

**IN THE MATTER OF AN ARBITRATION
PURSUANT TO SECTION 148.2(1) OF THE REVISED REGULATIONS
TO THE *INSURANCE (MOTOR VEHICLE) ACT*
BC REG. 447/83**

AND

***THE COMMERCIAL ARBITRATION ACT,*
R.S.B.C. 1996, C. 55**

BETWEEN:

[REDACTED]

CLAIMANTS

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

**ARBITRATION DETERMINATION OF THE CLAIMS OF A [REDACTED] T [REDACTED],
C [REDACTED] C [REDACTED] AND D [REDACTED] T [REDACTED]**

**DATE OF HEARING:
PLACE OF HEARING:**

**March 29 – 30, 2010
Camp Fiorante Matthews**

J.J. CAMP, Q.C.
Camp Fiorante Matthews
400-856 Homer Street
Vancouver, BC V6B 2W5

Arbitrator

GREGORY L. SAMUELS
Cross Border Law
Suite 204 – 1730 West 2nd Avenue
Vancouver, BC V6J 1H6

Counsel for the Claimants

**AVON M. MERSEY
MARTHA VON NIESSEN**
Fasken Martineau LLP
Barristers & Solicitors
Suite 2900-550 Burrard Street
Vancouver, BC V6C 0A3

Counsel for the Respondent

ISSUE TO BE ARBITRATED

1. The parties have agreed, pursuant to s. 148.2 of the Revised Regulations (1984) of the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "Act"), and the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 to submit this matter to arbitration.
2. The parties have agreed that I have jurisdiction to determine the issues engaged in this arbitration.
3. The parties have agreed that each of the claimants are entitled to underinsured motorist protection coverage of up to \$1 million less all appropriate deductions.
4. I intend these reasons to be relatively brief although I have carefully reviewed all of the evidence, documentation and counsel's helpful arguments. I am compelled to say at the outset and without being critical of any party, that this is a case where the wheels of justice have grinded very slowly.

FACTS:

5. The single vehicle accident that is the subject of this arbitration occurred on October 27, 1996 near Chehalis, Washington (the "MVA" or the "1996 MVA"). The British Columbia vehicle involved in the accident was being driven by Mr. P■■■■ T■■■■, the patriarch of the T■■■■ family. He had six family members with him. One of the tires on the vehicle rapidly deflated causing Mr. T■■■■ to lose control of the vehicle. It rolled over several times causing injuries to the claimants.
6. At the time of the accident, Mr. P■■■■ T■■■■ was a resident of British Columbia and was insured under a third party liability policy with a limit of \$200,000 issued by the Insurance Corporation of British Columbia ("ICBC"). Mr. P■■■■ T■■■■ did not have any excess third party liability insurance on the vehicle. It was conceded the \$200,000 third-party liability coverage would not be sufficient to satisfy the claims emanating from this accident.

7. At the time of the accident, each claimant was a resident of British Columbia and a member of the same household as Mr. P████ T████ and, as such, each had first party coverage underinsured motorist protection ("UMP") pursuant to Part 10, s. 148.1 of the Regulations to the *Act*. Hence, each of the claimants have UMP coverage of up to \$1 million less appropriate deductions.

8. On October 26, 1999, the claimants filed a Complaint for Damages For Negligence and Product Liability in the Superior Court of Washington for Lewis County against the defendants, the Uniroyal Goodrich Tire Company, Uniroyal Goodrich Tire Company Inc., Michelin North America and P████ T████ (the "Complaint"). The Complainant alleged that the defendant P████ T████ negligently maintained and operated his motor vehicle. The claim against the remaining defendants was for defective design or defective manufacture of the tires on the vehicle.

9. The tort trial before a jury commenced in March, 2004 and lasted approximately 45 days. On April 23, 2004, the jury delivered a verdict, dismissing the product liability case. The jury found that, although the defendant P████ T████ was not negligent in his operation of the vehicle, he was negligent in failing to maintain the tire in proper working order and in this regard his negligence was the proximate cause of the plaintiffs' injuries. The jury awarded damages of approximately \$9.1 Million (U.S.) to the plaintiffs as follows:

- A████ T████ (nee T████): US \$ 1,497,266
- A████ T████: US \$ 1,129,271
- B████ T████: US \$ 1,553,921
- D████ T████: US \$ 3,605,832
- D████ T████: US \$ 1,179,991
- C████ C████ (nee T████): US \$ 136,798.

10. On September 17, 2009, I handed down my ruling on a motion by the claimants that the law of Washington state should govern the quantum of damages on the facts of this case. I determined that the issues pertaining to the quantum of damages must be determined by the law of British Columbia.

11. On January 19, 2010, I handed down my ruling on a motion by ICBC to have one of the claimants, A [REDACTED] T [REDACTED] attend an independent medical examination by an orthopedic specialist, a functional capacity specialist and a vocational specialist. I found that I did not have jurisdiction to order such examinations.

12. The arbitration in this matter to determine the quantum of damages was heard on March 29 and 30, 2010, in Vancouver, British Columbia, and dealt with the claims of three of the T [REDACTED] family members, namely, his daughters A [REDACTED] T [REDACTED] and C [REDACTED] C [REDACTED] and, his wife, D [REDACTED] T [REDACTED]. My analysis and awards follow.

A [REDACTED] T [REDACTED]

13. Ms. T [REDACTED] filed a will-say statement, a supplemental will-say statement, and gave oral evidence at the arbitration including cross-examination by counsel for ICBC. She was also examined for discovery by counsel for ICBC a few months before the arbitration hearing. A number of documents including a letter of reference, clinical records, fitness questionnaire, pay slips and medical payment records were introduced into evidence as well. Her husband, D [REDACTED] T [REDACTED], and her employer, Diane Klose, also filed will-say statements. In addition, the will-say statements from her sister, C [REDACTED] C [REDACTED], and mother, D [REDACTED] T [REDACTED], commented upon the injuries and symptoms of Ms. T [REDACTED].

14. Ms. T [REDACTED] was born April 5, 1978 in Romania and came to Canada when she was 11 years of age. She enjoyed swimming, camping, hiking, skating, bike riding, tobogganing, and other outdoor activities. She married her husband, D [REDACTED], in the summer of 1996 in Romania and returned to Canada that fall and began the immigration process for her husband. Ms. T [REDACTED] was 18 years old and in her high school graduation year when she suffered serious injuries in the MVA. She was also doing care aide work on a part-time basis caring for a

quadriplegic woman. Generally speaking, her injuries included a closed head injury with some brain swelling, significant scalp laceration, fracture of many of the thoracic spine vertebrae, a broken right clavicle and serious abrasions, including a deep scalp laceration, as a result of contacting the asphalt surface of the highway. She also suffered a flexion extension injury to the neck.

15. The evidence shows that Ms. T [REDACTED] was brought up with a strong work ethic. She was enrolled in grade 12 and was at the same time performing some care aide work for a disabled woman, Diane Klose, suffering from quadriplegia. She says that she was generally unable to work after the MVA due to chronic pain and weakness in her back. She says that she does not believe that she will be able to work as a care aide due to her disabilities but she would like to pursue other opportunities if possible. She wants to be completely healed but she says she is stuck living with significant disability.

16. From the spring of 1997 until the fall of 1997 she did perform various jobs including care-giving for the same disabled woman and also did some house cleaning and day care work. She said that she was compelled to do this work in order to improve the chances of successfully sponsoring her husband to emigrate to Canada from Romania. She had to work in order to provide and show a stable income in her sponsorship papers. Although the care-giving work included transfers between a bed and a wheelchair, she figured out ways and means to perform these tasks without causing undue pain. She was also accommodated by being able to take rests after any physical exertion. She eventually had to give up working in the fall of 1997 because the pain became too intense and because her husband had successfully emigrated to Canada. She resumed doing care aide work in 2004 on a limited basis.

17. She remembers very little about the MVA. Her first recollection is some hours after the accident in the Harborview Medical Center in Centralia, Washington State, feeling an intense burning pain on her scalp where it impacted the pavement. She could not feel her legs and she thought that she might be paralyzed. Upon gaining full consciousness, she learned that she had sustained significant orthopedic injuries involving multiple spinal fractures. A few days later she was airlifted to Vancouver General Hospital where she was fitted with a full body brace from her hips to her neck which she wore for three months. She had a great deal of difficulty sleeping

during this period of time and was in constant pain taking several different prescription pain medications. She had problems walking because the brace held her torso rigid from her hips to her chin. In December, 1996, while wearing the brace, she lost her balance trying to navigate a graded driveway. She fell face first, breaking several front teeth, lacerating and scarring her bottom lip and bruising her face.

18. As at the date of the arbitration hearing, she says that not much has changed in her physical condition. She has learned how to tolerate the pain and to accommodate her disabilities. She has reduced strength in her right arm and she also experiences occasional right hand numbness. She has difficulty lifting her right arm above her shoulder. She continues to have headaches which tend to be seasonal and weather affected. These headaches occur about once every two weeks and seem to be related to muscle tension in her neck and the damaged area on her scalp. She keeps the top of her head covered to avoid the effect of wind which causes her discomfort. She wears a knitted cap to sleep every night. Her sleep is interrupted by the pain she experiences lying in bed. Her hair has not grown back on the lacerated area on the top of her scalp and she finds this somewhat embarrassing. She now wears a different hairstyle to cover up the disfigured area. Someday she would like to get this scalp area repaired by a plastic surgeon.

19. Her husband massages her back and neck virtually every day. He also performs a chiropractic-like maneuver on her several times a day to relieve her of back pain. If she had the money, she says she would undertake professional treatments such as massage, chiropractic manipulations and physical therapy. She does do some exercises at home and she would like to have additional exercise equipment. She feels better when she does strengthening exercises.

20. D█████ T█████ related that he performed the heavy work around the house and the heavy work caring for their children. He described how any heavy work produces pain in his wife's back, neck and shoulder which often forces her to lie down. He also commented on her sleep being interrupted because of pain and headaches. He provides her with massages and a form of chiropractic treatment where he hugs her very tightly and lifts her which seems to offer relief to the pain in her back. He performs this maneuver several times a day. He also commented that his wife can no longer participate in such sporting activities as skating, swimming, hiking and

biking. These and other activities were enjoyed by the two of them before the MVA. Furthermore, he says that she has substantially curtailed her activities with their children.

21. Ms. T [REDACTED] would prefer a stronger orthopedic bed. She would also like to participate in a sexual health program. Sexual intercourse has not been pleasurable due to the pain in her spine. Her husband is supportive but she knows that this causes stress for him as well. Her husband confirmed these matters in his will-say statement.

22. She and her husband now have five children. These children were born in March, 1999, March, 2000, January, 2002, June, 2005 and March, 2009. D [REDACTED] has worked sporadically and when he is not fully employed, he assists in child rearing. She also notes that she is no longer able to play the clarinet in her church band due to the injury to her teeth and lip. She tried to learn how to play the flute, but it proved to be problematic because of her shoulder pain. Even playing with her children can cause pain and she says this is most unsatisfying.

23. If she receives a substantial sum of money, she says that she would need to have advice on managing any such award because neither she nor her husband have any money management acumen.

24. Ms. T [REDACTED] was treated by her family physician, Dr. Bever until 1999 when she switched to Dr. Velay. Due to financial constraints, she and her family have moved from the lower mainland to the Fort St. John region and she has found a new family physician. She has been attended to by various treatment providers with respect to the injuries she suffered in the MVA in the 14 years since the accident occurred.

25. Counsel for ICBC introduced the deposition evidence of Dr. Bever, taken for the purposes of the Washington State trial. Dr. Bever was asked questions pertaining to notes that he took during various visits by Ms. T [REDACTED]. When he saw Ms. T [REDACTED] in December, 1996, approximately 2 months after the accident, she did not appear to be in any distress and she behaved as if she were well. She still had a scalp dressing. He next saw her in mid-January, 1997 and noted that things were improving. He noted that on January 23, 1997 she suffered a substantial smash to her face and fractured a number of teeth. He prescribed pain medication. In

February 1997 she reported that she was experiencing some pain in the right shoulder blade area, right shoulder and neck area. Her teeth were very painful. Her range of motion in some areas was good and in some areas poor. She had been experiencing pain in the thoracic area of her back which radiated up to her neck. Pain was radiating to her left shoulder area and left back and in the trapezius muscle and paraspinal muscles. He recommended physiotherapy. In March she reported that she had improved her range of movement. At that time she did not report any problems with sleep. She was still experiencing pain in the mid-back area but Dr. Bever felt that she had made a good recovery and had responded well to the therapy. He next saw her in December, 1997. In the interim she had been performing some care aide work but she reportedly had to give it up due to pain. In December, 1997 she reported that the "road rashes" she suffered in the accident would extrude bits of sand. In the opinion of Dr. Bever, by the second half of 1997, Ms. T [REDACTED] no longer needed physical therapy. Dr. Bever last saw Ms. T [REDACTED] in August, 1998. He noted that she had been asked to lift a 160 pound female patient and she could not do this because of her injuries. She did not have any complaints relating to her thoracic spine or complaints consistent with thoracic outlet syndrome at the time of her last visit.

26. As noted above, Ms. T [REDACTED] gave oral evidence. She said that all her meetings with Dr. Bever were very brief and the longest one that she recalled only lasted a few minutes. She felt rushed and that Dr. Bever was perfunctory. This was part of the reason why she switched over to Dr. Velay. She said that Dr. Bever recommended physiotherapy but she could not afford to take the number of sessions that he recommended nor could she fit in the physiotherapy sessions when she was working. She did her own home exercises to try and improve her mobility and her husband gave her massages for the same purpose. She purchased a special seat for her car and a therapeutic pillow for her bed.

27. Ms. T [REDACTED] was a passenger in a car driven by her husband again in Washington state in June, 1999. They encountered the carcass of a dead elk and ran over it. The car remained upright but she was seriously jolted. As a result of the 1999 accident, she said that some of the symptoms she was experiencing from the 1996 MVA were exacerbated. She also experienced some fresh pain in her right shoulder, neck and in her right hand. The pain she experienced in her right shoulder was in the same place where she suffered a fractured clavicle in the 1996 MVA. Generally speaking, she felt that she was back to the same stage in her recovery from the

1996 MVA within approximately 3 months. She received a settlement of \$3,500 pertaining to the injuries and symptoms suffered in the 1999 accident.

28. Given the relatively mild and brief nature of her injuries and symptoms sustained in the 1999 accident, and given the relatively discrete time frame associated with these injuries and symptoms, I propose to ignore the settlement associated with the 1999 accident from my analysis and quantification of the damages associated with the much more serious 1996 MVA. I am aware of the "devaluation method" as laid down in such cases as *Seyfert v. Butler*, [1993] B.C.J. No. 1905, (see paras. 62-63), in which the British Columbia Court of Appeal articulated the appropriate method of apportionment where a plaintiff was involved in more than one accident. However, the *Seyfert* case and others like it have dealt with multiple accidents with significant overlapping symptoms and I view the 1999 MVA as being discrete and virtually negligible compared to the injuries and sequela sustained in the 1996 MVA.

29. In preparation for the Washington State trial, Ms. T [REDACTED] was seen by an orthopedic surgeon, Dr. Tarazi, in April, 2003. He noted that she was found to have a closed head injury as well as severe scalp laceration. She had neck and back pain and multiple abrasions to her hands, feet and right shoulder. She had a fractured right clavicle. She had cerebral edema which is consistent with a closed head injury. She suffered compression fractures to her thoracic spine from T-4 down to T-10 as well as spinous process fractures of the T-2 and T-3 vertebrae. At Vancouver General Hospital she underwent irrigation and the debridement of her scalp laceration. Skin was harvested from her leg and laid down at the laceration site on a later date. The graft was only partially successful. The scalp wounds have eventually closed but have left significant scarring. The area of the scars has also precluded hair growth. She was fitted with a back brace that immobilized the cervical, thoracic and lumbar spine and extended from the jaw all the way to the pelvis. This brace kept her body upright during the bone healing phase. She wore this brace for three months. She then started a physiotherapy program which lasted about two months. She suffered pain from the base of the skull all the way down to her lumbar spine. Her right clavicle fracture was treated and the fracture eventually healed. However, she continued to complain of discomfort in the clavicle fracture site particularly when she lifted her right arm over the shoulder level. She suffered from chronic headaches related to the head injury which were not improving over time. They were associated with occasional dizziness.

30. Dr. Tarazi noted that she was able to work as a caregiver for a disabled woman for several months after the accident.

31. Dr. Tarazi noted that although she could walk short distances without pain she was not able to do any type of impact activities such as running due to the back and neck pain. She experienced difficulty doing housework and she relied heavily on her husband to do all of the heavy work such as vacuuming and bathing the children.

32. Dr. Tarazi noted the June, 1999 MVA when her husband ran over the carcass of an elk. Their car remained upright but Ms. T [REDACTED] jarred her right wrist and her back. She reported that within a few months after this accident, the pain and suffering associated with this accident had subsided and she felt that she had returned to the same level of pain and suffering as existed just prior to the June 1999 accident.

33. On examination, Dr. Tarazi noted pain in the lower cervical spine and throughout the thoracic spine. A range of motion in her cervical spine was reduced by about 25%. Her lumbar-sacral movement was reduced by about 50%. When she bent forwards, she was only able to touch her hands to her knees and this maneuver produced a lot of pain in her neck and thoracic spine. Her right clavicle has a step deformity and was tender over the soft tissues around the clavicle.

34. Dr. Tarazi noted an extensive and painful recovery from her injuries. He noted that as at the time of his examination in April, 2003, her functioning was fairly limited. Even her walking tolerance was restricted due to neck and back pain. His prognosis was that Ms. T [REDACTED] would have pain in her back and neck as well as in her right shoulder on a chronic basis. He also found that she was at high risk for developing degenerative osteoarthritis in her spine. In his opinion, her discomfort would continue to limit her activities and she would most likely have to settle for nonphysical jobs and ideally, a sedentary job which would have no lifting, pushing or pulling and would be confined to waist height activities. If she develops increasing degenerative osteoarthritis, he opined that her pain will likely get worse. It was his opinion that the pain associated with the right clavicle fracture will continue to bother her on a chronic basis. Although he is not a neurosurgeon or a neurologist, in his experience, patients who suffer

recurrent headaches and dizziness over many years tend to become subject to chronic headaches and dizziness.

35. Counsel for Ms. T█████ relied upon the deposition evidence of Dr. Theo Van Rijn, a specialist in physical medicine and rehabilitation who treated Ms. T█████. Dr. Van Rijn was asked by Ms. T█████'s family physician to determine if there was a rehabilitation program that would assist her with her level of functioning. He saw Ms. T█████ in May and in November of 2002. In the first visit, he found that Ms. T█████ had restricted neck movement and pain in the side of her neck, between her shoulder blades in the thoracic area of the spine and in the lower back. She had increased irritability in the region of her right shoulder and was having symptoms of tingling and numbness in her hand. In the second visit she had started up a gym-based program that was proving to be helpful in improving strength in the upper body functioning that was causing her so much distress. She lacked the financial resources to have what he considered to be an adequate rehabilitation plan. Her pain was now centered in the mid-back area near the thoracic vertebrae number 12. Her back pain was probably a result of the compression fractures that she suffered in the accident. In his opinion, the pain that she was describing was consistent with the nature of the injuries she sustained. Her pain was chronic. He also found her to be psychologically distressed. Depression adversely affects a patient's capacity to deal with pain. She needed pain control management. She needed antidepressant medication. She needed chronic pain management. She also needed to improve her general level of physical condition to better manage daily activities.

36. Counsel for Ms. T█████ also introduced the report of Dr. Velay dated May 22, 2002. Dr. Velay had treated Ms. T█████ since December 1999. In August, 2000, on examination, she noted a palpable crepitus in the clavicular junction and in the right shoulder. By December, 2000, Ms. T█████ was experiencing headaches, scalp, neck, thoracic, right clavicular, wrist and shoulder pain. She noted that Ms. T█████ was waking on and off throughout the night with neck and shoulder pains. Dr. Velay recommended various exercises and a gym program which seem to help but Ms. T█████ was not able to continue attending the gym sessions because of financial constraints. By December, 2001, Dr. Velay reported that Ms. T█████'s chronic pain had worsened and her range of motion was less. When last seen in April, 2002, her symptoms were

essentially unchanged. In her opinion Ms. T [REDACTED]'s daily upper back pain, neck pain and headaches interfered with her daily living.

37. ICBC responded with a report of Dr. Paul Bishop an orthopedic specialist who concentrates his practice area on the orthopedic spine. He reviewed the clinical records, MSP records, expert medical reports, the expert vocational, occupational health and rehabilitation reports, employment/income records, educational records and reports of some of the other medical specialists retained by ICBC. In his opinion there is insufficient objective evidence for the problems and symptoms of which Ms. T [REDACTED] complained. Most of the symptoms were subjective in nature. He was critical of the fact that she only received 25 physical therapy treatments and 10 chiropractic treatments given the nature of her subjective complaints. He did not agree that Ms. T [REDACTED] was a high risk candidate for developing degenerative arthritis in her spine. He could find no objective medical basis for any of the recommendations for her future care nor did he see an objective medical basis for the need for her to identify and pursue alternative occupational options.

38. In April, 2003, Ms. T [REDACTED] was examined by Dr. George Aitken, an orthopedic surgeon retained by ICBC. At the time of his examination he noted that Ms. T [REDACTED]'s husband was assisting her with housework. She reported to be suffering from severe headaches and she was experiencing pain in her back, neck and shoulder regions. Her range of motion was markedly reduced. He noted that it appeared to be reasonable for her to be unable to take part in heavy lifting. He recommended further investigation of the right shoulder girdle and thoracic outlet to determine if she has significant pathology. He opined that she would have some residual disability and she should avoid prolonged activities that engaged her thoracic spine.

39. Dr. Don Ragan, a dentist, filed a report indicating that crown work still needed to be done on three of Ms. T [REDACTED]'s teeth. He estimated the cost at \$2,906.80. Counsel for ICBC conceded that this amount is reasonable and should form part of any damage award.

40. In July, 2003, Dr. Anthony Salvain, a vascular surgeon and a specialist in thoracic outlet syndrome, examined Ms. T [REDACTED] and opined that she did suffer from a thoracic outlet syndrome, a condition whereby symptoms are produced from compression of nerves or blood vessels, or

both, because of an inadequate passageway through the thoracic outlet, an area between the base of the neck and the armpit. Symptoms include neck, shoulder, and arm pain, numbness, or impaired circulation to the extremities. Dr. Salvain opined that Ms. T [REDACTED] would require assistance with heavy household chores such as vacuuming and washing and that she would continue to have significant neck pain. He recommended ongoing conservative therapy for her thoracic outlet syndrome.

41. ICBC responded with the report of Dr. Ian Munro, a medical specialist in thoracic and cardiac surgery. He concentrated his report on the possible thoracic outlet syndrome. He first opined that although there was tenderness over the mid-cervical spine shortly after the accident and neck pain for many years after the accident, there was no x-ray evidence of any serious cervical spine injury. He concluded that Ms. T [REDACTED] probably suffered from a mild to moderate soft tissue injury of the neck. Dr. Munro did not agree that there was evidence of thoracic outlet syndrome or that the test results were positive for a thoracic outlet syndrome.

42. I interject at this juncture in the factual narrative to say that I am unable to discern whether Ms. T [REDACTED] suffered or suffers from thoracic outlet syndrome. In my opinion the evidence is insufficient and it would be mere speculation on my part to conclude that she was or was not suffering from this condition. On the other hand, however subjective her complaints of various aches, pains, headaches, etc. may be, I am satisfied that the overwhelming evidence supports the proposition that she does suffer these various symptoms, some of which may be consistent with or indicative of thoracic outlet syndrome.

43. Ms. T [REDACTED] was also seen by a neural psychologist, Dr. Kaushansky who conducted a neuropsychological assessment. He reported in September, 2003, that she enjoyed average intellectual functioning and any anomalies were most probably due to the fact that English was her second language. He noted that she had anxiety, low-grade depression and pain in her back, neck and right shoulder which symptoms may have impacted upon her test performance. She suffered from headaches but was reluctant to take medication. She expressed a desire to return to school for more education but she experienced difficulty concentrating due to physical pain. She attempted entrance exams to postsecondary school on two occasions but failed, in his opinion at least partially due to the ongoing symptoms of pain and headaches. She also indicated

that her pain made her irritable and moody and interfered with the enjoyment of playing with her children. Dr. Kaushansky opined that she sustained a probable mild traumatic brain injury which has largely resolved. As a result of the neuropsychological assessment and personality assessment, Dr. Kaushansky suggested that she suffers from a major depressive episode and generalized anxiety disorder. He noted that her symptoms of physical pain and headaches, like many patients he sees, impacted upon mental skills rendering her less cognitively efficient. His prognosis was that because of pain which would wax and wane throughout her life, her ability to upgrade her skills in the future was limited. He recommended psychological support and the assistance of a homemaker and home-based child care. Dr. Kaushansky noted that Ms. T [REDACTED] has been seeing a treating psychologist over a number of months.

44. ICBC filed the report of a clinical psychologist/neuropsychologist Dr. Hanna Lysak. She was very critical of the lack of facts and test results upon which Dr. Kaushansky rendered his opinions. Based on this and other criticisms, she did not share Dr. Kaushansky's opinion that Ms. T [REDACTED] suffered from any serious psychological ailment.

45. In February, 2003, Mr. Paul Pakulak, an occupational therapist, carried out an assessment pertaining to range of motion, strength, reaching, body mobility, activity tolerance and strength. He noted pain in the neck, mid back and right shoulder regions which increased over the seven hours of testing and which slowed her work pace and activity tolerance. He found restrictions to mobility in the right shoulder, cervical and lumbar spine. He found reduced upper extremity strength, reduced lifting and carrying capacity, limited capacity for sitting down, limited capacity for long periods of standing and a limited capacity for repetitive reaching below the waist level. He found that she demonstrated an inability to perform household chores. Given her limitations, it was his opinion that she did not have the capacity to work as a care aide worker or as a cleaner on either a full or part-time basis. He found that she could be competitively employable only for work of a sedentary to light level.

46. ICBC filed a report of Mr. Kerr, an occupational therapist. Mr. Kerr questioned some of the findings by Mr. Pakulak and noted inconsistencies between some of the test results although he conceded that there is room for Ms. T [REDACTED] to improve her back muscle strength and fitness.

47. Mr. Pakulak filed a rebuttal report dated March 29, 2010, responding to many of the criticisms and concerns registered by Mr. Kerr.

48. In September, 2003, Nancy Scullion, an occupational therapist, performed a cost of future care analysis. Ms. Scullion interviewed Ms. T■■■■, her husband and parents and performed various tasks. She also reviewed the medical reports and records pertaining to Ms. T■■■■. In her opinion, Ms. T■■■■ enjoyed a decreased quality of life as a result of her injuries. The injuries also created difficulties for Ms. T■■■■ in completing a number of self-care tasks. For example, she relied upon her husband to wash her hair. If she did wash and dry laundry, she suffered a significant increase in pain which could last for long periods. Childcare tasks also presented a significant challenge to Ms. T■■■■. She suffered increased neck, shoulder and back pain while lifting, carrying and holding her children. She relied upon her husband to bathe her children. Ms. Scullion summed up by saying that Ms. T■■■■'s injuries and symptoms associated with her injuries have negatively impacted a wide array of functional, recreational, leisure, social, and vocational tasks as well as her emotional well-being and ability to maintain positive family relationships.

49. Ms. Scullion made a number of recommendations, the most significant of which were that Ms. T■■■■ be provided with homemaking services, handyman services, an orthopedic bed, a recliner chair, medications as prescribed by her physicians, and changes to her bathroom to accommodate her disability. She also recommended various therapies including physiotherapy, kinesiology, occupational therapy and psychological therapy. The costs of these recommendations were broken down into initial costs and ongoing annual costs.

50. Gordon Wallace, a vocational rehabilitation specialist, interviewed Ms. T■■■■, reviewed her reports and consulted with some of her therapists. He ran a battery of tests and filed a report in June, 2003. He reviewed her schooling and vocational history including her failed attempts to take a care aide course at Douglas College within one year of the accident. He found that she should be able to complete formal education training programs of approximately 1 year in duration as well as apprenticeship training programs for training on the job. To succeed in any of these programs, she would have to complete academic upgrading courses. It was his opinion that she enjoyed a considerable range of occupational options prior to her injuries. Now she is

restricted to sedentary or light physical demand activities. She had a limited capacity for sitting or prolonged standing. She had reduced upper extremity strength and limited capacity for repetitive reaching below her waist level. He concluded that her ongoing problems have had a significant negative impact on the range of occupational options which she could now viably consider. He identified a number of possible occupations that remain open to her. He recommended that she complete formal education training programs within her residual physical capabilities. He recommended specialized vocational counseling which would cost approximately \$750-\$1,000.

51. A second report pertaining to vocational rehabilitation counseling was filed by Ms. Cloie Petgrave. She also conducted an assessment of Ms. T [REDACTED]. She found that her educational and earning capacity was limited to that of the average high school graduate. She found that she would experience greater periods of absenteeism and periods of unemployment throughout her work life as she attempted to find work within her limited capacities. In her opinion, she would experience a permanent reduction in her wage earning capacity in the range of 10 to 15%. It was her further opinion that Ms. T [REDACTED] would need assistance in her home and she conservatively recommended four hours per week of home care assistance.

52. ICBC responded with the report of Mr. Joseph Hohmann, a vocational rehabilitation specialist. He noted that Ms. T [REDACTED] had completed her grade 12 high school degree after the accident, had worked in the personal care and cleaning fields for periods of time after the accident and was motivated to attempt to gain admission to a certified care aide program. He also noted that she is currently caring for five children which would be equal to full-time employment. Ms. T [REDACTED]'s neck, back and shoulder pain was supported by the medical information he reviewed. In his opinion, she was limited to performing work of a sedentary/light nature with restrictions in a number of areas. She lost access to some employment opportunities that might otherwise have been available to her. Furthermore, living in the Fort St. John area also restricts her vocational future. In his experience, it was not uncommon for women with five small children to be absent from the labour force for a few years to as much as 10 or 12 years. He recommended that she upgrade her vocational training to enhance her skill set. He identified a number of possible vocations and earnings associated with those vocations. He agreed that she

should be provided with counseling towards establishing a vocation which counseling costs he estimated would be in the range of \$1,000-\$1,500.

53. With respect to the care-giving work that Ms. T [REDACTED] was doing for Diane Klose after the accident, counsel for the claimant said that Ms. T [REDACTED] was able to perform or assist in transfers because the patient only weighed 110 pounds at that time. Furthermore, Ms. T [REDACTED] could afford to take down time if she did have to exert herself. In any event, it was necessary for the claimant to do this work to support her husband's application for immigration and her counsel argued that this should not be used against her.

54. With respect to Ms. T [REDACTED]'s failed attempts to register for a nursing aide course at Douglas College, she may well have had barriers associated with English being her second language and with concentration problems associated with pain.

55. I now turn to a general damages award for pain and suffering. Ms. T [REDACTED] has endured a substantial amount of pain for upwards of 14 years. I accept that her pain is now chronic and she will likely have to endure this level of pain for the remainder of her life. She is at increased risk for osteoarthritic changes in her back. She is also embarrassed and self-conscious about the scarring and the residual lack of hair at the top of her scalp. Importantly, I also accept that she has suffered a great deal not just from pain and headaches but also a very significant disruption of her social, recreational, family and sexual relations. As best I can tell, she will probably have to endure this disruption for the rest of her life. I find that an award of \$135,000 for pain and suffering would be fair and reasonable in all circumstances.

56. Turning to future care costs, the law requires that these costs be both medically necessary and reasonable. (See *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33). I am satisfied that some of the costs claimed are both medically necessary and reasonable. I do not intend to parse through each and every cost item but rather I intend to deal more generically with the claim for future costs. I accept that Ms. T [REDACTED] should receive some psychological therapy for two years, some occupational therapy for one year, some physical therapy for two years and some vocational consulting advice. I also accept that she should receive some long term homemaking services of 4 hours per week. On this particular future care cost, I accept the evidence of Cloie Petgrave. I

do not accept that Ms. T [REDACTED] needs handyman services. I do accept that she should have an orthopedic bed, a recliner chair and some modest changes to her bathroom for safety purposes.

57. Mr. Carson, an economist retained on behalf of the claimant, calculated the present value of the future costs on the assumption that all future care costs identified by Nancy Scullion would be awarded. Using a 3.5% discount rate, he estimated future care costs including Consumer Price Index inflation to be \$137,471. To this figure, the initial care costs would have to be added. I note, however, that Mr. Carson's calculations are based on one hour of homemaking services every two weeks as described in the report of Nancy Scullion, as opposed to my finding that she requires four hours of homemaking services each week. Mr. Hildebrand, an economist retained by ICBC, notes correctly, in my opinion, that the future costs pertaining to homemaking services, heavy cleaning and handyman services should generally be truncated at approximately age 80 and this would serve to reduce these estimates by about 4% to 5%.

58. Mr. Carson provided a chart with cost of care multipliers which I have utilized in coming to my conclusion that a fair and reasonable award of costs of future care amounts to \$160,000 in all of the circumstances of this claim.

59. Besides general damages and future care costs, past and future income loss was hotly disputed in this case. It was argued on behalf of Ms. T [REDACTED] that her sister, Ms. C [REDACTED] could be used as a surrogate for the earning power of Ms. T [REDACTED]. Although there is some superficial merit in this approach, I have decided that Ms. T [REDACTED]'s past and future income loss must be determined on a stand-alone basis. Economists retained by both Ms. T [REDACTED] and ICBC used similar methodology for analyzing this proposition although they came to dramatically different results. It was generally conceded that Ms. T [REDACTED] wanted to enjoy remunerative work to the extent reasonably possible. Given the fact that Ms. T [REDACTED] was in grade 12 at the time of the accident (she completed her grade 12 some months after the accident) and given the fact that she had five children since the time of the accident, it was conceded on her behalf that the presence of these children, their ages and her education all affect probabilities of participation in the labour market including unemployment and part-time work. Unemployment insurance benefits do assist women to remain out of work for up to a year. The real question is what discount must be employed from the full labour participation to suit the facts and circumstances presented by

Ms. T [REDACTED] and her family. ICBC argued that I should not take into account employment insurance benefits that Ms. T [REDACTED] received in calculating loss of earning power since it is a state benefit. I do not agree with this contention. First and foremost there are a number of cases across Canada and more particularly in British Columbia which have taken unemployment insurance benefits into account in assessing earnings. For example, in British Columbia, see para. 31, *Marois v. Pelech* [2009] B.C.J. No.1420; 95 B.C.L.R. (4th) 243 (B.C.C.A.); see also *Harlow v. Thompson* 1995 CanLII 860 (B.C.S.C.). Second, I refer to the provisions of the *Act* and regulations pertaining to underinsured motorist protection. Section 148.1(1) provides that employment insurance benefits to which the insured is entitled is to be taken into account in determining the "deductible amount". It seems to me that ICBC would be approbating and reprobating if I did not include employment insurance benefits in assessing earnings while at the same time employment insurance benefits must be taken into account in determining a deduction from earnings.

60. Estimates of gross past income loss varied from approximately \$218,000 (not including non-wage benefits which would increase this figure by about 10 to 15%) based on the analysis of Mr. Carson, down to approximately \$131,500 on the low scenario, based on the analysis performed by Mr. Hildebrand. Various deductions were calculated from these gross figures. Mr. Carson estimated a 25% to 50% accident related decrease for the vagaries of life, whereas the Mr. Hildebrand posited a decrease in the range of 85%. Mr. Carson filed a rebuttal report dated March 29, 2010 in which he refuted many of the concerns and criticisms registered by Mr. Hildebrand. I find that the analysis performed by Mr. Carson has more veracity than the analysis performed by Mr. Hildebrand, given my findings pertaining to the degree of pain, suffering, disability and Ms. T [REDACTED]'s work ethic. Counsel for ICBC relied heavily on the opinion of Cloie Petgrave in her report where she estimated a permanent reduction in the wage earning capacity for Ms. T [REDACTED] to be about 10 to 15%. In my opinion, the weight of the evidence favours a much higher permanent reduction in wage earning capacity. I am satisfied from a careful review of all of the evidence pertaining to wage loss for Ms. T [REDACTED] that because of her injuries and symptoms, she will be permanently restricted to fewer hours of work than the average person in her circumstances, more exposed than the average person in her circumstances to the risk of being out of work and is now restricted to unskilled jobs or to self-paced work. I find that past income loss should be fixed at \$95,000. I pause to reflect that this past income loss

covers a period of more than 13 years and takes into account the fairly modest earnings of Ms. T [REDACTED] over this period including all employment insurance benefits received.

61. I now turn to future wage loss or what is more accurately described as loss of earning capacity. The leading decision in British Columbia pertaining to loss of earning capacity is *Perron v. Lalari*, 2010 BCCA 140 in which the Court of Appeal first referred to the basic principles as articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, that:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation (*Athey* at para. 27); and
2. It is not loss of earnings but, rather, loss of earning capacity for which compensation is awarded (*Andrews* at para. 215).

Hence, the first step in the analysis is to first enquire as to whether there is a real and substantial possibility of future income loss. (*Perren* at para. 25, quoting *Chang v. Feng*, 2008 BCSC 49 at para. 76). If there is a substantial possibility of future income loss, the next step is to consider the factors set out by Finch J. (as he then was) in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at p.4:

1. Has the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. Is the plaintiff less marketable or attractive as an employee to potential employers;
3. Has the plaintiff lost the ability to take advantage of all job opportunities which might otherwise have been available to him, had he not been injured; and
4. Is the plaintiff less valuable to himself as a person capable of earning income in a competitive labour market.

The court in *Lalari* notes that this approach is particularly appropriate in the case of a young person whose career path is uncertain (see para. 12). I am bound to follow this approach in analyzing the loss of earning capacity for Ms. T [REDACTED].

62. As reflected in the expert reports by both economists, averages pertaining to income loss do not reflect the impacts of an early family formation and particularly of a large family. There can be no doubt but that the presence of children affect the probabilities of participation in the labor market including unemployment and part-time work. Nor can there be any doubt that employment insurance benefits assist women to remain out of work during the time shortly before and then after childbirth. I have had to struggle with the reduction probabilities of participation in the paid labor force and in the increased risks of unemployment on the facts and circumstances of the case pertaining to Ms. T [REDACTED]. In addition, Mr. Hildebrand suggested discounts for the changes in employment prospects and living costs between regions where Ms. T [REDACTED] and her family lived for many years, namely, the Lower Mainland, as compared to where they now live, the Northeast sector of British Columbia. Without getting into the minutiae of the differences between the two economists, suffice it to say, that the overall difference was as high as 50% pertaining to her wage loss.

63. I have come to the conclusion that it is likely that Ms. T [REDACTED] would work as much as she reasonably could. I base this in part on the financial constraints facing her and her family and on her strong work ethic. Mr. Carson assumed that she would retire at age 70 from the workforce. I take a different view and I assume that she would retire at age 65. Accounting for this difference, Mr. Carson's estimate for future wage loss would come in at approximately \$555,000 (not including non-wage benefits which would increase this figure by about 10 to 15%). Mr. Hildebrand and Mr. Carson referred to the disabilities and physical injuries which would reduce work participation. In addition, Ms. T [REDACTED] was likely limited in any event to unskilled jobs. A combination of these factors, in Mr. Carson's opinion, would reduce likely future earnings by 25% to 50%. Extrapolating to retirement at age 65, and using the approach adopted by Mr. Carson, the future wage loss would fall in the range of \$313,000 to \$470,000.

64. Mr. Hildebrand is critical of Mr. Carson's analysis in several respects. He notes that the employment insurance benefits are not as generous as stated by Mr. Carson in that he failed to account for the fact that the claimant would not have been able to accumulate sufficient insurable hours between the birth of her first two children. Mr. Hildebrand used different labour force non-participation estimates and he criticized Mr. Carson for not factoring in child care costs when the claimant was forecast to be working. Mr. Hildebrand did not agree that geographical differences

in earning power should be incorporated into the wage loss analysis and, even if it should, then the analysis should also account for the change in living costs between regions. Finally, Mr. Hildebrand does not agree that the accident-related decrease in the claimant's future earnings would be 25% to 50%. Rather, he thinks a larger diminution is in order.

65. Mr. Carson filed a rebuttal report on March 29, 2010, responding to many of the criticisms and concerns registered by Mr. Hildebrand.

66. It is my view that some of these criticisms by Mr. Hildebrand are warranted. Assuming retirement at age 65, it is my opinion that a fair and reasonable amount for Ms. T■■■■'s impaired capacity to earn should be fixed at \$315,000.

67. I will suspend any decision on the tax gross up, if any, to be applied on the future care costs or the impaired capacity to earn. Similarly, I will suspend any decision on the issue of management/custodial fees. I will operate on the assumption that counsel will endeavor to agree on these issues and, if they are unable to agree, they will arrange a short hearing for me to resolve the issue or issues.

68. I am advised that with the exception of the allocation of the \$200,000 third-party liability payment, counsel have agreed on the deductions which must be applied under the UMP provisions of the *Act* and regulations. Again, if counsel are unable to resolve the allocation of the third-party liability payment, they should arrange a brief hearing for me to resolve this issue.

69. In summary, I find that the fair and reasonable award of damages to Ms. T■■■■ is as follows:

- (a) general damages for pain and suffering - \$135,000;
- (b) cost of future care - \$160,000;
- (c) past wage loss - \$95,000;
- (d) impaired capacity to earn income - \$315,000;

- (e) special damages pertaining to dental work as agreed - \$2,906.80;
- (f) tax gross up on future care expenses and impaired capacity to earn - to be determined; and
- (g) management/custodial fees - to be determined.

C [REDACTED] C [REDACTED]

70. Ms. C [REDACTED] filed a will-say statement and was examined for discovery a few months before the arbitration hearing. An expert report was filed by an occupational therapist on her behalf and ICBC responded with a report from a clinical psychologist. A number of documents were also entered into evidence including a letter of reference, MSP print out, emergency records, clinical records and care aide records. Various depositions were also referred to with respect to this claim. Mrs. C [REDACTED] attended at the arbitration but did not give oral evidence. I did peer closely at her facial scars.

71. Ms. C [REDACTED] also worked as a part-time care aide for Diane Klose while she was in high school. Upon graduation, she was employed as a care aide worker in both a hospital setting and offered private care aide services.

72. Ms. C [REDACTED] was married in Romania in 1998. Her husband also emigrated to Canada. They have had six children. The children were born in August, 2000, March, 2002, October, 2004, September, 2006, June, 2008, and February, 2010.

73. Ms. C [REDACTED] took a course and got a certificate as a care aide worker from West Coast College of Health in 2000. This is the same course that Ms. T [REDACTED] twice tried but failed to get into. Ms. C [REDACTED] also worked for a period of time for Diane Klose, the same disabled person that Ms. T [REDACTED] worked for. After Ms. C [REDACTED] had children she continued to work as a care aide worker. For example, she was employed at Eagle Ridge Hospital during periods of time that she was not on maternity leave. She received unemployment insurance during the periods of time that it was payable. For example, she received unemployment insurance benefits during

maternity leave in each year from 2000 to 2007. Her husband, a construction worker, is self-employed. Either Ms. C■■■■'s mother or her husband would look after her children while she worked. She was on call and worked up to six days a week. It is her present intention to take approximately 2 years off work.

74. Ms. C■■■■ was ejected from the vehicle and struck her head causing her to lose consciousness. She probably suffered a mild closed head injury. She also suffered multiple lacerations and abrasions to her forehead, the bridge of her nose, left wrist and back. She also suffered some soft tissue injuries including a strain of the lumbosacral area. She also says that she had pain in her shoulders.

75. Her injuries have resolved with the exception of facial scars and emotional distress.

76. Ms. C■■■■ did not miss any time from work as a result of the accident.

77. She attended at the emergency department of the Centralia hospital where she received treatment for her wounds including evulsions of some tissue around her left wrist. She remained in hospital overnight. She attended Dr. Bever shortly after the accident and from time to time thereafter. About seven weeks after the accident she reported to Dr. Bever that she had occasional pain in her back.

78. The scarring to her nose is quite pronounced and she also has some scarring on her forehead. She describes herself as being very self-conscious about these facial scars. She does not think the scars can be improved. She also has some modest scarring to her left wrist. The scarring is a constant reminder of the tragic motor vehicle accident.

79. Four months post accident, she was only experiencing occasional back pain.

80. She saw a psychological counselor on a few occasions because of her guilty feelings that others in the vehicle were much more seriously injured than she was. This therapy was helpful.

81. Ms. C [REDACTED] was assessed by Nancy Scullion, an occupational therapist in the summer of 2003. Ms. Scullion interviewed Ms. C [REDACTED], her husband and other family members and reviewed the medical records and clinical notes.

82. At that time Ms. C [REDACTED] said that she was still experiencing back and neck pain. In the opinion of Ms. Scullion, Ms. C [REDACTED] continued to suffer emotionally from the effects of the motor vehicle accident. She also reported that Ms. C [REDACTED]'s family relations have been strained because Ms. C [REDACTED] worried a great deal about the effects of the motor vehicle accident on her family. Ms. Scullion found that Ms. C [REDACTED] had no functional disabilities and she was fully capable of looking after her family. Ms. C [REDACTED] was very apprehensive when she was driving or being driven in a motor vehicle. It is the opinion of Ms. Scullion that the injuries and effects sustained by Ms. C [REDACTED] in the motor vehicle accident had a significant impact on her life. She recommended that Ms. C [REDACTED] be provided with ongoing psychological counseling to facilitate her emotional well-being. In her opinion 10 sessions per year for 10 years would be appropriate, at an annual cost of \$1,200.

83. ICBC responded with the report of Dr. Hanna Lysak, a clinical psychologist. She reviewed the medical and other records provided to her as well as the report of Ms. Scullion. Dr. Lysak noted that if there were no updated psychological records or opinions after 2003, it would be reasonable to assume that Ms. C [REDACTED]'s conditions, if any, were adequately resolved. Dr. Lysak also noted that she could not find any indication that Ms. C [REDACTED] was impaired or disabled in her vocation as a result of any psychological condition resulting from the accident.

84. It is my opinion that but for the disfiguring facial scars, Ms. C [REDACTED]'s physical injuries were largely resolved within six months of the accident and her physical injuries were completely resolved by the summer of 2000. She has suffered from what is commonly known as "survivor's guilt" as identified by Ms. Scullion which was helped by psychological counseling. It is my opinion that some further counseling would be appropriate but I limit this to 10 sessions at \$120 an hour for a total of \$1,200. With respect to the disfiguring facial scars, I find that the scarring to the nose is particularly noticeable and that Ms. C [REDACTED] is very self-conscious about this scarring. I do not find that Ms. C [REDACTED] suffered any past wage loss nor any impairment of

future earnings. I award general damages for pain and suffering, facial disfigurement and the emotional suffering in the amount of \$45,000.

85. It is my understanding that the parties have agreed on the deductions that are required to be made under the UMP provisions of the *Act* and regulations.

86. In summary, I find that the fair and reasonable award of damages to Ms. C [REDACTED] is as follows:

- (a) general damages for pain and suffering - \$45,000;
- (b) cost of future care for psychological counselling - \$1,200;
- (c) past wage loss - nil;
- (d) impaired capacity to earn income - nil;
- (e) special damages - nil;
- (f) tax gross up on future care expenses and impaired capacity to earn - nil; and
- (g) management/custodial fees - nil.

D [REDACTED] T [REDACTED]

87. Mrs. T [REDACTED] was and is the matriarch of the family. She filed a will-say statement and she was examined for discovery a few months before the arbitration hearing. In addition, medical records, clinical records, and MSP printout and an ICBC print out of Part 7 medical payments was entered into evidence. Mrs. T [REDACTED] attended at the arbitration but did not give oral evidence.

88. Mrs. T [REDACTED] says that her life was turned upside down because of this accident. Four of her children were badly injured and all struggle with their injuries. In her case, the accident was

horrific. When the van finally came to rest, she was upside down hanging from a seatbelt. She suffered injuries to her abdomen, hand, neck, shoulder, chest, quadriceps and multiple abrasions and contusions. She was also treated at the emergency department of the Centralia hospital. She was diagnosed with both cervical and thoracic strain, right shoulder sprain and contusion, chest wall pain and contusion and lower extremity abrasions and contusions. She was treated by her family physician, Dr. Bever, from time to time thereafter until she changed her family physician and became a patient of Dr. Velay who subsequently retired. Mrs. T■■■■ was thereafter treated by Dr. Chung.

89. Mrs. T■■■■ first attended on Dr. Bever about five days after the accident. He prescribed painkillers and physiotherapy. In particular, she had shoulder and neck pain which interfered with her sleep. She also had occasional pain in the area of her left breast. She started with Tylenol but graduated to stronger painkillers. She only took a few physiotherapy sessions because of the cost and the time associated with these sessions. She was severely traumatized by the accident and the injuries sustained by her children. Dr. Velay diagnosed post-traumatic stress disorder and depression and prescribed medicine for this. Dr. Velay also opined that she was a very stoic woman and it was difficult to coax her aches and pains out of her. In addition, English was her second language and she was not adept at expressing herself. Among other things, she became very frightened to be in a motor vehicle and she had problems sleeping. For these and other emotional injuries, Dr. Velay referred Mrs. T■■■■ to a psychologist. Mrs. T■■■■ attended a few sessions with the psychologist.

90. Her husband escaped Romania's communist rule and brought Mrs. T■■■■ and their six children to Canada. She was 42 years old at the time of the MVA.

91. Mrs. T■■■■ is the one primarily responsible for taking care of their children, cooking and cleaning around the home. She also tends to a small garden. She has found that it is difficult to do these chores, particularly to tend to the garden. At the present time, she suffers from headaches and pain in her back, neck and shoulder. She is still upset and vividly recalls the accident. She still takes painkillers at least once a day. She is stoic and tries to avoid the doctors and caregivers if at all possible. She did not have any major problems before the accident and although she is only 56 years of age, she feels like an old woman since the accident. She

fatigues much more quickly now although she concedes that some of this is due to the aging process.

92. Mrs. T■■■■ was assessed by Nancy Scullion, an occupational therapist who filed a report in September, 2003. She interviewed Mrs. T■■■■, some of her children and two of her treatment providers. She also reviewed medical reports, clinical records and case notes.

93. Ms. Scullion concluded that Mrs. T■■■■ suffered from daily headaches, sleep disturbance, fatigue, loss of balance, dizziness, shoulder, neck, back and leg pain, despair at the changes in her family relationships and fear of driving, all of which was confirmed through her assessment of Mrs. T■■■■. Mrs. Scullion indicated that Mrs. T■■■■ is at increased risk for falls and injury, for instance, getting in and out of the bathtub. In her opinion, her right shoulder, neck and back pain limit her ability to lift heavy items and to reach for items located at or above the shoulder height. Doing household chores and gardening exacerbates her pain and generally speaking, Ms. Scullion opined that the injuries have had a significant impact upon Mrs. T■■■■'s quality of life. As a result, she recommended a number of services, supplies and equipment to maximize Mrs. T■■■■'s functional level of independence and quality of life. These included an orthopedic bed, homemaking services of four to six hours per month, a recliner chair, safety features to be incorporated into her bathroom, physical therapy assessment and treatment as required and ongoing psychological counseling to facilitate her emotional well-being. The initial costs for these recommended services, supplies and equipment amounted to approximately \$8,000. The annual replacement cost for these recommended services, supplies and equipment amounted to a further \$3,500 approximately. Using average lifetime probabilities for females in Canada and discounting this amount by 3.5% yields a total future outlay of approximately \$77,000 for this package of recommended services, supplies and equipment in addition to the initial outlay of costs.

94. ICBC responded with the report of Dr. Hannah Lysak, a clinical psychologist. She reviewed medical records, including the report of Ms. Nancy Scullion and various vocational and employment records. Dr. Lysak noted that Mrs. T■■■■ only had three visits with the psychologist terminating in April, 2003 and opined that since no further records have been produced and her current status is unknown, it is reasonable to assume that her psychological problems and

conditions have resolved. Furthermore, there was no proper assessment setting out the facts and assumptions other than self-reported psychological problems. It was the opinion of Dr. Lysak that a proper opinion cannot be provided by a psychologist simply taking the complaints of the patient at face value. Furthermore, Dr. Lysak noted that Mrs. T■■■■ had sleep apnea problems prior to the accident and that other issues not caused by the accident could have contributed to her psychological complaints.

95. There is a dearth of testimony from treating doctors pertaining to Mrs. T■■■■ but there is no doubt in my mind that she is a stoic person who avoided doctors, medicines, and caregivers as much as she possibly could. This does not mean that she did not suffer pain and psychological distress resulting from the motor vehicle accident. Her stoicism should not be counted against her. I do not find that her reluctance to seek medical treatment amounts to a failure to mitigate.

96. Counsel for ICBC argued that there was an insufficient medical basis to ground the future care claim. See *Milina (supra)*. I hold the view that some of the future care costs are both reasonable and medically necessary. However, given Mrs. T■■■■'s aversion to caregivers, for example, I highly doubt that she would actually attend the psychological therapy sessions recommended. Doing the best I can with a view to being fair and reasonable to both sides, I assess future care costs at \$9,500.

97. With respect to general damages for pain and suffering, this is a claim in my opinion in which more attention needs to be paid to the rubric of "suffering" than "pain". I turn to a few fairly recent British Columbia decisions which offer guidance in this area.

98. In *Stapley v. Helsjet*, 2006 BCCA 34, the Madam Justice Kirkpatrick quoted from the Supreme Court of Canada decision in *Lindal v. Lindal*, [1981] S.C.R. 629 on the topic of non-pecuniary damages as follows:

“Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation

of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury." (para. 45)

99. Kirkpatrick J.A. then listed common factors that influence an award of non-pecuniary damages:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life; [emphasis added]

100. To the above list she added the following factors:

- (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 (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54) (para. 46). [emphasis added]

101. The court considered it significant that Mr. Stapley would no longer be able to live on the ranch if he could not work there, and would therefore lose the lifestyle and community that he had anticipated enjoying for the rest of his life. At paragraph 111, the court asks "what, then, is reasonable compensation for the additional potential loss of lifestyle?" and concluded that it could not reasonably exceed an additional \$75,000.

102. Hence, in addition to listing “emotional suffering” (not defined) as a common factor influencing the award of non-pecuniary damages, the *Stapley* case considers, and adds a monetary award for the “loss of lifestyle”.

103. In *Kuskis. v. Tin*, 2008 BCSC 862, the plaintiff suffered from a worsening of a pre-existing migraine disorder, a new form of headache and low grade but persistent neck and shoulder pain as a result of soft tissue injuries caused by a motor vehicle accident. In awarding Ms. Kuskis non-pecuniary damages, the court noted that she was “sometimes exhausted, irritable and unhappy”, and while she could work, travel and socialize most of the time without significant impairment, her personal life has been diminished by her increased headaches and pain. Specifically, her ability to form and maintain intimate relationships has been compromised by her increased irritability and fatigue (para. 143).

104. Other factors taken into consideration under the general concept of “pain and suffering” include: anxiety and depression, deleterious impact on quality of life (specifically comparing personality and lifestyle before and after the accident) (see *Djukic v. Hahn*, 2006 BCSC 154. at paras. 61 – 64); changes in personality including being more “withdrawn and distracted”, increased tiredness, and inability to enjoy activities previously enjoyed (see *Fox v. Danis*, 2005 BCSC 102 at paras. 112 – 122); and depression affecting concentration and attention (*Maillet v. Rosenau et al.*, 2006 BCSC 10 at paras. 63-65).

105. I find that Mrs. T■■■■ has suffered much more than just aches, pains and headaches. Her world was and is hinged on her matriarchal role that has been significantly and adversely affected by this accident as described above. Taking all of the circumstances into account, I find an appropriate award of damages for pain and suffering to be \$75,000.

106. It is my understanding that the parties have agreed on the deductions that are required to be made under the UMP provisions of the *Act* and regulations.

107. In summary, I find that the fair and reasonable award of damages to Mrs. T■■■■ is as follows:

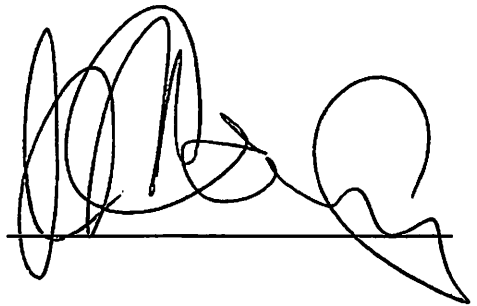
- (a) general damages for pain and suffering - \$75,000;
- (b) cost of future care - \$9,500;
- (c) past wage loss - nil;
- (d) impaired capacity to earn income - nil;
- (e) special damages - nil;
- (f) tax gross up on future care expenses and impaired capacity to earn - nil; and
- (g) management/custodial fees – nil.

108. As noted in these reasons, there may be outstanding issues that will require my further attention and I leave it up to counsel to arrange a conference call with me if such further attention is required.

Dated:

May 13, 2010

Signed:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a horizontal line.