IN THE MATTER OF AN ARBITRATION PURSUANT TO PART 10, DIVISION 2 OF THE REVISED REGULATION (1984) UNDER THE *INSURANCE (MOTOR VEHICLE) ACT,* AND THE PROVISIONS OF THE *COMMERCIAL ARBITRATION ACT*

BETWEEN:

NN, DN and MEN

CLAIMANTS

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

Arbitrator:	**Donald W. Yule, Q.C.**
Dates of Hearing:	**August 25, 26 and 27, 2008**
Location:	**Victoria, British Columbia**
Date of Award:	**September 15, 2008**

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INTRODUCTION

1. Pursuant to the provisions of s. 148.2(1) of the Revised Regulation (1984) under the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996 c. 231 and the *Commercial Arbitration Act*, R.S.B.C. 1996 c. 55, the parties have submitted for determination the assessment of the quantum of damages to which the Claimants, Mrs. N, Ms. NN and Ms. DN are entitled to recover as a result of the death of Mr. N.

2. Mr. N was the husband of Mrs. N and the father of Ms. NN and Ms. DN.

3. Mr. N was killed in a motor vehicle accident that occurred on May 2nd, 2006 on Interstate 5 in San Joaquin County, California (the "Accident"). Mr. N's vehicle was stopped on the right-hand shoulder of the highway when it was struck from behind by a motor vehicle owned and operated by MDW. Mr. W. carried no automobile liability insurance. He remains in jail awaiting trial on criminal charges arising out of the Accident.

4. The parties have agreed upon the following facts:

    i. Mr. N was an insured person for the purposes of entitlement to UMP (underinsured motorist protection) coverage;

    ii. Mr. N's death was caused solely by the negligence of MDW in the operation of his motor vehicle;

    iii. MDW is an "underinsured motorist" for the purposes of this UMP claim;

    iv. The total of "deductible amounts" under s. 148.1(1) of the Regulation is $47,660.00. This total comprises a BCAA death benefit of $2,000.00, Part

VII benefits of $22,580.00, a CPP death benefit of $2,500.00, a $20,580.00 being the net amount for Mrs. N's anticipated life expectancy of the difference between her entitlement to her husband's pension monies and her increased care costs due to a reduced subsidy;

v. Mrs. N is entitled to recover $397.50 for tax preparation services and $400.00 for transportation services to and from medical appointments previously provided by Mr. N;

vi. The expenses that the Claimants have incurred in conducting investigations, retaining counsel and obtaining Judgment in California against MDW are to be treated as costs in this arbitration, and not as special damages, and, accordingly, will be addressed subsequently when costs issues relating to this arbitration are dealt with.

5. Mrs. N seeks a management fee of $5,000.00 and a tax gross up of $5,000.00, whilst acknowledging that consideration of these awards is often left until the amount of compensation has been assessed. The Respondent submits that the quantification of any tax gross up should be deferred until damages have been assessed. As no evidence was adduced with respect to either head of damage, I think the proper course is to defer consideration of both management fees and tax gross up until damages have been assessed.

6. The parties have prepared a joint statement of issues. After reducing the list of issues because of agreements reached and the deferment of management fees and tax gross up, the remaining issues for determination are as follows:

1 Whether and to what extent Mrs. N is entitled to an award for loss of support/loss of dependency as a result of Mr. N's death;

2 What services had Mr. N been providing to each of the Claimants prior to his death and whether and to what extent the loss of each of these services is compensable:

a) services to Mrs. N:
   i. companionship services;

b) services to Ms. NN:
   i. transportation services;
   ii. handyman services;
   iii. moving services;

c) services to Ms. DN:
   i. delivery services;
   ii. handyman services;
   iii. moving services.

3 Whether and to what extent Mrs. N, Ms. NN and Ms. DN are entitled to an award for the loss of Mr. N's guidance;

4 Whether and to what extent Mrs. N, Ms. NN and Ms. DN are entitled to an award for loss of inheritance;

5 Whether and to what extent Ms. NN and Ms. DN are entitled to an additional award for their increased caregiver burden to Mrs. N;

6. Whether and to what extent Ms. NN is entitled to an award for grief counselling;

7 Whether and to what extent Ms. NN is entitled to an award for increased travel expenses;

BACKGROUND CIRCUMSTANCES

7. Mr. N was 65 years of age at the time of his death. Mr. and Mrs. N were married on November 22nd, 1961. Mr. N worked for more than 30 years for the Province of British Columbia. For more than 20 years he worked at G. Lodge in V. and the T. Institute in K., tending to patients with reduced mental capacity, often arising from congenital impairments. Initially Mr. N was employed at the G. Lodge in V. He transferred to the T. Institute in K. in 1976, the year in which he and Mrs. N separated. He remained in K. until the T. Institute was closed by the Government and then transferred back to G. Lodge in 1986. He remained working at G. Lodge until it also was closed by the Province. Because of his long service, a job was found for him, which he did not enjoy, in the shipping department of the QP in V. He remained there until retirement at age 65 in 2005. Thereafter, he commenced working as an independent owner/operator/driver for D. driving vehicles for car dealers, mostly between V. and V. or V. and other points on Vancouver Island. (Mr. N was in the course of driving a vehicle from California to V. in this connection when he was killed.)

8. Mrs. N was born February 23, 1929 and is currently 79 years old. She resides in the JBC Facility (the "Lodge") to which she was admitted in January, 2005. She suffers from vascular dementia, first diagnosed in 2003. She is unable to care for herself or look after

her affairs. Mrs. N had a working career as a bookkeeper. She moved to K. in 1982 and remained there until she retired in 1997 and returned to V., BC.

9. Ms. NN was born in January, 1972 and is now 36 years of age. She obtained a B.A. from the University of V. and is employed as an archeologist with GA. She had been living in V. but as of June 1, 2008 she has moved with her partner to N, B.C. where she has the opportunity to build and be the head of an archeology department at GA's C. office.

10. Ms. DN is a 42 year old self-employed graphic designer who now resides with her partner in the Chinatown area of V., BC.

11. While the Respondent concedes that the Ns were a close-knit family, the living circumstances of Mr. N and Mrs. N were somewhat unusual. As noted previously, Mr. and Mrs. N. separated in 1976. Mr. N. moved to K. and Mrs. N. remained in V. with her daughters.

12. In 1980 a reconciliation commenced and in 1982 Mrs. N. and the daughters moved to K. and resumed living together with Mr. N. However, when T. Institute in K. closed in 1986 and Mr. N. transferred back to G. Lodge in V., Mrs. N. remained in K. until she retired from work in 1997. She then returned to V. but did not resume cohabiting with Mr. N. but lived in her own separate accommodation until she was admitted to the Lodge in January, 2005. Thus, Mr. and Mrs. N. lived separate and apart from 1986 until Mr. N.'s death in 2006, ie. for the last 20 years. There was no separation agreement and subject to what is discussed subsequently, Mr. N. did not financially support Mrs. N.

13. The uncontradicted evidence is that even during the initial separation between 1976 and 1982 and the later separation between 1986 and 1997, when Mr. and Mrs. N. were living in different cities, the family remained very functional. There was a lot of contact

between Mr. N. and his wife and children. They took all their holidays together and travelled together. In 1997, after Mrs. N. retired and returned to V. to live in her own apartment, all four family members were living independently in separate accommodation in V. Ms. DN said it was "great" to have all four family members living in the same city again. A feature was a regular Sunday morning breakfast, usually at Mrs. N.'s apartment. The family all got together on holidays such as Christmas and Easter and for all birthdays.

14. Family members, particularly Mr. N., began to notice some changes in Mrs. N.'s behaviour in 2001. Mrs. N. was a volunteer at the M. Museum, taking admission fees and handling the cash for the gift shop. On hearing that Mrs. N. was having trouble making change and working with simple numbers – a notable change in a retired bookkeeper - the family got together, discussed the problem, and together convinced Mrs. N. that she should retire from this volunteer position. Between 2001 and 2003, family members observed further signs of cognitive impairment. Mr. N. took the initiative in bringing his concerns to the attention of Mrs. N.'s physician. Mr. N. usually attended with Mrs. N. on her doctor appointments. Mr. N. never held a Power of Attorney over Mrs. Ns' affairs, and Ms. DN took over looking after her mother's financial affairs in 2003. In 2003, Mrs. N. was first formally diagnosed with vascular dementia by Dr. C., a specialist in geriatric medicine. On a reassessment in April, 2004, Dr. C. suggested that a plan for long-term care be prepared. At that time, Mrs. N. was still living alone but a daughter was dispensing her medications. Mr. N. was taking Mrs. N. grocery shopping once a week. Mr. N. talked to her on the phone 2 or 3 times a day. Mrs. N. used meticulous lists obsessively, would wander and require directions, and sometimes got mixed up as to time and place.

15. On January 4, 2005, Mrs. N. was admitted as a resident of the J.B. Lodge (the "Lodge"). At the time of admission, the Lodge facilities were undergoing renovations and so residents, until about June, 2005, stayed at a designated floor of the G.R. Hospital, after which they were transferred to the J.B. location.

16. The family members, particularly Mr. N. were supportive of Mrs. N. in this transition into full-time care. An issue arose with respect to one of the medications, Premarin, which had been prescribed for Mrs. N. by her family physician, Dr. K. Mr. N. kept close track of Mrs. N.'s various medications and became aware of well publicized information associating Premarin in some patients with stroke. As there was some evidence suggesting stroke disease as the likely basis for Mrs. N.'s dementia, Mr. N. attempted, without success, to persuade Dr. K. to discontinue the Premarin. Ultimately, Mr. N. was the moving force behind a change in Mrs. N.'s physician and Dr. M., who was a family physician and medical co-ordinator at the Lodge and responsible for the care of multiple patients there, became Mrs. N.'s family physician in April, 2006. Dr. M. discontinued the Premarin.

17. From the time Mrs. N. became a resident of the Lodge, all family members visited her on a regular basis. Ms. NN visited about three times per week when she was in town. Her work, however, required her to travel out of town two to three weeks per month. When she was in town, she would take her mother for walks, to have coffee, to feed the ducks in the park, and she would sit with her at a meal or watch TV with her in the evening. Ms. DN visited her mother approximately four times per week. The timing of her visits would be co-ordinated with those of Mr. N. Ms. DN would visit in the morning and Mr. N. (until he retired) would often visit after work. Both before he retired and even more so after he retired, Mr. N. bore the lion's share of the care provided to Mrs. N. by her family. Mr. N. was the "quarterback" or "team captain". He visited Mrs. N. at least once and some times twice per day. He was in touch with Ms. DN on a daily basis to co-

ordinate schedules. Mr. N. took Mrs. N. out at least once per day. They went to Cup of Joe's or to Starbucks for coffee or a snack. Mr. N. took Mrs. N. to mass on Saturday evening. He took Mrs. N. to various restaurants, including Red Robin and the Reef. He took her for walks to the beach or to B.H. Park or to O.B. Marina to feed seals. He took her on drives, or to do shopping for minor personal items.

18. The evidence from Mr. N.'s daughters and from the staff members at the Lodge who testified at the Hearing is clear that Mrs. N. looked forward to these visits by Mr. N. She "dressed up" for them and was concerned about her appearance. She "perked up" in anticipation of these outings and they gave her pleasure.

19. Mr. N. also provided assistance in dealing with a consequence of Mrs. N.'s anxiety. Mrs. N. had bladder incontinence and wore adult diapers. If she were on an outing and had an accident, she would want to return to the Lodge immediately. Mr. N. was able to calm her so that they could continue with the outing. Her daughters were unable to do the same which restricted their ability to take their mother to public places.

20. Another consequence of Mrs. N.'s anxiety disorder was fecal smearing. There were two separate occasions of varying lengths when this occurred. The first occasion was after her transfer to the J.B. location of the Lodge and before Mr. N.'s death. The second episode appears to have commenced a few months after Mr. N.'s death. According to Dr. M. fecal smearing is not a common component of dementia. It involves manual bowel disempaction by the patient. The patient, the patient's clothing, bedding, and sometimes the walls of the bedroom or bathroom become smeared with feces. During these episodes Mrs. N. became extremely anxious and distressed such that the staff were not always able to perform the necessary clean up. On multiple occasions the staff contacted Mr. N. who immediately came to the Lodge and was able to relieve Mrs. N.'s state of anxiety so that the staff could bathe her, if necessary, and clean up wherever required. On one occasion

when Mr. N. was unable to attend because of the flu, Ms. DN went instead but after an hour she was still unable to calm her mother with the result that Ativan was administered instead.

21. The evidence is also clear that Mrs. N. did not enjoy living at the Lodge and she particularly did not enjoy the food or eating at the Lodge. She found living at the Lodge overwhelming and wanted to be taken "home". She would sometimes wake up and not know where she was. She was not comfortable with group situations and the dining room was boisterous with residents sometimes yelling at each other. There was an on-going concern about Mrs. N.'s eating habits. She usually had an adequate breakfast, but was disinterested at lunch and often refused dinner. In this circumstance Mr. N.'s daily trips to a coffee shop or restaurant involved getting some food into Mrs. N. as well as providing her with a break away from the Lodge.

22. Vascular dementia is a gradually progressive disease of cognition which has very few treatment options and is not curable. The Respondent filed an expert report from Dr. T.E., a specialist in internal medicine and endocrinology. He has provided an opinion that Mrs. Ns' life expectancy is a further four years from the date of this Hearing. The Claimants have accepted this opinion and there is no evidence to the contrary.

23. In May, 2007 Dr. M. examined Mrs. N. An excerpt from his letter to Claimants' counsel dated May 10, 2007 [Exhibit 6] provides the following description:

> "She [Mrs. N.] was pleasant but easily distracted and appeared anxious. She did not know who I was and was disoriented to time, person and place. Her speech rambled and made no sense. She had no idea about her assets, finances or daily living expenses. There was evidence of

> significant short term memory loss and lack of insight into her circumstances."

24. Dr. M. gave evidence that Mrs. N. has never known who he was since he became her family physician in April, 2006. Ms. DN says that currently Mrs. N. "mostly" recognizes her. Mrs. N's response varies from day to day. When Ms. NN has not visited for a few weeks, it will take a couple of visits before Mrs. N. recognizes her.

25. Since Mr. N.'s death, the regime for visiting Mrs. N. and taking her out has necessarily changed. Two caregivers, Ms. J.A and Ms. S.S. have been hired. They visit Mrs. N. at the Lodge for 5 hours per week and take her on small outings. Ms. DN has increased the number of her visits to six days per week. On June 1, 2008, Ms. NN moved to N. BC. Her plan is to spend three weeks every month working there and to return to V. for one week every month so long as her mother is alive. Her employer is aware of this intention and has accommodated the plan to date.

CLAIM OF MRS. N. FOR LOSS OF SUPPORT/LOSS OF DEPENDENCY

26. Mrs. N. submits that her claim for loss of dependency, after reduction for the agreed applicable deductible amounts, should be assessed at $101,640.00. The Respondent submits that Mrs. N. is not entitled to any award for loss of support or dependency because Mr. N. did not provide her with any financial support at all.

27. Mrs. N. relies upon the expert report of Mr. W. dated November 9, 2007 [Exhibit 2 – Tab 3], and some follow up e-mails adjusting his conclusions in accordance with the agreed life expectancy of Mrs. N. Mr. W.'s opinion is necessarily based upon certain assumptions. One assumption is that Mr. N. was earning about $49,600.00 per year from

his various pensions and business income, and that he would continue to earn approximately this amount throughout Mrs. N.'s agreed life expectancy. Mr. W. makes a reduction for the amount Mr. N. would have spent on his own living expenses. In this regard, at page 5 of the report, Mr. W. states as follows:

> "As economists we can provide statistical information on the approximate amount that an individual is likely to spend on food, clothing and shelter, based on age, income levels and family status. We cannot answer the question of what proportion of income represents 'living expenses' as opposed to income 'at (the Plaintiff's) disposal', since we cannot make a simple distinction between 'needs' and 'wants'. The minimum physical requirements for sustaining life in Canada bear no relationship to what people actually spend on the 'necessities' of food, clothing and shelter.
>
> We believe that economists must accept the guidance of the Courts in determining a suitable amount for living expenses, since the concept is primarily a legal rather than an economic or biological one. As far as we are aware the Courts have usually defined 'living expenses' as a percentage of income.
>
> For the estimates used below, we have assumed Mr. N. would have required 'living expenses' in the amount of 35% of his total income."

28. Based on the assumption, then, that 65% of Mr. N.'s income would have been used for the benefit of Mrs. N., Mr. W. then calculates that the loss of dependency from the date of the Accident to the hearing date is $40,500.00, and the future loss over Mrs. N.'s remaining four year life expectancy is $108,800.00. The gross loss of dependency before deduction of applicable, deductible amounts is $149,300.00. It is apparent that in calculating Mr. N.'s own living expenses, Mr. W. used a standardized percentage; he did not attempt an individualized analysis of Mr. N.'s income and expenses. It might be particularly difficult to do so where, as here, the deceased lived alone.

29. The income tax returns of Mr. N. show total income of:

2004	$42,616.00,
2005	$57,693.00 (the last full year before the Accident),
2006	$24,395.00 (to May 2, 2006).

30. The income tax returns of Mrs. N. show total income of:

2005	$19,877.00,
2006	$25,881.00, and
2007	$30,296.00.

31. The evidence is that both before and after the Accident Mrs. N. paid all her expenses at the Lodge and all her medication expense out of her own funds and after doing so had a few additional thousand dollars left over for any other incidental expenses. The Lodge was a full care facility. Her accommodation at the Lodge was substantially subsidized, and although her income rose as a result of Mr. N.'s death, due to her receiving additional pension monies, and her daily cost of living at the Lodge rose (because of a reduced subsidy owing to her increased income), Mrs. N. nevertheless continues paying the full cost of her accommodation at the Lodge herself.

32. To the surprise of his children, Mr. N. died without leaving a Will. To their further surprise, he died impecunious. He left no assets. He had lived for many years in a rented basement suite. He left debts to financial institutions of about $30,000.00 in unpaid loans and a line of credit. Ms. DN has no idea where her father's money went. She assumes he must have used virtually all of it on his own living expenses. The amounts that he spent on Mrs. N. were relatively small compared to his total income. There is no evidence to explain how Mr. N. spent all of his income and it is pointless to speculate. What is clear, however, from the evidence of Ms. DN and Ms. NN is that, apart from the food, snacks and minor personal items that Mr. N. bought for Mrs. N. during his daily visits, he was not otherwise supporting Mrs. N. financially.

33. The Respondent submits that the W. report should be wholly disregarded for two reasons. First, one important assumption in calculating Mr. N.'s net revenue from his business is incorrect. The 2006 income tax return showed gross revenue of $9,392.12 and expenses totaling $4,233.22 for net revenue of $5,158.90. Included in the list of expenses was the sum of $242.77 for insurance. However, in order to carry on the business of transporting cars from place to place for dealers, Mr. N. had to obtain from ICBC a transporter's license and special automobile insurance at an annual cost of just under $3,000,00. The prorated additional licensing and auto insurance cost for the first four months of 2006 would be approximately $1,000.00. This is a significant discrepancy on total business expenses of $4,200.00.

34. The Respondent's second and fundamental criticism of the W. report is that the assumption that 65% of Mr. N.'s income was used for support of Mrs. N. is simply wrong and incompatible with the actual proven facts. I agree with the Respondent. The theory behind an award for loss of dependency or support is to compensate the claimant for the actual financial support that would have been received by the claimant from the deceased but which is lost as a result of the death of the deceased. The principles governing the

assessment of the quantum of damages in a family compensation claim have been described by Viscount Simon in the leading decision *Nance v. British Columbia Electric Railway Company* (1951) 3 D.L.R. 705 (P.C.) @ p.714 as follows:

> "The claim to damages in the present case falls under two separate heads. *First*, if the deceased had not been killed, but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward, what sums during that period would he probably have applied out of his income to the maintenance of his wife and family? (Under this head in the present case the wife or widow need alone be considered, since his children and step-children were all adults and self supporting, and at the time of his death he contributed nothing material to their maintenance).
>
> *Secondly*, in addition to any sum arrived at under the first head, the case has been argued on the assumption common to both parties that according to the law of British Columbia it would be proper to award a sum representing such portion of any additional savings which he would or might have accumulated during the period for which, but for his accident, he would have lived, as on his death at the end of this period would probably have accrued to his wife and family by devolution either on his intestate or under his Will, if he made a Will."

35. Where family members all reside in one dwelling, consume the same food, and benefit from whatever household tasks are done by the deceased member, there are sometimes difficult questions of calculating what sums were actually spent by the deceased on other family members and what notional benefits ought also to be taken into account. However, the circumstances in this case are dramatically different. Mr. and Mrs. N. did not share the same dwelling; they had lived separate and apart for the last 20 years. Mrs. N. resided at the Lodge, which provided total care, and all of that expense was paid out of Mrs. N.'s own separate funds. Apart from the sums spent by Mr. N. on Mrs. N. in conjunction with his daily visits, there was no other financial support flowing from Mr. N. to Mrs. N. Thus, I conclude that the approach and analysis in the W. report is not helpful in determining any loss of dependency or loss of support claim that Mrs. N. may have.

36. The Respondent submits that in these circumstances there is no loss of dependency or support at all sustained by Mrs. N. I do not agree. The evidence is unchallenged that ever since Mrs. N. became a resident at the Lodge, Mr. N. visited her virtually daily and in conjunction with those visits purchased for her coffee, snacks, occasional restaurant meals and minor personal items such as cosmetics, underwear, etc. The Respondent submits that these expenditures were in the nature of gifts given out of love and affection and should not form the basis of a claim for loss of dependency or support. As I understand it, the Respondent says that to be compensable a loss must arise out of a financial dependency upon the deceased. One does not just calculate the pecuniary value of everything the deceased did for the benefit of surviving claimants. This submission suggests that, for example, if Mr. N. always paid for coffee or lunch when he took Mrs. N. out, but Mrs. N. was in fact financially able to pay for herself, the cost of coffee and lunch would not be a compensable loss. I do not think the capacity of a claimant to do or pay for services provided by the deceased is a precondition to entitlement for their loss. At the same time, not every act done by the deceased that may have benefited a claimant and to which an economic value can be attached is necessarily compensable. In *Nance*,

supra, Viscount Simon's question was what sums would the deceased probably have applied out of his income to the maintenance of his wife and family. In reference to self supporting adult children who had no claim, Viscount Simon noted that the deceased had contributed "nothing material" to their maintenance. In *Keizer v. Hanna*, [1978] 2 S.C.R. 342 @ p. 6 (Quicklaw copy) Dickson, J., for the majority, stated that the claimant was entitled "to an award of such amount as will assure her the comforts and station in life which she would have enjoyed but for the untimely death of her husband". *Fleming, Law of Torts*, (Fourth Edition) 1971 at p. 586 describes compensation as due and due only "for loss of support, measured by the claimant's reasonable expectation of pecuniary benefit". In *Killeen Estate v. Kline* (1982) 33 B.C.L.R. 225 (B.C.C.A.) @ para. 21, Lambert, J.A. for the Court described the overriding principle as an assessment that represents "fair, full monetary compensation for future pecuniary loss". These authorities suggest to me that material support is the focus rather than financial necessity or financial dependency of the claimant. Thus, there may be instances in which purchases by one family member for another are so infrequent and minor as to be regarded either as not constituting material support or as being *de minimus*, but I do not think that is the situation here. Although the monetary amounts are comparatively small, the expenditures were made on a daily basis over an extended period of time and particularly the food, cosmetic and clothing items are in the nature of necessaries. These expenditures were not in the nature of gifts such as an annual birthday or Christmas present. On the evidence there is every reason to think that Mr. N. would have continued to spend these sums on Mrs. N. for so long as she was able to enjoy and benefit from them. There is evidence from Dr. M. that, at the end stages of dementia the patient becomes bedridden, and loses appetite, energy and the ability to communicate. Dr. E. describes the increased mortality rate for dementia as due to "progressive wasting and inanition culminating in death, often due to pneumonia". I accordingly take into account that these expenditures will likely diminish, if not end, prior to Mrs. N.'s demise.

37. Calculating the amount of this loss of financial support to Mrs. N. is not easy, but difficulty of assessment is not a reason for making no award [*Loyie, supra @ p. 4*]. From Mr. N.'s papers and records located after his death, a number of receipts for various expenses were located and put in evidence. These include MasterCard and G.V. Savings Credit Union statements [Exhibit 1, Tabs19, A, B and C], ING bank statements [Exhibit 1, Tab 19D] and a bundle of miscellaneous receipts [Exhibit 1, Tab 22]. Through no fault of the Claimants, these receipts are incomplete. Although the evidence supports the conclusion that Mr. N. took his wife out virtually daily and almost invariably always bought coffee and some food item, there are receipts for only 16 of the 31 days in March, 2006 and for only 9 of 30 days in April, 2006, the last two full months before the Accident. For the receipts that are produced, as the daughters were not present, they cannot say for sure that every receipt represents an occasion when Mrs. N. was present. Other receipts were located but not put into evidence because there was no apparent connection to Mrs. N. It is conceded by the Respondent that the receipts for Cup of Joe's and Starbucks appear in the records only after Mrs. N. moved into the Lodge. Those two establishments are in close proximity to the Lodge. It is reasonable to conclude that all or at least most of those receipts represent occasions when Mrs. N. was present. The evidence is that Mr. N. dined out himself a lot, and frequented Red Robin restaurants. He also, however, took Mrs. N. there. Accordingly, some but not all of the Red Robin receipts likely represent occasions when Mrs. N. was present.

38. Although there is no absolute consistency, many of the Cup of Joe's receipts are in the range of $20.00 to $25.00. Many of the Red Robin receipts are for the identical amount of $12.62 (there are 7 such items in March, 2006 and 3 more such items in April, 2006). This suggests a standard order. There are also multiple receipts at Red Robin for $11.01 (4 such receipts in March and April, 2006).

39. There are two Starbucks receipts in the month of April, 2006 for the identical amount of $19.33. Earlier Starbucks receipts are often on the order of $50.00 or more. I cannot conclude that the higher Starbucks receipts include a 50% portion for coffee and food for Mrs. N. The most frequent expense that is documented in the two months prior to the Accident is an expense in the range of $11.00 to $12.00 which likely represents coffee and a snack split between Mr. and Mrs. N. There are other receipts for higher amounts that likely represent a shared meal rather than a snack. On average I conclude that Mr. N. likely spent about $10.00 per day on coffee, snacks and food for Mrs. N. which represents an annual expenditure of approximately $3,600.00. Based upon the evidence that Mr. N. also purchased items such as cosmetics, chocolates, and toiletries for Mrs. N. I conclude that he probably spent another $400.00 per year on these items, making a total annual expenditure of $4,000.00. Taking into account the additional factors of Mrs. N.'s six year life expectancy from the date of the accident, and the fact that these expenditures will probably be curtailed or cease some time prior to her death, I award $20,000.00 for loss of dependency.

MRS. N.'S CLAIM FOR LOSS OF SERVICES

40. It is agreed that the value of the compensable claim for loss of transportation services is $400.00 and for loss of income tax preparation services is **$**397.50.

41. In addition, Mrs. N. claims for loss of companionship services valued on the basis of the paid companions who have been hired after the Accident. This claim is quantified at $5,328.00 for past loss and $76,752.00 for future loss. The future loss claim is calculated on the basis of 15 hours of service per week at $25.00 per hour.

42. The Respondent submits that loss of spousal companionship is not a compensable head of damage in a family compensation claim, relying upon the decision of *Bianco Estate v. Fromow* (1998) 161 D.L.R.. (4th) 765 (B.C.C.A.). Alternatively, if the cost of replacement companion services is compensable, the Respondent says that the claim is properly assessed at $4,214.00 for past loss and $18,564.00 for future loss, for a total loss of $22,778.00. This sum is based on adding the total of all invoices for past services and a continuation of the current 5 hours per week for the next three years.

43. Dr. M. is a licensed family practitioner for more than 20 years. He has been the medical co-ordinator for the Lodge for 20 years. He is well qualified and experienced in dealing with geriatric patients with dementia. In his report [Exhibit 2, Tab 4], he expresses the opinion that:

> "A nurturing and supportive milieu is important to the well being of the frail elderly, with or without dementia. Mr. N.'s contributions to [Mrs. N.'s] care cannot be replaced. I believe though that a companion to take her out when family are not available is at least of some benefit despite her gradual cognitive decline. The stimulation provided by personal, one to one, interaction is important to [Mrs. N.'s] quality of life."

44. Dr. M. supports having a paid companion for up to 8 hours per week.

45. In his oral testimony, Dr. M. stated that about 85% of the residents at the Lodge have some cognitive impairment and his impression is that those who have visitors or companions do better and have an increased quality of life. With respect to Mrs. N. in particular, Dr. M. understood that Mrs. N. did not consistently know who the caregivers

were but, based on information from Lodge staff, he also understood the caregiver visits were something Mrs. N. looked forward to and he thought there was some possibility the visits were of some value to Mrs. N. I accept Dr. Ms.' opinion in this regard. (Mrs. N. has been told that the caregivers are friends of her daughters; she is unaware that they are being paid.)

46. There is some evidence of a decline in Mrs. N.'s condition since the Accident. The daughters or staff have observed that Mrs. N. has lost weight and her appetite is poorer; she takes less interest in her appearance; she no longer requests Ms. V. to apply her makeup; she has refused to wear her upper denture; she is more despondent and spends more time in bed with the blanket up to her nose. Dr. M. cannot say that he has specifically noticed a change in Mrs. N.'s condition following the Accident; however he has only seen Mrs. N. approximately 12 to 15 times since April, 2006 and quite a few of those visits were in connection with an extended episode of fecal smearing. I accept the evidence of the daughters and the Lodge staff regarding the deterioration in Mrs. N.'s condition since the Accident. It is, of course, difficult to distinguish between changes as a result of grief and the absence of Mr. N. and changes attributable to the inevitable progression of the disease. Nevertheless it is reasonable to conclude, and I do, that some deterioration is attributable to Mr. N.'s absence, particularly for a person like Mrs. N. who becomes anxious and distressed in public situations but responds to one-on-one contact with persons with whom she is familiar and comfortable.

47. While conceding that "in the usual circumstances" loss of companionship is not a compensable loss in a family compensation action, Mrs. N. submits in paragraphs 50 and 54 of her written argument why the prohibition should not apply in this case:

"50. . . . . The Claimants submit that the entire rationale behind the common law principle that the loss of companionship is not a compensable loss is that, generally speaking, the loss of a person's spouse or companion cannot be quantified in monetary terms and cannot be replaced with a monetary award. In this instance, this is simply not the case, and consequently, the rationale behind the general rule of no compensation for loss of companionship is lost. (Mrs. N.) did not suffer the loss of (Mr. N.s') companionship in the traditional way in which a surviving spouse suffers the loss of a deceased spouse's companionship. Given her condition, it is not as though (Mrs. N.) has the ability to move on and find another companion with whom to share her life the way one spouse may often do on the death of the other. Therefore, the only form of companionship she may now have, as a result of (Mr. N.s') death, will be in the form of one of her daughters or a paid companion. . . .

54. It is a well settled legal principle that a tortfeasor must take his victim as he finds her. (Mrs. N.s') condition is similar to a victim with a thin skull. She is entitled to be put in the position she would have been in, so far as monetary compensation can do so, but for (Mr. N.s') death. In this case, there can really be no dispute that (Mr. N.s') death has had a devastating effect upon (Mrs. N.) and her quality of life. This is likely much more so than would have been the case had (Mrs. N.) been a woman with all of

> her faculties. (Mrs. N.) can be placed in the similar position to that which she would have been had (Mr. N.) been living. The Respondent can compensate her by extending to her monetary damages to assist her in hiring paid companions to mentally stimulate her and to ensure she is able to be physically active. This is a quality of life issue, more so than a true loss of traditional spousal companionship. As a consequence, the Claimants submit that (Mrs. N.) be entitled to an award for the loss of (Mr. N.s') companionship services."

48. On the issue of entitlement the Respondent relies upon *Bianco Estate, supra*. In that case an award of $10,000.00 in non-pecuniary damages for the loss of love, guidance, affection and companionship was set aside by the Court of Appeal. The plaintiff was a 75 year old father who claimed damages for the loss of his 30 year old son. The relationship between father and son was described as far transcending the normal father/son relationship in that they were the best of friends, inseparable; they regularly hunted and fished together; the father welcomed his son's friends into his home; the son included his father in many of his social activities with his friends. The son lived in the father's home, as did the son's girlfriend in the last few months before the accident. The son contributed a monetary amount to household expenses and did many maintenance jobs.

49. In overturning the award, the Court of Appeal said as follows:

> "10. Damages for the loss of 'love' and 'affection' under the present legislation, in my judgment, are not recoverable.

> 11. That leaves for consideration the question of companionship which was the principal consideration motivating the trial judge to make this nominal award. In my judgment, companionship is not a recoverable head of damages because such damages must necessarily be for the loss of the life of the deceased. This distinction was well identified by Parrett, J. in *Loyie v. Erickson Estate* (1994) 94 B.C.L.R. (2nd) 33 (S.C.) where that learned judge reviewed the authorities and decided at 37 that
>
> > 'it is the loss of the 'services' of the deceased rather than the loss of the deceased himself which provides the theoretical framework for this type of award.'
>
> 12. I have no doubt that the father has suffered a loss of companionship. I also have no doubt that in some cases a bereaved father might employ a substitute companion and suffer an actual pecuniary loss in that respect. But returning to the question of characterization, I am persuaded that an actual or potential loss of companionship is not a recoverable head of damages under the *Family Compensation Act.*"

50. The issue in *Loyie v. Erickson Estate, supra*, was whether the defendants were required to pay interest under the *Court Order Interest Act*, R.S.B.C. 1979 c. 76 on awards of $30,000.00 made to two children for loss of guidance arising from death of a parent. The *Court Order Interest Act* prohibited awarding interest on non-pecuniary damages arising

from personal injury or death. The issue then was whether the award for loss of parental guidance was a pecuniary or a non-pecuniary award. After reviewing authorities from both England and the Supreme Court of Canada, Mr. Justice Parrett concluded that damages awarded under the *Family Compensation Act* are confined to actual or expected pecuniary loss suffered by the claimant; such damages were not to be awarded as a solatium but rather in reference to a loss as of a pecuniary character. Parrett, J. stated as follows at page 4:

> "The rationale behind these conclusions can be found in the distinction drawn between solatium and the loss of a substantial benefit. The quantification of such a claim may be difficult or 'loose and indefinite' to use the words of the Chief Justice in *Lett*, but the difficulty in quantifying the claim makes it no less a loss. It is the loss of the 'services' of the deceased rather than the loss of the deceased himself which provides the theoretical framework for this type of award. The award under this head of damage is designed, however inadequately, to provide the cost of replacing those services in the open market.
>
> The nature of the award often does not lend itself to rigorous and detailed analysis on an economic basis and this has led, in turn, to the characterization of some such awards as 'conventional'. In my respectful view, such a characterization does not materially change the nature of the award which remains pecuniary in nature . . . "

51. The Court concluded that an award for loss of parental guidance was pecuniary in nature and subject to payment of Court Order interest.

52. This case helps to clarify that it is the "services" aspect of the deceased's conduct that is compensable. It does not matter that the service is motivated by love and affection for a spouse. Household services are also motivated by care and affection. The replacement of them is clearly compensable. Mrs. Ns' claim is for companionship services, not merely the loss of companionship. In *Bianco Estate* the claim was for loss of companionship only. The plaintiffs were seeking an "at large" lump sum award. Hence, the issue as to whether the award was pecuniary or non-pecuniary. There was no attempt in that case to attach an economic value or cost to the lost services aspect of companionship. The judgment at paragraph 12 seems to leave open the possibility of a compensable claim where substitute or replacement services result in an actual pecuniary loss.

53. It seems to me that one aspect of Mr. Ns' companionship is the loss to Mrs. N., in terms of the pleasure and comfort that derives from the continuing association with a long time friend and spouse. That loss is irreplaceable; no economic value can be attached to it and it is not compensable. That is the *solatium* aspect. But another aspect of Mr. Ns' companionship is the loss to Mrs. N. of having someone to take her out of the Lodge on a daily basis; to encourage and facilitate her maintaining mobility as long as possible; to provide a "break" from the institution; to provide an opportunity to supplement her food intake; and to provide social stimulation to the extent she is able to participate in it. This is a loss that can be provided by substitute commercial services. Moreover this loss addresses a medical health issue – keeping Mrs. N. as vital as possible for as long as possible – and does affect her quality of life. In the language of Ritchie, CJ in *St. Lawrence & Ottawa Railway v. Lett* , [1985] 11 S.C.R. 422 (S.C.C.) quoted at p. 3 of the Judgment in *Loyie,* Mrs. N. has suffered a "substantial injury", not a "merely

sentimental" one, and the legal remedy is by way of pecuniary compensation. The replacement companion services could fairly be characterized as health care services provided by a non-medically trained person. There is certainly a health and medical benefit aspect to these services.

54. The Respondent advanced an additional argument as to why the claim for companionship services is not compensable. By analogy to the law as it relates to 'in trust' claims, the Respondent submitted that an award could only be made where the claimed services were necessary as a result of injury sustained; where the claimed services were outside the normal duties of parents or other family members; and where someone outside of the family would have been required to perform the services had the family members not done them. I do not agree that the analogy to 'in trust' claims is appropriate. The economic value attached to services that were provided by the deceased person is compensable whether those services were strictly "necessary" or not. Moreover, in this case, the "necessity" argument is met by the evidence of Dr. M. who clearly is of the view that one on one companionship and outings benefit dementia patients, at least until the last stages of the disease. Again, I do not think a claim for loss of services under the *Family Compensation Act* is restricted to services over and above what would be expected from caring family members. Many of the services provided by family members to each other are provided out of ordinary, familial care and affection. Their loss is nonetheless compensable. In addition, I note that in this case Dr. Ms' evidence is that the involvement of Mrs. Ns' family, particularly Mr. N. was above normal. Thus, I conclude that Mrs. Ns' claim for loss of companion services is compensable.

55. Mrs. N. seeks reimbursement for past funds paid to Ms. A. and Ms. S. for companion services in the amount of $5,328.00. The discrepancy between the calculation of this claim by the parties arises from their different approaches. The Claimant based her calculation on the number of weeks from the Accident to the date of Hearing; the

Respondent totaled up the actual invoices relied on by the Claimant and in evidence at Exhibit 1, Tab 23. Both parties were attempting to determine the same amount, ie. what has been paid to date to the two companions. Subject to any mathematical error, I accept the Respondent's addition of the invoices and award the sum of $4,214.00 for past loss of companionship services.

56. With respect to future companionship services, it is necessary to determine the appropriate amount of companionship hours per week. The current level is 5 hours per week at slightly differing rates between the two companions. The Respondent says that level is sufficient and should only be provided for a further 3 years, based on Dr. Ms' evidence regarding the final stages of dementia. The Claimant seeks 15 hours per week, being the existing companionship hours augmented by 2 hours per day, 5 days per week during the dinner hour to ensure that Ms. N. is eating full and nutritious meals at dinner time.

57. Ms. NN said that she would like the hours increased by at least 2 more hours per week, to a total of 7 hours per week, so that a companion was visiting at least once each day. Ms. DN said that she would like a companion present at dinner time, 2 nights a week, both to assist in proper feeding and to have an extra set of "eyes" observing the state of Mrs. N. The expert report of Ms. S-B, a registered nurse, with experience in medical and rehabilitation nursing, particularly of individuals with chronic illness and disability, recommended 8 hours per week of companion services. Dr. M. agreed with that recommendation.

58. I think 8 hours per week is a reasonable level of replacement services. It would allow an outing once per day, 7 days a week, with one extra hour available for use one day a week at dinner time; alternatively a companion could attend during the day, 5 days per week, leaving 3 hours available for use at dinner time.

59. I accept the Claimant's submission that the hourly rate should be $25.00. That is the current rate of Ms. A. The reason Ms. S's rate is currently lower appears to be based on her having provided services to Mrs. N. for a comparatively short time and there is some suggestion that she may not be continuing to provide services. The intent would be to minimize the turn over of companions, particularly as it takes some time for Mrs. N. to become comfortable with a new person. At 8 hours per week, at $25.00 per hour, the annual cost is $10,400.00. Taking into account Dr. Ms' evidence regarding the state of patients in the final stages of dementia, I award $35,000.00 for future loss of companionship services.

CLAIM OF MS. DN FOR LOSS OF SERVICES

60. Ms. DN claims for loss of handyman services, calculated at $7,200.00, loss of courier services calculated at $10,333.44, and loss of moving services calculated at $200.00. The claims for handyman and courier services are based upon Mr. N. continuing to provide these services for a further 9 years from the date of the Accident. Ms. DNs' evidence is that, from time to time, Mr. N. performed handyman services for her, including minor automobile servicing, and plumbing and electrical repairs. On those occasions when Ms. DN moved, Mr. N. hired a moving van for her. With respect to courier services, when Ms. DN resided in Central S., approximately 20 minutes from downtown V., Mr. N. used to perform delivery services for her, in connection with her graphic design work, either picking up or dropping off materials related to her business.

61. The Respondent's position is that none of these services is compensable because they all relate to "familial conveniences and gifts" provided by Mr. N. Such gifts were provided out of care and affection and did not create a financial loss arising from any dependency.

62. With respect to the issue of entitlement, both parties cite the case of *Bjornson v. McDonald,* ([2005] B.C.S.C. 765, Paris, J.) In *Bjornson*, the claimant was a 38 year old, single mother of three children who sued for loss arising from the death of both her parents, age 64 and 66, in a motor vehicle accident. The claimant had lived independently for 17 years, and at the time of the accident lived in Killam, Alberta, whereas her parents lived in Lac La Hache, BC. The claimant had relied greatly upon her parents for emotional and financial support and assistance with the children, particularly since the break up of a prior marriage. The parents visited her often and provided babysitting services and the father did vehicle repairs and other handyman work. Prior to the accident the parents had been intending to move to Alberta to live with the claimant and her children. In addition to making an award for past and future financial support, the Court made a separate award for loss of child care and household work services, past and future [para. 24]. Although there is little detail provided as to the nature of the household services performed in *Bjornson*, the broad description would certainly include the plumbing and electrical repairs and minor automobile services performed by Mr. N. There is also the similarity that the Bjornson parents lived separately from their daughter (indeed in a different province), and they provided services on an intermittent basis. While it may be said that the extent and the value of the services provided in the *Bjornson* case were sufficiently large to create a financial dependency, the decision itself does not characterize dependency as a prerequisite to recovery. I refer to my previous analysis of the "dependency requirement" at paragraph 36 above. Thus, in the present case, where services, even though of modest value, have been provided by the deceased to surviving family members on a frequent, although irregular basis over an extended period of years, and are not immaterial and where the value of those services can be economically quantified then, as a matter of principle, in my view, the services are compensable.

63. The evidence regarding the frequency of handyman services provided by Mr. N. is imprecise. He would be called to unplug toilets. He helped Ms. DN paint her apartment a couple of times. He did oil changes and changed spark plugs on Ms. DN's vehicle, which she has given up since her move from Central S. to downtown V. The claim for $7,200.00 is based upon plumbing and electrical repairs at between $150.00 to $200.00 per visit, manual cost of $800.00 total, for 9 years. As noted, Ms. DN no longer has an automobile. There is no evidence of her having incurred auto, plumbing or electrical repair expense between the date of the Accident and the date of the Hearing. No past loss has been proven. Ms. DN has been cohabiting with her partner for the last 2 ½ years. While I accept that Mr. N. provided these kinds of services in the past, I think it is likely, for a variety of reasons, including his own advancing age, the anticipated deterioration in Mrs. Ns' medical condition in the next few years, and Ms. DN being in her own household with her partner, that Mr. Ns' services would have been called upon less and less. I award $1,000.00 for loss of future handyman services.

64. From the nature of his business transporting automobiles, Mr. N. often drove in and out of V. When Ms. DN lived in Central S., Mr. N. would telephone to see whether she needed anything picked up or dropped off. This included design work in progress to be delivered to clients and office supplies if Mr. N. were going himself to Office Depot. Ms. DN estimated that her father made such deliveries two to three times per week. Since the Accident Ms. DN has mostly made such deliveries herself. Some work products she is now able to transmit to clients via computer. There is no evidence of the cost of deliveries incurred between the date of the Accident and the Hearing date. Ms. DN agreed that she could, at least in some instances, add a service charge for courier services to her account for professional services.

65. The Claimant's calculation of the value of lost courier services is based upon a one-way charge of $7.36 per trip x 3 trips per week for an annual cost of $1,148.16 for 9 years from the date of the Accident making a total of $10,333.44. I do not think it is a complete answer to the question of entitlement for the Respondent to say that Ms. DN can simply charge her clients for additional courier services. She is presumably in a competitive business and benefits if she can keep her total costs as low as possible. Nor is it a complete answer to say that she can personally pick up or deliver materials herself, thereby reducing her time available for other aspects of her business. Mr. Ns' driving services were a pecuniary benefit to Ms. DN provided on a regular basis over an extended period of time. However, no invoices for replacement courier services incurred between the date of the Accident and the date of Hearing were provided, nor did Ms. DN estimate any additional out of pocket expense. She is now delivering some materials via computer. She has commenced to charge some customers for courier services. As Mrs. Ns' health further deteriorates in the next few years and as Mr. N. ages, I expect that Ms. DN would have become less and less reliant upon her father's delivery services. Taking all these factors into account, I award the sum of $2,000.00 for past and future courier services.

66. I award $200.00 as claimed for moving services. In the past, Mr. N. assisted both his daughters by hiring a van whenever they moved. Ms. DN has already moved once since the date of the Accident. Even though Ms. DN has resided for the last few years with her partner, it is reasonable to conclude that Mr. DN would have continued to provide some moving assistance.

MS. NNs' CLAIM FOR LOSS OF SERVICES

67. Ms. NN claims $1,600.00 for loss of handyman services, $11,962.94 for loss of transportation services, and $200.00 for loss of moving services. For the reasons previously given with respect to the similar claims by Ms. DN, I do not accept the Respondent's submission that there can be no entitlement to recovery because these services were in the nature of gifts or conveniences provided out of love and affection.

68. Ms. NNs' evidence is that in the recent years prior to the Accident, Mr. N. provided minor plumbing or electrical repairs approximately four times per year. Ms. NN was living in rental accommodation but the landlord was unresponsive to requests for repairs. The Claimant acknowledges that any claim for handyman services would have ended once she moved to N., BC in June, 2008. There is no specific evidence that Ms. NN has actually incurred out of pocket expenses for handyman services between the date of the Accident and her move to Nelson, BC, nor are any receipts for such services in evidence. As this is a claim for past loss of services, and no replacement costs have been established, I make no award for this claim.

69. With respect to transportation services, Ms. NN travelled a great deal in the course of her employment. She did not have a car. Mr. N. drove her to and from the V. harbour float plane terminal and the S. airport (depending on her destination) and also took her approximately once per week grocery shopping and to Costco. Mr. N. took her to the airport or float plane terminal approximately four times per month. The cost of a taxi to the airport is $45.00 - $50.00; the cost to the float plane terminal is approximately $8.00 - $10.00. All of these services would, of course, have come to an end when Ms. NN moved to N., BC.

70. No receipts have been produced for taxi expenses to go grocery shopping or visit Costco since the date of the Accident. Since November, 2006 Ms. NN has been living with her partner who has a car. I expect that after November, 2006 Ms. NN would have done most of her shopping either with her partner or by using his vehicle. In the absence of receipts and given the comparably short time until Ms. NN would have had access to a vehicle, I award $250.00 for loss of transportation services for shopping purposes.

71. Similarly there are no receipts for taxi expenses incurred since the date of the Accident for transportation to the airport or the harbour float plane terminal. Based on the Claimant's calculation, she would be out of pocket approximately $8,000.00 for these services since the Accident. Ms. NN did not give an estimate of her actual out of pocket expense to date, stating simply that she has not kept her receipts. Ms. NN also acknowledged that she can be reimbursed for transportation expenses by her employer about 75% of the time, depending upon the client. I do think an employee is in a little different situation compared to a self-employed business operator in regards to choosing to pass on expenses to an ultimate client. An employer has no reasonable expectation that employees will not submit legitimate expenses for reimbursement, and employees who choose not to do so either because they drive themselves to the airport and don't submit mileage or parking charges or they get "free" transportation from a friend or family member, cannot reasonably expect to have the cost of that personal choice transferred to tortfeasors. Given the absence of receipts and the ability to be reimbursed for much of this expense, I award $1,000.00 for loss of transportation services to air terminals.

72. Ms. NN has, since the Accident, moved to N., BC. Her father helped her with prior moves by renting a van. He would likely have similarly assisted her in the move to N. I award the sum of $200.00 as claimed for loss of moving services.

CLAIM OF MS. DN AND MS. NN FOR REPLACEMENT INCREASED CAREGIVER BURDEN

73. Ms. DN and Ms. NN claim an award of $10,000.00 each to compensate them for their increased caregiver burden, beyond what they were previously providing to their mother and beyond what would be reasonably expected of adult daughters. There is no doubt that Ms. DN and Ms. NN have increased their visits to their mother since the death of their father. Although the award is sought on a global basis, the claim is characterized as the replacement of Mr. Ns' services in providing companionship to Mrs. N. *Jung v. Krimmer* (1987) 15 B.C.L.R. (2nd) 90 (S.C.) is cited for the proposition that an award for loss of services may be made even when the service is subsequently provided gratuitously by another family member. In the *Jung* case the deceased had performed domestic chores such as shopping, placing household insurance, selecting cars and paying taxes and also looked after renting out and repairing an apartment property. After his death these tasks were performed gratuitously for the surviving widow by two of her adult children. The Court held that the defendant could not benefit from the voluntary replacement of these services noting that the children may not be present to help the plaintiff for life. An award was made for the value of the lost services both to the date of trial and for future losses.

74. The Respondent submits that this kind of claim is not compensable. First, the companionship services were provided to Mrs. N., not the daughters. Second, an award for loss of services to adult independent children ought not to be made except where there is obvious significant reliance and interdependence between the adult child and deceased parent. Third, the claimed loss is not reasonably foreseeable and too remote, and reliance is put on *Mustapha v. Culligan of Canada Ltd.*, [2008] S.C.C. 27.

75. In my view, the claim for loss of companionship services, to the extent it is available, is the claim of Mrs. N., and has already been compensated for in the award for replacement caregiver services. Prior to the Accident the daughters visited their mother not because their father could not make visits and they were filling in his absences, but because they wanted to visit their mother as they still do out of love and affection as often as they can. Moreover, I do not think there is an actual pecuniary loss to the daughters in the sense articulated in the *Nance* case. Ms. DN and Ms. NN have decided to devote more of their own time to visiting their mother, which is understandable and proper in these circumstances, but I do not think this is a compensable, pecuniary loss to them.

CLAIMS OF MRS. N., MS. DN and MS. NN FOR LOSS OF GUIDANCE

76. Mrs. N. seeks $30,000.00 and Ms. DN and Ms. NN seek $15,000.00 each for loss of love, guidance and affection.

77. With respect to the claim of Mrs. N., the Court of Appeal decided in *Bianco Estate* that damages for loss of "love" and "affection" are not recoverable under the *Family Compensation Act*. That leaves for consideration the issue of loss of "guidance". Mrs. N. has not provided case authority in support of the proposition that a surviving spouse is entitled to an award for loss of guidance of a deceased spouse. I do not think it is sufficient to say that, because of the effect of her dementia on her cognitive faculties, Mrs. N. was dependent for guidance like a child. Mrs. N. was in a full care facility. Her financial affairs were being looked after by Ms. DN, not Mr. N. The theoretical basis for an award to children for loss of guidance is itself sufficiently anomalous and difficult to make compatible with the essential prerequisite of an actual pecuniary loss, and I would not extend the scope of entitlement under the *Act* to loss of guidance sustained by one spouse from the death of the other spouse.

78. Modest awards for loss of guidance are awarded to adult children. *Plant v. Chadwick* (1986) 5 B.C.L.R. (2nd) 305 determined that the award for loss of guidance should be a "conventional" one. The Court of Appeal upheld a jury award of $30,000.00 in favour of a nine month old child. There have been slightly higher awards for very young children. In *Roy v. Canada* (2002) B.C.S.C. 1021 (Neilson, J.) the Court awarded $7,500.00 to children between the ages of 19 and 21. In *Hoodspith v. Cook*, ([1999] B.C.J. No. 1280, J.T. Edwards, J.), the Court awarded $3,500.00 each to two adult children, one of whom was described as "completely independent" and living in his own home and the other of whom was engaged and who would be expected increasingly to gain care and guidance from her fiancé. In the present case the daughters say that they relied upon their father in particular for his guidance and advice with respect to various issues surrounding the care of their mother. In other respects they were independent. Both lived in their own accommodation. Both were engaged in full-time careers. Awards in the middle or high end of the range up to the conventional limit are to compensate for loss of guidance over extended period of years and over the wide variety of issues that confront children, youth and young adults in growing up. Accordingly, the award for Ms. DN and Ms. NN, who are respectively ages 42 and 36 must necessarily be at the low end of the range. I nevertheless accept that looking after their mother was a significant issue in their lives and that they did look to and rely upon their father for guidance and advice respecting their mother's care. I award each daughter $5,000.00 for loss of guidance.

CLAIM OF MS. DN and MS. NN FOR LOSS OF INHERITANCE

79. No claim was advanced for loss of inheritance by Mrs. N. Mr. N. died impecunious, leaving debts of approximately $30,000.00 to financial institutions. He worked full-time for the Province of British Columbia throughout his working career, primarily in the

health care field and later at the Queen's Printer. Upon retirement from the civil service, he became self-employed, transporting vehicles for car dealerships. In the last two full years before his death, his total income was approximately $42,000.00 and $57,700.00. Where he spent all of his money is unknown. What is known is that after a career of steady employment he had not amassed any estate. The Claimants submit that he enjoyed his work transporting automobiles; would have continued to do so until age 75; and that, assuming Mrs. N. would have died in 2012, he would have had more disposable income with which to assemble a modest estate which would have benefited his daughters.

80. There is no indication in the evidence how long Mr. N. intended to continue transporting automobiles. Apart from his own time spent with his wife, Mr. N. was not contributing significantly out of his own income to Mrs. Ns' support. In the absence of an explanation as to why Mr. N. had not been able to create a modest estate during his life time of full-time employment, it is complete, unwarranted speculation that he might have created an estate in his remaining years. For this reason I make no award for loss of inheritance.

CLAIMS OF MS. NN FOR GRIEF COUNSELLING and INCREASED TRAVEL EXPENSES

81. Ms NN claims $990.00 for six future counselling sessions. The death of her father was a tremendous shock. She was physically ill for several months and took five weeks' stress leave from work. She received counselling from Dr. Houghton, a registered psychologist, on 12 visits. She now has guilt feelings about placing the burden of her mother's care upon her sister, as a result of moving to N., BC. In her report [Exhibit 2, Tab 1] Ms. S-B recommends six more counselling sessions "to assist [Ms. NN] with making this decision", that is the decision to relocate to N., BC. There is no medical report

recommending further counselling. Ms. NN has, in fact, made the decision to relocate without benefit of further counselling.

82. The Respondent submits that grief is not compensable (*Stegemann v. Pasemko* (2007) B.C.S.C. 1062, Powers, J., @ paras. 55 and 56, and additional authorities cited there). The Court does not compensate for the indirect result or reaction to the death or injury of a loved one; that is for sorrow or grief. Thus, it is submitted, if there is no entitlement to compensation for grief, there can be no entitlement to compensation for grief counselling. In *Bjornson, supra*, the plaintiff suffered a "break down" several months after the death of her parents, apparently related to the distress caused by their death. She was suicidal on two occasions and received psychological counselling. It was conceded by the defendant that the treatment cost was recoverable as special damages.

83. I am not sure that it follows that because there is no compensation at large for grief that there cannot be compensation for the actual pecuniary expense for grief counselling. In the present case the potential future counselling is not so much dealing with grief as it is dealing with guilt over being unable to share more equitably the burden of caring for Mrs. N. However, in this case I am not satisfied that Ms. NN has satisfied the burden of proving that further counselling either will occur or is necessary. There is no medical evidence to support further counselling and the basis of the recommendation in Ms. S-B's report has been bypassed by events. Moreover, it is not clear to me that Ms. NN in fact intends to seek additional counselling. In these circumstances I decline to make an award for grief counselling.

84. Ms. NN seeks the sum of $44,800.00, being the transportation, lodging, car rental and incidental expense of additional trips from N., BC to V. so that she can assist with the visiting and care of her mother. Had Ms. NN moved to N., BC while her father was alive, she estimates that she would have returned to visit her mother four times per year. She

now intends to return one week each month for an additional eight trips annually for the four remaining years of Mrs. Ns' life expectancy.

85. The Respondent submits that these expenses are not compensable as being too remote and, in any event, is not based upon a loss of services to Ms. NN. I agree. The analysis set out in paragraph 75 above also applies to this claim. An additional factor is that Ms. NN made a career choice in June, 2008 to accept a promotion at work and move to N., BC. While that decision may have been the correct one, albeit a difficult one, it is that decision that has dramatically increased the cost of visiting her mother. Had the career opening been to a much more distant destination, the cost of visiting would have been even greater. In my view such travel expenses are not reasonably foreseeable or are too remote to be compensable as damages under the *Family Compensation Act (Mustapha v. Culligan, supra)*. According, I made no award for them.

86. In summary, I make the following awards:

A. **MRS. N:.**

$20,000.00	loss of dependency
$ 400.00	loss of transportation services
$ 397.50	loss of tax preparation services
$ 4,214.00	loss of past companionship services
$35,000.00	loss of future companionship services
$60,011.50	**Total**
<$47,660.00>	**Less agreed deductible amounts**
$12,351.50	**Award**

(I have applied all of the agreed deductible amounts against the claim of Mrs. N. as that was the manner in which they were handled by counsel.)

B. **MS. DN:**

$1,000.00	loss of future handyman services
$2,000.00	past and future courier services
$ 200.00	moving services
$5,000.00	loss of guidance
$8,200.00	**Award**

C. **MS. NN:**

$ 250.00	loss of transportation services for shopping purposes
$1,000.00	loss of transportation services to air terminals
$ 200.00	loss of moving services
$5,000.00	loss of guidance
$6,450.00	**Award**

DATED at Vancouver, British Columbia this 15th day of September, 2008

Donald W. Yule, Q.C. Arbitrator