

IN THE MATTER OF AN ARBITRATION

PURSUANT TO: Section 148.2(1) of the Revised Regulations
to the *Insurance (Vehicle) Act* (BC Reg 447/83) and
the *Arbitration Act*, RSBC, 1996 c. 55 (the “Act”)

BETWEEN:

E.B.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

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Rose Keith QC

Dates of Hearing

Dec. 7 – 11, 14 – 15, 2020
Feb. 3 – 4, 2021

Date of Submissions

Feb. 4, 2021

Date of Award

April 5, 2021

INTRODUCTION

1. This is a claim for compensation for injuries sustained by the claimant, pursuant to underinsured motorist coverage provided by the *Insurance (Vehicle) Regulation*.
2. The motor vehicle accident which gave rise to this proceeding occurred on September 4, 2014.
3. Liability was admitted in the tort proceeding underlying this claim. The claimant agreed with the respondent to settle that action for the available insurance limits and proceed with this claim.

THE CLAIMANT'S BACKGROUND, EDUCATION AND WORK HISTORY

4. The claimant was born on April 19, 1988 and at the time of the hearing was 33 years old. The claimant was a new mother, her son being born in August. At the time of the hearing the claimant was living in Edmonton with her partner and her son.
5. The claimant was born in Castlegar where she lived with her mother, father, and older brother until age ten or eleven, at which time the family moved to Trail. The claimant graduated from high school in Trail and throughout high school she was athletic and had several friends. The claimant found school boring and this was reflected in her grades which were not good.
6. The claimant experienced two difficult events at the age of 15. Her grandfather died and then within 12 days her cousin drowned. This was a difficult period for the claimant and after a brief course of medication and treatment with a therapist the claimant was described as coping well.
7. While in high school the claimant worked at a variety of jobs. The claimant contributed to the support of her family through the money she earned working. The claimant had a good relationship with her mom during high school while her relationship with her dad was described as at times bumpy. The claimant's mom described the claimant prior to the accident as being very energetic, independent, and happy. Her mom confirmed that the claimant participated in a wide variety of sporting activities and had several friends during her high school years.
8. After graduating from high school in 2005 the claimant had a job detailing cars and was also working at the front desk of a local hotel. She attended Selkirk College in 2006 where her mom worked, which provided her with free tuition. She enrolled in the business administration program which she did not like and did not excel at. The claimant failed this program as she did not withdraw prior to the deadline.
9. In 2006 the claimant moved to Kelowna with friends. She worked at an architectural drawing company and participated in a variety of activities such as hiking and biking. She was also active socially with friends. The claimant found that Kelowna did not suit her, and she moved back to the Kootenays with the intent of ultimately moving to Edmonton.

10. When the claimant returned to the Kootenays, she returned to her employment at the local hotel, working not just at the front desk but also bartending and serving.
11. In August 2008 the claimant moved to Edmonton. The claimant worked at a property management company taking payments for rent, helping with the cleaning, and doing walk throughs for new tenants. She remained in this role until September 2009. It was during this time that the claimant met her best friend, CP, who was also her neighbor. The two would spend time together walking their dogs, hiking, biking, shopping, and going out for dinners. The claimant at this time also began modeling for extra income.
12. In February 2010 the claimant began working as an activity coordinator at the Canterbury Foundation in Edmonton. She remained in this role until September 2010.
13. In the fall of 2010, the claimant moved back to Trail with her boyfriend. The claimant's goal was to secure employment at the mill. The claimant worked for one month at the mill when it was shut down and repairs were required to the drums. This job involved the claimant working 12-hour shifts. The work was physically demanding with the claimant spending most of her day walking up and down scaffolding stairs to the top of 300-foot high drums. The claimant testified that she had no physical problems doing the job.
14. When the job at the mill ended the claimant took on a role at the seniors centre as an activity assistant. The claimant was given the position at the claim centre on the condition that she enroll in the activity program through the College of the Rockies. The claimant was unable to satisfy this requirement because she did not have the required prerequisites and consequently the role of activity coordinator was given to another individual. She remained in the role as activity assistant until June 2011.
15. In the summer of 2011, the claimant worked at the Kootenay Society for Community Living running a summer program for disabled children. The claimant described this role as being physical with activities varying daily. At the end of August 2011, the claimant took a position as a labourer in Fort McMurray. By this time her relationship with her boyfriend had come to an end. The construction job involved a variety of physical tasks including digging ditches, bolting pipes and filling sandbags. The claimant remained in this role until November 15, 2011. The claimant testified that she had no difficulty with the physical aspects of this job.
16. On November 24, 2011 the claimant began working as an administrative and payroll clerk at TJ's Oilfields. She remained in this role until March 7, 2012.
17. In March 2012 the claimant began working for Cenovus in Calgary in an administrative role. She worked for Cenovus from March 2012 to December 2013. During her time in Calgary the claimant was an avid participant in spin and yoga and described herself as being in the best shape of her life. She described herself during this period as light-hearted and very driven, with lots of friends. During this time, the claimant completed the yoga teacher training and did a training course in spin to become a certified instructor. She began teaching yoga and spin in 2013.
18. In January 2014 the claimant moved back to the Kootenays with her boyfriend, KB. She bought a home with KB that required substantial renovations. KB was commuting to work

in Alberta and would often be away and as a result the claimant would have extended periods of time on her own. She spent her time teaching yoga, doing a variety of renovations and outdoor projects on the home that they had purchased and hiking, biking, swimming, boating and other recreational activities with friends. The claimant testified that she began to plan to open a yoga studio in Castlegar, with her intent being to teach yoga and rent space to other practitioners. The claimant testified that her dream was to return to university to obtain her masters in psychotherapy. The claimant used her social media profile to brand herself and to help generate attendance at the classes that she was teaching.

19. In July 2014 the claimant and KB were married. In August 2014 the claimant began a contract teaching three yoga classes per week. In September the claimant began teaching yoga at Selkirk College and Silver Birch Clinic. The claimant testified that her intention during this time was to determine what her teaching threshold was, expecting that she would have the capacity to teach three to five classes per day. The claimant anticipated that her earnings would increase with opening the studio through retaining a percentage of earnings from others who were teaching or offering other services at her studio.
20. The documentary evidence confirms that the claimant was contracted to teach seven classes per week of yoga at Silver Birch Clinic beginning in September 2014. It was expected that the claimant would earn \$57.00 per class or \$399 per week for this work. Documentary evidence also confirms that the claimant was contracted to teach two yoga classes at Selkirk College over a ten-week period. The maximum that the claimant would have earned from pre enrollment at Selkirk College was \$2,394 for the ten-week period.
21. Tax returns entered as evidence document pre-accident earnings as follows:

2013	\$58,096	Cenovus and Bowen Workforce Solutions Inc.
2012	\$56,726	Bowen Workforce Solutions Inc. and TJ's Oilfields Contracting Ltd.
2011	\$36,458	Voice Construction Ltd., Chantelle Management Ltd, Terra Nova Motor Inn Ltd., Kootenay Society for Community Living and TJ's Oilfields Contracting Ltd.
2010	\$34,369	Business Development Bank, Chantelle Management Ltd, Canadian Industrial Mill Services Ltd., Terra Nova Motor Inn Ltd., and Canterbury Foundation
22. The claimant had looked at space but had not yet signed a lease for studio space at the time of the accident. She testified that her intent was to continue to teach classes where she had contracts, establish a good base of followers, and hopefully open the studio in January 2015. No concrete steps towards opening the studio had been made by the time of the accident.

THE CLAIMANT'S PRE-ACCIDENT HEALTH AND ACTIVITIES

23. Apart from an issue with polyps, the claimant enjoyed excellent health prior to the accident. She had an active lifestyle and took part in many activities including hiking, biking, yoga,

swimming, spin, and boating. She had an active social life spent time with friends and family.

24. The claimant's pre-accident health and activity level were confirmed by the evidence of her friends CP, NW and DP who described the claimant as very outgoing, bubbly, energetic and happy. NW described her as the person that you would go to if you needed emotional support. CP spoke of the claimants love of yoga and her advanced skill level which was also confirmed by DP.
25. The claimant denied having any issues with sleep, pain, emotions, or cognition prior to the accident and described being unrestricted in her physical and vocational activities. This was confirmed by her mother, RC.

THE ACCIDENT

26. The accident occurred near the claimant's home. She was returning to her home after being in Castlegar. She was travelling on what she described as the main road at the time of the accident. She was wearing a lap and shoulder seatbelt and was alone in her vehicle. The claimant described driving around a corner and seeing a car approaching from the hill at a fast rate. The claimant described hovering her foot over the brake and when she realized the car traveling down the hill was not stopping, she slammed on her brakes and swerved to attempt to avoid a collision. The car t-boned her vehicle at speed, pushing the claimant's vehicle across the oncoming lane and down the embankment. The claimant's vehicle came to a stop on the bank of the river, oriented sideways and close to the water. The claimant remembers being scared because of how close she was to the water. She described childhood fears of going into bodies of water in a car accident. The claimant testified that with the impact she saw the river and feared that she was going to die. The airbags in the claimant's vehicle deployed.
27. At the time of the impact, the claimant hit the left side of her head on the driver's side window and felt that she had a brief loss of consciousness. The claimant recalled feeling dizziness following the impact.
28. The claimant's recollection of the accident and its aftermath is spotty. In cross examination she described remembering the accident occurring and then it was "lights out". She described seeing dust everywhere, a loud ringing in her ears and a sense that the truck might still be moving. She recalled putting the truck in park and remembers hearing the first responders arrive.
29. RC was at the college close to the accident site when the accident occurred and was therefore on scene shortly after the accident occurred. RC described seeing the claimant at the scene of the accident with her feet within three feet of the water's edge and the truck almost in the river. Fire and ambulance also attended the scene.
30. The claimant described being very scared at the scene of the accident and experienced immediate neck and back pain. The claimant also experienced foot pain and described being unable to stand due to pain. She had a bruise on her temple from hitting her head on the door frame. The claimant was placed on a spine board and transported by ambulance to the emergency centre in Castlegar following which she was transferred to the Trail

Regional Hospital for further assessment. At Trail a variety of diagnostic tests were conducted including a CT scan.

31. The photographs from the scene of the accident were entered into evidence. They show the claimants truck on the side of a steep embankment, very close to the river. The photographs also document swelling and bruising to the claimant's foot, scrapes, burns and bruising to her forearms and bruising in the left temple area. The photographs show extensive vehicular damage to both vehicles.

THE CLAIMANT'S INJURIES AND CURRENT CONDITION

32. On the day following the accident the claimant complained of neck, shoulder, feet, and back pain. She also reported experiencing flashbacks of the accident and anxiety. She found it difficult to travel past the scene of the accident which, given the vicinity to her home, was often necessary. The claimant testified to being fearful of sleep, fearing that if she fell asleep, she would not wake up. She described being in a lot of physical and emotional pain in the immediate period after the accident.
33. The claimant also had difficulty sleeping following the accident because of pain and night terrors. She described reliving the motor vehicle accident in her sleep or having fears of something getting her, killing her, or dying, or the sound of the motor vehicle accident. She described these night terrors as being different than bad dreams. The claimant says that she continues to experience night terrors and at the time of the hearing testified to experiencing them approximately three times per week. The claimant described feeling panicked in her sleep which would awaken her and at times she would wake up yelling with her heart racing. The claimant described waking feeling terrified and unable to recall what the nightmare is about. In general, the theme of the night terrors that the claimant described are either the motor vehicle accident itself or about impending doom. The claimant testified that she has experienced night terrors consistently since the motor vehicle accident other than a short period of time after seeing a therapist.
34. RC described the claimant as not wanting to leave her home or be alone in her home in the initial period after the accident. RC testified that for a period following the accident the claimant stayed in a trailer on her property rather than the house because she was having panic attacks and nightmares associated with the rooms in the house.
35. The night terrors impacted the claimant's relationship with KB. KB stopped sharing a bed with the claimant because the night terrors would waken him.
36. RC described the claimant as becoming reclusive following the accident. The claimant and RC testified that following the accident the claimant was reluctant to leave her home, felt depressed and stopped caring for her house and yard in the way that she had previously done.
37. CP saw the claimant three weeks after the accident. She described the claimant at that time as being very emotional. CP testified that the claimant appeared to be in significant pain and that she observed the claimant to have difficulty walking due to pain.

38. The claimant described difficulties with returning to driving following the accident. She testified to experiencing panic attacks when she drove by the scene of the accident. She also testified to experiencing panic attacks if other triggering events occurred while she was driving. The panic attacks were significant enough that the claimant would have to pull over to the side of the road. She would be sweating, crying, and shaking and would have to take time to calm herself down before she could resume driving.
39. In December 2014 the claimant and her husband, KB, traveled to Mexico. The claimant testified that she did not have the energy to participate in her usual Mexico activities. She testified that she did not want to leave her room while in Mexico.
40. CP testified to seeing the claimant in approximately the fall of 2016. CP testified that the claimant was not much different than how she had been three weeks after the accident at her wedding in the fall of 2015. She described the claimant as not wanting to leave the house and appearing to be in significant pain. She described the claimant as depressed, irritable, very sad and anxious.
41. Throughout the hearing, there was testimony with respect to the claimant's travel since the accident. The claimant described a trip that she took with KB to Norway in June 2016. She found the flight very difficult. The trip included physical activities including a lot of walking and socializing with family members which the claimant testified was difficult. The claimant described going on a hike with KB's family and the difficulties that she experienced. CP testified about a trip to Mexico with the claimant in the spring of 2018 during which she described the claimant as being anxious and not happy. The claimant described a trip to the United Kingdom during which she and KB decided to end their marriage. While the evidence established that the claimant has traveled since the accident, the evidence clearly established that the claimant's activities and enjoyment of the travel were significantly different than prior to the accident.
42. In the fall of 2018, the claimant met her current partner, SM, while she was living in Calgary. In 2019 the claimant moved to Edmonton and began living with SM. SM testified that due to his job security and associated pension it made more sense for the claimant to move to Edmonton than for him to move to Calgary. SM described the claimant as being very kind, very honest, very outgoing and with good family values. The claimant and SM had a son in August 2020.
43. SM testified about ongoing issues that the claimant experienced with her back. He testified that with exertion of approximately twenty minutes the claimant would experience difficulties with her back, and as a result they moderated their activities. He described the claimant as trying hard to push through. He described the necessity of stopping after driving for a couple of hours to allow the claimant to stretch. He testified that the claimant constantly has bad headaches and nightmares that will result in her waking up screaming. He described observing symptoms of depression and that if he told the claimant disturbing things, she would have difficulty with letting them go. As a result of this, SM described moderating the things that he tells the claimant about his work.
44. The claimant currently says that her worst pain is her low back pain. She continues to experience headaches frequently, significant neck pain which has worsened since having her child and ongoing problems with her shoulders with difficulties raising her arms above

her head. She continues to have sleep disruption with pain making sleep difficult and she continues to experience night terrors. She testified that her pain makes her irritable and short and she described continuing memory problems. The claimant testified that she continues to experience symptoms of anxiety and panic attacks.

45. The claimant testified that she has been unable to continue in her usual activities. She testified to going snowmobiling on one occasion with her father after the accident but had limitations in what she was able to do. She testified to ongoing limitations in her ability to participate in spin or yoga with limitations resulting from her neck and low back pain and repercussion following attendance. The claimant testified that she missed attending yoga and spin and the loss of community that was associated with this.
46. The claimant described significant changes in her social life since the accident. She testified that many of her pre-accident friendships no longer existed. The claimant attributed the loss of friendships to the loss of commonality in interests and her being unable to participate in her pre accident activities.
47. The claimant testified that while she had improvement in the level of symptoms that she was experiencing for the first couple of years, the level of symptoms since then has plateaued. She described a worsening in symptoms with the birth of her child in the summer of 2020.
48. The claimant described herself prior to the accident as being driven with the world at her fingertips. She said that she believed that whatever she chose to do she could have done. She described herself as resilient and confident. She said that people leaned on her and shared things with her and she was able to let their burdens go and not affect her life. This contrasts with how the claimant describes herself since the accident. She says that she is a constant ball of anxiety, always worrying and nitpicking. She describes herself as very worried about her future and unable to deal with change.
49. The change described by the claimant post-accident was confirmed by RC and NW. Both described a significant change in personality in the claimant after the accident, describing the claimant as now being insecure, anxious, and ruminating. NW described the claimant as becoming irrational in the way that she worries about things.

HISTORY OF THE CLAIMANTS MEDICAL TREATMENTS FOLLOWING THE ACCIDENT

50. The ambulance report documents a 30 second loss of consciousness following the accident. After transfer to hospital x-rays of the right shoulder, right foot, and cervical and thoracic spine were performed, all of which were unremarkable. Following transfer to Trail Regional hospital a CT of the head and neck were conducted, both of which were unremarkable.
51. The claimant was seen shortly after the accident by her family doctor. The claimant reported significant soft tissue pain and headaches as well as vertigo, anxiety and feeling foggy.

52. The claimant began receiving massage therapy at Silver Birch shortly after the accident and attempted to return to yoga. She had 58 massage therapy treatments at Silver Birch between September 16, 2014 and March 29, 2019.
53. In December 2014 the claimant started physiotherapy treatments at Saber Physiotherapy. Between December 18, 2014 and November 24, 2015, the claimant had 27 physiotherapy treatments at Saber Physiotherapy.
54. The claimant began seeing a chiropractor, Dr. Brandy Grantham starting in August 2015. The claimant reported not sleeping well, experiencing dizzy spells, and having constant headaches. Also noted were complaints of low back pain radiating into the left leg, right neck, and shoulder pain. The claimant received 24 treatments from Dr. Grantham between August 24, 2015 and May 24, 2017.
55. In March 2015 the claimant's family doctor referred her to Castlegar Mental Health for assessment of PTSD and the claimant began counselling sessions with Erica Ortega. The claimant described feeling lost, not sleeping, and waking up with night terrors every night. The claimant described feelings of anxiety and depression. Trazadone was prescribed to assist with sleep and symptoms of anxiety.
56. In August 2015 the claimant's family doctor referred her to Dr. Kalia, who has an interest in pain management. She was also referred to a neurologist, Dr. Marion Berry who did nerve conduction and EMG studies. At the time the claimant was experiencing muscle spasms in the right side of her neck and radiation of pain to her thighs. Celebrex was prescribed for pain management.
57. In February 2016 the claimant began attending the Rise BC Wellness Centre where Dr. Kalia administered injections. The claimant found the injections painful with resultant nausea and no improvement in her pain levels. The claimant's chief physical complaint at the time of treatment by Dr. Kalia was neck pain and lower back pain. CBD was also recommended as a treatment modality, but the claimant found that this resulted in worsened anxiety.
58. In June 2016 the claimant was seen by Dr. Marion Berry who performed an EMG nerve conduction study. The claimant complained of excruciating low back pain which was radiating into her thighs. EMG testing was normal, and Dr. Berry recommended stretching exercises.
59. On October 18, 2016 the claimant was assessed by Andrew Hosking. At the time of the assessment the claimant reported neck and head pain with stiffness and limited mobility, right shoulder pain with limitation in range of motion, weakness and a feeling of "looseness", mid back pain with stiffness and achiness, low back pain with weakness, spasms and limited mobility, right hip pain with cracking and aching and pain and achiness in both of her knees.
60. When the claimant was assessed by Dr. Brooks on October 19, 2016, she reported ongoing headaches, neck pain, right shoulder discomfort, mid back pain, low back pain and right hip pain. She rated her pain in her neck, right shoulder, and low back as a 4/10. She rated her pain in her upper mid back as a 3/10. Headaches were her most significant concern.

61. In May 2017 the claimant underwent a vocational assessment with Avita Sharma. Her reported symptoms at that time included constant pain in her neck, low back, knees and both shoulders. The claimant reported that the neck pain was her worst problem. She also reported experiencing headaches, challenges with memory, panic and anxiety when driving, PTSD triggers during the night, irritability and difficulty letting go of things. She also reported social isolation and sleep disruption due to fear, anxiety, and nightmares.
62. In June 2017 the claimant was assessed by Dr. Tessler, neurologist, at the request of ICBC. At that time the claimant reported ongoing discomfort in her neck, shoulders, and trapezius muscles with pain in her low back, hips, and the back of her knees. The claimant reported headaches occurring approximately twice per week.
63. In July 2017 the claimant began EMDR treatment with Holly Smee at HollyTree Wellness Centre. The treatment was stopped when the claimant moved back to Calgary in the fall of 2017.
64. In 2019 after the claimant moved to Edmonton, she began attending counselling with Beth Murray. Her first session was on May 3, 2019 and between then and February 14, 2020 she attended for 12 treatment sessions. At the time when she began treatment the claimant reported experiencing nightmares almost nightly, and feeling hopeless, weary, numb, and very low. Treatment included CBT, DBT and EMDR therapies. The treatment with Ms. Murray involved examining the claimant's childhood roots and resulted in the claimant catastrophizing her childhood. She found things about her childhood to be very upsetting and noted that these things had never bothered her before.
65. On May 14, 2019 the claimant was assessed by Dr. Hirsch at the request of ICBC. Reported symptoms at that time included headaches, anxiety, driving related anxiety, mood dysfunction and pain in her neck, upper back, shoulders, low back, hips, and knees. Her primary physical concern was constant central low back pain, which was aggravated by sitting and standing, as well as constant pain in her neck, upper back, and shoulder girdle region. She reported experiencing a headache most days and that her sleep remained disturbed. The claimant reported continued anxiety and her impairment in her memory which she perceived to be worsening with an associated feeling of being in a fog and reduced concentration.
66. On May 15, 2019 Dr. Brooks conducted a second examination of the claimant. The claimant reported ongoing symptoms of neck and back pain, as well as headaches. Overall, the claimant reported that she felt that the pain had become somewhat worsened since the previous assessment. The claimant now considered the low back pain to be the most significant of her symptoms. She complained of ongoing nightmares and sleep that was interrupted due to either nightmares or pain. She also reported anxiety. Her score on the Pain Disability Index Questionnaire was now in the moderate to high range whereas at the time of the 2016 assessment was in the low range.
67. In June 2019 the claimant was assessed by Dr. Susan Lazar. At that time the claimant reported experiencing daily headaches and neck pain. She also reported cracking in her shoulders and a feeling of looseness. She reported constant tightness and pain in her upper and lower back and achy hips. She also reported pain in her knees. She reported memory

concerns, difficulty with sustained attention and focus, sustained low mood, accident related anxiety, nightmares, and daily worries about a variety of issues.

68. The claimant gave birth to her son in August 2020 following which she developed postpartum mood concerns with low mood and anxiety. She also reported increase in her physical symptoms following the birth of her son.
69. The claimant was seen by Dr. Lazar in follow up in September 2020. At that time the claimant reported that her pain was the same or worse as it was when seen initially, which she attributed to the duties related to the baby. She reported continued constant pain in her neck, upper back, lower back, hips, and knees. She reported continuing to experience concentration and memory issues, sleep difficulties, control issues, excessive worry, anxiety, low mood, and nightmares.
70. Currently the claimant manages her pain with Tylenol and Advil. She also has an anti-inflammatory prescription as well as a prescription for Ativan to assist with anxiety management. In addition, she uses topical medication for pain management.

THE CLAIMANT'S POST-ACCIDENT EDUCATION AND EMPLOYMENT HISTORY

71. At the time of the accident the claimant was working on a part time basis as a yoga instructor. She was planning to increase the frequency of teaching beginning one week after the accident. The claimant was also considering opening a yoga studio after the new year.
72. The claimant attempted to return to teaching yoga at Silver Birch in September. She found teaching difficult as she was unable to adjust students or demonstrate poses. She would often have to cancel teaching because of her symptoms. The claimant ultimately found that she could not continue teaching and discontinued her contract at Silver Birch and at Selkirk College. The claimant's tax return for 2014 documents T4 earnings of only \$81 and receipt of employment insurance benefits.
73. In 2015 the claimant again began teaching yoga at two studios in Castlegar. The claimant found that she was unable to teach yoga in the way that she had prior to the accident which led to the realization that she would need to find a different career path. The claimant completed the National Construction Safety Officer Training Program in Calgary. She found the course physically taxing due to the amount of sitting that was required and emotionally hard because she felt as if she were giving up on her dreams.
74. In February 2015 the claimant renewed her CPR Certification and registered for the Emergency Medical Responder course at the College of the Rockies. She withdrew from the course before it started because she could not do the physical elements necessary to roll patients and strap them to spine boards which was required in the CPR Certification course. During the CPR Certification course, the claimant experienced flashbacks of the motor vehicle accident. The claimant says that her experiences during the CPR Certification course led to her conclude that a career as a paramedic was not feasible.
75. In May 2015 the claimant began working as a soil tester for Hil-Tech Contracting Ltd. ("Hil-Tech"). Her work duties were varied and involved standing taking samples of soil

and doing paperwork in the afternoons. She found the work physically challenging and required accommodations such as the ability to go into the back room to stretch. She continued in this job for eighteen months. The claimant said that she found it difficult when she was unable to do various tasks at work. Her employment came to an end in October 2016 because of completion of the project. The claimant said that if further projects had been available with Hil-Tech she would not have accepted the work as she felt she could not physically maintain the work and found it emotionally draining.

76. BB from Hil-Tech testified that the claimant was hired for a soil sampling job with the original intent being for this to comprise the entirety of her job. Soil testing was downgraded to intermittent as the project evolved and the claimant was given site office paperwork to maintain her employment on a full-time basis. He testified that the claimant met all his expectations and all the client's expectations.
77. BB became aware of the motor vehicle accident injuries approximately one month after the claimant began working at Hil-Tech. He testified that the claimant told him that the injuries would not be an issue for her work and from his observations the claimant was physically able to do the job. He testified that the claimant performed her tasks without hesitation, and he was not aware of any accommodations being asked for by the claimant or being put in place due to physical limitations. He did not think that the claimant missed work due to her injuries and he testified that her attendance was the same as other employees. In terms of her interactions with other employees, BB testified that she got along very well with other people and he described her as being very open and easy to communicate with.
78. BB testified that the claimant's work came to an end in November 2016 because the project ended. He testified that he would have rehired the claimant if there was work available to her and that at no time was her job in jeopardy.
79. In cross examination BB testified that the claimant's job was a light duty job that had variation in the positions that were required. He confirmed that the claimant had told him about her back pain and that while he did not personally observe the claimant taking stretch breaks, he was aware through colleagues that she did. He also testified that while the claimant did not ask for special accommodations, he was aware through colleagues that certain accommodations were provided.
80. TM, the claimant's supervisor at Hil-Tech, testified as well. He explained that the job that the claimant was hired for was project based. He observed the claimant daily while at work. TM described the claimant as a good worker. He was aware of the claimant's injuries and testified that at times her back may prevent her from doing some things and that at times she may have to go and have a rest. He described her attendance as being good, noting that it was no different than any one else's. In terms of the claimant's demeanor, TM described her as getting along well with others, very sociable and always happy. TM testified that the claimant was a good worker and that had there been further work they would have rehired her.
81. TM testified that the accommodation that were provided to the claimant including allowing her to use the conference room to stretch. He testified that the claimant did this on almost a daily basis in the morning and as well she would stretch at lunch. TM testified that on occasion the claimant would lay down while at work. In cross examination TM testified

that there were times that the claimant looked like she was in pain and that she was not a complainer.

82. While working at Hil-Tech the claimant was also teaching four classes per week of yoga and spin, although with modifications from her pre-accident teaching style. She was no longer able to demonstrate the poses and did not spend her time standing during the classes. The claimant testified that attendance at her classes began to decrease which she attributed to her revised teaching style. The claimant testified that this very hard for her emotionally.
83. The claimant's tax return for 2015 documents T4 earnings of \$41,840 and receipt of employment insurance benefits.
84. In March 2016 the claimant completed a Doula training course. The claimant testified that during the training she realized how physically demanding the work would be and that she would be physically unable to do the work. She attended this four-day training course while her work at Hil-Tech was on a break.
85. After her employment at Hil-Tech came to an end, the claimant moved to Mexico for approximately six months, returning to Canada in March 2017. While in Mexico the claimant did some infrequent modeling, but otherwise was unemployed.
86. The claimant's T4 earnings for 2016 totaled \$51,566. These earnings included income earned from Hil-Tech until October. The claimant's tax return for 2017 documents receipt of employment insurance benefits and no earnings.
87. In the fall of 2017, the claimant began attending Mount Royal University in Calgary with the intention of completing a degree in child and youth counselling which was a four-year program. In the fall of 2017, the claimant took two courses to upgrade her qualifications. She did very well in both courses. In the winter session the claimant took five courses and did very well in all but one. The claimant testified that the course that she did not do well in was one where she had difficulty with the pace of the course and the professor would not allow her to record the lectures. The claimant and KB separated in the summer of 2018.
88. The claimant returned to Mount Royal University in the fall of 2018 after her separation from KB. KB financially supported her while she attended this semester at Mount Royal. In the fall of 2018, the claimant took four courses and did very well in all but one course. In the winter 2019 session the claimant took three courses and did excellent in all three. The claimant says that she struggled physically and emotionally with school, finding it hard on her body sitting in class and listening to lectures. She would often tape record her lectures as she had difficulty concentrating. While the claimant achieved good grades, she said it was at a cost.
89. The claimant had no earnings in 2018. The claimant testified that if she had not been injured in the motor vehicle accident she would have worked while attending school and would have worked during the summer. There was no evidence of the reason that the claimant did not work while she was on a break from school during the summer.
90. At the end of the spring 2019 school year, the claimant decided to move to Edmonton and to switch programs into the MacEwan University's Child and Youth Care Program. The

claimant testified that she chose to switch programs due to a different structure at McEwan College which would allow her a two-year exit strategy rather than completing the full remaining three years required for the Mount Royal University program. The claimant was concerned that she would find the four-year program too challenging due to the emotional, cognitive, physical, and financial restraints. SM testified that they chose to have the claimant move to Edmonton rather than him move to Calgary due to his job security and pension in Edmonton.

91. When assessed by Dr. Hirsch in May 2019 the claimant reportedly told him that she was working towards obtaining her child and youth care counselling degree, however she was unsure whether she had the aptitude to complete the four year program and because of this had enrolled in a similar type of program in Edmonton, pursuing open studies which allows her to get a diploma in two years.
92. In the fall of 2019, the claimant enrolled in five courses at Grant MacEwan University. The records from Grant MacEwan show that the courses at Mount Royal and Grant MacEwan did not allow for a direct transfer with credit for all courses. Rather because of the differences in the program, the claimant was missing too many courses to be a year two registrant as they had originally thought she would be, rather she would be a year one applicant. The records from Grant MacEwan indicate that the claimant was advised of this prior to making the decision to accept the offer to attend the school. I find that the major driving reason for the claimant changing schools and moving to Edmonton was her relationship with SM and his inability to move to Calgary.
93. In the fall semester at Mount Royal University two of the claimant's courses related to a field placement which was at an elementary school. The claimant testified that she started having difficulty with the field placement, finding that she could not deal with having to hear sad things and started having nightmares and panic attacks. In consultation with her counselor, Ms. Murray, the claimant decided to withdraw from the field placement courses. She continued with the remaining three courses, finishing with excellent grades.
94. SM described the claimant as having difficulties at school when they began learning about the Indian Residential schools and that she could not handle the anxiety and stress. He says that the claimant talks about returning to school all the time.
95. The clinical records of the psychologist Beth Murray dated September 30 note that the claimant "has decided to leave her education program/schooling and that this has brought about a sense of relief. She is going into an arts degree instead at some point". In Dr. Lazar's October 2, 2020 report the following is quoted from the clinical records of Beth Murray dated October 15, 2019:

Trying to do the schooling on top of all she's going through with the accident and settlement process has felt overwhelming. She is finding that the content of which she is studying is triggering a lot of her old childhood trauma and distress
96. In her letter to Grant MacEwan University withdrawing from the practicum courses, received on October 25, 2019 the claimant states the following:

I am writing to you in hope to obtain your approval to reconsider my non-repayment of fees regarding my withdrawal from specific Child and Youth Care classes. I had originally intended on completing my undergrad in this program, however due to the highly sensitive and triggering content of the program was unable to continue with most of my studies, and will be continuing my studies at MacEwan in the Arts program.

My seminar and practicum classes did not start at the beginning of the semester as the program is structured to provide group activities for the first ten days of classes within the program. I only attended two seminar classes and one day of practicum before having to withdraw due to severe anxiety and PTSD triggers.

I suffer from Generalized Anxiety Disorder, and Post Traumatic Stress Disorder, which made certain topics discussed within the program detrimental to my mental health. It was decided with my therapist that continuing in a program such as CYC would be harmful then and continue to be harmful to my health...

97. The accompanying letter from Beth Murray indicates in part that it is her opinion and recommendation that the claimant withdraw from her college courses at this time due to unforeseen stressors and mental health issues related to situations outside of her control. The claimant completed her three remaining courses in the winter term, achieving excellent grades in all three courses.
98. Under cross examination the claimant could not recall how many times she attended the practicum and that it was the content of the practicum that drove her anxiety up. Based on the letter that the claimant wrote to the school at the time of withdrawal I find that the claimant attended one day of her practicum and that it was the highly sensitive nature of the content of the program that led to her withdrawing.
99. The claimant did not return to school in the winter of 2020. By this time, she was three months pregnant. There was no evidence before me of why the claimant did not return to school in the winter of 2020.
100. In January 2020 the claimant began working from home approximately 20 hours per week for a clinic completing receivables. She was continuing to do that work at the time of the hearing and was receiving net pay of \$688 bi-weekly or annual net earnings of \$17,888.
101. The claimant testified that she intends to finish her diploma. She testified that she will be the second person in her family to graduate from high school and the first to have completed post-secondary school. She testified that her long-term goal is to complete the diploma and work with children.

THE CLAIMANT'S EXPERT EVIDENCE

(a) Dr. Susan Lazar

102. Dr. Lazar was tendered as an expert in psychiatry. Her first opinion is dated July 9, 2019. At the time of her assessment, which occurred on June 25, 2019, the claimant reported experiencing daily discomfort and pain, including headaches and pain and stiffness in her

neck, shoulders, upper and lower back, hips, and knees. In that opinion, Dr. Lazar concluded as follows:

In my opinion it is possible that as a result of the accident of September 4, 2019 **E.B.** experienced a traumatic brain injury based on a possible loss of consciousness and loss of memory for events in the moments following the accident. In my opinion, any possible traumatic brain injury would be in the mild range of severity and a complete recovery would be expected.

In my opinion, **E.B.**'s cognitive complaints, specifically her concerns with respect to her memory and her ability to sustain attention, likely relate to a number of factors, including her experience of pain, sleep disturbance, anxiety and mood concerns, and not to the direct effect of any injury to the brain sustained in the accident of September 4, 2014.

...

In my opinion, as a result of her involvement in the motor vehicle accident of September 4, 2014, **E.B.** experienced emotional and psychological difficulties consistent with the diagnostic criteria outlined in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) for the probable diagnosis of somatic symptom disorder, post-traumatic stress disorder, generalized anxiety disorder and major depressive disorder. In my opinion, as a result of the motor vehicle accident, **E.B.** likely experienced a change in her social, recreational, occupational and possibly, her academic functioning.

103. Dr. Lazar's opinion was that with appropriate treatment, the claimant had the potential to improve in her day to day functioning. Treatment recommendations included cognitive behavioural therapy with a PHD level psychologist. Dr. Lazar recommended the addition of pharmacotherapy if CBT therapy did not to produce a full remission to the claimant's mood, anxiety, and post-traumatic stress symptoms.
104. Dr. Lazar conducted a second assessment on September 14, 2020, with a report written on October 2, 2020. Following this follow up assessment, Dr. Lazar concluded that the claimant continued to fit the criteria for the diagnosis of somatic symptom disorder and that her experience of pain continued to significantly impact on her functioning in general and continued to assume a central part in her day to day life. Dr. Lazar opined that the claimant continued to satisfy the diagnostic criteria for post traumatic stress disorder and generalized anxiety disorder and that her major depressive disorder was now in remission.
105. With respect to impact on academic functioning, Dr. Lazar notes that the claimant's academic pursuit have been impacted by her anxiety symptoms, but not related solely to the motor vehicle accident. Dr. Lazar states as follows:

... **E.B.**'s recent academic pursuits have largely been impacted by her anxiety symptoms. In my opinion, clinical records of the psychologist Beth Murray dated October 15, 2019, which note that the content of **E.B.**'s academic courses were triggering "childhood trauma and distress" and that she was "relieved with her decision to drop out of the child and youth program she had started,"

suggest that [REDACTED] E.B.' anxiety symptoms related to her involvement in her academic program were, at least in part, informed by non-accident related factors. I also note that [REDACTED] E.B. reported in our assessment that her psychologist Ms. Murray, had suggested that she withdraw from her academic program. Ms. Murrays clinical notes do not appear to support this. It remains my opinion that I am hindered in fully opining on the impact of the motor vehicle accident on [REDACTED] E.B.' academic functioning, as I have not had the opportunity to review any of [REDACTED] E.B. academic records.

106. Dr. Lazar was unable to provide a firm prognosis due to the lack of treatment to date. Dr. Lazar on cross examination stated that her prognosis remained the same as at the time of her earlier report as the claimant had not in the interim received the recommended treatment. Dr. Lazar remained of the opinion that with appropriate treatment there were opportunities for improvement in day to day functioning and her treatment recommendations remained the same as at the time of her assessment in June 2019.
107. Dr. Lazar provided an addendum letter dated October 22, 2020. Dr. Lazar appears not to have been provided with the academic records or at least not asked to comment on them, rather she states the opinion that the claimant's emotional and psychological difficulties make her more vulnerable to a variety of life stressors, including those arising from academic and occupational pursuits.
108. In cross examination Dr. Lazar stated that she assumed a specific trigger within the practicum had overwhelmed the claimant's ability to attend to the practicum. Dr. Lazar also stated that she assumed that if the claimant was successful in other classes at school that the anxiety did not prevent her from doing the other classes and that if she were able to avoid the trigger she could have some success at school. Dr. Lazar also stated that if the claimant were able to complete the academic courses that would bode well for her ability to complete school.

(b) Dr. David Brooks

109. Dr. Brooks is an expert in sports medicine with a specialization in occupational medicine. He first examined the claimant on October 19, 2016. At that time, the claimant reported ongoing headaches, neck pain, right shoulder discomfort, mid back pain, low back pain and right hip pain. She also reported ongoing nightmares and feeling anxious. The claimant completed the Pain Disability Index Questionnaire and her score indicated that her symptoms were having low impact on her life in general. Dr. Brooks' diagnosis included chronic myofascial pain syndrome, post-traumatic headaches, mild traumatic brain injury and post-concussion syndrome. Dr. Brooks also opined that the claimant had clinical features of thoracic outlet syndrome on the right side.
110. With respect to degree of impairment, Dr. Brooks' opinion was as follows:

[REDACTED] E.B. has mild to moderate impairment with symptoms involving primarily the neck, shoulders and low back. These musculoskeletal symptoms do affect her in both personal and work life with reduction of her ability to work in jobs with physical demands that require lifting and carrying. She is also significantly affected in tasks requiring sustained prolonged standing and sitting postures. Her overhead

work capacity is decreased due to neck and upper back pain and elements of shoulder girdle weakness.

111. Dr. Brooks concluded that the claimant would not fully meet the job criteria for many physically demanding job positions based on her current assessment, which would reduce her competitive employability. With respect to prognosis, Dr. Brooks opined that the claimant would continue to have chronic neck, upper and lower back and right shoulder girdle pain to some degree indefinitely unless further active intervention is initiated. Recommended treatment included physiotherapy, trigger point therapy, Pilates and personal training therapy as well as a trial of medications.
112. Dr. Brooks conducted a second assessment on May 15, 2019 with a report dated June 18, 2019. The claimant reported that in the interval between the assessments there had been no change in her symptoms and possibly the pain had become worse. Dr. Brooks noted that this perceived worsening of condition would not be unusual in an individual with a chronic pain disorder where central sensitization to pain occurs. He noted that her marital separation likely contributed to her overall pain picture. His prognosis was that the claimant would continue to have chronic pain indefinitely. His treatment recommendations included more psychological interventions and the addition of pharmacological management. He opined that she is likely to have reduced employability in the work force due to her physical limitations, with it being likely that the claimant would work part time or at least restricted hours due to her chronic pain.

(c) Andrew Hosking

113. Mr. Hosking was tendered as an expert in functional capacity evaluations and cost of care assessment. His initial evaluation of the claimant occurred on October 18, 2016 at which time the claimant was working as a soil technician with Hil-Tech. He concluded that the claimants perceived capacity was less than the capacity that she demonstrated. Following his assessment, Mr. Hosking expressed the following opinion with respect to the claimant's work capacity:

6. Summary of work capacity: Based on the medical diagnoses, prognoses and the results of this evaluation, **E.B.** is likely capable of working as a yoga instructor on a part time basis. That is, her demonstrated limitations indicate that she likely does not have the endurance capacity to teach classes on a full-time basis. She would be better suited to a work routine that involves a mix of body positions and postures (i.e. a mix of sitting and standing). For instance, she would be suited to part-time yoga instruction and to part-time work in an office setting with accommodations to allow for frequent changes in position between sitting and standing. The barrier to her working full-time in yoga instruction is the presence of marked deficits of muscle function in the right shoulder girdle, lower back and right hip, which present as limitations for achieving the correct body positions required for various yoga postures. **E.B.**'s office type work demands should be modified such that there is limited need for prolonged neck-flexed postures (not longer than one hour at a time while sitting at a desk), lifting and carrying in the light range and no requirement for reaching above shoulder level. She is not well suited to continue with her current job as an environmental safety

officer in the construction industry. The particular job which she is employed requires repeated short intervals of severe stooped standing, a position which over time appears provocative of her lower back symptoms. Should she wish to continue as a safety officer, she should choose alternative employment which allows for more variation in body position and reduced demand for stooped standing.

114. I note that Mr. Hosking concludes that the claimant demonstrated the capacity during the functional capacity evaluation to mostly meet the physical demands of a construction site safety officer or environmental officer.
115. With respect to the claimant's ability to undertake housekeeping activities, Mr. Hosking concludes that she does not require home help for regular household cleaning but would require help with heavier seasonal cleaning and gardening.
116. Mr. Hosking authored a second report dated February 25, 2017 following review of Dr. Brooks' opinion. Given the diagnosis of thoracic outlet syndrome, Mr. Hosking changed his opinion and stated that the claimant would be poorly suited to work as a yoga teacher and that she should avoid this and other vocational or recreational activities which require repeated or prolonged use of her arm in positions of elevation, extension and/or external rotation.

(d) Avita Sharma

117. Ms. Sharma was tendered as an expert in vocational consulting, qualified to provide an opinion on employability and residual earning capacity. She assessed the claimant on one occasion, May 16, 2017. Two reports were tendered from Ms. Sharma, one dated November 7, 2017 and the second dated July 22, 2019. For the purposes of the second report Ms. Sharma was instructed to assume that the claimant would complete the requirements for a diploma for a child and youth worker rather than completing a master's level child and youth counsellor qualifications.
118. Ms. Sharma administered vocational testing. Ms. Sharma concluded that the claimant's testing scores indicate that she would most likely be best suited to short term, hands-on or skill-based training programs which are less than two years in duration. Ms. Sharma noted that the claimant reported experiencing cognitive difficulties during the testing day, which could have had an impact on test performance.
119. With respect to the claimant's employability, Ms. Sharma stated the following:

E.B.'s limitations as a result of the subject motor vehicle accident have resulted in a narrowing of her vocational options. The impact includes her ability to competitively perform the types of work she has done over the course of her pre-accident work history, her ability to competitively perform work that she has engaged in since the subject accident, and her ability to pursue other vocational options that would have been reasonable for her to consider.

E.B.'s primary issues which are discussed in the expert reports are chronic pain and mood dysfunction. Specifically, she has barriers related to chronic pain affecting her neck and back, right shoulder, right hip, overall reduced physical and

strength tolerances. This is compounded by her reported issues with disrupted sleep, PTSD, low energy, depression, anxiety, headaches, and cognitive difficulties. While the medical opinions outlined above comment on the impact of her conditions on her work as environmental safety consultant and yoga instructor, from a vocational rehabilitation perspective, these issues can also affect her work productivity regardless of the industry.

Based on my understanding of the medical and functional information reviewed, it appears that [REDACTED] E.B. could be capable of select part-time employment, however, there are a number of restrictions and accommodations to take into consideration. She requires ongoing treatment in her ability to optimally manage her symptoms.

120. With respect to limitations on vocational options, Ms. Sharma states as follows:

[REDACTED] E.B. has a range of residual functional limitations as outlined earlier. Specifically, she has barriers related to back, shoulder, hip and neck pain, headaches, cognitive issues, psychological challenges and reduced tolerance for work involving significant physical demands. Her symptoms are ongoing and prognosis for any significant improvement is poor. This could have a directly limiting impact on the range of vocational options available for her to consider on a future and durable basis.

121. In Ms. Sharma's report of July 22, 2019, she conducts a labour market review to identify current wages in the Lower Mainland for child/youth practitioners at the diploma and graduate levels. Diploma level child and youth workers earned between \$15.00 per hour and \$28.85 per hour, while master's level graduates earned between \$17.85 to \$39.66 per hour.

(e) Sergiy Pivnenko

122. Mr. Pivnenko was tendered as an expert in labour economics. In his report he provided calculations that could be used to assess the claimant's wage loss. His calculations relied on statistics based on field of study and education. He provided two different scenarios, one based on the claimant obtaining a master's degree and the other based on the claimant attaining a diploma. Neither scenario included non-wage benefits. His evidence was that non-wage benefits account for a further 10 – 15% with the higher rate applying to the unionized sector. Mr. Pivnenko noted that if the claimant were to complete her diploma later than 2021 the provided tables overestimate the claimant's earnings.

123. Mr. Pivnenko provided estimates of present values of future wage and benefits as follows:

- (a) Master's Degree – earnings from Jul 1, 2024 - \$1,295,272 earnings or \$1,489,600 accounting for earnings plus 15% for benefits.
- (b) College diploma with earnings from July 1, 2021 - \$777,635 or \$894,300 inclusive of 15% benefits.

THE RESPONDENT'S EXPERT EVIDENCE

(a) Dr. Gabriel Hirsch

124. Dr. Hirsch was tendered as an expert in physical medicine and rehabilitation. He examined the claimant on May 14, 2019 and authored an opinion dated May 15, 2019 and confirmed the opinions contained therein following review of further reports.
125. Dr. Hirsch noted that the claimant enjoyed excellent health prior to the motor vehicle accident and that she was functioning at a high level. He opined that the claimant sustained a traumatic brain injury at the mild end of the spectrum and that it was more likely than not that she had made a full recovery from that injury. He opined that her reported worsening memory issues were likely attributable to mood and anxiety issues, sleep disturbance and dealing with chronic pain.
126. Dr. Hirsch opined that the claimant sustained injuries to her right forearm, right wrist and feet in the motor vehicle accident but had made a full symptomatic and functional recovery from those injuries. He also opined that the claimant had suffered soft tissue injury to her neck and back and was experiencing cervicogenic headaches and tension-type headaches.
127. With respect to the impact of emotional and psychological issues on the injuries suffered in the accident, Dr. Hirsch opined as follows:

Based on today's assessment, [REDACTED] E.B.'s post-subject motor vehicle accident clinical course was complicated by her emotional and psychological reaction to her circumstances. Today [REDACTED] E.B. reported significant anxiety issues, driving related anxiety and mood dysfunction. In addition, her multisite pains reportedly adversely affect her sleep. These particular confounding health issues can lower the pain threshold and amplify disability. Evaluation and treatment of psychiatric conditions is outside the realm of my expertise. Hence I defer an opinion to a psychiatrist or psychologist with respect to [REDACTED] E.B.'s mental health post-subject motor vehicle accident, recommended treatment, prognosis, causality, and possible negative functional ramifications.

128. With respect to prognosis, Dr. Hirsch opined that it was more likely than not that the claimant would continue to experience pain of sufficient intensity that it would negatively impact on her level of function, for at least one to two years. He further opined that the claimant had the physical ability to perform tasks which are of sedentary, light and medium physical demands possibly with some limitations in place. In his opinion, the claimant had the physical and intellectual capacity to further her education. In cross examination Dr. Hirsch testified that it was more likely than not that the claimant will continue to have pain and he expected her functional limitations to go on into the future. He agreed that it was more likely than not that she will have to manage pain on a permanent basis.
129. Dr. Hirsch noted inconsistencies in his examination including neck range of motion, reports of superficial tenderness and reported versus observed sitting tolerance, although in cross examination he testified that the superficial tenderness was likely a result of entrenched pain belief and probably pain.

130. In cross examination Dr. Hirsch testified that while the claimant did not require medical attention for emotional distress prior to the accident there was indications that she was emotionally more vulnerable, but he did not consider this a major issue nor an issue that was preventing her from being able to function in her life.
131. In cross examination Dr. Hirsch also testified that there were two negative prognosticators present in the claimant's circumstances. The first one being that the claimant had become less tolerant to pain which led to further limitation in activity due to fear of pain. The second negative prognosticator was that the claimant had experienced no resolution of her chronic pain and sleep issues for six years. Dr. Hirsch testified that the longer the time from injury, the less likely for a resolution.

(b) Dr. Bernard Tessler

132. Dr. Tessler is a neurologist and his report dated June 14, 2017 was tendered into evidence. His opinion was that the claimant had sustained a very Mild Concussive Injury and developed post traumatic headaches, in part related to the concussive injury but more likely due to the cervical injury. She also sustained a soft tissue injury to her neck and her low back. He also noted that she had sleep disruption with intrusive dreams and nightmares with a diagnosis of Post Traumatic Stress Disorder with anxiety and likely some depression. He noted at the time of his assessment that the frequency of headaches had lessened to up to twice a week.

(c) Mark Szekely

133. Mr. Szekely was tendered as an expert in the field of labour market economics. His report dated August 29, 2019 was tendered as evidence. In his report he reviewed and commented on Mr. Sergiy Pivnenko's report. His concerns with the projections of Mr. Pivnenko included the labour force participation rates, the assumption that but for the accident the claimant would have achieved a master's degree, differing assumptions relating to non-wage benefits without accident and with accident and double counting of part time work factors.
134. Mr. Szekely also provided alternative projections for master's degree, bachelor's degree and diploma with earnings lagged by 10 years to account for the claimant's late entry into the work force.
135. Mr. Szekely provided projected future earnings as follows:
- | | | |
|-----|-------------------|-------------|
| (a) | Master's degree | \$1,134,673 |
| (b) | Bachelor's degree | \$940,190 |
| (c) | College program | \$676,320 |

These estimates exclude non-wage benefits, which could, on average, add about 10% to the value of future earnings.

THE NATURE AND EXTENT OF THE CLAIMANT'S INJURIES

136. The parties agree that the claimant sustained a significant injury in the motor vehicle accident and that her injuries continue to impact her life. The central issue is the extent of the claimant's injuries, the impact on her functioning and the prognosis for further recovery. The respondent says that the functional restrictions that the claimant is experiencing are less than she perceives.
137. Compensation for negligent conduct should only be made where there is a substantial connection between the injury and the defendant's conduct. "But for" the negligent conduct would the claimant have experienced what she has experienced? *Hanke v. Resurface Corp.*, 2007 SCC 7.
138. The claimant did not experience any of the difficulties I have found she now experiences, prior to the accident. All the experts agree that the difficulties that the claimant is now experiencing were caused by the accident.
139. I accept Dr. Brooks' opinion that the claimant is suffering from a chronic pain disorder because of the injuries suffered in the accident. I accept Dr. Hirsch's opinion that the claimant suffered a mild traumatic brain injury in the accident but has fully recovered. I accept Dr. Lazar's opinion that the claimant continues to experience cognitive symptoms that are related to her experience of pain, sleep disturbance, anxiety and mood concerns. I accept that the chronic neck, upper back, lower back and right shoulder pain are a result of the motor vehicle accident and are likely to continue indefinitely, although there is the possibility of symptomatic relief with treatment.
140. I accept Dr. Lazar's opinion that as a result of the motor vehicle accident the claimant experienced emotional and psychological difficulties consistent with the diagnostic criteria for the diagnosis of somatic symptom disorder, post-traumatic stress disorder, generalized anxiety disorder and major depressive disorder. I accept Dr. Lazar's opinion that the somatic symptoms disorder has resulted in the claimant experiencing high levels of anxiety about her health and symptoms and that she has developed a hypervigilant attitude toward symptoms emergence. I accept as well that the claimant's experience of pain interacts with her anxiety and mood concerns, resulting in persistent high levels of anxiety about her symptoms, excessive anxious ruminations focused on her symptoms and a significant change in the quality of her social and recreational engagements.
141. I accept the opinions of Dr. Tessler, Hirsch and Lazar that the claimant suffered a mild traumatic brain injury or concussion in the motor vehicle accident but has recovered from that injury. I accept the opinions of Dr. Hirsch and Dr. Lazar that any ongoing cognitive symptoms that the claimant is experiencing are a result of chronic pain and the anxiety and mood concerns. I find that the claimant was able to accommodate any ongoing cognitive issues in her academic pursuits, noting the very good grades that the claimant was able to achieve in her courses. I accept the claimant's evidence that her good academic performance was a result of taking steps to accommodate her ongoing issues and that achieving that success came at a personal cost.
142. Dr. Brooks diagnosed the claimant with thoracic outlet syndrome based on his findings of radiation of symptoms into the fourth and fifth fingers. Given the lack of reported radiating

symptoms until specifically questioned, the absence of reporting of this symptom during his second examination and the absence of this complaint to any of the other involved treating practitioners or experts, I prefer the opinion of Dr. Hirsch on this issue.

(a) Credibility and reliability

143. The respondent says that reliability is a key threshold issue as the claim must be determined largely based on subjective complaints. The respondent points to the following in support of their submission that reliability is an issue:
- (a) Mr. Hosking's finding that the claimant overstated her disability in respect to some questionnaires;
 - (b) Mr. Hosking's finding that the claimant's perception of her abilities was not consistent with his examination and testing;
 - (c) The social media photographs which the respondent says shows that the claimant's actual function exceeds her perceived function;
 - (d) That the claimant's evidence with respect to her limitation in activities is not consistent with the evidence of SM who testified to the claimant participating in a hike;
 - (e) Dr. Hirsch noted inconsistencies in the claimant's presentation including volunteered active range of motion versus spontaneous range of motion and reporting sitting tolerance versus observed sitting tolerance; and
 - (f) That the claimant perceived her limitations to be significant from the outset.
144. The respondent says that due to the above, the claimant's evidence as well as the opinions of the experts, must be assessed with a degree of caution.
145. The respondent says that the social media pictures demonstrates that the claimant has been able to experience a level of enjoyment from travel and socializing since the accident and she is able to participate in recreational activities and to do so in a manner that exceeds her perceived limitations.
146. The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296 as follows:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie and the demeanor of a witness

generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

147. Overall, the claimant was a credible and reliable witness. I did not find that she overstated the difficulties that she experienced as a result of the accident, however I do accept the evidence of the experts that the claimant's perception of her difficulties as a result of the psychological overlay may exceed her functional limitations. The lay witnesses that testified for both the claimant and respondent were helpful and painted a consistent picture of the claimant as a person who was continually trying and who had significantly changed because of the accident. The opinions of the experts on the claimant's current condition and future prognosis were relatively consistent. I am satisfied that the claimant genuinely experiences the pain that she reports, although it has a significant psychological component in addition to physical. The onset of that pain, whether rooted in the psychological or the physical, is a result of the accident.
148. Evidence was presented at the trial of social media posts depicting the claimant participating in activities that would indicate a higher level of functioning than she testified to. The claimant on cross examination provided context to the social media posts. I take the view, as has been found by our courts previously, that there is limited utility to social media posts. As noted in *Juelfs v. McCue*, 2019 BCSC 1195 at para. 38:

[38] I agree with the observation in the case law that social media evidence tendered to test a plaintiff's credibility in personal injury litigation should be approached with caution. See *Dakin v. Roth*, 2013 BCSC 8 at para. 55 – 56; *Carlisle v. Vanthof*, 2015 BCSC 2427 at para. 114 – 118; *Mullens v. Toor*, 201 BCSC 1645 at para. 61. Photographs posted on social media accounts may have limited utility for a number of reasons. For one thing, a photograph is a snapshot that may not reveal much about a person's level of physical comfort or discomfort over any meaningful interval of time. For another thing, people often try to portray themselves in a positive light in posted photographs, particularly 'selfies' posted on the internet. These are just two of the various reasons why photographs posted on social media sites have to be approached with caution.

[39] For the sake of balance, I should add that this does not mean photographs posted on social media sites are always given little or no weight. Much depends on the circumstances. A properly identified photograph of a person finishing a triathlon may be strong evidence that the person has the physical ability to swim, bike and run with a certain degree of proficiency. The evidentiary value of a particular photograph depends on what is actually at issue in the litigation, the content of the photograph and the circumstances in which it was taken.

149. The evidence, in particular that of Dr. Lazar, provides an explanation in part for why there may be at times differences between perceived functional limitations and observed. Dr. Lazar diagnosed the claimant as satisfying the diagnostic criteria for somatic symptom disorder with predominant pain. Dr. Lazar explains that diagnosis as follows:

In my opinion, **E.B.**' experience of pain, which she is aware of on a daily basis and which impacts her consideration of all daily activities, has resulted in the

development of emotional concerns and behaviours that are characterized by the diagnosis of somatic symptoms disorder with predominant pain. In my opinion, [REDACTED] E.B.' experience of pain has resulted in a significant change in her functioning in general and has come to assume a central part in her day to day life. [REDACTED] E.B.' pain has significantly impacted her engagement in a variety of activities and relationships and has resulted in the development of a hypervigilant attitude toward symptom emergence. In my opinion, [REDACTED] E.B.' experience of pain interacts in a complex and mutually-reinforcing relationship with her anxiety and mood concerns, resulting in persistent high levels of anxiety about her symptoms, excessive anxious rumination focused on her symptoms and a significant change in the quality of her social and recreational engagements.

150. Dr. Hirsch noted some inconsistencies in his physical examination however in cross examination he testified that while the claimant's perception is not what formal testing demonstrates her ability to be, he did not identify any pain behaviour. In cross examination he also testified that the claimant has entrenched pain belief and probably pain. He testified that the observed inconsistencies could be related to perception of pain and that it was not unusual for patients to limit activity because of fear of pain. He also confirmed that chronic pain amplifies disability and results in limitations of activity.
151. Likewise, Mr. Hosking confirmed that fear of pain can result in low physical effort and display of reduced abilities. He testified that; symptoms associated with somatic symptom disorder could play a role in level of effort.
152. As noted by claimant's counsel, the social media posts do not tell the whole story and the limitations in the claimant's activities were confirmed by witnesses. I accept the claimant's evidence that the social media pictures were meant to portray a specific image and that they do not reflect her level of functioning or an absence of pain.

(b) What is the claimant's prognosis?

153. I accept the opinions of Dr. Brooks and Dr. Hirsch that the claimant is likely to continue to experience symptoms of chronic pain indefinitely and that while some improvement in the symptoms in her neck, upper and lower back and right shoulder is possible it is not likely that she will return to a complete absence of pain, but rather that the claimant will have to manage pain on a permanent basis.
154. I accept the opinion of Dr. Brooks that the claimant's headaches are unlikely to fully resolve.
155. With respect to the mood and anxiety concerns I accept Dr. Lazar's opinion that with appropriate treatment there are opportunities for improvement. I also accept that it is likely that the claimant will continue to experience exacerbations of her mood and anxiety symptoms in the future, particularly in times of psychological or interpersonal stresses and that absent the motor vehicle accident the claimant likely would not have experienced the anxiety and mood symptoms that she has experienced since the accident. Finally, I accept Dr. Lazar's opinion that should the claimant be in another motor vehicle accident in the future she is at risk of worsening of post-traumatic stress symptoms. I also accept Dr.

Lazar's opinion that the symptoms of anxiety are attributable in part to non-motor vehicle accident factors.

DAMAGES

156. The respondent concedes that the accident of September 4, 2014 has affected the claimant's physical and emotional health, and has significantly hindered her work, leisure and social activities. The parties disagree as to the extent of that impact and the damages that should result.

(a) Non-pecuniary damages

157. Non-pecuniary damages are awarded as compensation for pain, suffering, loss of enjoyment of life and loss of amenities. The amount awarded must be fair to all parties, with fairness being measured against awards made in comparable cases.

158. In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal provided an outline of factors to be taken into consideration when assessing non-pecuniary damages. Those factors included the following:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering;
- (f) loss or impairment of life;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism.

159. I accept that before the accident, the claimant was independent, outgoing and active. I also accept that her life course has been significantly altered because of ongoing pain and mood and anxiety symptoms. The medical evidence indicates that with appropriate treatment the claimant may experience an improvement in function, but she will never be without symptoms related to the accident.

160. Claimant's counsel said that an appropriate non-pecuniary damages award would be in the range of \$200,000 to \$250,000, claiming \$225,000. Respondent's counsel said that an appropriate award for non-pecuniary damages would be \$110,000.

161. Claimant's counsel points to the significant change in the claimant's life as a result of the accident. Claimant's counsel emphasized the fear, stress, anxiety and depression that are a daily part of the claimant's life and take a toll on her personal relationships. Claimant's counsel also points to the claimant's experience of pain and the limitations and psychological deterioration that are a consequence. Claimant's counsel emphasized that before the accident the claimant participated in a variety of physical activities and is someone who worked consistently.
162. The respondent conceded that the claimant will continue to experience chronic pain but says the medical evidence shows that the claimant has not been optimally treated and that with time and proper treatment, further symptomatic and functional improvement is expected. The respondent also points to the evidence of the activities that the claimant has been able to engage in, noting that the claimant even with the suboptimal treatment she has received to date, has been able to travel regularly and to maintain at least an element of her pre-accident social life.
163. While the cited authorities provide some guidance, none is determinative. Each case must be decided on its own facts. I generally find the authorities cited by the claimant to involve injuries more significant than that suffered by the claimant, involving orthopedic injuries requiring surgery, psychological injuries characterized as near catastrophic and resulting in numerous suicide attempts, concerning orthopedic injuries that will deteriorate over time and involving injuries that will completely prevent future employment.
164. Having regard to the claimant's young age, her chronic pain and the associated psychological injuries as well as the potential for improvement with appropriate treatment, with an understanding that treatment will only improve not eliminate the consequences of the injury and taking into account the non-exhaustive list of factors that I am to consider which are set out in the cases, and the submissions of the parties, I conclude that a fair award of non-pecuniary damages is \$135,000.

(b) Past wage loss

165. The claimant is entitled to compensation for loss of the value of work she would have performed but could not perform because of accident related injuries. Compensation for past loss of earning capacity is to be based on what the claimant would have, not could have, earned but for the injury that was sustained. *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, *M.B. v. British Columbia*, 2003 SCC 53.
166. The test for whether the claimant should be awarded damages for past and future income losses is the same: whether there is a real and substantial possibility of loss. *Morlan v. Barrett*, 2012 BCCA 66, *Reilly v. Lynn*, 2003 BCCA 49, and *Brunridge v. Bolton*, 2018 BCSC 343. Assessing the claimant's damages is not a matter of calculation rather it is a matter of judgment.
167. The burden of proof of actual past events is a balance of probabilities: *Gao v. Dietrich*, 2018 BCCA 372 at para. 39. The assessment of hypothetical events requires a real and substantial possibility, not mere speculation: *Athey v. Leonati* at para. 27. The measure of damages for hypothetical events is determined by assessing the likelihood of the event: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

168. Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a claimant is entitled to recover damages for only his or her past net income loss.
169. The claimant says that at the time of the accident her short-term career goal was to open a yoga studio and that following the accident she made attempts to resume her yoga teaching with substantial modifications to teaching style. The claimant found that with her changed teaching style she began to lose students and found it very difficult to get through classes.
170. The claimant testified that her longer-term goal was to return to school and obtain a master's degree in counselling. The claimant testified that she would be the only one in her family to achieve post-secondary education.
171. Following the accident, the claimant considered several different vocations. She initially renewed her CPR certification in February 2015 with a goal of becoming a paramedic. The claimant testified that she was unable to endure the physical aspects of the training and suffered from panic attacks and flashbacks during the training, ultimately withdrawing from the program and concluding that a career as a paramedic was not feasible for her.
172. During a lay off while she was employed at Hil-Tech, the claimant enrolled in and completed a doula course. Though the claimant was able to complete the course, she realized that she would not be able to handle the physical demands required of a doula.
173. In 2015 the claimant completed the National Construction Safety Officer Program, which led to her employment at Hil-Tech. She remained employed there from March 2015 to October 2016. Her role at Hil-Tech was a combination of administrative work and soil testing. The evidence establishes that the claimant was able to fulfill the requirements of the role with the only accommodations required being that she was able to take stretch breaks throughout the day. The claimant testified that she was unable to complete all the physical requirements of this role, noting that she would require assistance with some of the tasks. The evidence of the employer was that the tasks that the claimant asked for assistance with were not unreasonable. The claimant while working at Hil-Tech also taught yoga and spin classes. The claimant's employment at Hil-Tech came to an end with the conclusion of the project. Both BB and TM testified that if there had been further work available it would have been offered to the claimant and that they were both very satisfied with the claimant's work performance.
174. Following the end of her employment at Hil-Tech, the claimant decided to return to school to pursue her pre accident plan to qualify as a child and youth counselor. She was very successful in her first year of post-secondary education which was an upgrading year. The claimant achieved significantly better grades than in her pre-accident education. The second year of post-secondary education was the first year of her program. Again, the claimant excelled despite dealing with marital breakdown and significant financial pressures. During that year, the claimant decided to change schools, attending a school in Edmonton which allowed for a two-year diploma exit rather than the requirement to complete a four-year degree program. Doing so allowed her as well to live in the same city as her new partner, SM.
175. The claimant testified that the primary reason for the academic transfer was the need for a shorter degree alternative. I find that while the shorter degree alternative may have been a

factor in the decision, so was the desire to live in Edmonton, particularly given her new relationship with SM.

176. In late 2019 the claimant withdrew from the practicum courses and continued with three academic courses, which she excelled at. The claimant did not return to school after completion of the fall session of 2019, although it is apparent that her intent is to return.
177. Beginning in January 2020 the claimant has been working in an administrative role, from home, working up to 20 hours per week.
178. The claimant says that but for the accident she would have earned a minimum of \$850 per week teaching yoga classes in the fall of 2014 and that she would have opened her own studio in January of 2015. The claimant says but for the accident she would have worked as a yoga instructor with increasing hours from the date of the accident until the fall of 2017 at which time she would have gone back to school, supporting herself with part time work and passive income from the studio, working towards a masters in counselling.
179. Claimant's counsel seeks past wage loss as follows:
 - (a) September 2014 – December 31, 2014 – yoga contracts yielding earnings of \$850/week for 16 weeks for a total gross loss of \$13,606.
 - (b) 2015 – earnings from running her own yoga studio of \$80,000, less \$41,800 earned from Hil-Tech for a net loss of \$38,520.
 - (c) 2016 – earnings from running her own yoga studio and one teacher training course of \$145,000, less \$51,566 from Hil-Tech for a loss of \$93,434.
 - (d) 2017 – 2020 passive income from the studio and part time yoga teaching - \$50,000 per year for a total of \$200,000, less \$16,512 earned for a net loss of \$183,488.
180. The respondents say that the claimant's pre-accident employment history establishes that the claimant was not significantly attached to the work force and at the time of the accident had not settled on a career. They point to the significant periods of time when the claimant was either unemployed or underemployed. They say that while the claimant gave evidence of wanting to start her own yoga and health studio, no real plans or actual steps had been taken in that respect and that any loss in relation to that studio is too speculative to form a basis for a past wage loss claim. The respondent also points to the claimant's performance in the business program at Selkirk College as being indicative that the claimant was unlikely to succeed in running her own business. The respondent says that the pre accident history does not provide a sufficient basis to perform a mathematical calculation of past wage loss rather it must be assessed as a past loss of capacity.
181. The respondent says that except for approximately six months immediately after the accident, the claimant has been relatively busy with school, work or holidays and has not had a significant amount of downtime. Specifically, by December 2014 the claimant was well enough to travel, that in early 2015 the claimant took the National Construction Officer Safety Training course and in February 2015 began teaching yoga again and took CPR training. In May 2015 the claimant began working at Hil-Tech where she continued

to work until October 13, 2016 while also teaching yoga classes. The claimant chose to live in Mexico from October 2016 to March 2017 and in the fall of 2017 returned to school.

182. The respondents say that the claimant's uncertain pre-accident attachment to the workforce makes it hard to know with any certainty what she would have done if the accident had not occurred. The respondent says that the claimant would have missed time from work to travel, attend university and have a child. The respondent says that past wage loss should be assessed as one year of the claimant's pre-accident earnings or \$50,000.
183. The evidence establishes that at the time of the accident the claimant had three different contracts in place to teach yoga. The contract at Selkirk College had her teaching three days a week and the documentary evidence establish that the maximum pre-paid enrolments would have resulted in income of \$2,394 over the 10-week period, or approximately \$240 per week. The agreement to teach yoga at Silver Birch spa would have resulted in her earning approximately \$400 per week and the occasional teaching at the studio in Nelson resulted in payment of \$50 per class. This would have resulted in gross earnings over the 10-week period of \$690 per week.
184. I conclude that the mathematical approach suggested by the claimant is not appropriate in the circumstances. Calculation of past wage loss based on earnings from a yoga studio which had not yet been opened is too speculative. Not only is there a question as to whether the studio ever would have been opened but it is impossible to know what sort of earnings the studio would have yielded. I was not presented with any evidence of earnings of similar studios and the claimant's projections are without evidentiary foundation. I also have not been provided with complete evidence of the claimant's earnings since the accident, I have no evidence before me of the earnings that the claimant has had from teaching yoga since the accident.
185. I conclude that but for the accident the claimant would have continued a pattern of earnings similar to her pre accident pattern with the exception of the immediate year after the accident in which the claimant had concrete plans to teach yoga which would have resulted in her earning significantly less. Her pre accident earning pattern demonstrated that the claimant had the potential to earn approximately \$55,000 per year gross. This does not mean that the pre accident earning pattern was permanent. I accept that the claimant would have furthered her education in some capacity regardless of the accident's occurring and that there is a possibility that she would have worked towards achieving a master's degree. I also accept that had the accident not occurred the claimant would have had some income while attending school from teaching yoga and/or spin classes and would have worked full time in the months that she was not attending school.
186. Considering all the foregoing, I assess the claimant's past loss of earning capacity at \$80,000. This figure is based on the view that, but for the accident, the claimant would have earned somewhere in the range of \$4,000 - \$5,000 per month when she was working full time and in the range of \$1000 per month while she was attending school and takes into consideration potential negative contingencies affecting her income earning. But for the accident the claimant would have had earnings in the four months of the year when she was not attending school. But for the accident the claimant would have attended school similarly to as she has since the accident occurring.

(c) Loss of earning capacity

187. A claim for loss of future earning capacity requires a trier of fact to gaze into a crystal ball to see the future. The claim raises two questions. 1) has the claimant'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.
188. In *Rosvold v. Dunlop*, 2001 BCCA 1, [2001] B.C.J. No. 4, the Court of Appeal summarized the approach that a trier of fact should take to assessing damages for loss of income earning capacity:

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

[9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leoneti* [1996] 3 S.C.R. 456. Possibilities and probabilities, chances, opportunities and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

...

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

189. The Claimants position is that the accident has rendered the claimant not competitively employable in her prior roles and less competitively employable in any capacity. The

claimant says she requires accommodations in both physical and sedentary roles, that the range of jobs available to her is now limited and she is unlikely to successfully complete further studies. The claimant says that the medical evidence confirms that her injuries limit her vocational options. The claimant says that the loss of earning capacity should be based on one of four scenarios:

- (a) Master's degree – absent the accident the claimant would have completed her master's in child and Youth Counselling in the spring of 2024 and commenced full time work as a counsellor from June 2024 through to age 70. With the accident the claimant will obtain a two-year diploma in 2021 and work part time 3 days a week as a child and youth care worker from June 2021 to the age of 70.
 - (b) Part time yoga – the claimants second scenario includes the claimant obtaining her master's degree but in addition continuing to derive income from either teaching part time yoga or from opening a yoga studio. For the purposes of this scenario, the claimant says that she would have earned an addition \$10,000 per year from 2021 to age 70.
 - (c) Yoga – the third scenario is that absent the accident the claimant would have worked as a yoga instructor or yoga studio owner full-time to the age of 70. With the accident, the claimant will continue working part-time until the age of 70 with intermittent periods of employment due to her requirements of significant accommodations. The claimant says that the present value of the loss associated with this scenario is \$1,151,950.
 - (d) Part time counselor/part time yoga – the fourth scenario is absent the accident the claimant would have worked part-time as a yoga instructor or studio owner until completion of her Masters in the spring of 2024, then continued working part time as a counselor and part time as a yoga instructor/studio owner until age 70. With the accident the claimant will work part time until the age of 70 with accommodations and intermittent periods of employment. The claimant says that the present value of the loss associated with this scenario is \$1,603,077.
190. The claimant's economist, Mr. Pivnenko calculated the loss associated with scenario 1 as being \$976,400 including non-wage benefits while the respondent's economist, Mr. Szekely calculated the absent non-wage benefits loss as being \$728,881. The claimant says that the loss associated with scenario 2 is \$1,262,510 using Mr. Pivnenko's numbers of \$1,014,991 using Mr. Szekely's numbers.
191. After taking into consideration positive and negative contingencies, the claimant says that \$1,200,000 is the appropriate award for this head of damages.
192. The respondent says that periodic or even ongoing pain does not necessarily equate to a real and substantial possibility of a future event leading to an income loss and that pain during work without economic consequences is compensated through the non-pecuniary award. The respondent says that the capital asset approach can be used to assess future loss where the loss is difficult to measure but that this does not mean that the award is unstructured or at large with there being no necessity for the court to explain the factual basis of the award.

193. The respondent says that the claimant has not established that the accident materially contributed to the claimants dropping out of the program at Grant McEwan, pointing to the claimant's pre accident inconsistent education history and the significant improvement in her grades post-accident. The respondent also points to the stressors unrelated to the accident that the claimant was experiencing at the time that she dropped out of school and that there is no evidence before the court that the non-accident related factors that led to increased anxiety that resulted in the claimant dropping out of the program would not have occurred regardless of the accident. The respondent says that there is no evidence that the claimant cannot complete the program if she avoids the specific trigger or complete another program.
194. The respondent says that the claimant has demonstrated since the accident that she is capable of full time work and even more than full time work, pointing to the time period when she was working full time at Hil-Tech and part time teaching yoga.
195. With respect to the claimant's ability to complete further schooling, the respondent says that the success at school that the claimant has demonstrated since the accident showed that if she could avoid the impact of the specific trigger that caused the anxiety in the practicum and seminar she should see success at school. The respondent emphasizes Dr. Lazar's opinion that the claimant's overall performance at Mt. Royal and Grant McEwan "bodes well" for her future education. The respondent says that the claimant's dropping out of school was unrelated to her injuries.
196. The respondent says that there is no indication that the claimant will not be able to return to school and complete her training at some point in the near future and that she should then be able to turn that education into a full time position that fits her physical and psychiatric condition.
197. The respondent says that absent the accident the claimant likely would have continued to work in much the same manner as she had prior to the accident. The respondent says that the evidence indicates that the claimant had a weak attachment to the workforce and her average earnings in the four years prior to the accident were \$46,500 and this likely would have continued going forward absent the accident. The respondent says that while the claimant will have ongoing symptoms into the future, the evidence is that she will see improvement in her psychiatric condition and should be able to continue with her education. The respondent accepts that the claimant has a real and substantial possibility of a future income loss. They say that in the circumstances, the capital asset approach is the appropriate way to assess loss of future earning capacity. The respondent says that four years of the claimant's likely absent accident annual earnings of \$50,000 is an appropriate award for loss of future earning capacity.
198. Following his assessment in October 2016 Dr. Brooks described the claimant's degree of impairment from competitive and future employment as follows:
 90. **E.B.** has mild to moderate impairment with symptoms involving primarily the neck, shoulders and low back. These musculoskeletal symptoms do affect her in both personal and work life with reduction of her ability to work in jobs with physical demands that require lifting and carrying. She is also significantly affected in tasks requiring sustained prolonged standing and sitting

postures. Her overhead work capacity is decreased due to neck and upper back pain and elements of shoulder girdle weakness.

91. She would not fully meet the job criteria for many physically demanding job positions based on current assessment and this would reduce her competitive employability...

92. Based on the current evaluation she is more likely suited to jobs in the range of Sedentary to Light Physical only. Prolonged sitting and standing should be avoided and she should take frequent microbreaks breaks from any sustained postures to move around and stretch.

199. In 2019 Dr. Brooks described the claimant's occupational limitations as follows:

55. **E.B.** has several physical limitations for employment. I would agree that she is no longer capable of working as a yoga instructor due to her altered postures and biomechanics along with reduced lumbopelvic stability.

56. She is currently a university student, and her studies present challenges to sustained sitting, mental concentration and reduced cognition. She is receiving some accommodation in her program as a result. **E.B.** has concerns about her ability to complete a further three years of study for her bachelor's degree and has opted to transfer to McEwan University in Edmonton to give herself an exit strategy in two years if she cannot cope with the demands of the full program.

57. I would be hopeful that **E.B.** can obtain her bachelor's degree in child and youth counselling but am not certain she will choose to persist with further education and go into a master's program (as was her original plan).

200. With respect to competitive and future employability, Dr. Brooks opined that if the claimant became a youth counselor, her work efficiency may be reduced compared to expected normal and that her limitations will reduce her options for work in some facilities. He further opined that the claimant may have to work less and may require an understanding employer who can provide accommodations if possible. Dr. Brooks concludes as follows:

64. Overall, **E.B.** is likely to have reduced current and future employability in the work force, both with her field and in alternate employment options due to her physical limitations. The limitations could most likely be viewed as permanent considering the almost 5-year time interval since the collision and **E.B.** would be considered as having a permanent partial disability due to her chronic musculoskeletal pain. It is therefore likely that **E.B.** will most likely work on a part time basis, or at least restricted hours. In my experience, individuals with chronic pain conditions often work reduced daily hours or have extra days off per week to reduce the impact of the chronic pain relative to employment.

65. The natural history of an individual who is relatively young, like **E.B.**, is that her future employability is permanently impacted due to the impact of chronic pain and reduced physical capacity. Her ability to work as many days per

week as she usually would have been expected to do as a new graduate is likely permanently impaired. Her earning capacity is therefore likely decreased. Her career duration may also be curtailed if her pain levels increased and/or work tolerance decreased since individuals with chronic pain are unlikely to work indefinitely and she may find as she ages that her mental and physical capacity to work “x” hours per week declines over time. As mentioned earlier, in the research by Bunkertorp, a proportion of individuals with chronic whiplash disorder are unemployed, even many years after the initial injury.

66. Overall, it is my opinion that the length of her career as a youth counsellor and the number of hours worked per week may have been reduced had she not been injured in this accident. I note also that [REDACTED] E.B. [REDACTED] had to change careers from that of a yoga instructor as a consequence of this accident.

201. Dr. Lazar assessed the claimant in June 2019. She opined that the claimant likely experienced a change in occupational and academic functioning after the accident related to her physical symptoms and her experience of pain. However, she was unable to fully opine on the impact of the accident on her academic and occupational functioning due to a lack of records on workplace or school functioning after the accident. Dr. Lazar opined that with appropriate treatment there were opportunities for improvement in the impact of the claimant’s symptoms on her day-to-day functioning.
202. Following provision of updated records and reassessment of the claimant in the fall of 2020, Dr. Lazar stated the following with respect to the impact of the accident on academic functioning:

Finally, it remains my opinion that as a result of her involvement in the accident of September 4, 2014, [REDACTED] E.B. [REDACTED] possibly experienced a change in her academic functioning. In my opinion based on my re assessment of [REDACTED] E.B. [REDACTED] and the additional records available for my review, [REDACTED] E.B. [REDACTED]’ recent academic pursuits have largely been impacted by her anxiety symptoms. In my opinion, clinical records of the psychologist Beth Murray dated October 15, 2019, which note that the content of [REDACTED] E.B. [REDACTED] academic courses were triggering “childhood trauma and distress” and that she was “relieved with her decision to drop out of the child and youth program she had started,” suggest that [REDACTED] E.B. [REDACTED]’ anxiety symptoms related to her involvement in her academic program were, at least in part, informed by non-accident related factors. I also note that [REDACTED] E.B. [REDACTED] reported in our assessment that her psychologist, Ms. Murray, had suggested that she withdraw from her academic program. Ms. Murray’s clinical notes do not appear to support this. It remains my opinion that I am hindered in fully opining on the impact of the motor vehicle accident on [REDACTED] E.B. [REDACTED] academic functioning as I have not had the opportunity to review an of [REDACTED] E.B. [REDACTED]’ academic records.

203. With respect to the role of the claimant’s accident related emotional and psychological issues on her ability to navigate life stressors, particularly with respect to academic and occupational functioning, Dr. Lazar opined that the claimant is more vulnerable to a variety of life stressors. This vulnerability makes it more difficult to process and manage stressors arising from academic and occupational pursuits.

204. Dr. Hirsch who assessed the claimant at ICBC's request in May 2019 concluded that the claimant's decline in vocational functioning post-accident was attributable to the accident and the related physical and emotional trauma. He concluded that while treatment may result in some symptomatic improvement, the claimant would experience ongoing pain of sufficient intensity that it will probably continue to negatively impact on her level of function. He concluded that the claimant would not be able to resume working as a yoga instructor and that she was limited to performing tasks which are sedentary, light and medium physical demands possibly with some limitations in place. He opined that the claimant had the physical and intellectual capacity to further her education and anticipated that she would be successful in working in the field of child and youth care counselling.
205. Dr. Tessler deferred to the functional capacity testing and the vocational counselor with respect to the claimant's capabilities of returning to the workplace.
206. Following his functional capacity evaluation in October 2016, Mr. Hosking summarized the claimant's work capacity as follows:
6. Summary of work capacity: Based on the medical diagnoses, prognoses and the results of this evaluation, **E.B.** is likely capable of working as a yoga instructor on a part-time basis. That is, her demonstrated limitations indicate that she likely does not have the endurance capacity to teach classes on a full-time basis. She would be better suited to a work routine that involves a mix of body positions and postures (i.e. a mix of sitting and standing). For instance, she would be suited to part-time yoga instruction and to part-time work in an office setting with accommodations to allow for frequent changes in position between sitting and standing. The barrier to her working full-time in yoga instruction is the presence of marked deficits of muscle function in the right shoulder girdle, lower back and right hip, which present as limitations for achieving the correct body positions required for various yoga postures. **E.B.**'s office type work demands should be modified such that there is limited need for prolonged neck-flexed postures (not longer than one hour at a time while sitting at a desk), lifting and carrying in the light range and no requirement for reaching above shoulder level. She is not well suited to continue with her current job as an environment safety officer in the construction industry. The particular job in which she is currently employed requires repeated short intervals of severe stooped standing, a position which over time appears provocative to her lower back symptoms. Should she wish to continue as a safety officer, she should choose alternative employment which allows for more variation in body position and reduced demand for stooped standing.
207. Mr. Hosking altered his opinion after considering Dr. Brook's diagnosis of functional neurogenic TOS concluding that due to this diagnosis the claimant would be poorly suited to work as a yoga teacher and that she should avoid this and other vocational or recreational activities which require repeated or prolonged use of her arm in positions of elevation, extension and/or external rotation.
208. Ms. Sharma conducted a vocational assessment in May of 2017 following which she concluded that the claimant was impaired in her income earning capacity in a variety of

ways. She concluded that the claimant was not competitively employable in any of her past or current occupations and that her mood and headaches would continue to result in absences or reduced function at work which would make her a less reliable worker. Ms. Sharma concluded that the claimant is less competitively employable and no longer able to pursue the type of jobs to the fullest capacity commensurate with her professional experience. Ms. Sharma also concluded that the claimant was no longer able to pursue the types of occupations related to her expressed career goals to the fullest capacity on a competitive basis compared to the likelihood of her doing so in the absence of the accident. With respect to the claimant's ability to complete training, Ms. Sharma concluded as follows:

Based on her residual limitations related to chronic pain, fatigue, and impaired mood, and particularly related to her reported issues with cognitive dysfunction, I have reservations regarding **E.B.**'s ability to pursue post-secondary studies and then work durably given her ongoing symptomatology and due to the physical, psychological, endurance and cognitive demands of academic and work requirements. This has implications in terms of both income opportunities as well as employment opportunities. It is my opinion that, in the absence of the subject accident, she would have, more likely than not, been better able to tolerate the demands of occupational training and subsequent employment.

209. Ms. Sharma concluded that the claimant may be relegated to pursuing positions offered on a contract or part time basis depending on her ability to tolerate full time demands without accommodation. As well, her opinion was that the claimant will require a specific work environment and accommodations to assist her with energy conservation and compensatory strategies for her headaches, mood issues and pain symptoms.
210. After Ms. Sharma's assessment, the claimant attended school and achieved good grades.
211. I conclude that the plaintiff has suffered a loss of income earning capacity because of the accident. The evidence establishes that all the criteria in *Brown* are met. While I find that the claimant remains able to work, she is no longer capable of the full range of job duties that she could perform before the accident. On the expert medical evidence, these limitations will persist indefinitely, although there is the possibility of improvement with appropriate treatment.
212. While the economist's estimates provide a useful reference point, I conclude that they do not capture the claimant's likely with and without accident projected earnings. Many positive and negative contingencies could alter these projections. I am also mindful that while the medical evidence I have accepted considers that the claimant's prognosis is guarded, further treatment has been recommended and the claimant may see some improvement from those treatments. The medical evidence indicates that the claimant should be able to complete her education. The claimant has demonstrated an ability to work on a full-time basis since the accident and I do not find that the claimant will be limited to part time work only for the duration of her working life. I believe that this must also be considered when I am assessing the claimant's future income losses.
213. This is not a case in which the value of the claimant's loss of future earning capacity is easily measurable. For this reason, I prefer the capital asset approach to assessment of her

loss. Application of the *Brown* factors supports the conclusion that the claimant has suffered a significant loss of her capital asset. She has been rendered less capable overall from earning income from all types of employment. She is less marketable or attractive as an employee to potential employers. She has lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured and the claimant is less valuable to herself as a person capable of earning income in a competitive labour market.

214. Considering all the matters I have discussed, and all the evidence and argument, I assess the claimant's future loss of capacity to earn income at \$450,000.00.

(d) Cost of future care/Lost Housekeeping capacity

215. The claimant makes no claim for the cost of future care. The claimant seeks \$200,000 for past and future housekeeping capacity, based on one to two hours per day, or a requirement of \$1,000 per month, decreased for the contingency that the claimant will devote less time to caring for her home as she grows older and her children age.
216. The claimant points to her reliance on her partner's assistance with most of her housekeeping and childcare responsibilities as the rationale for the housekeeping capacity award. The claimant says that such an award is supported by the evidence of the medical experts, Dr. Brooks and Mr. Hosking. The claimant says that the opinion of Dr. Hirsch should not be accepted as it is internally inconsistent and does not reflect the claimant's ability to perform household tasks.
217. The respondent says that caution in general should be applied to lost housekeeping capacity awards. They rely on the evidence of SM of the division of labour in their home and Dr. Hirsch's evidence that the claimant has the physical aptitude to perform all domestic tasks, although she may need to space out the more physically demanding activities in the home. The respondent says that \$10,000 should be awarded for loss of housekeeping capacity.
218. The evidence does not suggest that the claimant is unable to do any housework. Rather the evidence establishes that the claimant has benefited from living with a partner who is ready and willing to take on many of the domestic chores in the household. With further appropriate treatment, the claimant may experience an improvement in her symptoms. However, the evidence satisfies me that the claimant has suffered an impairment of housekeeping capacity because of the accident.
219. A loss of housekeeping capacity can be compensated by a pecuniary or a non-pecuniary award: *Kim v. Lin*, 2016 BCSC 2405 aff'd 2018 BCCA 77. In quantifying this loss, a plaintiff is not required to prove that she will hire replacement labour to perform the duties she is unable to do because of a diminished capacity: *McTavish v. MacGillivray*, 2000 BCCA 164. A loss of housekeeping capacity claim is to be assessed generally and not calculated precisely: *Campbell v. Banman*, 2009 BCCA 484 at para. 26. As noted in *Chappel v. Loyie*, 2016 BCSC 1722 the compensation is for the loss of the value of the work that a claimant would have performed but which due to the injuries, she can no longer perform.

220. In *Chappell* the 52-year-old male plaintiff was awarded \$50,000 to compensate him for his past and future loss of housekeeping capacity, including the loss of capacity to do home maintenance, repairs and renovations. The evidence established that the plaintiff had lost much of his capacity to do the outside yard work, home maintenance, repair and renovation work. The evidence established that prior to the accident the plaintiff did all the yard and garden work. The evidence also established that the plaintiff would remain limited in his household activities. The evidence before the court included the cost of replacement services for yard care, home maintenance services and renovation services.
221. The female plaintiff in *Kim v. Lin* 2016 BCSC 2405 was 36 years old at the time of trial. The court found that the plaintiff had suffered a “profound loss of capacity, both to perform household tasks and carry out childcare responsibilities”. The plaintiff had received gratuitous assistance from family members up to the time of trial. The evidence established that the plaintiff lacked the capacity to properly look after the house and care for her children, that this was causally related to the accident and that this condition would continue indefinitely. The court concluded that the plaintiff required a minimum of two to three hours per day of assistance to replace her lost housekeeping and childcare capacity. Past loss of housekeeping capacity was calculated based on \$2,000 per month for a period and \$1,000 per month thereafter for a total of \$168,000. Loss of future homemaking capacity was assessed at \$250,000. The trial judge calculated the present value of loss of housekeeping capacity to age 70, without adjustment for contingencies, at \$312,360. This amount was discounted to take into account the substantial possibility that the plaintiff’s condition may improve to the point that her home making capacity increases and to the substantial possibility that the plaintiff would not have to devote as much time to caring for the home as her children grew older and that fact that as she grows older she would in any event have done less of the household chores.
222. The claimant says that one to two hours per day is a reasonable estimate of the assistance that the claimant will need to replace her lost housekeeping and childcare capacity, or as a rough valuation, she will require \$1,000 per month or \$12,000 annually. The present value of \$12,000 annually to age 70 is \$343,332. The evidence is different than the evidence in *Kim* where the impairment in housekeeping capacity was significantly greater.
223. The claimant’s evidence is that she cares for her baby while SM is at work. When SM comes home from work, he will clean up the “chaos from the day”, doing the dishes and putting on the laundry. He will also take the baby as she will be at her mental and physical end. She testified that SM would make supper and they will put the baby to bed together. She testified that SM makes the meals and changes all the diapers while she takes care of the baby’s naps and that on his days off, SM does most things.
224. SM testified that he does most of the housework. He testified that when he gets home, he takes care of the cleaning, washing the floors and the outdoor work while the claimant cares for the baby. He testified that this division of labour works for them as he likes working with his hands. He testified that on their acreage he takes care of the yard although the claimant will come out and try to help for a bit. In cross examination SM confirmed that the claimant still cooks and that between the two of them they get everything done that needs done. On redirect, SM testified that before the baby was born, the claimant took care of most of the cooking and laundry while he took care of the cleaning and mopping. He

said that the claimant can do a few minutes of mopping, but it is easier on her for him to do it himself.

225. When the claimant was assessed by Dr. Brooks in October 2016, she reported that she had extreme limitations for home repairs, painting and scrubbing floors, moderate limitations for doing the laundry and making beds and slight limitations for vacuuming. Dr. Brooks concluded that the claimant required assistance indefinitely for heavier home cleaning, gardening and yard work based on the current assessment and that she should avoid overhead activities such as cleaning walls and windows and similar tasks.
226. At her follow up assessment with Dr. Brooks in 2019 the claimant reported extreme limitations for performing home repairs and painting, moderate limitations for grocery shopping and scrubbing floors, and slight limitations for sweeping, making beds, vacuuming and childcare.
227. With respect to housekeeping capacity, Dr. Hirsch concluded that the claimant had the physical capacity to perform all domestic tasks, however she may have to space out the more physically taxing activities in her home. He did not foresee the need for homemaker assistance in the long term.
228. Following his functional capacity in October 2016, Mr. Hosking concluded with respect to the claimant's capacity for domestic activity as follows:

E.B. is independent with activities of self-care. She does not require home help for regular cleaning but will need to pace herself or perform aggravating tasks for short intervals at a time, thus extending the time to complete tasks. E.B. requires assistance for heavier seasonal cleaning such as moving furniture, washing walls/windows/blinds, cleaning cupboards and moving heavier storage boxes. E. E.B. will require assistance for heavier or repetitive garden and yard care, including tasks such as pruning, shoveling, raking, digging, carrying soil or plants, using a wheelbarrow and planting larger trees and bushes.

229. In June 2019 when the claimant was assessed by Dr. Lazar, she reported that she is independent in her activities of daily living and instrumental activities of daily living.
230. I find that the claimants housekeeping capacity has been impaired because of the injuries sustained in the accident. I accept Mr. Hosking's opinion that the claimant does not require help for regular cleaning but may need to pace herself which may extend the time required to complete tasks. I also accept Mr. Hosking's and Dr. Brooks' opinion that the claimant will require assistance for heavier seasonal cleaning and yard work. Taking into consideration all the evidence, I assess the claimant's loss of housekeeping capacity, past and future, at \$50,000.

(e) Special damages

231. The parties have agreed that the special damages incurred by the claimant because of the motor vehicle accident total \$10,700.

SUMMARY

232. The claimant is entitled to the following damage awards:

- (a) Non-pecuniary damages – \$135,000.00
- (b) Past income loss – \$80,000.00
- (c) Future income loss – \$450,000.00
- (d) Loss of housekeeping capacity – \$50,000.00
- (e) Special damages – \$10,700.00

Total: \$725,700.00

233. If the parties wish to make submissions regarding costs, interest, and deductions, they should arrange a telephone conference with me to determine how best to proceed.

234. I wish to thank counsel for their assistance and helpful submissions in this matter.



Rose Keith QC