition and some chronic pain. He currently engages in private practice three days a week accepting only patients with complex chronic pain.

84. Dr. Wiseman examined the Claimant for IME purposes on September 18, 2018 and November 25, 2019. He produced three reports dated November 30, 2018, December 6, 2019 and a rebuttal report dated March 2, 2020 all of which were admitted into evidence. In his first report under Facts and Assumptions, Sections A, B, C and D, he relied upon information from the Claimant which he assumed to be correct. For the information under Section D regarding current functioning and symptomology the Claimant was asked to address a typical day in the last month preceding the interview. Dr. Wiseman was struck by the limitations of the Claimant's functioning. She seemed to be "hard capped" and stopped by exhaustion. She was able to do a relatively wide range of activities but unable to continue them because she became overwhelmed, tired and needed to rest.

85. Dr. Wiseman found no significant inconsistencies in the Claimant's descriptions. There was no indication of any pre-accident psychiatric or pain conditions. Dr. Wiseman did observe that the Claimant had significant anemia prior to 2013 as well as being diagnosed with celiac disease. At one point in time her ferritin level was very low but those levels were back in the normal range on tests in both 2016 and 2017. Dr. Wiseman diagnosed

post-traumatic stress disorder ("PTSD") based upon post-accident prevalent and distressing nightmares and visual images pertaining to the crash, as well as a marked fear of driving with associated physiological arousal symptoms. Sleep disturbance, panicky sensations, irritability, distress when confronted with reminders or invitations to discuss crash related issues and a number of existential thoughts and feelings about safety and control are all additional post-traumatic stress symptoms described by the Claimant and reflected in a significant degree in the records which he had reviewed.

86. Dr. Wiseman also diagnosed a major depressive disorder for which she had been prescribed the antidepressant Cipralex at a reasonably high dose which helped by reducing the intensity of her symptoms.

87. Dr. Wiseman concluded that the Claimant had developed manifestations of central nervous system sensitization. In such a situation, pain signaling from injured tissues sensitizes the pain pathways in the spinal cord and brain such that even when the peripheral tissues heal to a degree, the pain signaling continues and ultimately develops a life of its own. The ultimate example of central sensitization is that of phantom limb pain. In the Claimant's case clinical support for centralization comes from the widespread distribution of her pain, the marked sensitivity to even light pressure or touch she can experience and her complaints of marked fatigue, lack of energy, sensitivity to light and sound and cognitive impairment. She had strange sensations in her face at times and noted that her body can feel very hot and have flu like sensations in the absence of flu. As the Claimant did not complain much of active depression symptoms at the time of interview Dr. Wiseman considered her major depressive disorder to remain in partial remission.

88. The Claimant had "done a ton of treatment" for her physical injuries but overall it had not made much difference. The Claimant's PTSD and residual depression symptoms were not in and of themselves severe enough to cause significant impairment and workplace disability. However, they persisted within the larger context of her chronic pain and probable manifestations of central sensitization and as such altogether these problems rendered her highly limited in what she could do. The main barriers to increased

functioning were marked limitations in her levels of energy, stamina and cognitive efficiency. She cannot just "push through" the pain as it invariably increases with activity and ultimately demands rest and a reset. Pacing, acceptance and active pain management needed to become key components of the Claimant's life and would likely remain so for the foreseeable future.

89. Dr. Wiseman recommended that the hemoglobin and ferritin should be reassessed. He recommended further sessions of cognitive behavourial therapy. He suggested some medication changes. The prognosis for significant reversal of her chronic pain was quite poor although he did think she could be meaningfully assisted to cope with the pain and could improve her residual PTSD and depressive symptoms further.

90. There was no other compelling explanation for her condition other than central nervous system sensitization.

91. By the time of his second IME, the Claimant's PTSD symptoms had improved overall – nightmares rarely, if ever, bothered her. She was never clear of her PTSD overall and continued to have fear and some panicky anxiety responses in a number of driving situations. The Claimant's major depressive disorder had improved to the extent that it was largely, if not completely, in remission as a clinical condition. With the improvement in the Claimant's mental status she was coping better with ongoing pain. By this time she had successfully completed the graphic design course at Emily Carr. The Claimant continued to experience significant physical and mental fatigue, reduced stamina and cognitive inefficiency experienced as memory impairment and poor concentration. Dr. Wiseman continued to believe that the Claimant's chronic centralized pain drives these symptoms to a significant degree as does her residual post traumatic anxiety symptoms and related central nervous system arousal levels. Dr. Wiseman noted that the Claimant's ferritin level had fallen in early 2019 and recommended supplements and follow up. He acknowledged that this could be a contributing factor to a number of the Claimant's ongoing cognitive, energy and abdominal related complaints although he felt that the bulk of her symptoms were still accident related. He considered that her chronic pain was unlikely to improve. There was a risk likely greater than 50% of another major depressive

episode. He felt the Claimant could cook dinner, go for a walk, and work half a day or day but could not do them all together on a sustainable basis. He did not expect her to be able to work full time.

92. In his rebuttal report in response to the report of Dr. Horlick, Dr. Wiseman submitted that central nervous system sensitization is really outside the scope of Dr. Horlick's expertise as the Claimant is not functionally impaired by an obvious structural musculoskeletal lesion palpable on examination or visible on imaging. Nor does Dr. Horlick address the way that pain itself can impair functioning.

93. On cross-examination Dr. Wiseman agreed that he is not a neurologist, never conducted a physical examination of the Claimant, never conducted formal neuropsychological testing and is not one of the Claimant's treating doctors. He also agreed that he does not hold the certification recognized by the medical college in chronic and complex pain.

94. He was aware that the Claimant had resumed driving after the accident, although possibly not as early as March 2, 2015. He was aware she was driving on streets in Vancouver but not aware of her trips around Vancouver Island and to the interior.

95. The low ferritin levels shown on testing in 2019 could possibly be playing a modest role in her symptoms and increasing the ferritin levels to above 50 would likely increase her function to a modest degree.

96. He was aware the Claimant obtained a certificate in graphic design from Emily Carr although she required accommodations. Dr. Wiseman chose not to ask about counselling with Dr. [redacted] as it appeared to relate to non-accident issues. Dr. Wiseman did not physically test for allodynia but accepted that the Claimant had it based on her description. He did not recall any record by any other practitioner diagnosing allodynia.

97. On re-examination Dr. Wiseman explained that central nervous system sensitization may be diagnosed in the absence of allodynia as allodynia does wax and wane and can be weather dependent or stress related. He explained that until three years ago Canada did not recognize a pain specialist. The Royal College has now created this specialty but he

has elected not to take the examination as it features many elements that are of no interest to him in his practice.

Dr. Denise Hall

98. Dr. Hall was accepted as an expert for the Claimant as a vocational assessor. She interviewed the Claimant on January 28, 2020 and prepared a report dated February 4, 2020 which was filed as an exhibit. She has 25 years of experience in the field. During her assessment which took 4 hours and 15 minutes with two breaks the Claimant reported pain and had to stand for some of the tests. She reported fatigue towards the end of the assessment. She did not display any inappropriate or bizarre or pain behaviours. The assessment is considered representative of the Claimant's abilities.

99. On testing the results were variable. They were average for language usage and below average for spatial relations, work knowledge, verbal reasoning, manual speed, and dexterity, mechanical reasoning, numerical ability, perceptual speed and accuracy. For someone who had completed a degree in industrial design at Emily Carr and finished a certificate program in 2019 at Emily Carr the aptitude testing results were not indicative of someone with this background. The Claimant should have performed higher particularly on perceptual speed and accuracy, spatial relations and verbal reasoning. Dr. Hall considered that the results likely reflected the Claimant's challenges with focus and concentration due to pain and cognitive limitations.

100. The Claimant's performance indicated average academic potential. She was a candidate for post-secondary training at the certificate level but not for a master's degree. Her reading comprehension and math results were below average for her background.

101. Dr. Hall was asked to assume that the Claimant would have remained at [redacted]. Her income then could have been $45,760 (the median income for NOC industrial designers) or $85,010 (the median annual salary for NOC 0124 advertising marketing and public relations managers).

102. Dr. Hall also was asked to assume the Claimant might have pursued a career in graphic design (industrial design). Dr. Hall provided median annual salary of $48,000 for NOC

5223 graphic arts technician and $45,760 for NOC 5241 graphic designers and illustrators.

103. Taking into account the medical information provided, Dr. Hall thought the Claimant would likely be able to manage work that is part time, begun on a graduated basis and would need to be flexible allowing her to take breaks, pace herself and without demanding and time sensitive requirements. Computer based occupations such as graphic design, web development and industrial design might be suitable on a part time basis with a flexible schedule and supportive employer.

104. Most graphic design work is project based, self-employment and contract work. Dr. Hall admitted that it was difficult to slot the Claimant into any category assuming she would not have continued at SOTT. The Claimant would not be competitive in professions and would need to start work on a part time basis and at the lower end of the hourly rate scale.

105. Dr. Hall made several recommendations to enhance employment including involving an OT to set up and monitor strategies for return to employment; use of a vocational consultant; and an ergonomic assessment of her work station.

106. On cross-examination Dr. Hall agreed that she is not a medical doctor, not a psychologist, and did not administer any neuropsychology battery of tests. She appeared only to have reviewed the Claimant's expert reports. She agreed graphic design work is sedentary. She did not review the Claimant's resume for her job applications. She agreed that by moving to Victoria to live the number of job opportunities were restricted. She did not do a functional capacity evaluation. She acknowledged that the Claimant had little past management experience as her understanding was the Claimant had some supervisory responsibilities at [redacted] although she did not know how long those lasted.

Dr. George Medvedev

107. Dr. Medvedev was accepted as an expert for the Claimant in neurology. He conducted two IME's on April 5, 2018 and July 11, 2019 and produced three reports dated May 25, 2018, July 15, 2019 and a rebuttal report dated March 12, 2020 which were marked as

exhibits. From 2006 to the present he has been head of the Neurology Department at Royal Columbian Hospital and head of Neurology of the Fraser Health Region.

108. The Claimant told Dr. Medvedev that she did not recall the moment of impact but recalled regaining awareness with her face down and head tilted forward. Dr. Medvedev concluded it was likely that she briefly lost consciousness. Current complaints included low back pain, pain in the left shoulder, neck pain, tingling in the feet and legs, headaches, pain in the left hip, imbalance/dizziness, insomnia, emotional psychological symptoms (depression, anxiety and increased irritability) and cognitive dysfunction (difficulty with word finding ability, memory capacity and efficiency of memory retrieval and difficulty with concentration).

109. It is difficult for an injured person to tell whether they have lost consciousness unless the loss lasts dozens of minutes. Lack of memory may be the interference with the ability to register and retain information arising from shock.

110. On neurological examination there was no definitive root tension signs i.e. no clear evidence of nerve entrapment. Dr. Medvedev concluded that the Claimant's neck and low back pain was most likely musculoskeletal. An MRI of the lumbar spine did show minor degenerative changes, no definitive disc protrusions, but an annular tear in the L5-S1 disc.

111. Dr. Medvedev diagnosed a mild traumatic brain injury or concussion, symptoms of chronic post-concussion syndrome, as well as a soft tissue sprain and strain injury of her neck and back, and soft tissue injury in her shoulders and her legs. He thought the annular tear could be contributing to the pain in her low back.

112. There was no pre-existing significant neurological or psychiatric history or history of prior traumatic brain injury. There was nothing to account for the sudden onset of symptoms except for the car accident.

113. Dr. Medvedev concluded that the Claimant remained fully disabled from a working standpoint and partially disabled with regard to activities of daily living and recreational

activities. He thought some further improvement in symptoms was possible although she would likely remain with a degree of disability indefinitely.

114. At the time of his second IME the Claimant's symptoms were mostly unchanged, although there had been minimal improvement. The neurologic examination was also unchanged. The diagnosis remained unchanged. The Claimant remained quite limited in all forms of activities and was certainly not in a position to return to the physical occupation she had at [redacted]. She was physically quite limited by pain. Dr. Medvedev thought that she would remain with lifelong susceptibility to any form of physical trauma and remain at high risk of developing chronic neurologic and psychiatric conditions associated with a history of concussion. She would likely also remain with chronic pain although some further improvement could not be entirely excluded. She would be at increased risk for conditions such as epilepsy and Parkinson's Disease and chronic depression. She would need lifelong support to manage her symptoms. Most recovery, especially from concussion occurs within 12 months. Complete recovery would be quite unlikely.

115. In his rebuttal report in response to the defence report of Dr. Dost, Dr. Medvedev considered that Dr. Dost underestimated the significance of the collision and the likely forces involved. There was no doubt the Claimant suffered a traumatic brain injury although it would be considered mild based on clinical definitions. Dr. Medvedev agreed that the Claimant developed several conditions such as psychological factors, pain and non-restorative sleep that could not be fully disentangled from the effects of a concussion. Dr. Medvedev agreed that every effort should be made to address these other factors but nonetheless considered it more likely than not that the symptoms originating from the brain injury itself would linger. He considered the ongoing debate regarding the essence of a diagnosis of mild traumatic brain injury to be an assessment of the degree of mildness which was where he and Dr. Dost differed.

116. <u>On cross-examination</u> Dr. Medvedev agreed that he did not do a functional capacity evaluation nor neuropsychological testing. He has no notes from his first interview of the Claimant and found it hard to remember what she had told him. Dr. Medvedev was

pressed on his diagnosis of concussion or mild traumatic brain injury. He agreed that relevant factors to consider in coming to such a diagnosis were any period of loss of consciousness, a lack of memory before or after the traumatic event, confusion or slowed thinking, diagnostic imaging and actual symptoms. One must approach the symptoms alone with care because they may be caused by other sources. Dr. Medvedev said that none of these factors were required to be present in order to make the diagnosis. He insisted that the possibility of the Claimant having a brief loss of consciousness was not critical to his diagnosis. In this case the symptoms that followed made the diagnosis. The fact that no CT scan was ever requested does not mean there was no mild traumatic brain injury. He agreed that if the Claimant wiggled her toes immediately after the accident while being in severe low back pain that was appropriate behaviour. He also agreed that in making a diagnosis one must look for the most plausible explanation. He agreed the neurological examination of the head was normal. He did palpate the Claimant and observed no allodynia. He agreed that an annular tear is common as people age but thought it was unusual for a person of the Claimant's age.

Samantha Gallagher

117. Ms. Gallagher was accepted as an expert witness for the Respondent with expertise in vocational rehabilitation counselling. She interviewed the Claimant via Zoom on August 11, 2020 and prepared a report dated August 17, 2020 which was entered as an exhibit. She was unable to do achievement and aptitude testing because of the format but did not think that had any significant effect on her opinion. The absent tests would have been more important to determine retraining possibilities but the Claimant seemed to have settled into a new career path in graphic design.

118. From a vocational perspective it was a positive prognostic factor that the Claimant was able to complete the graphic design program at Emily Carr with distinction post-accident. Typically work as a graphic designer is sedentary and allows for postural flexibility and breaks throughout the day. This type of work can often be done on a freelance basis. Information from Work BC indicates that only 50% of people employed in the occupational group that includes graphic designers work on a full time basis. The job of a

graphic designer seemed to be in keeping with the Claimant's medical restrictions. Stats Canada considers that working more than 30 hours per week is full time. Ms. Gallagher was critical of the reference in the Claimant's resume circulated to perspective employers to her absence from work owing to a motor vehicle accident. This would be a "red flag" to an employer. The preferred approach in her view was to emphasis strengths and later, once some interest or rapport was created in a prospective employer the accident related absence could be disclosed. Data from Work BC indicates that 79.8% of the jobs for graphic designers are in the Lower Mainland area whereas only 10.8% of jobs in this group are on Vancouver Island. Overall the Claimant's plan to work as a graphic designer seemed to be in keeping with her background, education, as well as her self-reported symptoms and limitations. Ms. Gallagher recommended working with a job placement provider at an estimated cost of approximately $2,500.

119. On cross-examination Ms. Gallagher agreed that the longer a person was out of work following an accident the more difficult it was to re-enter the job market. Although the Claimant required accommodations at Emily Carr she had done well and should be able to do some work in graphic design. The work effort at Emily Carr should be a signpost of the minimum of what the Claimant should now be able to do.

120. Ms. Gallagher agreed that as a freelancer one needs clients and it takes time to build up a clientele and the ability to network is important. The Claimant is restricted in her ability to compete with others mostly on how she would go about her work rather than on her creativity. It would be an advantage to be in Vancouver seeking work in the graphic design field.

Dr. Rohan Dost

121. Dr. Dost was accepted as an expert for the Respondent in the field of neurology. He assessed the Claimant on January 27, 2020 and prepared a report also dated January 27, 2020 which was entered as an exhibit. He reviewed the ambulance service report indicating no loss of consciousness and a Glasgow Coma Scale of 15; the Richmond General Hospital Emergency Room note indicating no LOC, a GSC of 15, and no nausea/vomiting and orientation to person, place and time. He reviewed the hospital

records of the Royal Jubilee Hospital which makes no reference to head complaints. A nerve conduction study report at Royal Jubilee Hospital dated February 16, 2015 was normal.

122. An MRI of the lumbar spine showed a small annular tear at L5-S1 but it did not meet the S1 distribution and was not causing sensory complaints.

123. Dr. Dost's own neurological examination was normal. The Claimant was tender over the cervical paraspinals, left trapezius and left infraspinatus. This was an objective sign, there was muscle tightness he could feel. Subjectively the Claimant complained of pain.

124. Dr. Dost did not consider that the Claimant sustained a mild traumatic brain injury. The only evidence to support that diagnosis is the Claimant's self-report to her family doctor a few days after the accident that she thought she may have blacked out. The criteria for a diagnosis of mild traumatic brain injury are:

a. Concussive force (assumed by Dr. Dost to be present);

b. Any one of

(i) Loss of consciousness, amnesia, disorientation, or confused state;

c. At the time of trauma brain injury must be the most likely explanation.

Any small gap in the Claimant's memory may be attributable to acute pain and psychological issues which the Claimant experienced at the scene. Her ongoing cognitive issues would be due to the interference effects of chronic pain, non-restorative sleep and psychological factors. If the Claimant did have patchy recall attributable to brain trauma then she would have sustained a mild traumatic brain injury on the milder end of mild. Historically a small percentage of those who sustain a mild traumatic brain injury fall outside the expectations for complete recovery and their persistent symptoms are termed post-concussion syndrome. However, post-concussion symptoms cannot be used to diagnose a mild traumatic brain injury. Dr. Dost also referred to the "effect size" of any possible mild traumatic brain injury and concluded that it would be non-existent when compared with the effect of non-restorative sleep, pain and psychiatric factors. He found

no evidence of allodynia on palpation. The stabbing "ice pick" headaches are idiopathic meaning of no known cause.

125. On cross-examination Dr. Dost agreed that the Claimant's symptoms would be most in keeping with chronic myofascial pain syndrome with central sensitization caused by the accident. He would defer to a physiatrist or psychologist for this non-neurological diagnosis. He would defer to an expert in myofascial pain and central nervous system sensitization regarding diagnosis, prognosis and treatment. Dr. Dost sees patients with chronic pain symptoms which sometimes mimic a neurological problem in order to rule out a neurological explanation. He agreed that pain and headaches limit function and the Claimant had tried many types of treatment in the years post-accident.

126. Ultimately then Dr. Dost stated at page 10 "succinctly then whether one accepts that Ms. [redacted] sustained an MTBI or not and whether one accepts she has structural brain damage as a result or not, we have a medical distinction without much of a difference". Etiology becomes relevant where it is reversible. Ongoing cognitive issues would not necessarily remain permanent since both pain and psychological factors are potentially reversible but Dr. Dost would defer further comment on psychological and non-neurological pain symptoms to relevant medical specialists.

Dr. Simon Horlick

127. Dr. Horlick was accepted as an expert for the Respondent as a specialist in orthopaedics and orthopaedic surgery. He assessed the Claimant on February 12, 2020 and issued a report dated the same day which was entered as an exhibit.

128. Dr. Horlick's opinion is well summarized commencing at line 335 of page 9 of his report as follows:

> "Physical examination of her entire axial skeleton on February 12, 2020 is devoid of any measures of physical impairment. She has no findings suggestive of any ongoing osseous, disc or nerve related pathology to the cervical, thoracic or lumbar spine region. She has no evidence of a right-sided radiculopathy in the L5-S1 region. Her diagnosis with respect to

> residual complaints in this region would be in keeping with myofascial-derived pathology or pain of non-specific origin. Ms. [redacted] has had a plethora of treatment strategies to date including massage therapy, physiotherapy, kinesiology, chiropractic treatments."

129. Myofascial pathology is a diagnosis of exclusion, i.e. after one rules out structural elements as the cause of pain one is left with pain of non-specific origin. The Claimant's pain and complaints are still attributable to the motor vehicle accident. Because the residual complaints are of non-specific origin there will not be any progressive impairment or progressive disability. Similarly there is no need for further imaging. The complaints in sensation, power and reflexes do not fit any neurologically defined pattern.

130. Dr. Horlick concluded that there were no specific contraindications regarding the Claimant's participation in vocational or recreational pursuits. From a records review it was difficult to discern when the Claimant would have been capable of returning to work but he estimated that she was temporarily disabled from employment for 8 to 12 months. In his view there was no contraindication to her returning to the work force in an occupation in keeping with her vocational skill set.

131. Dr. Horlick acknowledged the accident was not a simple rear-end collision; the rear-end of the Claimant's vehicle was "destroyed".

132. In cross-examination Dr. Horlick agreed that he elicited tenderness in palpation of the low back. He did not think the Claimant was exaggerating her symptoms and found her "very credible". He agreed there was nothing in the pre-accident medical records to indicate anything that would have contributed to her current condition. He accepted that the accident has caused her complaints; there was "no issue with causation". He agreed that the complaint of pain is a continuing problem. He had seen the report of Dr. Dost and came to the same conclusion, namely that the Claimant's pain was myofascial or of non-specific origin. He agreed that central nervous system sensitization is a non-specific origin although he was not making that diagnosis.

133. Significantly he agreed that his opinion that the Claimant was able to return to work did not take into account the pain she experiences and that pain would limit activities. He is not an expert in central nervous system sensitization and would defer to doctors with experience in that field.

Post-Accident Treatment

134. Exhibit 1 – Tab N is an 8 page listing of a Schedule of Special Damages for medication, therapy, transportation, equipment and miscellaneous. The total therapy and user fee expense is slightly over $19,000. The Claimant has received chiropractic treatments, therapeutic ultrasound, tens, post-concussion rehabilitation, nerve conduction and EMG studies, massage therapy, x-rays and MRIs, physiotherapy, acupuncture, trigger point injections, clinical pilates, aqua therapy, a bone scan, psychological counselling, and osteopathic treatment. Despite this "plethora of treatment strategies" (Dr. Horlick at line 340 on page 9 of his report) the residual symptoms remain.

Video Surveillance

135. I do not place any special significance on the video surveillance. The surveillance shown was from April 19, 2017 and March 4, 7 and 8, 2020. The excerpts were part of a much larger extent of surveillance not put into evidence. The surveillance essentially showed three aspects of the Claimant's activities. One was walking in and out of her front steps. On one occasion she used the handrail to ascend. On another occasion she did not. A second aspect shows the Claimant driving in Vancouver including on Cambie Street in fairly heavy traffic. The third aspect shows her enjoying lunch at a restaurant with friends for approximately 1½ hours. While I do not agree that the images of the Claimant ascending the stairs makes her look "like an old lady", I do accept that, prior to the accident, she likely did not feel a need to use the handrail. With respect to driving in traffic, the video does not of course show the Claimant's emotional state whilst driving. She does not deny driving in traffic. Indeed where she must go by car she prefers to drive. Finally, the restaurant video does show the Claimant sitting for an extended period of time without obvious discomfort and without standing. Again the Claimant does not deny that she ever socializes and does say that she takes pain medication often following

social activities. I do not consider that there is anything in the video that contradicts the Claimant's evidence.

136. I will add that while the Claimant was giving her evidence at the hearing she did alternate between sitting and standing multiple times. I accept these changes as genuine and in my view they underline the requirement for considerable flexibility in her work place wherever it is. During her testimony I did not observe any pain grimacing or other facial expressions that can sometimes be an indicator of exaggeration.

DISCUSSION AND ANALYSIS

Overview

137. It is useful to recognize at the outset certain concessions made either by the Respondent's experts in evidence or by Respondent's counsel in argument in order to understand what is truly in issue between the parties. I identify these concessions in point form.

a. Although Dr. Dost's neurological examination was negative, he agreed at paragraph 2(c) on page 10 of his report that the Claimant's symptoms would be most in keeping with chronic myofascial pain syndrome with central sensitization. He would defer to a psychiatrist or psychologist for non-neurological diagnosis such as myofascial pain and central sensitization. There was no reason to think that the Claimant's symptoms were not caused by the accident.

b. Although his orthopaedic examination was normal, Dr. Horlick agreed at lines 335 – 340 on page 9 of his report that the Claimant's "diagnosis with respect to residual complaints in this region (neck and back) would be in keeping with myofascial-derived pathology or pain of non-specific origin". He had no issue with causation, i.e. he accepted that the accident caused the Claimant's complaints. Moreover, his opinion regarding the Claimant's ability to return to work did not take into account the Claimant's pain and he agreed that pain would limit some abilities.

c. Dr. Horlick agreed that the Claimant was "very credible".

d. Dr. Dost did not suggest that the Claimant was exaggerating or feigning symptoms or evidencing "pain behaviour".

e. Counsel in submissions advised the Respondent accepted that the Claimant had genuine chronic myofascial pain caused by the accident.

f. The Claimant's own medical experts found her to be forthright and genuine without exaggeration of symptoms. Dr. Bentley was aware of the potential for an exaggerated pain response in the litigation context and careful to try to match stated symptoms with physical examination.

g. None of the medical experts anticipates that there will be any substantial improvement in the Claimant's condition given the plethora of past treatment and the lapse of time since the accident. Dr. Dost does not provide a prognosis, as he defers to other relevant medical specialists. Dr. Horlick saw no additional benefit in further treatments apart from a self-directed exercise program predominately in the pool, but from an orthopaedic point of view there was no residual disability. Dr. Bentley concluded that the Claimant had reached "maximal medical improvement" and focused on future treatment to promote "symptom management". Dr. Wiseman thought that with appropriate support and management the Claimant's depression and PTSD symptoms could continue to slowly improve and resolve over time. But given that her pain was chronic and given its likely centralization, the Claimant could expect to experience many, if not all of her current pain related symptoms on an ongoing basis. This in turn would continue to impact her physical and cognitive stamina, her sense of memory and concentration and her overall stress tolerance. Dr. Medvedev thought the Claimant would remain with chronic pain although some further improvement could not be entirely excluded. His prognosis for improvement of her soft tissue pain would be described as guarded.

138. Although the Claimant says that the effects of her injuries have been devastating and completely changed her life, the Respondent says that the central issue is the extent of the myofascial pain and the actual limitation on her function. The Claimant's evidence must

be examined with careful scrutiny. The Respondent challenges the reliability of some of the Claimant's evidence and submits that other admitted activities suggest much less significant limitations on the Claimant's capacity.

139. Counsel for the Respondent in argument said that ICBC accepts that the Claimant was totally disabled for one year post-accident.

Challenge to the Claimant's Evidence

140. The Claimant told Dr. Bentley that her low back pain was 11/10 on a scale where 10 was the worst pain one could imagine. The Respondent says this is an obvious exaggeration and should have been a "red flag" to the Claimant's credibility. Dr. Bentley recognized that the response was a logical impossibility and indicated he regarded it as reflecting some other psychological factor. I accept Dr. Bentley's approach. He recognized the impossibility of the accuracy of the answer and looked for another explanation. Because the answer was patently impossible, it is not the kind of exaggeration that a patient might make thinking the truth might not be discovered. I take the answer as being a statement of the Claimant's very great low back discomfort.

141. The Respondent submits that the Claimant reported to Dr. Bentley that she had not made any further improvement since his first assessment. This is also incorrect as Dr. Bentley recorded measurable improvement in several movements and range of motion as well as resolution of the previously diagnosed left sacroiliac joint sprain. Dr. Bentley took the answer to mean an absence of significant improvement in either pain or functional status. Given that the Claimant's pain is now regarded as myofascial in origin, it is not surprising that an answer to a general question regarding improvement might focus on pain and function rather than particular range of motion results. I note that at the conclusion of the section of his second report entitled Diagnosis and Opinion, Dr. Bentley at line 480 states: "There was no evidence of pain behaviours. Ms. [redacted] presented in a genuine fashion".

142. In his first report Dr. Bentley recorded the Claimant reporting improvements of varying percentages since the accident in her headaches, neck and mid-back symptoms, right arm

symptoms, rib symptoms, low back pain, shoulder symptoms and jaw symptoms. In cross-examination the Claimant said she did not recall giving those percentages. I accept Dr. Bentley's evidence that she did give them and the unwillingness to concede that she likely did so is one factor to take into account in assessing the Claimant's reliability.

143. The Respondent asserts that the Claimant described herself as "completely disabled" but at the time was working in her own design business under the style of [redacted]. Given the minimal amount of work done through [redacted], I do not think her description is unreasonable. She was totally disabled on a competitive basis.

144. The Respondent asserts that the Claimant told Dr. Bentley on both occasions that she was having difficulty performing heavier household tasks such as mopping floors, carrying groceries, making beds and lifting heavy pots. This allows the inference that the Claimant was doing these activities albeit with difficulty. In her evidence, the Claimant said she does do some household chores depending on her degree of pain on the day but she has never washed floors or cleaned the tub since the accident. Ms. [redacted]'s evidence is that the Claimant has not been able to make beds or wash the tub. Dr. Bentley does record that the Claimant was unable to clean the tub.

145. I accept the evidence of the Claimant and Ms. [redacted] in preference to any inference arising from Dr. Bentley's report. It is clear on the medical evidence that the Claimant could not do work involving heavy lifting or bending.

146. The Respondent asserts that the Claimant has travelled quite extensively post-accident both for work, pleasure and family purposes and that not all these trips were disclosed to her doctors. While that appears true, there are two answers to it. The first is that the Claimant says that she had to medicate herself during long travels. The second answer is that none of the Claimant's medical experts were asked whether their opinion would change had they been aware of all of the Claimant's travels. What the travel does demonstrate is a degree of mobility that is not consistent with a "catastrophic" injury.

147. The Respondent asserts that the Claimant's medical doctors were not aware of the full extent of her hours worked while at Emily Carr obtaining her graphics design degree. It is

evident from the evidence of Ms. Goncharova that students were expected to put in two hours outside of class for each hour in class, meaning the expected hours were 18 hours per week. As noted however the Claimant had multiple accommodations in taking this course including the extension of deadlines and her own evidence, and that of Ms. [redacted] is that after a day of class the Claimant might have to take the next day off. As with the reports of travel, none of the medical experts were asked whether their opinion would change had they been aware of the hours expected at Emily Carr.

148. The Respondent relies on Dr. Horlick's opinion that the physical examination of her entire axial skeleton was devoid of any measures of physical impairment. What this leaves out of account however is Dr. Horlick's concession that he was not taking into account the Claimant's pain which he agreed would limit function.

149. Finally, the Respondent asserts that the Claimant's low ferritin levels at the time of last testing on in early 2019 raised the possibility that some of her cognitive complaints may be attributable to a treatable condition. This possibility was recognized by Dr. Wiseman in his December 4, 2019 report and must be considered as a negative contingency. Assuming Dr. Wiseman's report has been passed on to the Claimant's treating physicians it is not clear why her ferritin levels have not been checked.

150. Despite these challenges to the reliability of the Claimant I find that she was a credible witness and I do accept her evidence regarding the stark difference between her level of activities pre-accident compared to post-accident. I also accept, as do her doctors, her subjective complaints of pain, whatever the correct diagnosis for them is, and that they were caused by the accident. In further support of this conclusion is the evidence of her partner, Ms. [redacted], and her friend, Ms. [redacted], and her sister, [redacted]. No serious attack was made on their credibility or the reliability of their evidence of the pre and post-accident condition of the Claimant.

Did the Claimant Sustain a Mild Traumatic Brain Injury

151. The only expert to diagnose a mild traumatic brain injury is Dr. Medvedev. Dr. Bentley did not do so, although it would have been within his area of expertise to do so. Dr. Dost

asserts quite strongly that the evidence does not support the criteria necessary for a formal diagnosis of mild traumatic brain injury.

152. Dr. Medvedev accepted the criteria of a diagnosis of mild traumatic brain injury posited by Dr. Dost and also accepted the necessity for a careful consideration of other factors that might account for cognitive symptoms otherwise associated with a mild traumatic brain injury. Although Dr. Medvedev insisted the loss of consciousness was not essential to his diagnosis, he seems to conclude that there was a very short period of unconsciousness immediately post-impact. The evidence to support that conclusion is very tenuous at best. The ambulance and hospital records indicate no loss of consciousness and a GSC of 15. The Claimant has said that she does not know whether she lost consciousness, as well as saying that she believes she did lose consciousness briefly. Her first recorded suggestion of a loss of consciousness was to her family physician several days post-accident. She does recall being in the vehicle after impact looking down at her feet with a sense of blackness coming towards her.

153. On the other hand, the evidence that the Claimant did not lose consciousness is quite compelling. She has a recollection pre-accident of looking out the window at the ocean, of hearing a "loud bang", of seeing the heads of other passengers moving about and the driver's curly hair flying in the air, of hearing the driver say she thought they had been in an accident, of hearing another passenger say she thought her arm was broken, of feeling severe pain in her low back and wiggling her toes, of being in a twisted position in the rear seat and of both another couple and the motorist from the car behind coming up to the side of her car.

154. She was not confused in the required sense of being unable to follow simple instructions. Although Ms. [redacted] confirms that the Claimant was in some confusion the day after the accident as to what hospital she had been taken to and the sequence of events, that is perhaps not surprising since the accident occurred at night, in Delta, and she had never been to the Richmond General Hospital. She was on her own evidence in severe pain.

155. Ultimately I think that Dr. Medvedev's conclusion was really based upon the severity of the collision and the symptoms that followed immediately thereafter. It was the kind of

collision as a result of which one could reasonably anticipate that a vehicle occupant might have a mild traumatic brain injury. At one point Dr. Medvedev said that "the symptoms that follow make the diagnosis". Dr. Dost gave exactly the opposite evidence, i.e. one cannot make the diagnosis of mild traumatic brain injury on post-concussion symptoms alone. I prefer the analysis of Dr. Dost. In the result, if I were required to decide this question, I would be inclined to conclude that the evidence does not support a diagnosis of mild traumatic brain injury. However, I also agree with Dr. Dost that really it is a distinction without much of a difference. If there was a mild traumatic brain injury it was on the milder end of mild. The pain and psychological factors would overshadow any hypothetical brain damage.

Does the Claimant Have Central Nervous System Sensitization ("CNSS")?

156. Dr. Wiseman made the diagnosis and he is well qualified to do so. Dr. Dost agrees that the Claimant's symptoms "would be most in keeping with chronic myofascial pain syndrome with central sensitization". Dr. Horlick does not address the issue in his report but in evidence by way, I think, of explanation, said that he found no allodynia on extensive palpation. Dr. Wiseman's evidence was that allodynia was a "cardinal feature of CNSS". Dr. Medvedev also did not detect allodynia despite his physical examination of the Claimant. Dr. Wiseman, it will be recalled, did not himself find allodynia but rather accepted the Claimant's self-report of it. Dr. Wiseman's explanation for the failure of other clinicians to find allodynia was that it is a symptom that waxes and wanes. Dr. Wiseman detected other characteristics of CNSS including an expansion of the pain field to the Claimant's entire left side and throughout her back, a burning hot temperature sensation, sensitivity to light and sound, difficulty with concentration and focusing, and activity intolerance leading to fatigue. He did concede that there was no other compelling explanation for the Claimant's symptoms.

157. Although I am troubled by the absence of any clinician actually finding allodynia, on a balance of probability and in the absence of any other compelling explanation for the Claimant's genuine symptoms, I conclude that she probably does indeed suffer from CNSS. It may not make much difference to the ultimate outcome, whether she does or

not, because there is no evidence to suggest that it is a treatable condition or, if it is not present, that the myofascial pain will improve given the extensive treatment she has already undergone.

Injuries

158. In keeping with the evidence of the Claimant and the medical experts I find that the Claimant suffered the following injuries and symptoms as result of the accident:

a. Whiplash associated disorder II with cervicogenic headache;

b. Sprain/strain of the thoracic and lumbar spine;

c. Left sacroiliac joint sprain;

d. Symptoms of the above included headache, both pressure and "ice pick" types; tingling in the limbs; neck pain; mid-back pain; left shoulder pain; low back pain and left hip pain;

e. Post-traumatic stress disorder involving cognitive impairment in word finding, poor memory, poor concentration, low energy and limited stamina;

f. Major depressive disorder including irritability and low mood;

g. Anxiety particularly during driving;

h. Nightmares;

i. Disturbed non-restorative sleep; and

j. Probable CNSS.

159. Some of these injuries have either resolved or significantly reduced in severity over time. As of December 2019 Dr. Wiseman thought that the Claimant's major depressive disorder was largely, if not completely, in remission as a clinical condition. The PTSD symptoms had also continued to improve as the Claimant rarely if ever had nightmares.

The depression had lifted apparently in conjunction with medication. The anxiety was now largely related to driving.

160. Despite the extensive treatment received over the years the Claimant continues to suffer from residual symptoms of chronic pain, headache, fatigue and cognitive impairment. So long as the Claimant continues to be so functionally and financially dependent upon Ms. Hunt, the Claimant will suffer some degree of anxiety and stress in that regard.

161. I accept the opinions of Dr. Bentley and Dr. Wiseman that there is not likely to be any significant improvement in the future. Dr. Bentley thought the Claimant had reached maximum medical improvement and his treatment recommendations were to provide symptom management rather than symptom resolution. Dr. Wiseman allowed for slow resolution of the Claimant's depression and PTSD at the same time allowing for continued emotional issues in adapting to a restricted way of life and functioning. He also concluded that the Claimant would experience many if not all of her current pain related symptoms on an ongoing basis which would impact her physical and cognitive stamina, her sense of memory and concentration and her overall stress tolerance.

162. While allowing for the possibility of some minimal improvement in symptomology in future I find and conclude that the Claimant's current restrictions on functioning are likely to be permanent.

DAMAGES

Loss of Earning Capacity

163. The law with respect to assessing a claim for loss of earning capacity is aptly summarized in *Fletcher v. Biu* (2020 BCSC 1304) at paragraphs 94 – 96 as follows:

> "[94] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not the application of a purely mathematical calculation.

> The appropriate means of assessment will vary from case to case: *Brown v. Golaly* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232 at para. 19.
>
> [95] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. To the extent possible, the plaintiff should be put in the position she would have been in but for the injuries caused by the defendant's negligence: *Lines* at para. 185. The court's essential task is to compare the plaintiff's likely future working life with and without the Accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.
>
> [96] There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both of are correct. The "earnings approach" is generally more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. When the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12. The earnings approach involves a form of math-oriented methodology such as: i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233."

164. Thus, in order to evaluate the claim for loss of earning capacity of the Claimant one must first determine what the Claimant would likely have been capable of earning if the accident had never happened as well as determining what the Claimant is now likely to be capable of earning in her injured condition. In a sense in this case the latter question may be easier to answer than the former. The Claimant has rehabilitated herself by obtaining the degree in graphic design from Emily Carr. This is a field that was of

interest to her and based upon the comments of Ms. Goncharova as well as her marks in the course the Claimant has talent and ability in the field. Both vocational assessors agree that a career in graphic design is appropriate for the Claimant given that it is often a freelance occupation allowing for one to choose their hours of work and work station. It is also a sedentary occupation that nevertheless allows for breaks from long periods of sitting.

165. What the Claimant would have done but for the accident is difficult to discern. I find that she would have continued to work at [redacted] until the downsizing of that business. She was well regarded by the owner, Mr. [redacted]; had just received a promotion into a management position and there was a possibility of a further promotion in three to five years to a more senior management position at a higher salary. We know however from Mr. [redacted] that because of economic circumstances [redacted] reduced the scope of its business and its employees drastically. Exactly when this occurred is not in evidence. The start of the decline, according to Mr. [redacted], was roughly the time that the Claimant had the accident. There is no evidence to support a finding that the Claimant would have been retained as an employee.

166. The parties are far apart in their submissions regarding what the Claimant would have done. The Claimant submits that with her education, her experience working at [redacted] and an expected glowing recommendation from Mr. [redacted], she would have been able to find a similar paying job somewhere else i.e. at an annual salary of $65,000. The Respondent says that after the Claimant obtained her Bachelor's degree in industrial design in 2004, she never utilized her industrial design degree but rather worked for six years in the family food business before taking two years to experience life in Montreal. While at [redacted] she did not have management experience (yet) and had she been let go from [redacted] she would likely have resorted to working at least in part in the food industry. Alternatively, the Claimant might have moved to Vancouver with Ms. [redacted], thereby losing any connection with the Victoria job market.

167. In the absence of the collision the Claimant submits that in the short term she would have continued to work at [redacted] progressing to an annual salary of $65,000 per year plus

benefits and bonus. If she were let go from [redacted] then with her background and attributes as a valuable employee she would have moved into some other job involving some degree of management, at an equivalent salary to what she was earning at [redacted]. Going into the future, the Claimant offers four potential scenarios. The first is an arbitrary assumption of an annual income of $75,000 plus benefits and bonus. This arbitrary salary can be corroborated by comparison with the NOC 0124 average income for advertising, marketing and public relations managers which is the management occupation most likely to include industrial designers or similar professionals.

168. The second possibility is that the Claimant would earn the average salary in the NOC 0124 i.e. approximately $77,000 per year. The third possibility is that the Claimant would earn the average NOC classification code of industrial designers, graphic arts technicians and graphic illustrator. This is a non-management classification with an average salary of approximately $55,000. A fourth possibility is that the Claimant would have earned an average income of $100,000 per year after benefits and bonus. This is approximately equivalent to $80,000 per year plus 10% bonus and 10% benefits. This possibility assumes that by the date of the arbitration the Claimant would have six years of management experience, presumably with [redacted]. This income level might be realistic if she were running the [redacted] business with Mr. [redacted].

169. In the post-accident circumstances, the Claimant suggests that the Claimant will only be able to work for the rest of her career part time doing graphic design. If she can now work on average 12 hours per week, that is about 25% of what she was able to do prior to the accident. Twenty-five percent of the average income of a graphic designer of $55,000 annually is approximately $13,750 per year. This does not take into account the absence of clients in the beginning of a freelance business, the necessity of charging lower hourly rates to build a group of clients, gaps between contracts or any worsening of her physical or psychological condition. This amounts to a residual earning capacity of approximately $270,000.

170. The Respondent’s submission is starkly different. The Respondent submits that there is too much uncertainty for the earnings approach to be appropriate. Much of the

uncertainty arises because the job at [redacted] would have been lost. The Respondent advocates the capital asset approach. Once the job at [redacted] ended, the Respondent says that there is no evidence to support an assumption that she would have obtained a financially equivalent position elsewhere. The Respondent points out that having obtained a degree in industrial design, the Claimant had not been able to find work in that field and she acknowledged that her degree was now dated. Prior to the job at [redacted], which the Respondent characterizes as "exceptional" the Claimant was actually working 18 hours per week at Emily Carr while also doing some work for [redacted]. Twenty-four hours per week which Mr. Pivnenko was asked to assume in his with accident scenario is only six hours below the 30 hours that the NOC recognizes as full time work. The Respondent says the Claimant would be able to work these additional six hours, relying on Dr. Horlick's opinion that she has no specific impairment. Ultimately, the Respondent suggests that a reasonable, if not generous, application of the capital asset approach would be an award of $60,000 to $100,000 inclusive of both past and future capacity loss.

171. I do not accept ICBC's submission. Dr. Horlick concluded the Claimant was probably totally disabled for one year post-accident. The Respondent conceded this period of total disability in argument. While it is not clear when the Claimant's job at [redacted] would have ended, there is no basis for assuming that it would have ended virtually at the time of the accident. The Claimant's salary at [redacted] for one year following the accident would have been $50,000 plus fringes and the possibility of a bonus. At the low end of the Respondent's range for loss of earning capacity past and future, the assessment provides an allowance of $10,000 for the remaining years up to the date of arbitration and nothing for loss of future earning capacity going forward. That approach simply does not take into account the significantly altered ability of the Claimant to work. None of the medical experts say that the Claimant can work full time, apart from Dr. Horlick whose opinion in that regard was wholly qualified by the acknowledgment that he did not take into account the effect of the Claimant's myofascial pain which he accepted as genuine. The Claimant is also precluded from any occupation involving heavy work. She is restricted to sedentary occupations, with accommodations.

172. A second major flaw in the Respondent's approach is that in effect it assumes that in the without accident scenario, when the job at [redacted] was lost, the Claimant would have decided to pursue the occupation of a freelance graphic designer in which 50% of workers work only part time. Although there is no specific evidence as to what the Claimant would have done without the accident, if the job at [redacted] was lost, there is no reason to believe she would have been content with that occupation if she were fully able to work full time without medical restrictions.

173. I also do not accept the Respondent's submission that the Claimant, absent the accident, would have followed Ms. [redacted] to Vancouver. Ms. [redacted]'s evidence, which I accept, was that the primary reason for that move was the higher salary offered to her given that the Claimant was unable to work and it was not clear when she would be able to return nor to what job. Both the Claimant and Ms. [redacted] were clear that their preference was to remain on Vancouver Island and in the absence of the accident and the Claimant's injuries I accept that they would have done so.

174. Although Ms. [redacted] acknowledged some anxiousness about the delay in approving her appointment as research chair in Nanaimo I accept that that concern was not the primary motivation for the move to the University of British Columbia.

Residual Earning Capacity - Conclusion

175. I would assess the loss of future earning capacity claim on the earnings approach. Although the evidence of what the Claimant would have done in the without accident circumstances is less than ideal, I conclude there is sufficient evidence on which to base a fair and reasonable assessment of without accident earning potential. The Claimant is not a minor without any working history; she is an adult with an established pattern of working, with an undergraduate degree, with a settled job at a good salary with real prospects for advancement. I reject the submission that any small multiple of one year's income can adequately compensate the Claimant for the significant restrictions on her capacity to work for the rest of her working life.

176. In estimating the Claimant's residual earning capacity I come to the following conclusions. She will pursue a career in graphic design. This is in keeping with her interest, her ability and her residual restrictions. It is the career that the Claimant has chosen to rehabilitate herself in. It is consistent with her earlier interest in industrial design. Her ability is reflected in graduating from the Emily Carr program "with distinction". It is consistent with Dr. Wiseman's opinion that paid employment will need to be flexible, modest, supportive and very limited in hours and demands particularly at first. It is an occupation that both Dr. Hall and Ms. Gallagher consider appropriate for her limitations.

177. On the basis that it is unlikely there will be any significant improvement in these limitations, I conclude that the Claimant will only be able to work part time. Dr. Hall suggests that the Claimant will likely only be able to work 8 to 15 hours a week for the remainder of her career. On the other hand, I accept Ms. [redacted]'s evidence that students were expected to work two hours out of class for every hour in class, meaning that the Claimant would have been working 18 hours per week while at Emily Carr. This however does not take into account the extended deadlines and the extra year required to complete the course. Assuming the Claimant is now able to work either 12 or 18 hours per week, based on a 40 hour work week that she was able to achieve pre-accident, her future work capacity is approximately one-third or one-half of what it was.

178. Both Dr. Hall and Ms. Gallagher agree that the average salary for a graphic designer is $55,000. On the basis of a 50% or two-thirds reduction in work capacity, that translates into an annual salary of approximately $27,500 or $18,315 which, using Mr. Pivnenko's multiplier ($1,000 to age 65 having a net present value of $19,570) produces a residual earning capacity between approximately $360,000 to $540,000. I find it is reasonable to select the rough midway point, or $450,000. I would however make three further adjustments. First, using the average annual salary for a graphic designer from the date of arbitration forward does not fully take into account the difficulties Ms. [redacted] outlined for someone trying to start up as a self-employed graphic designer. Those difficulties are real and in my view require a reduction in the residual earning capacity. Second, there is a probability that the Claimant will suffer a further major depressive

episode in the future, which will likely interrupt or interfere with her ability to work. This also requires an adjustment downward in the residual earning capacity. Third, and on the other hand there is the possibility, beyond speculation, that the Claimant's low ferritin levels may be contributing to some of her limitations. If so, that is a treatable condition and should increase her work capacity. Overall I think the first two factors are more significant than the third factor and accordingly I would adjust the assessment of residual earning capacity to $400,000.

Earning Capacity Without the Accident

179. I assume that the Claimant would have lost her job at [redacted] at some date between the accident and the arbitration. The difficulty in assessing this loss, as recognized by both parties is that there is no clear evidence as to what the Claimant would likely have done in the unforeseen event that her job at [redacted] ended. I reject the Claimant's submission of an annual income between $75,000 to $100,000 as unduly speculative. I similarly reject the Respondent's submission that the Claimant would have returned to a comparatively low wage occupation in the food industry or would have selected the graphic design career she has chosen post-accident. Prior to the accident she did not have physical restrictions and was capable of doing heavy manual work as evidenced by her work at [redacted]. I further reject any inference that questioned the Claimant's motivation to work. After obtaining her industrial design degree she did not get employment in that field but worked six years in the family food business. I attribute this choice to family loyalty rather than any lack of ambition.

180. The evidence from witnesses such as Mr. [redacted], Ms. [redacted], Ms. [redacted] and her sister describe a person who was energetic, ambitious, and a hard worker. Mr. [redacted], her employer for two years prior to the accident described the Claimant as "trustworthy, focused, dependable, a team player, enthusiastic and conscientious". He felt she was "looking after [redacted]". These are the earmarks of an exemplary employee. Even post-accident, the Claimant has gone back to school at Emily Carr to rehabilitate herself and done well at it. This is further compelling evidence of the Claimant's desire to advance herself.

181. Prior to the accident the Claimant did not have significant management responsibilities. She would have obtained some experience in her new position at [redacted] prior to being let go. Nevertheless I consider that she was someone with management potential but with no certainty that she would in fact achieve a management position.

182. The question then is what kind of income would a person with her background of a university degree, work experience with an employer who would, based on his assessment of her, been willing to provide a very favourable reference, and her exemplary personal characteristics reasonably be capable of?

183. I reject the Respondent's suggestion that the job at [redacted] was "exceptional" in the sense that it was one that she was never likely to obtain again. It is not clear how the Claimant obtained the job at [redacted]. While Ms. [redacted] described the position as a "dream" job, it must be remembered that the Claimant was not the graphic designer at [redacted], Mr. [redacted] was. I do however recognize and take into account the fact that the Claimant's work history prior to [redacted] was not in occupations with a salary in that range.

184. Doing the best I can in difficult evidentiary circumstance, I conclude that following a period of either unemployment or under-employment when the job at [redacted] was lost, the Claimant likely would have settled into new employment at an annual salary of between $45,000 and $55,000. Although the low end of this range is below the level of earnings at the date of loss, it must be remembered that the Claimant bears the onus of establishing what she would have done and similarly bears the burden of any gaps in the evidence on this issue. Using Mr. Pivnenko's multiplier, this range translates into a lifetime earnings of between $880,000 and $1,000,000. I assess the future earning capacity at $950,000. Reducing that amount by the residual earning capacity of $400,000, I assess the claim for loss of future earning capacity at $550,000.

Past Loss of Earning Capacity Claim

185. In Table B of his report on page 7 Mr. Pivnenko set out an estimate of past accident earnings for the six years from January 4, 2015 to the arbitration date. He assumed that the Claimant would have remained at [redacted] and received a promotion after three years to

an annual salary of $65,000. Neither counsel asked Mr. [redacted] when the downsizing of his business would have resulted in the Claimant's loss of her job. I will arbitrarily select that date as the end of 2017, halfway through this period of time. Thus the Claimant's loss of earnings for 2015, 2016 and 2017 would have been $50,000 per year plus fringes which Mr. Pivnenko averages at 4%. This amounts to a total of $156,000.

186. What the Claimant would have earned after losing the job at [redacted] between 2018 and 2020 is difficult to assess on the state of the evidence. It is reasonable to think there may have been a period of unemployment and a further period of working in the family food business or the food industry generally while possibly taking further training at an educational institution. I do not think the Claimant would have been content not to provide any financial support to her household. By 2020 which allows two years to find a new permanent position I think the Claimant would have reached the range that I have found for the loss of future earning capacity claim. I would add modest earnings for the years 2018 and 2019. I therefore arbitrarily assess the Claimant's lost earnings from 2018 to 2020 at $75,000. The total past loss of earnings is accordingly $231,000. From this must be deducted her actual earnings from [redacted] of approximately $6,000 resulting in a claim of $225,000.

187. I shall leave it to counsel to calculate the net past income loss taking into account taxes.

Cost of Future Care

188. For a treatment or care item to be included in an award for future care costs the Claimant must establish that it is both reasonable and medically justified, not necessitated. The treatment or care item must of course be related to the Claimant's injuries. It must also be intended to ameliorate the impacts of the injuries and to promote the physical or mental health of the Claimant (*Milina v. Bartch* (1985) 49 BCLR (2d) 33 (SC)).

189. Generally speaking I accept the treatment recommendations of Drs. Bentley and Wiseman. The Claimant has presented in argument a tabulation of what she is either currently spending or will spend on medication and treatment which totals roughly between $15,000 and $18,000 per year for the rest of her life. As will be evident I do not

accept that all of those costs are reasonable and medically justified. I do however award the following items:

a. Counselling for residual PTSD symptoms - $4,000. Dr. Wiseman recommended a further 10 to 15 sessions at a cost of $2,000 to $3,000 for the Claimant's residual PTSD symptoms. However he also thought it was more likely than not that the Claimant would have a further major depressive episode at some time in the future. I have accordingly increased the allowance for future counselling to take into account that likelihood.

b. I award $2,000 annually for massage/chiropractic treatment. Dr. Bentley recommends this treatment once or twice per month. This amount allows for a combined two treatments per month. The Claimant is currently receiving massage / chiropractic treatment six to seven times per month.

c. I allow $624 annually for clinical pilates. This therapy is also recommended by Dr. Bentley.

d. I award $1,449 annually as the cost of a pool pass. Dr. Bentley recommends aqua therapy and the Claimant has found it amongst the most beneficial treatments.

e. I allow a lump sum of $2,500 for a job placement provider as recommended by Ms. Gallagher.

f. I award $252 annually for the Cipralex medication recommended by Dr. Wiseman. I agree with Dr. Wiseman's recommendation to continue with this medication, as it has been beneficial, rather than switching to Pregabalin as suggested by Dr. Bentley.

g. Finally, I allow $1,000 as a lump sum for analgesic medication. Dr. Wiseman in his second report does not specifically address analgesic medication. In his evidence he thought the effect of other medication would likely be quite modest. In his second report Dr. Bentley suggested the Claimant would benefit from a more regular and sustained pharmacological regime for pain management. He

understood the Claimant was then only taking medication for pain on an as needed basis. His list however of current medication was only Vimovo and Tylenol #1 (six tablets per day). That is quite different from the schedule of current or expected spending cited in argument which included two Tylenol #3 per day, one extra strength Advil per day and six extra strength Tylenol per day, plus Vimovo. In his evidence Dr. Bentley said he had recommended the Claimant get off analgesics. I accept Dr. Bentley's evidence in this regard and decline to award ongoing medication for pain management. I acknowledge that the Claimant's current consumption, while not toxic is none the less high, and I make an award of $1,000 to afford her the opportunity to gradually reduce her consumption if she chooses to do so.

h. I decline to award an annual pass for yoga as I understand the Claimant was participating in yoga prior to the accident.

i. I decline to make an award for vocational consultation as well as a job placement provider. I consider there to be overlap between the two roles and in any event the Claimant appears to have settled on the role of graphic designer which is appropriate given her limitations.

j. In summary, the annual expenses total $4,325 which, applying Mr. Pivnenko's cost of care multiplier of $28,980 for $1,000 a year of expense totals $125,338.50. To this must be added $7,500 in the one-time lump sum awards for a total of $132,838.50.

k. I round this amount up to $133,000.

Special Damages

190. The special damages claimed by the Claimant are set out at Exhibit 1 – Tab N in the total amount of $26,906.79. In the Agreed Statement of Facts, paragraph 39, it was agreed that the amount, cost, type, dates and frequency of treatments and medication were a true and accurate index of the out-of-pocket medical expenses for same incurred by the Claimant. This was not an admission that the expenses were all a result of injuries caused by the

accident. In its closing submission Respondent's counsel indicated that he was awaiting instructions on a position with respect to the special damages, suggesting that there may be an issue as to whether some of the special damages had already been paid for by the Respondent. The Claimant's evidence was that these treatments and expenses were for injuries she sustained in the accident. Receiving essentially no submission from the Respondent I award the Claimant special damages in the amount of $26,906.79. If there is ultimately an agreement between the parties that some of the awarded special damages were previously paid by ICBC the parties may adjust this portion of the award accordingly.

Non-Pecuniary Damages

191. Non-pecuniary damages are awarded to compensate the Claimant for pain, suffering, loss of enjoyment of life and loss of amenities caused by a tortious act. The compensation awarded should be fair and reasonable to both parties. Fairness is measured in part against awards made in comparable cases. Other cases are helpful but serve only as a rough guide. Each case depends on its own facts.

192. In *Stapley v. Hejslet* 2006 BCCA 34, leave to appeal refused 2006 SCCA 100, the Court of Appeal outlined factors to be considered when assessing non-pecuniary damages. The inexhaustive list includes: age of the plaintiff, nature of the injury, severity and duration of pain, disability, emotional suffering, loss of impairment of life, impairment of family marital and social relationships, impairment of physical and mental abilities, loss of lifestyle, the plaintiff's stoicism (which should not generally penalize the plaintiff). *Rab v. Prescott* (2020 BCSC 1255) at para. 73 – 74.

193. The Claimant seeks a separate award for past and future loss of housekeeping capacity in the amount of $42,000 and non-pecuniary damages of $250,000 relying upon the following cases namely:

    a. *Gill v. Apeldoorn* 2019 BCSC 798;

    b. *Fletcher v. Blu* 2020 BCSC 1304;

c. *Wallman v. Doe* 2014 BCSC 79;

d. *Young v. Anderson* 2008 BCSC 1306;

e. *Sirna v. Smolinski* 2007 BCSC 967

194. The Claimant submits that she has suffered tremendously in a devastatingly violent collision. She has ongoing multiple physical and psychiatric injuries. She no longer plays any of her beloved sports or recreational activities, her passion and outlet before the collision. Her social life has been greatly curtailed. She is dependent on her partner. Her career, which she was passionate about and to which she was dedicated, is a fraction of what it was. She is in daily pain. She is no longer the outgoing, confident, energetic, happy young woman she used to be. She is taking multiple medications every day to manage her symptoms and requires ongoing physical and psychological therapy for the foreseeable future. Her relationship has suffered. She is entitled to a considerable award.

195. The Respondent submits that the facts do not justify a separate award for loss of housekeeping capacity which loss should instead be included in the award for non-pecuniary damages, citing *Kim v. Lin* 2018 BCCA 77. With respect to non-pecuniary damages the Respondent says the appropriate range is between $75,000 to $125,000 citing the following cases namely:

a. *Dennison v. Jenson* 2019 BCSC 725;

b. *Floris v. Castillo* 2020 BCSC 1447;

c. *Achan v. Jin* 2020 BCSC 1430;

d. *Johnson v. Heer* 2020 BCSC 1168;

e. *Sharma v. Day* 2020 BCSC 1365;

f. *Rab v. Prescott* 2020 BCSC 1255;

g. *Maldonado v. Mooney* 2016 BCSC 558;

h. *Sood v. Galea* 2020 BCSC 1236;

i. *Matthew v. Noble* 2020 BCSC 1499.

196. The Respondent makes the following points. Although the Claimant has lost some ability to engage in athletic and sports oriented activities, her participation in competitive sports in later years prior to the accident appears to have been minimal. Her psychological problems have diminished very significantly requiring limited treatment for mild residual PTSD anxiety related to driving. She is seeing Dr. [redacted] for unrelated psychological/emotional matters. Her depression was largely, if not completely, in remission as of December 2019 according to Dr. Wiseman. The Claimant was able to resume driving by March 2, 2015. The Claimant has continued to travel extensively to California, Hawaii, Invermere, Tofino, Mexico and Poland. She remains in her relationship with her partner. She has successfully obtained a bachelor's degree in the area of graphic design with distinction. She continues to drive, socialize and enjoy such things as film festivals. She has some difficulty performing particularly heavy physical household tasks but appears to still perform them despite discomfort. Given the extent of her activities and accomplishments post-accident, her injuries and the impact of them should not be characterized as catastrophic.

DISCUSSION AND ANALYSIS

197. The Claimant has clearly suffered a loss of housekeeping capacity. She is unable to do some heavier household chores. While Dr. Bentley recorded in his second report being told that she continued "to have difficulty with performing heavier household tasks including cleaning the bathroom, making the bed, mopping the floors, carrying the groceries and lifting heavy pots when cooking", I accept the evidence of the Claimant and Ms. [redacted] that she has not made the beds, washed the tub, nor scrubbed the floors post-accident. Other household tasks, including cooking quick meals, she has been able to do but with difficulty. Given the comparatively few tasks that the Claimant is not able to do at all, and following the guidelines in *Kim v. Lin*, I will take this loss into account in assessing non-pecuniary damages.

198. I do not include a separate in-trust award for the services provided by Ms. [redacted]. For the most part what Ms. [redacted] has taken on is an increased burden of housework, driving the Claimant to some treatment appointments, the full financial burden of the household and emotional support for the Claimant. I do not think these are extraordinary services for a partner to provide.

199. I agree with the Respondent that the Claimant's injuries are not catastrophic. She has part time residual earning capacity at a sedentary occupation. She is able to travel and has done so rather considerably. She is able to do most household tasks although with difficulty.

200. On the other hand the Claimant has significant residual restrictions. I find the most apt general description of these limitations was given by Dr. Wiseman when he said on his initial consultation that he was struck by the limitations on the Claimant's functioning. Her functioning seemed to be "hard capped", and she was "stopped by exhaustion". Although she was able to do a relatively wide range of activities, she was unable to continue an activity for long before becoming overwhelmed and tired, needing to rest. This generalization is consistent with the evidence of Ms. [redacted] who said that the Claimant could work two to three hours per day on design work before her brain became muddled because of pain. Ms. [redacted] also gave evidence that after a particularly active day the Claimant would be tired the following day and require more rest. Prior to the accident the Claimant was happy, energetic with an active recreational and social life. Her life currently is focused on pacing herself and managing her pain. She is no longer reliable. The prospect of improvement is minimal.

201. In these circumstances I find that the cases relied upon by the Respondent do not reflect the seriousness of the effects of the Claimant's injuries. The cases I consider most apt as a guide are *Gill, supra* and *Fletcher, surpa*. Mr. Gill was 49 years old at the time of trial. He had worked as a longshoreman and was unable to work at any occupation post-accident. His physical injuries included myofascial pain symptoms arising from spinal sprain/strain injuries including facet mediated pain and post-traumatic headache. His most significant injury was major depressive disorder with predominant anxious features.

It interfered to the greatest extent in his life. Prior to the accident he was happy, outgoing, sociable and engaged in social events with friends and family. He was healthy, strong and worked hard. His psychological problems would not be cured. He was isolated from his peers. He had lost his own sense of self-worth and confidence and had become a lonely, frustrated and frightened individual. He had become a shadow of his former self. His interaction with his friends and family was non-existent. The effect of his injuries on his day to day functioning was profound. He made one suicide attempt. Mr. Gill's non-pecuniary damages were assessed at $200,000. I consider his post-accident state more serious than that of the Claimant.

202. In *Fletcher, supra*, the plaintiff who was 33 years of age at the time of trial suffered injuries to her shoulder, neck and upper and mid-back resulting in headache, neck pain and disrupted sleep. She had nightmares and panic attacks. She pursued physiotherapy, massage therapy, acupuncture, chiropractic treatments and medical management. Her mental health deteriorated and she was often anxious, irritable and tearful with a consistently low mood. At the time of trial she had complaints of ongoing chest, upper, mid and low back pain, left leg symptoms, headaches, sadness, anxiety, periodic nightmares, impaired sleep and fatigue. She was an uneasy driver and passenger. MRI studies demonstrated objective evidence of profound progressive traumatic spinal injury. She remained at significant risk of relapse of her major depressive and post-traumatic symptoms. She gave up her sports, career goals and her recreational, social and professional network and lost confidence, courage and the source of much of the joy in her life. Having regard to the plaintiff's young age, her chronic back pain, the severity, permanence and progressiveness of her life altering spinal injuries, the limited efficacy of available treatment options and the substantial corresponding likelihood of a relapse in her mental health symptoms over time her non-pecuniary damages were assessed at $200,000. Similarly I consider Ms. Fletcher's post-accident circumstances more serious than that of the Claimant.

203. On considering all of the factors that must be taken into account, and in addition adding compensation for the continuing loss of housekeeping capacity and taking into account the contingency that low ferritin levels (a treatable condition) may possibly be

contributing to a small extent to the Claimant's cognitive symptoms, I assess the Claimant's non-pecuniary damages at $180,000.

204. In summary, I assess the Claimant's damages as follows:

a. Non-pecuniary damages: $180,000

b. Gross loss of past earning capacity: $225,000

c. Future loss of earning capacity: $550,000

d. Cost of future care: $133,000

e. Special damages: 26,906.79

TOTAL: $1,114,906.79

I leave it to the parties to calculate the net past loss of earning capacity.

205. The parties are also to determine the applicable deductible amounts and in the absence of agreement a further hearing may be held.

"Donald W. Yule, Q.C."

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Arbitrator: Donald W. Yule, Q.C.

After publication of this decision, counsel advised that they have agreed to the following:

Special damages: $14,190.47

Deductible amounts: $641,328.16

"Donald W. Yule, Q.C."

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Arbitrator: Donald W. Yule, Q.C.