

IN THE MATTER OF AN ARBITRATION
PURSUANT TP S.148.2(1) OF THE REVISED REGULATION 1984
UNDER THE *INSURANCE (VEHICLE) ACT*,
B.C. REG 44/83 AND THE *ARBITRATION ACT*, R.S.B.C. 1996, c.55

BETWEEN:

L [REDACTED]

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA
"ICBC"

RESPONDENT

ARBITRATION AWARD

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Dates of Hearing

November 14, 2017 - November 17,
2017 and November 20, 2017

Place of Hearing

Vancouver, BC

Written and Oral Submissions

November 21, 2017

Date of Award

February 9, 2018

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INTRODUCTION

1. This Arbitration has been commenced by [REDACTED] L [REDACTED] ("Claimant"), against the Insurance Corporation of British Columbia ("ICBC"). Pursuant to his under-insured motorist protection with ICBC, the Claimant seeks compensation for personal injuries arising out of a motor vehicle accident that occurred on July 13, 2011 ("Accident"). The parties have provided the Arbitrator with an agreed upon statement of facts.

2. Pursuant to the *Domestic Commercial Arbitration Rule of Procedure*, direct evidence was generally provided by way of sworn statements and then subject to cross examination. Expert evidence was entered by way of reports and the experts were then subject to cross examination.

3. The case is complicated by the fact that the Accident occurred approximately 5 weeks after the Claimant returned to work after an extended stress leave.

4. The Claimant claims non-pecuniary damages, past income loss, loss of future earning capacity, loss of future revenue property, costs of future care including past and future loss of housekeeping capacity, special damages and costs. The Claimant seeks the following damages:

a) General Damages	\$180,000.00
b) Past net income loss	\$286,400.00
c) Loss of Capacity	
i. Work	\$346,648.00
ii. Revenue Property	\$150,000.00
d) Cost of Future Care	
i. Midpoint of past loss of housekeeping	\$94,774.50
ii. Midpoint of future loss of housekeeping	\$385,340.50
e) Special Damages	<u>\$12,003.47</u>
	\$1,455,166.47

AGREED UPON STATEMENT OF FACTS

5. An agreed upon Statement of Facts was provided by counsel for both of the parties to the Arbitrator and set out as follows:

(i) The Claimant L [REDACTED] seeks an arbitration to determine damages with respect to a motor vehicle accident which occurred on July 13, 2011.

(ii) On July 13, 2011 at about 4:00 p.m., the Claimant was driving westbound on [REDACTED] approaching the intersection at [REDACTED] Street, in the City of Penticton, in British Columbia.

(iii) R [REDACTED] owned and operated a 1998 Ford Taurus motor vehicle bearing British Columbia license plate number [REDACTED]. He was driving his Ford north on [REDACTED] Street. R [REDACTED] collided with the Claimant's vehicle. ICBC admits that liability rests with R [REDACTED].

(iv) R [REDACTED] vehicle was insured by ICBC at the time of the accident. However, R [REDACTED] insurance limits were \$200,000.00.

(v) By agreement with ICBC, the Claimant accepted \$184,404.56 plus costs and disbursements of \$36,800.00 as his pro rata share of the available insurance limits under tort. The settlement was made pursuant to a written agreement that the settlement would not limit the Claimant's right to pursue mandatory underinsured motorists protection funds.

(vi) L [REDACTED] is a defined "insured" under s. 148.1 of the *Insurance (Vehicle) Regulations*.

(vii) R [REDACTED] is an underinsured motorist.

(viii) The Claimant suffered a number of injuries in the above accident and the sum of money referred to above was paid out under tort for some of those damages.

(ix) The Claimant is an insured who is eligible for UMP coverage in an amount to be determined by arbitration.

(x) ICBC is entitled to deductions which are available to it under UMP in an amount to be determined.

(xi) The Respondent has also advised that it does not dispute that the Claimant's fibromyalgia and Somatic Symptom disorder were caused by the Accident. It is the assessment of damages that are in dispute.

EVIDENCE FOR CLAIMANT

The Claimant

History

6. In this Arbitration, the Claimant's direct evidence was provided in three Affidavits. He was also cross examined.

7. At the time of the hearing, the Claimant was 58 years old. He lives in the Okanagan with his common law spouse, D [REDACTED], in a two-storey house that is over 3200 square feet. Between the Claimant and his partner, they have four children and four grandchildren, none of whom live with them.

8. The Claimant grew up in the Okanagan and was a sports minded child and teenager. He played competitive hockey until he was 17. He was also good with his hands and took to woodworking and mechanics in high school. He deposed that he was a "...quick study of home repairs, mechanical repairs and was more than capable of these tasks." He has a grade 11 education.

9. Starting at the age of 19, the Claimant worked in the logging industry for about 29 years.

10. While the Claimant was working in the logging industry, he sometimes performed home renovations. At aged 19, he purchased a 12-foot-wide mobile home. After renovating it, he sold it for a profit and used the proceeds, along with contributions from his RRSP, to purchase a 14-foot-wide mobile home in 1984. At that time, he had a young family and wanted extra room, so he added on a large addition wired for power and created a fully finished family room area.

11. In the early 1980's the Claimant was involved in a motor vehicle accident and hit his head on the windshield. He made a complete recovery.

12. In the 1980s he was involved in a WorkSafe BC accident involving a rollover and a collision with a logging truck. He suffered soft tissue injuries. The Claimant made a full recovery and continued working in the logging industry.

13. In 1990 the Claimant was searching for plans for a house to build on a lot that he had purchased. He found plans that were close to meeting his needs and, using the drafting skills that he had acquired in high school, he reworked the plans. He submitted them to the local regional building authorities, who accepted the building plans with the changes. The Claimant then sold his second mobile home for a profit and started making arrangements to have his present house built. In 1992 he obtained quotes from contractors, chose his trades and the construction of his present home commenced. During that time, he hired all of the trades, decided on the finishings, and made sure that materials were on site. He also dealt with the inspections by the building authorities over the course of construction. He worked on the family home during this time even though he was working 12 to 14-hour days as a skid operator. He deposed:

I did all the excavation for the footings and foundation as well as back filling and grading with a family owned bobcat and backhoe. I also had access to a forklift and did all of the lifting of materials such as trusses, plywood, etc. as the house is a two story.

14. In his spare time, he enjoyed watching and learning from trades and learnt quickly. He put his heart and soul into the house.

15. The Claimant worked as a [REDACTED] operator with [REDACTED] from the year 2000 until late 2007. He deposed that as a [REDACTED] operator, he usually worked 10 hours a day, with a two hour commute each way to and from the job site. He deposed that:

The work required very repetitious actions moving logs to a central location on uneven and sometimes steep terrain. The work was very physically demanding and at times I developed stiffness not unlike the stiffness one gets after working out at the gym.

16. The Claimant left the logging industry in November 2007 because it was dangerous work. The working conditions in the logging industry were stressful, hazardous and dangerous and involved working for long hours, on bad roads and working on steep or icy slopes, resulting in the possibility that a logging truck might overturn.

17. The Claimant was diagnosed with Post Traumatic Stress Disorder in 2007. He was going through a very acrimonious divorce and was dealing with work stress. Also, his brother, who he was close to and lived next door, passed away.

18. His family doctor, Dr. Robertson, recommended that he take time off work for health reasons. Dr. Robertson referred him to a psychiatrist, Dr. Agbodo and to Dr. Reinders, a counsellor.

19. The Claimant was off work on stress leave from November 2007 to 2010. However, there were some positive aspects to his life at this time as well. He enjoyed his relationship with his common law spouse, D [REDACTED]. On medical advice, the Claimant kept physically active during his stress leave. He worked out, and performed renovations on his home and on investment properties.

Personal Life

20. D [REDACTED] and the Claimant have been in a relationship since 2006. Prior to the Accident, the two of them got along very well and had many common interests, ambitions and goals. They laughed together often and D [REDACTED] appreciated the Claimant's sense of humour. They also had plans to buy properties that the Claimant could renovate. They planned to pay down the mortgages and collect rent and eventually re-sell the properties for a profit.

21. The Claimant and D [REDACTED] took pleasure in being active together. They enjoyed mountain biking, hiking, waterskiing, tubing, fishing, playing softball, gardening, and dancing. They also enjoyed travelling, attending movies, concerts and sporting events. The couple played on their pool table at home, used the equipment in their home gym and went to a local gym. He

enjoyed using his quad. The couple had plans to join a coed softball league and maybe a pool league. The Claimant reports that right before the Accident he was in the best shape that he had been in for a long time. He deposed that prior to the Accident they had a good social life and "a healthy intimacy".

22. In the four or five years before the Accident, the Claimant and D [REDACTED] took annual trips to Mexico. At least some of the trips involved cruises and they also went on excursions and participated in other activities. They took a jungle tour, climbed the Mayan Ruins in Tulum, went snorkelling and sailed on a catamaran.

23. In September 2010 the Claimant proposed to D [REDACTED] and they planned to be married in the Fall of 2011. They were considering getting married in Hawaii. They also planned on eventually taking a European river cruise and a Mediterranean cruise.

Home Life

24. The Claimant also deposed that he has many handyman skills and had worked on the family home, including tiling, painting, repairing toilets, replacing toilets and sinks, building stairs, and installing flooring tile and laminate.

25. Before the Accident he also performed much of the housework, including vacuuming, mopping, cleaning the toilets and some laundry. He deposed that:

D [REDACTED] and I both cleaned the kitchen, did dishes, cleaned the inside windows, blinds and sills and other household chores. I did all the lawn care and most of the outside work such as windows, gutters, leaf blowing, string [sic] trimming, raking, watering, tilling, maintaining the vegetable garden, pruning trees and shrubs, plowing and shovelling snow. I did all the vehicle and yard machine maintenance, electrical and plumbing repair. I enjoy a clean home and I take a great pride in the way my home and yard looks.

26. Before the Accident, he had:

- (a) performed plumbing and electrical work;
- (b) used oak to rebuild the stairway;
- (c) installed safety and accent lighting;
- (d) laid laminate and tile flooring;
- (e) tiled the kitchen backsplash;
- (f) installed new sinks, faucets, cupboards, baseboards, doors, lights fixtures;
and
- (g) painted $\frac{3}{4}$ of the house.

27. He had further plans to update the family home, including repairing a deck, removing a chimney and installing a skylight. He wanted to build a retaining wall and add parking capacity to the yard. He also advised that he needed to replace rotting timbers on the property.

Investments

28. D [REDACTED] is a [REDACTED]. She invests in properties. She thought that investing in properties was a good way for the two of them to invest together because of her knowledge of real estate and his handyman and renovation skills.

29. In 2009, the Claimant began renovations to D [REDACTED]'s property in Burnaby, which was a high-rise condominium ("Burnaby Property"). For weeks they travelled from home to the Burnaby Property and he performed a variety of renovations. In early 2011, the Claimant performed further renovations to the Burnaby Property. The renovations included:

- (a) installing new counters;
- (b) installing faucets;
- (c) installing a bath tub;
- (d) installing sinks;
- (e) installing blinds;
- (f) installing baseboards;
- (g) installing tiles; and
- (h) doing electrical work.

30. They also refinanced the Burnaby Property to buy a property in Phoenix, Arizona. The couple hoped to buy at least one more unit, if not more.

31. In 2010 they saw a lawyer to draw up a cohabitation agreement and to amalgamate some of their assets. They became equal owners of the home in Kelowna and of two properties that D [REDACTED] had previously owned on her own, including the Burnaby Property and a property in Oliver, BC. In 2010, they also purchased a property together in West Kelowna and a property in Phoenix, Arizona.

32. In 2010 he also performed some renovation work for a couple in Penticton. He declined to do more work for them because he took a job at [REDACTED].

Return to Work

33. The Claimant returned to work in 2011. He considered that his return to the workforce meant that he may be able to qualify for further bank financing, which would assist with their investment strategy of continuing to buy rental properties.

34. His first job after returning to work was with [REDACTED] in West Kelowna as a heavy-duty [REDACTED]. Shortly after he started the job with [REDACTED] he quit to work for [REDACTED]. On or about June 8, 2011 he started with [REDACTED] performing mechanical work. He did not have a red seal certification as a mechanic, but learnt mechanics and heavy equipment mechanics over the course of 29 years of working with logging equipment in the field. The job with [REDACTED] was indoors, involved a shorter commute and had normal hours. The job involved working on semi-tractor trailer units including air brakes, hydraulics and tarp rigs. He worked on ladders, on dump truck boxes, under big rigs and with large tarp rigs. The

Claimant used heavy tools and had to be "strong, fit and nimble". He was happy with the work at [REDACTED] and noted the safe indoor environment. He enjoyed the work and described the job as perfect for him. His goal was to work at [REDACTED] until retirement.

35. The Claimant worked for [REDACTED] for 40 hours per week at \$25.00 per hour, with about one hour of overtime a week. He received vacation pay at 4%. When he was unable to return to work after the Accident, his employment with [REDACTED] was terminated.

36. His income prior to the Accident was not consistent, which reflects the fact that he was on extended stress leave from November 2007 to June 8, 2011 and then changed from the logging industry to mechanical work.

37. His T4 slips show earnings as follows:

- (a) 2005 \$ [REDACTED] with a pension adjustment of \$ [REDACTED]
- (b) 2006 \$ [REDACTED]
- (c) 2007 \$ [REDACTED]
- (d) 2008 \$ [REDACTED] and other income of \$ [REDACTED]
- (e) 2009 other income of \$ [REDACTED]
- (f) 2010 other income of \$ [REDACTED]
- (g) 2011 \$ [REDACTED] with a gross rental income of \$ [REDACTED] and a net rental income of negative \$ [REDACTED]
- (h) 2012 interest income of \$ [REDACTED], gross income \$ [REDACTED], net rental income negative \$ [REDACTED]
- (i) 2013 interest income \$ [REDACTED], gross rental income \$ [REDACTED], net rental income negative \$ [REDACTED]
- (j) 2014 gross rental income \$ [REDACTED]

38. His 2015 tax return summary shows the following:

CPP	\$ [REDACTED]
CPP disability benefits	\$ [REDACTED]
Gross rental income	\$ [REDACTED]
Net income	\$ [REDACTED]

39. His 2016 tax return summary shows the following:

CPP	\$ [REDACTED]
CPP disability benefits	\$ [REDACTED]
Gross rental income	\$ [REDACTED]
Other income	\$ [REDACTED]
RRSP income	\$ [REDACTED]
Net income	\$ [REDACTED]

40. The Claimant was injured in the Accident on July 13, 2011. He was driving a 1996 Dodge Dakota ("Dakota") and was travelling west on [REDACTED] Avenue in Penticton. The Defendant was

driving a 1998 Ford Taurus North on [REDACTED] Street and went through a stop sign, t-boning the Claimant's truck behind the driver's door. The Claimant's Dakota spun into a third vehicle which ended up with a bent front right wheel. There was damage to the Dakota, including:

- (a) significant denting behind the driver's front door;
- (b) damage to the front of the rear wheel of the crew cab;
- (c) damage at the right rear corner on the box; and
- (d) damage to the steel bumper.

41. The Dakota was written off for \$[REDACTED]. The Defendant's vehicle was damaged on the front and the front bumper. The third party's vehicle was damaged around the front left tire.

42. The Claimant further deposed on October 28, 2017 that:

As a result of the accident, I injured my upper and mid back, neck, back of my head, right elbow, and across my shoulder blades and neck. I had pain and tingling in my hands, fingers, feet and lower leg. I had constant daily headaches – at least a level 7 and I had dizziness, nausea and diarrhea. I also had an earache. My condition has continued to worsen.

43. The Claimant was grinding his teeth after the Accident and as a result, he fractured two teeth. ICBC paid the dental bill associated with the fractured teeth.

44. The Claimant has been treated by several doctors post Accident, including Dr. Robertson, who had been his family doctor for seven years prior to the Accident.

45. After the Accident the Claimant was on total disability benefits from ICBC. These disability benefits were discontinued after May 31, 2012.

46. Besides Dr. Robertson, the treating doctors that the Claimant saw after the Accident included:

- (a) Dr. Agbodo, a psychiatrist;
- (b) Dr. Novak, a neurologist;
- (c) Dr. Laidlow, a physiatrist;
- (d) Dr. Hunt with St. Paul's Pain clinic;
- (e) Dr. Willmott with the Okanagan Pain Clinic; and
- (f) Dr. Reinders for counselling.

47. The Claimant's wedding plans have been put on hold. The Accident has changed the Claimant both physically and mentally. He has a difficult time getting a good night's rest. Little things bother him and he no longer has the same sense of humour. He is quiet, moody and irritable, less patient, more easily upset, easily fatigued and quick to anger. His memory is not as good as it was before the Accident. He is more forgetful and has to write things down. He can watch a movie and, in a few days, or weeks forget what he saw.

48. These changes in the Claimant's physical and mental condition have adversely affected his relationship with D [REDACTED]. He and D [REDACTED] can no longer talk the way they once did. They have had many intense arguments since the Accident. His intimacy with D [REDACTED] has been sharply reduced. They rarely hug or snuggle because doing so hurts him. Intimacy is sometimes painful for him and they have to stop. He also deposes:

D [REDACTED] and I no longer go dancing, work out together, take out the boats, fish, hike, mountain bike or take long walks. We used to shop together. Now, D [REDACTED] shops and I often sit for part of the shopping. We socialize much less frequently than before the accident. Now we rarely use our pool table.

49. The Claimant can no longer play with his grandchildren the way he would like to, as he no longer has the energy or the patience to do so. When he is in pain and discomfort he just sits and watches D [REDACTED] play with them.

50. He feels unable to help his elderly parents who live nearby. He used to be able to do many small repairs and maintenance on their house, yard, vehicle and equipment. He can no longer work with his hands above his head and do things like hang a picture. He no longer helps his parents with car repairs and maintenance, cutting their lawn, weeding, doing chores, cleaning rugs, snow removal, changing faucets and repairing toilets.

51. He also is in a great deal of pain and worries about his health and his future.

52. Since the Accident, the Claimant hires someone else to do mechanical work.

53. He no longer cleans and maintains his house to the same standard. Since the Accident, the Claimant is ashamed of his yard. He works through the pain when he does house or yard work in order to get anything accomplished.

54. The Claimant has not been able to continue renovating the investment properties. They either hire people to do the work or don't do it. The Burnaby Property sold in September 2017 with a capital gain of \$223,000.00. If he had been able to finish the other updates, he is confident they would have had a higher return. He deposes that the Phoenix property doubled in value. He further deposes that if the Accident had not happened, they would have been able to buy at least one more investment property in the US when the market was low and the dollar was on par and would have made more profit.

55. He also has not been able to continue to renovate his own home.

56. He no longer does woodworking, mechanics or metalworking projects the way he did before the Accident.

57. He no longer maintains his yard the way he used to. He hired arborists to cut down two trees that he deposes he would have cut down himself, if the Accident had not occurred.

58. He bought a newer vehicle in 2013 because he was no longer able to maintain the older one.

59. The Claimant and D [REDACTED] have abandoned purchasing other investment properties because of his loss of income, and his inability to qualify for financing and to perform maintenance on the investment properties. The Claimant believes that this has cost the couple hundreds of thousands of dollars including "...lost rental revenue, lost appreciation, and lost capital gains".

60. At the end of his Affidavit sworn October 28, 2017, the Claimant deposed:

I have endured constant pain and I am on a course to suffer with these issues for the rest of my life. I am unable to work. This accident has dramatically changed my life and the way I will forever have to live it.

61. I find the Claimant to be honest and his evidence to generally be credible. I also find that both he and D [REDACTED] had not managed to have a sustained period in their relationship when the Claimant hit his stride. He had been dealing with difficult circumstances, such as the Claimant's very acrimonious divorce and stress dealing with support payments to his ex-wife and his brother's death. For a portion of their relationship that occurred prior to the Accident, he had depression, post traumatic stress disorder and anxiety. He had been on stress leave. This makes it difficult for the Claimant and D [REDACTED] to accurately picture what the future would have been like if the Accident had not occurred, including how much time the Claimant, when he returned to work for some time, would have to devote to various other endeavours, including past-times, hobbies, sports, travel, socializing, helping his parents, cleaning, repair, maintenance and renovation. Had the Accident not occurred and the Claimant continued to work at [REDACTED], the Claimant's enthusiasm to get on with and enjoy his life would have been met with the time constraints of a full-time job.

PERSONAL WITNESSES FOR THE CLAIMANT

J [REDACTED]

62. J [REDACTED] is the Claimant's friend and he swore an Affidavit on October 24, 2017. He is 59 years old, married and lives in [REDACTED], BC. J [REDACTED] has been involved in the sale of [REDACTED] since 1990. He has known the Claimant since high school. He recounts that in high school, the Claimant was active and athletic. He remembers the Claimant being an exceptional hockey player and a talented defenceman and that he always loved sports.

63. J [REDACTED] has socialized with the Claimant in the last 15 years, including at barbecues each of them has held. They also drank together at functions like Beer fest.

64. Before the Accident, J [REDACTED] and the Claimant used to go out on the Claimant's boat and waterski. He remembers the Claimant being able to slalom ski beautifully and that the Claimant used to love taking people out on his boat and waterskiing.

65. J [REDACTED] remembers the Claimant being fit, athletic and upbeat during the years prior to the Accident.

66. J [REDACTED] considers that the Accident dramatically changed the Claimant's life. Physically, he is not the same person. He is no longer as mobile and does not move as fast or as freely. He looks like he is in pain. He seems to have a problem with neck and shoulder movements. He seems to have a pained look on his face. His renovation projects have come to a halt.

67. J [REDACTED] also deposed that the Claimant's personality has changed since the Accident. He does not speak as much. J [REDACTED] believes that the Claimant is hurting and is depressed. He can't work on his projects around the house.

68. They no longer do very much when they are together. When they get together the Claimant just sits. J [REDACTED] has invited the Claimant to play senior men's hockey with him, but he has refused, even though the Claimant owns high end skates and a full set of hockey gear. The Claimant tells J [REDACTED] that he can't play. He sits at home instead. His boat stays parked in his garage.

69. J [REDACTED] has noticed a dramatic change to the Claimant's activity level and personality since the date of the Accident and considers that the changes continue unabated.

Claimant's Father

70. D2 [REDACTED] T [REDACTED] is the Claimant's Father and he also swore an Affidavit in this Arbitration. His Affidavit evidence was almost identical to the Affidavit evidence given by his wife, as set out below.

Claimant's Mother

71. E [REDACTED] [REDACTED] is the Claimant's mother. E [REDACTED] [REDACTED] was 82 years old and retired when she swore her Affidavit on October 24, 2017. She lives with her husband, about a quarter a mile away from the Claimant. She lives on a double lot in a two-level house with just over 1300 square feet on each level. She and her husband have lived in the same house for 49 years. She is in frequent contact with her son and sees him two or three times a week. E [REDACTED] and D2 [REDACTED] [REDACTED] also speak to their son on the phone once or twice a week.

72. She recalled the Claimant being active and sports minded his whole life. As a child he participated in many sports and was even asked to try out for the local Junior A hockey team in Penticton, but he chose to go to work instead. He was interested in boating, swimming and waterskiing and regularly participated in these activities up to the date of the Accident.

73. E [REDACTED] deposed that the Claimant was also very mechanically inclined and that there was nothing that he could not do or figure out if he put his mind to it.

74. She further deposed that up until the Accident, other than the time he took off work from 2008 to 2010, the Claimant had been employed since he left high school.

75. She deposed that the Accident had a devastating impact on the Claimant that is hard for her to witness. She feels that she can see pain on his face. She also considers that he has a hard time doing physical activities. She also finds that her son is now quiet and down. She worries about him. She also advised that the Claimant's house and yard is not kept to the same standard as it was before the Accident.

76. She also emphasized that before the Accident, the Claimant helped her and her husband with physical chores and mechanical work including yard work, snow removal, maintaining their vehicle and some maintenance, repairs and updates around their house, such as moving boxes, changing light bulbs, changing the faucets and the toilets. His participation in these activities has been sharply reduced since the Accident.

77. She felt that their son would have performed special projects for her and her husband if the Accident had not occurred, including fixing a Bobcat they owned. She felt that if the Accident had not happened, the Claimant would have done much of the labour to install an irrigation system on their property that they had installed in 2014 and 2015. Also, in 2015, they built a Quonset on their property. She felt that the Claimant would have assisted with building the Quonset by participating in the labour to dig fittings, assisting with the concrete and with the construction.

D [REDACTED]

78. In October 2017, D [REDACTED] swore two Affidavits in these Arbitration proceedings. Since September 2006 she has been in a relationship with the Claimant. She is now 53 years old and has two grown daughters. After she divorced at 29 years old, she purchased a townhouse in Coquitlam, British Columbia. In 1996 she received her [REDACTED] designation. She moved to the Okanagan in August 2006 and soon after met the Claimant and they have been together ever since. At some point she moved in with him and came to an agreement to share ownership of some of their properties. The plan was to invest in more properties together while maintaining their jobs.

79. D [REDACTED] described the active lifestyle that she and the Claimant enjoyed from 2006 until the date of the Accident:

Before the accident, we enjoyed activities together such as travel, biking, hiking, water skiing, tubing, fishing, softball, gardening, dancing, going to movies, concerts and sporting events. We purchased over \$5,000 in equipment for our home gym including a universal gym, elliptical, treadmill, free weights, heavy bag and vibration machine. Before the accident in 2011, we both worked out regularly in the gym and were in great physical shape. We purchased a pool table and accessories for \$3,500 and played pool often together. L [REDACTED] owned a quad and used it. Pre-accident, we planned on buying a Harley-Davidson motorcycle. L [REDACTED] loves the outdoors and was active in sports and he encouraged me to be more active. He socialized often and encouraged me to visit with his friends and to get out more. L [REDACTED] enjoyed taking out his ski and fishing boats. He taught me how to operate his ski boat so that I could drive while he went water

skiing or tubing. I passed the boat smart exam and received a boating license in June, 2010. We went fishing and L■ was also looking forward to taking his grandson fishing and boating. We owned mountain bikes and rode them along local trails and we planned to ride the seawall with friends in Richmond. We were looking forward to joining a co-ed softball league and a pool league. L■ has always been sports oriented and has played many sports including baseball, soccer and competitive hockey. Pre-accident, I saw no physical restrictions in L■ and we enjoyed getting out and being active.

80. They enjoyed walking briskly together, whether they were out for a long walk or walking in the mall. They also enjoyed their annual trips to Mexico and the United States. They went on many road trips to Vancouver and Seattle to attend concerts, sporting and other events.

81. She felt that in the five years prior to the Accident they "...got along very well and had many common interests and shared ambitions. She deposed, "I admired L■'s sense of humour." She testified that they laughed and smiled together a lot, even while he was going through a divorce. They had an intimate relationship and hugged, kissed and snuggled.

82. Up until the Accident, the Claimant performed most of the repair work and renovations on their home and also similar work on investment properties.

83. D■■■■■■ further indicated that prior to the Claimant taking a leave of absence from logging, he was going through a difficult divorce. D■■■■■■ advises that from 2006 up until 2008 the Claimant had no difficulty working long hours in the logging industry. He left home at 4:00 a.m. and would be home by 6:00 p.m. every night. He even worked extra hours.

84. She felt that the Claimant and his brother were close and when his brother passed away in 2006 she noticed that the Claimant did not deal with this loss well and she believes that he has never completely dealt with it.

85. When the Claimant was on stress leave from 2008 to 2010 the couple remained physically active and had a healthy relationship. The Claimant also renovated three rental properties and did some renovations to their home and another individual's home in Penticton.

86. They even purchased a cargo trailer in 2010 and tools that the Claimant could use for the further renovations planned for the Burnaby Property.

87. D■■■■■■ felt that after the Claimant's divorce was finalized his spirits improved and his stress level decreased. In September 2010 the Claimant had proposed to her and they planned to be married in the Fall of 2011. They were looking at wedding packages in resorts in Hawaii.

88. The Claimant called D■■■■■■ from the Accident scene. She was driving from work in Oliver, but after she got the call she drove straight to the Accident. As no ambulance had arrived, she drove the Claimant to the hospital. He was placed on a bed in emergency and put in a neck brace.

89. D [REDACTED] deposed that their relationship and life has not been the same since the Accident. She finds that the Claimant is angry and frustrated that he is no longer physically able to do what he could do before the Accident. His sense of humour has diminished and he does not smile as much as he used to. She finds that he is often lying awake in pain at night. He is often moody and irritable. Little things bother him. They have intense arguments.

90. D [REDACTED] shares in her Affidavit that they no longer enjoy the intimacy they once had and that they rarely kiss and snuggle because of his physical discomfort. Intimate contact can cause him pain and they often need to stop. She hugs and touches him very softly now.

91. The Claimant's physical condition has not only meant that they no longer share the same physical activities, but they no longer socialize as much because of his pain, fatigue and discomfort.

92. Since the Accident they have been back to Mexico only once. The trip was for her 50th birthday.

93. She described their division of household chores and the Claimant's activities regarding home renovation in a manner consistent with the Claimant's evidence. The Claimant performed quality work. For instance, when he rebuilt the oak stairs prior to the Accident, he installed accent lighting on the side of each stair.

94. She deposes that their wedding plans have been put on hold due to uncertainty regarding the Claimant's health, and also due to his pain and financial constraints.

95. D [REDACTED] [REDACTED] mentioned that she would have paid the Claimant to renovate her condominium in Coquitlam in 2014 instead of hiring someone.

96. She also deposed that the Claimant has been unable to invest in any other properties since the Accident. Prior to the Accident, they planned on buying an older property closer to home to renovate and sell.

97. D [REDACTED] shared her real estate investment history, starting with buying a double wide mobile home for \$ [REDACTED] in Campbell River and then purchasing various other properties in British Columbia, and often selling the properties and making a capital gain.

98. In 2003, she purchased a two-bedroom condominium in Burnaby, also referred to as the "Burnaby Property", for \$ [REDACTED]. In 2009, while on leave from logging, the Claimant renovated the Burnaby Property. She sold it in one day for \$ [REDACTED], with a capital gain of \$ [REDACTED]. In 2009 they made plans to amalgamate their properties and started looking at purchasing further investment properties. She was studying the markets in Las Vegas, Phoenix and the Okanagan and documented the desired areas and financing scenarios.

99. She considered that if they had been able to invest in properties as planned, they would have continued to have similar market gains and also would have increased their equity because they could have used rental income to pay down the mortgages.

100. She swore a supplemental Affidavit on October 28, 2017 confirming the sale of the Burnaby Property. She advised that they purchased a property in Phoenix, Arizona for cash. They also purchased a property in West Kelowna.

B ■ ■ ■ ■ ■

101. B ■ ■ ■ ■ ■, along with his wife L ■ ■ ■ ■ ■, are friends of D ■ ■ ■ ■ ■ and the Claimant. He is 55 years of age and lives in Richmond with L ■ ■ ■ ■ ■ in their condominium. He has worked in dye maintenance regarding auto parts for approximately the last 28 years.

102. B ■ ■ ■ ■ ■ and L ■ ■ ■ ■ ■ met the Claimant through D ■ ■ ■ ■ ■ in about 2006.

103. Prior to the Accident, B ■ ■ ■ ■ ■ and the Claimant enjoyed some joint activities. They went fishing once and floated down the stream once.

104. B ■ ■ ■ ■ ■ deposed that after the Accident the Claimant's personality and activity level changed. The Claimant is no longer as fit. The Claimant looks tired and seems like he has had a poor sleep. He often gets upset and easily irritated, even with something small like poor service at a restaurant. Since the Accident, the Claimant is quieter and often downcast. If he is irritable, he stops talking. This contrasts to his behaviour prior to the Accident when he was more easygoing.

105. B ■ ■ ■ ■ ■ has a physical condition that causes him pain and limits him. However, he observes that what the Claimant has is worse. He feels from observing the Claimant's face and movements that he lives in pain. If the Claimant sits in a chair for 30 minutes B ■ ■ ■ ■ ■ can see the pain on his face when he then struggles to get up off the chair. The Claimant also has to battle his pain to do something.

106. Since the Accident, he and the Claimant went for a walk in Steveston along the dyke, but after a short time the Claimant appeared to be in pain and struggling. Prior to the Accident, the two couples used to cycle together, but the Claimant now refuses to go.

107. B ■ ■ ■ ■ ■ has also noticed that the Claimant used to walk or cycle to his Father's place, but now he drives.

108. On cross examination, B ■ ■ ■ ■ ■ admitted that his evidence regarding the Claimant's decreased ability to do handyman work was based on the Claimant's statements to him. In addition, on cross examination, B ■ ■ ■ ■ ■ admitted that he was not aware that the Claimant had been off on stress leave from work. I have given no weight to B ■ ■ ■ ■ ■'s statements regarding changes in the Claimant's ability to perform handyman work and renovations. I have also given limited weight to his other statements, given that he did not know about the stress leave, which puts into question how much he knows about the Claimant's life.

L [REDACTED]

109. L [REDACTED] is a [REDACTED] who lives in Richmond, BC. Her husband, B [REDACTED] and her were friends with D [REDACTED] before D [REDACTED] and the Claimant got together.

110. Generally, D [REDACTED] and the Claimant would stay with them once or twice a year and they would go to the Okanagan and stay with D [REDACTED] and the Claimant once a year. Prior to the Accident, L [REDACTED] found that the Claimant was an active man, easy going and fun to be around. The two couples went for long walks and went cycling together. They enjoyed cycling around the dykes in Richmond and they would cycle off road.

111. Since the Accident, L [REDACTED] has noticed a change in the Claimant's personality, activities and his ability to deal with physical contact of any kind.

112. She has found that since the Accident, the Claimant is "...more moody, depressed and talks much less". Since the Accident he is at times moody, irritable, angry and argumentative. At times the Claimant goes quiet and she will ask him if he is in pain. The Claimant will reply that he is and advise her that he does not want to talk and that he will just listen. L [REDACTED] has noticed that the Claimant now snaps at D [REDACTED].

113. Sometimes when they visit D [REDACTED] and the Claimant now, the Claimant will get up and go to his room for no good reason.

114. Since the Accident, L [REDACTED] has thought that the Claimant is in pain and she notices it in the way he moves and acts. He appeared to be in pain even from laughing. She has seen him try to cycle for 5 minutes, but he ends up getting off the bike and says he can't do it. The two couples also no longer go on long walks together. If they try and go on a walk, they often have to leave the Claimant to sit and rest during the walk. Three years prior to swearing the Affidavit, the Claimant was in so much pain after a walk that L [REDACTED] said that he slept apart from D [REDACTED].

115. L [REDACTED] also observed the Claimant trying to lift something and saw him wince and his face go white.

116. L [REDACTED] usually hugs friends, but when she has tried hugging the Claimant after the Accident, he has said "don't touch me", so she now only gives him a little pat.

EXPERT WITNESSES FOR THE CLAIMANT

Dr. Robertson

117. Dr. Robertson has been the Claimant's general practitioner since May 2007. He provided a medical legal report dated September 3, 2013 and one dated March 23, 2015.

118. Prior to the Accident, the Claimant had mostly seen Dr. Robertson for anxiety, depression and post traumatic disorder, dating from 2007. The Claimant had taken Tramacet for headaches, Nexium for dyspepsia and was on antidepressants. He received counselling and was off work.

According to Dr. Robertson, by July 2011, the Claimant was fully recovered and had successfully returned to work.

119. Dr. Robertson saw the Claimant the day after the Accident. Dr. Robertson examined him and diagnosed “multiple myofascial strains of the neck, left shoulder, bilateral upper back, left middle back, left lumbar back, right elbow and wondered if the tingling of his hands was related to thoracic outlet irritation or cervical nerve root irritation”. He suggested ice packs and also that the Claimant remain active. He also advised the Claimant to get physiotherapy and to take some time off work, but try to get back as soon as possible. Dr. Robertson prescribed naproxen, Flexeril and Tylenol and thought that the Claimant might be off work for a month or so. However, the Claimant’s symptoms did not resolve over time. The following paragraphs summarize some of the appointments the Claimant had with Dr. Robertson and various findings of Dr. Robertson.

120. The Claimant went to see Dr. Robertson on July 21, 2011. The Claimant was getting pain down his left arm with numbness, especially while moving his neck in certain ways. Dr. Robertson advised him to stop physiotherapy at that time, as it may have been making matters worse. He prescribed Tylenol 3 and gabapentin and told him to slowly increase the dosage. He advised him to avoid deep breathing as hyperventilating can cause tingling and numbness.

121. Several appointments later, on July 29, 2011, the Claimant was not feeling any better:

On July 29 he said he was not feeling any better and still having numbness in his left hand and arm, headaches from the top of his head to his left eye and back of his neck, and jabbing pains in the interscapular area. He reported pain in his right arm when doing minor activities such as brushing his teeth which worried him because he was right handed. He was unable to sit comfortably for more than a few minutes because of his back pain. He had noticed some slight tremors in his hands and a peculiar sensation in his left ear. His neck was too sore to turn and therefore he was keeping it quite rigid. He worried because there is a clicking sensation when he moved his neck. Nonetheless he was going for a walk every day. He was fatigued in the morning despite sleeping well. He was tender in his neck, upper back, and right arm but there again was no neurological deficit. I diagnosed continuing myofascial strains of his neck, left shoulder and upper back; I also worried about a possible relapse of his posttraumatic stress disorder that he suffered from in 2007. He had stopped physiotherapy because it made him worse when doing towel exercises. I increased his gabapentin to t.i.d.

122. Other investigations, such as cervical spine x-rays and a CT scan did not find a mechanical explanation for the symptoms.

123. On August 5, 2011, Dr. Robertson noticed that Claimant was severely stressed and ruminating about the Accident. He referred him to Dr. Agbodo a psychiatrist, to rule out post traumatic stress disorder. He also referred him to Dr. Laidlow for nerve conduction studies. The Claimant was taking gabapentin and naproxen.

124. On August 15, 2011, Dr. Robertson saw him again and found that he remained totally disabled since the time of the Accident. Dr. Robertson referred the Claimant to physiotherapy.

125. On August 24, 2011, Dr. Robertson again saw the Claimant. The Claimant reported general pain and numbness in all four limbs as well as other symptoms. He had bruxism that was quite severe. He had severe headaches at times. His vision was blurred. The Claimant had trouble brushing his teeth or combing his hair because of his right arm pain. Dr. Robertson diagnosed multiple myofascial trauma.

126. In September, 2011, the Claimant's physical pain with increasing symptoms continued to interfere with his everyday life, to the point that he could not make his bed.

127. In November 2011, Dr. Robertson diagnosed the Claimant with chronic myofascial pain and anxiety. The Claimant had been attending a fitness centre and attempting to swim and walk in the pool and use the hot tub.

128. On November 29, 2011, the Claimant still had symptoms including headaches, shoulder pain, interscapular pain, bilateral lumbar pain and occasional jabbing left chest pain. He still had clicking in his neck and dizzy spells and generalized numbness lying in bed.

129. Dr. Robertson further reported that the psychiatrist found no evidence for post traumatic stress disorder or depression.

130. In 2012, the Claimant saw Dr. Coughlin, a Physical Medicine and Rehabilitation Specialist in Kelowna, who recommended the pool program and did not think passive therapy would be helpful.

131. On February 1, 2013, the Claimant reported being frustrated with his situation. He felt socially isolated and could not practice his hobbies and sports or pass on his skills to others. He could not sit, stand or walk for very long. He got headaches while he was on the computer. His pain was aggravated when he twisted his trunk. He had a phobia of driving, especially in intersections. Dr. Robertson noticed that he moved uncomfortably and stiffly and was tender in the neck and back.

132. The Claimant continued to see specialists, including going to Dr. R.D. Cleveland's Pain Clinic, going to Dr. Reinders for counselling and going to Pro-Physio for therapy.

133. By August 6, 2013, the Claimant was prescribed Cymbalta as a pain modulator to be used in conjunction with his gabapentin.

134. In the September 3, 2013, report, Dr. Robertson summarized the Claimant's situation as follows:

In summary [REDACTED] L [REDACTED] sustained severe multiple myofascial trauma in an MVA over 2 years ago, with sprains and strains to his neck, entire back,

left shoulder and right elbow. He subsequently developed a generalized condition of pain and numbness which has proved relentless. It has been incapacitating, lasting all day every day on a consistent basis since that time. It has severely impacted all aspects of his life resulting in loss of self-esteem, causing social isolation, inability to work, and lack of ability to perform and enjoy hobbies and leisure past-times and recreational activities. He has been a compliant patient who has taken his medications faithfully and attended therapy regularly, all to no avail so far. His prognosis is guarded, especially with the lack of any improvements over the last 2 years. However, the addition of Cymbalta may provide considerable relief, and he is still awaiting the pain clinic in Kelowna, and therefore there is some hope that over the next year he may finally recover sufficiently to return to many of his previous activities. I will provide further progress reports along the way at your request.

135. Dr. Robertson wrote a follow up report dated March 23, 2015. At the time of completing the report, he had reviewed the opinion of a Psychiatrist, Dr. Shane and a Rheumatologist, Dr. Shuckett. Dr. Shane found that the Claimant does not have the criteria for a current diagnosis of PTSD. Dr. Shane diagnosed Somatic Symptom disorder, moderate chronic and persistent. Dr. Robertson agreed with Dr. Shuckett that the following diagnosis were caused by the Accident:

She diagnosed muscle contraction headaches, possible myofascial TMJ pain, musculoligamentous injury of the neck, with some radiologic evidence of spondylotic changes. Also, there was a small central disc protrusion C5-6 possibly related to the MVA. She also diagnosed myofascial pain of the neck and shoulder girdles, sacroiliac strains, possible neuropathy of his feet, and fibromyalgia syndrome, associated with a sleep disorder.

136. On May 14, 2014, Dr. Robertson completed the Claimant's Canada Pension Plan disability forms. He noted that the Claimant was on Cymbalta and Tramacet. The Claimant had tried many types of intervention and remained unimproved. Dr. Robertson considered the Claimant's disability to be permanent and fully supported his application for disability benefits.

137. Dr. Robertson summarized his findings in his follow-up report as follows:

In summary L [REDACTED] sustained myofascial strains in a motor vehicle accident almost 4 years ago and as a direct consequence has developed severe posttraumatic fibromyalgia. This has rendered him totally and completely unemployable for any type of work. The prognosis is poor and indeed he may never return to meaningful employment. However, the course of fibromyalgia is somewhat unpredictable. Perhaps one day he might recover enough to do some part-time sedentary work.

Julie Jacquet

138. Julie Jacquet is an occupational therapist who provided a report entitled “Cost of Future Care Analysis” dated July 7, 2016. She is a qualified occupational therapist with registration in the College of Occupational Therapists in British Columbia. She found the following:

My understanding of the clinical and medical reports reviewed, and the information obtained from L [REDACTED], is that he has experienced a significant decline in his ability to participate in activities of daily living over the last almost 5 years, primarily as a result of the motor vehicle accident.

139. She however, also advised of the following:

It is beyond my area of expertise to determine to what extent his current level of function is impacted by the injuries he sustained in the subject accident versus other medical conditions. I recommend that a medical opinion be sought to determine the extent to which the following recommendations can be related to this accident.

140. In preparing her report, Julie Jacquet reviewed medical reports. She also based her findings on the Claimant’s self report, which included a great deal of personal information. The self report included information the Claimant provided on his current symptoms, a self reported pain disability index, a checklist of roles he performs in his life and information on his ability to participate in those roles. The Claimant also provided information regarding tasks he had difficulty with or was unable to do and how frequently he normally would have performed those tasks.

141. She assessed the Claimant on April 5, 2015. She viewed him while he was in a variety of physical positions, like sitting and standing, and took note of his apparent level of discomfort. She also found that his movement was restricted when he tried bending and that his quality of movement deteriorated over time. He was hypersensitive to the touch. She found that he had limitations lifting above shoulder level, resulting from a reduced range of movement in both shoulders and reduced muscle strength involving the left arm. When he tried carrying a weight while walking his body mechanics deteriorated, which was evidenced by the Claimant using an asymmetrical posture, grimacing and increasing his pace towards the end of the assessment. His grip strength of his left hand, which is non-dominant, was stronger than the grip strength in his right hand. The grip strength in his right hand fell below average and the grip strength in his left hand was average.

142. During the activities, both his pain level and the number of areas that caused him pain increased. Julie Jacquet made a finding that:

Due to his ongoing physical functional limitations, L [REDACTED] must prioritize and pace his activities in order to complete routine activities of daily living such as showering, performing light cleaning, mowing the lawn with a self-propelling mower, grocery shopping, etc.

143. In her report, Julie Jacquet recommended services and equipment to increase the Claimant's level of independence to a level that approximates his pre-injury status and potential. She provided a price summary for services and equipment and attached it to her report.

144. She recommended that he enter into an exercise program, such as pilates, involving private classes. She considered that 5 introductory private classes followed by 12 trial sessions would cost \$935.00 and a treatment schedule of 52 visits for the first year would cost \$935.00, and a treatment schedule of 52 visits for the first year would cost \$2,860.00, while 24 visits every year thereafter would cost \$1,320.00 annually.

145. She further recommended an aquatic center membership and that he participate in a community-based pool program, to assist in maintaining his current physical function and to maximize it. The cost for an annual pass for individuals 19 to 59 years of age is \$293.00, with the cost decreasing in the older age groups.

146. She further recommended that the Claimant attend a pain clinic. She considered that yearly costs range from \$100.00 per year to \$8,400.00 per year.

147. Also, she recommended that he see a psychologist on a monthly basis to receive further education and intervention regarding pain management strategies. She suggested 12 to 24 sessions and referred to a fee of \$200.00 for psychology services, which she advised is recommended by The British Columbia Psychological Association. The cost for 12 to 24 sessions at this rate would be \$2,400.00 to \$4,800.00.

148. Julie Jacquet recommended that the Claimant have housekeeping services. She advised in her report that prior to the Accident, housekeeping was primarily the responsibility of the Claimant. She further found that he cannot perform the tasks at the same frequency as prior to his injury. She noted that his needs regarding cleaning may change based on where he lives and how many people live with him. She recommended that he receive between 4 and 6 hours of housekeeping assistance every two weeks. This would be between 104 and 156 hours of assistance per year. She recommended that the services be provided for as long as his physical abilities are impacted by the Accident. She considered that, with travel costs, the costs for 104 to 156 hours of housecleaning service each year, based on estimates, are \$2,808.00 to \$4,472.00 per year, based on present day fuel costs.

149. She further advised that the Claimant be provided with house maintenance services for as long as his abilities are impaired from the Accident. The services would be provided at the frequency at which the Claimant indicated that he performed these tasks prior to the Accident. Based on the quotes of two companies, she considered that the cost of yearly cleaning of the interior and exterior of the windows and screens to be between \$250.00 and \$270.00 and the yearly washing of the glass surrounding the deck to cost \$25.00. Cleaning the gutters once or twice a year would cost between \$150.00 and \$350.00 per year. The cost to pressure wash the vinyl siding is based on it being cleaned every 2 years at a cost of \$225.00 to \$275.00 per time.

150. Further recommendations were made regarding help for yard maintenance, tree care, building a retaining wall, vehicle maintenance, renovations to the house, and maintenance to 5 rental properties. Also, she recommended that a heating pad be paid for, as well as a mouth guard and prescription medication.

Dr. Shane

151. Dr. Shane is a psychiatrist who evaluated the Claimant on November 19, 2014 and provided a report dated December 3, 2014. He diagnosed the Claimant with Somatic Symptom Disorder. Dr. Shane considered that the Claimant's depressive symptoms he had experienced a number of years prior qualified him for Major Depression which seemed to be in remission. Dr. Shane further found that the Claimant had some symptoms of post traumatic stress disorder, but did not qualify for the disorder at that time.

152. Dr. Shane wrote:

It is my opinion that the motor vehicle accident of 2011 was the precipitating factor that contributed to his present condition. It is of significance as documented in my evaluation that he was significantly impaired from psychological perspective for some years before beginning to work for a few days before the motor vehicle accident in 2011. It is my opinion that it is quite probable if he were not in this accident, he most likely would have been able to continue to work. At the time of the motor vehicle accident he had been looking for work for some time and it would appear his Major Depression was in remission. I do not think he was malingering nor was there an issue of Factitious Disorder in the context of my present clinical evaluation.

153. Dr. Shane did find that the Claimant was at risk of future episodes of significant clinical depression because of his previous history of depression and present diagnosis of Somatic Symptom Disorder.

Curtis Peever

154. Curtis Peever is an economist who has written two reports, both dated December 12, 2016. The first report provides a calculation of past and future loss of earnings and non-wage benefits. The second report deals with providing present values for the claims, so that they can be expressed in a lump sum figure that will be just enough money to replace the future costs as they are projected over time. The concept is that the lump sum for a particular category will be exhausted when the last cost is replaced.

155. For past values of housekeeping costs, a low cost estimate and a high cost estimate were provided. For the low cost estimate, Curtis Peever used the lowest cost, or least frequent replacement of each item or service used in Julie Jacquet's report. The high cost estimate used the highest cost, or most frequent replacement of each item or service used in Julie Jacquet's report. Included in the calculation were interior house cleaning, house maintenance, yard maintenance,

tree care, vehicle maintenance and maintenance to five rental properties. The Claimant claims an average of the two numbers.

156. For future costs of care, a low cost estimate and a high cost estimate were similarly provided. The claims included pilates, aquatic centre membership, pain clinic, psychology, interior housecleaning, house maintenance, yard maintenance, tree care, retaining wall, vehicle maintenance renovations to the house and maintenance to five rental properties.

Dr. Shuckett

157. Dr. Shuckett is a Rheumatologist. A medicolegal report from Dr. Shuckett dated September 8, 2014 was entered on behalf of the Claimant, as well as a follow-up report dated December 12, 2016.

158. Dr. Shuckett first met with the Claimant about three years after the Accident.

159. She found that the Claimant has fibromyalgia syndrome. In her report, she notes her finding that the:

...sequence of events and injuries after the MVA probably contributed to his fibromyalgia syndrome although I acknowledge the controversy and the varying reports in the literature on this topic.

She also provided:

With the exception of the headaches and jaw pain that I defer to a specialist in that area, and also with the caveat that I have described causation fibromyalgia causation separately above, I believe that all of his other diagnoses are causally linked to the subject MVA.

160. She suspected that the Claimant has a chronic pain syndrome, which is co-existing chronic pain and a psychological diagnosis overlapping with one another. She wondered whether a psychiatrist would find that the Claimant has what used to be called pain disorder and is now termed somatic symptom disorder ("SSD"). She suspects SSD. She does not consider that the Claimant is malingering.

161. She was concerned about his prognosis but considered it important to have a pro-active approach. She believed that the Claimant was not capable of working in his current status.

162. A follow up report was also provided. She reviewed other reports provided by various medical professionals, including:

- (a) Dr. Coghlan dated February 13, 2012 and addendum dated May 15, 2012 and September 14, 2012;
- (b) Dr. Robertson dated March 23, 2015
- (c) Dr. Shane dated December 3, 2014 and follow up dated April 12, 2016; and

(d) Julie Jacquet dated July 7, 2015

163. Dr. Shuckett found that her review of these reports did not alter her previous opinion. She made the following comments regarding Dr. Coghlan's report:

I believe that Dr. Coghlan was dismissive of this patient's pain and suffering and he did not appear to acknowledge the presence of or role that fibromyalgia (of which I found this patient fulfilled both sets of criteria) was a disabling limiting diagnosis for this patient, in contrast to my impression.

EMPLOYMENT WITNESS

D [REDACTED] J [REDACTED]

164. The Claimant was employed at the Penticton Branch of [REDACTED] and D [REDACTED] J [REDACTED] was the general manager of that Branch. The Claimant's salary was \$25.00 an hour. In his Affidavit, he advised that the Claimant was employed with the company between June 9, 2011 and July 13, 2011. He understood that the Claimant did not have a red seal designation, but learned mechanics at his prior jobs. He considered that, knowing the Claimant's character and position, he would have easily continued beyond the probation period.

165. The employment contract attached shows a starting wage of \$25.00 per hour, with benefits after three months. Vacation was two weeks paid and went to three weeks after five years of continuous service.

EXPERT WITNESSES FOR THE RESPONDENT

Dr. Koch

166. Dr. Koch is a psychologist who, at the request of the Respondent, met with the Claimant on April 28, 2016 and prepared a report.

167. In his report, he emphasized the pre-existing psychological problems that the Claimant had experienced prior to the Accident.

168. He found that the Claimant had somatic symptoms disorder (SSD) at the time of the assessment. He wrote the following:

It is very clear that L [REDACTED] suffers from a Somatic Symptoms disorder that encompasses his various complaints of headache, neck and lower back pain, numbness in his fingers, as well as nausea and diarrhea. Psychological characteristics associated with his physical complaints include attempts to distract himself from thoughts of his pain, fear of falling (and of re-injury), very high subjective pain experience (even when compared to a sample of chronic pain patients), high levels of emotional

responding to pain (as measured by Pain Catastrophizing Scale), high fear that pain will lead to physical damage (as measured by the SOPA), and high levels of self rated pain-related disability compared to the average chronic pain patient. As an illustration of the severity of his somatic preoccupation, his score on the PAI Somatic Problems scale is higher than 99.9% of people in the general population and higher than 87% of MVA psychological injury claimants.

169. In his report, Dr. Koch ties the Claimant's pre-existing physical complaints, as far back as 2007, to SSD. He considered that to a substantial degree, the Claimant's SSD predated the subject Accident. He also considered it likely that the Accident aggravated the Claimant's SSD. Dr. Koch also wrote that it is possible that his SSD symptoms have not changed over time. He advised that he defers to his medical colleagues about organic changes associated with the Accident.

170. He also considered that the Claimant had Panic Disorder prior to and following the Accident and that this disorder had not changed substantially. It is a condition that generally waxes and wanes over time and his presentation of it, according to Dr. Koch, is similar before and after the Accident. Dr. Koch considered that it is unlikely that the Accident has contributed to the Claimant's Panic Disorder.

171. With respect to PTSD, Dr. Koch considered that there is strong evidence that the Claimant suffered PTSD secondary to his skidder accident in the 1970's and that it persisted into 2008 or 2009. Dr. Koch considered that it is possible that the Claimant's cautious driving could be a continuation of the previous PTSD state or a minor relapse.

172. Dr. Koch also raised the issue of depression. He found that the Claimant had a clinically severe episode of depression between at least 2008 and 2010. Dr. Koch further found that it is possible that the Claimant still suffered some level of depression. However, he also commented that depression can often re-occur:

...depression is generally a recurrent condition. That is, although the base rate of Major Depressive Disorder in men is between 4 and 12 percent, the risk of a future episode of Major Depression given one previous episode increases to 60 percent. Thus, it is possible that L [REDACTED] pre-MVA depression never entirely remitted. Even if it did entirely remit, he was more likely than not to develop a future episode of depression independent of any particular future personal or health stressor.

173. Dr. Koch advised that the Claimant had been at high risk for a vocational disability since at least 2008. He further considered that by 2008, the Claimant had entered the high-risk age range for vocational disability with a 16-17% risk of same. He advised that a combination of depression and chronic pain are known to lead to early retirement in men. He also considered that the Claimant's educational level, and the fact that he would likely be performing manual labour, would place him at heightened risk for early retirement. Dr. Koch provided the following opinion:

All the above has two implications. First, given his age, education, and current health condition, it is very unlikely that L [REDACTED] will return to full time work and sustain it without health-related interruptions until the usual retirement age of 65 years. Second, he was very likely on a course for such vocational disability and early retirement prior to the subject MVA given his pre-MVA mental and physical health conditions.

174. Dr. Koch recommended that the Claimant seek psychological treatment for his pain complaints, particularly in the setting of a multi-disciplinary pain management clinic with an emphasis on psychological management as well as increasing his physical fitness. Dr. Koch also recommended that the Claimant be referred to psychological treatment for his Panic Disorder.

175. As a psychologist, he agreed during cross examination that he is not qualified to comment on physical symptoms. He is qualified to comment on psychological symptoms.

176. I note that the Claimant has sworn an Affidavit in these proceedings expressing his concerns with how Dr. Koch treated him during the assessment. He felt that he was not allowed to answer the questions and that he had to speak rapidly to avoid getting cut off by Dr. Koch. He also considered that he was examined for 5 ½ hours with only a noon break and that he was emotionally fatigued and emotionally drained during the examination.

177. With respect to Dr. Koch's evidence, I find that his comments regarding the Claimant's history of depression potentially having an impact on his employment irrespective of the Accident to be one of many factors to consider with respect to wage loss. Another factor I have considered, as admitted by Dr. Koch in cross examination, is that the Claimant's good level of social support would positively impact his ability to stay employed. Dr. Koch also advised that 50% of people who suffer from major depressive disorder are still working.

178. I note that I did not have the benefit of having a report from Dr. Agbodo, who is a psychiatrist who treated the Claimant Pre-Accident. Such a report would likely have helped clarify the Claimant's Pre-Accident psychological state.

Dr. Rickards

179. Dr. Rickards is an orthopaedic surgeon who, at the request of the Respondent, met with the Claimant and prepared a report. I find that his report is of limited usefulness in this case, given that the Claimant's complaints and medical concerns that are the subject of this litigation are not those that are generally treated by an orthopaedic surgeon. In his report, Dr. Rickards provided that "Prognosis for this unusual presentation is unclear and I would defer to health professionals who more frequently assess and deal with cases suggestive of fibromyalgia syndrome." His recommendations regarding further treatment are, "A structured and well participated in exercise regime in order to increase flexibilities and strength and spinal and peripheral musculoskeletal areas".

GENERAL DAMAGES

180. With respect to general damages, the Claimant claims the amount of \$180,000.00. The Respondent argues that general damages should be set at \$112,500.00.

181. The Respondent provided the case of *Stapley v. Hejslet*, 2006 BCCA 34. In that case, the Court emphasized that there are more considerations than simply comparing injuries when assessing non-pecuniary damages. Paragraph 45 of the case provides as follows:

Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

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" (Cooper-Stephenson and Saunders, *Personal Injury Damages* in Canada (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff. An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[Emphasis added.]

182. Paragraph 46 of the case sets out a list of non-exhaustive factors to be considered when determining non-pecuniary damages:

The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (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;

I would add the following factors, although they may arguably be subsumed in the above list:

- (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] B.C.J. No. 163 (QL), 2005 BCCA 54).

183. The Claimant relies on the case of *Kim v Lin*, 2016 BCSC 2405 for the assessment of non-pecuniary damages. The plaintiff was in a car accident in 2007. She was 27 at the time of the accident. She was 36 at the time of the trial. Her injuries included back pain (soft tissue injuries), sacroiliac injuries (pelvis joint pain), a concussion, headaches, chronic pain syndrome, fibromyalgia, depression and anxiety. The plaintiff was found to have had no pre-existing conditions. She also suffered emotional damage in that her relationship with her husband and her children was affected. Her husband's hand was crushed when he was younger, which made him more dependent on her. As a result of her accident, the plaintiff was not able to provide her husband with the support that he had come to rely on. She was also not able to pursue her intended career as a dietician or as a sanitation technician in food services. She was found to have been a healthy young woman with no significant medical issues prior to the accident. She had enjoyed an outdoor lifestyle and socialized on a regular basis. As a result of the accident, she was rendered permanently unemployable. The Court found that the plaintiff suffered a profound loss of capacity, both to perform household tasks and carry out childcare responsibilities. The plaintiff was awarded \$175,000.00 for non-pecuniary damages.

184. The Claimant also relies on the case of *Sebaa v Ricci*, 2015 BCSC 1492 for the assessment of non-pecuniary damages. The plaintiff was in a head-on motor vehicle accident in 2010. She was 33 at the time of the accident and 38 at the time of the trial. Prior to the accident, the plaintiff had no physical or mental limitations. She was on probation at a new job. It was determined that she would not have been kept on past her probationary period due to a shortage in work, therefore she would have been laid off no later than four months after the accident. The plaintiff's injuries included chronic pain disorder with both psychological and physical workings, including PTSD, depression and anxiety. Clinical examinations did not pinpoint any clear physiological remnant of the original injuries that are producing her pain. She has fluctuating, but always present, pain in her neck, left shoulder, left hand, right knee and right foot as well as excruciating headaches and pain-disturbed sleep. Her injuries from the accident impacted her and her husband's plans to begin In Vitro Fertilization (IVF). The plaintiff has also become socially isolated. The plaintiff and her husband relocated to Qatar in 2014 prior to a decision being rendered. The Court also found that though it was not likely that the plaintiff would fully return to her previous level of functioning, mental health, employment and social engagement, there was a realistic possibility that she would improve past the point she was at, at the time of trial. The plaintiff was awarded \$180,000.00 for non-pecuniary damages.

185. The Claimant further relies on the case of *Zwinge v Neylan*, 2017 BCSC 1861 for the assessment of non-pecuniary damages. The plaintiff was 46 at the time of the accident and 49 at the time of the trial. The plaintiff was involved in a head-on motor vehicle collision that resulted in long-lasting soft tissue injuries and spine facet joint syndrome as well as PTSD, anxiety, headaches and depression. The plaintiff had a troubled background. He was a drywaller, which is a physically demanding job. The job required that he have the ability to lift between 40-100 pounds and to work overhead on ceilings. He had not worked since the accident. He lived with his 84-

year-old father and slept up to 20 hours a day. He rarely saw his children from his second marriage and did not see his children from his first marriage at all. He had no personal life, and was described by his ex-wife as shrunk and diminished since the accident. The plaintiff's anxiety and physical condition prevented him from driving and made routine chores difficult. The Court also noted that the plaintiff suffered from a pre-existing and active Substance Use Disorder. The plaintiff was able to live independently and care for himself since the accident. The court awarded the plaintiff \$150,000.00 for non-pecuniary damages.

186. The Claimant also relies on the case of *Kallstrom v Yip*, 2016 BCSC 829 for the assessment of non-pecuniary damages. The plaintiff was involved in six separate motor vehicle accidents between March 23, 2001 and December 9, 2004. Four lawsuits were tried together in this one case. The plaintiff was 44 years old. She was between 29-33 years old at the time of her accidents. The plaintiff suffered disabling neck and back pain, headaches, and depression as a result of the multiple accidents. She was previously a happy, successful, active young single mother with a wide circle of friends although she had some pre-existing issues with pain, depression and sleep, but not to the extent that her lifestyle was significantly impaired. The plaintiff had held multiple jobs for short periods of time prior to and following her accidents. In addition, following her accidents, she attempted suicide multiple times. The court awarded the plaintiff \$180,000.00 for non-pecuniary damages.

187. The Claimant further relies on the case of *Pololos v Cinnamon-Lopez*, 2016 BCSC 81 for the assessment of non-pecuniary damages. The plaintiff was 41 years old at the time of the accident and 49 at the time of the trial. He worked in the construction industry. The accident resulted in soft-tissue injuries to his neck, lower and mid-back, bruising on his chest, left arm, pain in both shoulders, arms and elbows, and his tailbone and abdominal pain. He developed sleep disturbance and anxiety as well as depression. There were no substantial pre-existing difficulties. Prior to the accident, the plaintiff was a reasonably active person. He enjoyed cooking, music and cycling. He was also actively involved with his son. They would go to the park and go on short hikes. After the accident, the plaintiff became isolated. His relationship with his family, including with his son, deteriorated and he had few friends. His life had little content and he had not been able to attend to his personal hygiene following the accident. The court awarded the Plaintiff \$180,000.00 for non-pecuniary damages.

188. The Claimant also refers to the case of *Redmond v Krider*, 2015 BCSC 178 for the assessment of non-pecuniary damages. The plaintiff was in a motor vehicle accident in 2010. She was 47 at the time of the accident. The plaintiff had been involved in two motor vehicle accidents (1990 and 1996), prior to the one which is the subject of the court decision. In 1991, following her first motor vehicle accident, the plaintiff was diagnosed with fibromyalgia. Following the 1996 accident, the plaintiff had a recurrence of fibromyalgia and she experienced pain throughout her body including muscular pain in her arm, shoulder and hips. She was feeling back to normal by 1999. Following the 2010 accident, the plaintiff experienced terrible pain in her neck, back, legs, hips, arms and back of her shoulders as a result of soft tissue injuries. She also experienced a flare up of fibromyalgia and cervicogenic headaches. She exhibited depressive symptoms and anxiety as well as reduced cognitive ability. Though she was able to still work, the plaintiff's quality of life had changed drastically. She could no longer enjoy physical fitness and life with her partner, she could no longer travel and live a pain-free life and she came home from work

exhausted and preoccupied with measures to try to lessen her pain. The court awarded the plaintiff \$150,000.00 for non-pecuniary damages.

189. The Respondent relies on the case of *Rizzotti v. Doe*, 2012 BCSC 1330 for the assessment of non-pecuniary damages. The plaintiff was in excellent health prior to being involved in a series of three motor vehicle accidents, the first and most serious of which was a head on collision which happened in June 2005. The plaintiff was between 42-45 years old at the time of the accidents and she was 49 years old at the time of the trial. The other two accidents exacerbated her condition. Liability was admitted in all three accidents. She sustained both physical and psychological injuries from the accidents. In the case, Mr. Justice R.S. Tindale preferred medical evidence from Dr. Anderson and Dr. Kettner over another Doctor. Dr. Anderson diagnosed the plaintiff as having ongoing depressive symptoms consistent with a chronic adjustment disorder with a depressed mood. He diagnosed the plaintiff with chronic post-traumatic stress disorder in partial remission. The psychologist, Dr. Kettner, also diagnosed her with post-traumatic stress disorder. Her physical injuries were found to be chronic and longstanding. She received injuries to her neck, shoulders, chest, lower back, abdomen, left hip, her left knee and her tailbone. She testified that her left hip bothered her for a long time and that her tailbone still bothers her on a daily basis. The plaintiff was awarded non-pecuniary damages of \$110,000.00.

190. The Respondent also relies on the case of *Bruno v. Diamzon*, 2014 BCSC 1270 for the assessment of non-pecuniary damages. The plaintiff was 41 years old at the time of the accident.

191. In paragraphs 124 to 128 of the case Madam Justice Ross provides as follows:

[124] In the present case, prior to the accident Mr. Bruno had a fulfilling life. He enjoyed his work, and took pleasure in the companionship of his friends and family. He took great pleasure in his hobby, caring for and showing his Mustang, spending hours detailing his car.

[125] The physical, psychological and emotional consequences of the accident have negatively affected all aspects of his life. He is in constant pain. The functionality of his back is impaired. His sleep is impaired and he suffers from chronic fatigue. He requires medication and therapy to deal with his anxiety, panic attacks, depression and agoraphobia. Ordinary activities of daily living are now a struggle, and have become things he must force himself to do as part of his “stress therapy”. He is not able to work. He is not an equal partner around the home. While his condition, with appropriate treatment and medication, is not likely to deteriorate further, his prognosis for substantial improvement is poor.

[126] I agree, however, with the defence that this court must consider the possibility that given his vulnerabilities, Mr. Bruno would have likely developed some or all of these conditions in any event. As Smith J.A., for the court, noted in *T. VV.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 28:

[28] ... a pre-existing condition, whether it is quiescent or active, is part of the plaintiffs original position.

[127] The appropriate approach was described by Newbury J.A. in *York v. Johnson* (1997), 37 B.C.L.R. (3d) 235, 148 D.L.R. (4th) 225 (C.A.) at paras. 5 and 6 as follows:

5 It is certainly difficult to differentiate conceptually in a case such as this one, between the court's task with respect to causation - making findings as to past events which may result in the apportionment of damages - and the court's task with respect to the measurement of damages - a task that includes considering events that might have occurred in future "but for" the accident and what may happen in the future in light of the accident, and which usually results in the discounting or reduction of damages...

6 Of course, the judgment as to the measure of damages is a much more subtle one than that as to causation, not only because it involves a consideration of mere contingencies as well as probabilities, but because of the range of results available in the discounting of the award, as opposed to the "all or nothing" choice that must be made with respect to causation. But the two issues do not operate at cross-purposes even where, as in this case, there is only one "cause" in tort law for the plaintiff's injury. The question is what award is appropriate to reflect the difference between the plaintiff's original state (including the risk, to which she was subject immediately prior to the accident, of the relapse of her latent condition) and the state in which she now finds herself.

[Emphasis in original.]

[128] In this case, Mr. Bruno's vulnerabilities are part of his original condition. However, in my view, the risk of him suffering these particular consequences absent the accident is minimal. He had experienced the stress of the workplace, coped with his irritable bowel syndrome and prostatitis, and experienced a stress equal to or greater than the CRA incident without developing anxiety, depression, insomnia, agoraphobia, chronic pain syndrome or panic attacks. He had demonstrated a level of robustness despite these vulnerabilities.

The plaintiff was awarded non-pecuniary damages of \$120,000.00.

192. The Respondent also relies on *Morlan v. Barrett*, 2012 BCCA 66 for the assessment of non-pecuniary damages. This is a British Columbia Court of Appeal Case. The plaintiff was 46 years old at the time of the accident.

193. In that case, Ms. Morlan was involved in two car accidents in quick succession. Following the accident, she had pain in her neck shoulders and upper back. She also had headaches. Nine months after the accident she was diagnosed with fibromyalgia. She took both over the counter

and prescription medication for the pain. She also obtained some relief from a variety of treatments including physiotherapy, massage, kinesiology, acupuncture and psychological counselling. She found it difficult to continue to commute to the job that she had prior to the accident and continued for over three years after the accident, so she switched to a job that had a shorter commute. The new job paid less per hour, but involved more work hours, resulting in an increase to her annual income.

194. In paragraphs 69 and 71, the Appeal Court found as follows:

[69] Ms. Morlan also relies on *Courdin v. Meyers*, 2005 BCCA 91, 37 B.C.L.R. (4th) 222. In that case, a 39-year-old plaintiff sustained minor soft tissue injuries in a motor vehicle accident. A year and a half later she was diagnosed with myofascial pain syndrome which had crippling effects on her life. Her prognosis was "very guarded". A jury awarded non-pecuniary damages of \$1 million. Subject to the defendants' right to appeal, the parties agreed to reduce that award to \$292,823.00 in order to comply with the then rough upper limit. On appeal, this Court, keeping in mind that defendants had chosen to have the matter tried by a jury, reduced the award to \$200,000.00.

[70] Returning to the case at bar, it is clear that prior to the accidents Ms. Morlan was a hard-working, motivated individual who applied a high level of energy in all aspects of her life. She has a long association with the labour union movement and derived much satisfaction from her job with the B.C. Fed, a job she can no longer perform. The accidents robbed her of her energy and left her unable to do much of what she did before. She now suffers from chronic pain and relies on medication to help get through each day.

[71] Although \$125,000.00 is a generous award, it cannot, having regard to recent awards in similar cases, be said to be so excessive as to warrant appellate intervention.

195. The plaintiff was awarded non-pecuniary damages of \$125,000.00 by the trial judge. The British Columbia Court of Appeal concluded that though \$125,000.00 is a generous award, it was not so excessive as to warrant appellate intervention.

196. In the case at hand, the Claimant was looking forward to a bright future after overcoming some difficulties in his life. His divorce was behind him and he was enjoying his relationship with D [REDACTED], including living a very active lifestyle that included sports and travelling. He was physically fit and he seemed to have fully recovered psychologically from previous problems he had, although there was a possibility that depression, anxiety and post traumatic stress disorder might impact him once again. He and his spouse had a personal partnership and an investment strategy. They had amalgamated their properties. In spite of the fact that he was in his 50's he decided to take on a job as a labourer doing mechanical work in a different industry, a position that he thought would

utilize mechanical skills he learned in the logging industry and throughout his life. His psychological and physical injuries from the Accident are such that his personal and professional life are not anticipated to ever be the same. He is no longer leading the same active and dynamic personal life that he was before the Accident. He has difficulty with intimacy, even to the point that he has trouble receiving a hug from his partner. He cannot help his elderly parents like he used to. His social life is impaired. His home and yard are not kept to his standards. Given all of the factors, I award the Claimant \$130,000.00 in non-pecuniary damages.

PAST AND FUTURE WAGE LOSS

197. The Claimant claims that the past net income loss should be set at \$286,400.00. Another figure was claimed in the alternative, calculated up to the arbitration date, of \$323,000.00. He further claims loss of capacity to work at \$346,648.00 and loss of capacity to work specifically with respect to the rental properties at \$150,000.00. Using the original figure for past net income loss, the total is \$783,048.00.

198. The Respondent argues that the amount for past loss of earning capacity should be set at \$143,133.00 and that future earning capacity should be set at \$250,000.00, for a total of \$393,133.00.

199. I have considered the legal test for assessing damages for lost income as provided for in the case of *Grewal v. Naumann*, 2017 BCCA 158 at paras, 48 and 49, which provides as follows:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

200. I find that there is a real and substantial possibility that the Claimant has suffered both past and future income loss.

201. In considering the award under this head of damage, I have taken into account the Claimant's employment and earnings history. The Claimant had a strong past employment history, including 29 years in the logging industry. However, from November 2007, until early June 2011

the Claimant was not employed. He was diagnosed with anxiety, depression and post traumatic stress disorder and was disabled from working as a logger. Work stress, past accidents and a very acrimonious divorce from his ex-wife contributed to his psychological diagnosis. Had the Accident not occurred, these psychological problems may have re-occurred in the future.

202. During the approximately three and a half years he was off work, he filled much of his time with physical activity, including performing house work, maintenance, renovations, and yard work. During those three and a half years, he also helped his parents, and performed some maintenance and renovations on rental properties. He enjoyed activities with his common law spouse, including travelling, sports and socializing. According to Dr. Robertson, he was fully recovered by July 2011.

203. Prior to changing careers, he did not train for a different position. Instead, he participated in some vocational testing during his stress leave, which showed that he had an aptitude to be a mechanic. Based on his interest and mechanical experience, he looked for a job as a mechanic. He started at a job, and then a few days later was offered a job at [REDACTED], which suited him better, for a variety of reasons, including because it was inside and did not involve shift work.

204. The Claimant had a lot of enthusiasm and aptitude for working with his hands, but he was in the early weeks of his employment when he was injured in the Accident. He was working under the supervision of a red seal mechanic. According to D [REDACTED] J [REDACTED], General Manager of BC Operations for [REDACTED], the Claimant was hired as a general labourer with mechanical knowledge. The Claimant had an opportunity for an apprenticeship and advancement. In the approximately 25 days that the Claimant worked at [REDACTED], the company had understandably not dealt with the apprenticeship program yet. The work was physically very demanding. It is notable that neither the mechanic that the Claimant worked with when he was in the logging industry, nor the mechanic that he directly worked for at the [REDACTED] shop provided any evidence in this Arbitration. The Claimant had yet to receive an employment evaluation and was still in the probation period at work. It is obvious from the Claimant's evidence that he enjoyed the work, but it was very early in his employment to be able to predict whether he would succeed at the job and stay in that position until retirement, or whether he would be changing jobs, or even industries again.

205. In spite of his recovery, there is a possibility that even without the intervening Accident, his psychological state might have interfered with his employment prospects sometime before he wanted to retire. In fact, there was a real possibility that he would be off work on long term disability again before retirement.

206. At the time of the Accident, the Claimant also had other obligations that may have interfered with his plans to work at [REDACTED] until retirement, including helping his elderly parents.

207. Keeping in mind that damages are assessed, not calculated, and that mathematical calculations are instructive, but arriving at a fair amount is more than a mathematical calculation, I award \$230,000.00 for past loss of earning capacity.

208. For future loss of earning capacity, I consider that the “risk and choice” estimates prepared by Curtis Peever are the appropriate starting point for assessing this head of damage, as opposed to the risk model, which does not account for any choice that the Claimant may make to leave the employment market. There was no direct evidence provided by the Claimant regarding what age he would have retired at, if the Accident had not occurred, nor was the evidence provided under cross examination. Curtis Peever used age 67 as the retirement age as one of his assumptions obtained from the communication with Claimant’s counsel. However, the “risk and choice” model to the Claimant’s age 67 provides an estimate roughly equivalent to L [REDACTED] participating in the labour market until retirement at age 63. I have considered that the job he was in was physically very demanding, which would have meant that he would have needed to retire early if he was no longer able to perform the physical tasks. I have also considered that there was a possibility that he would have needed to retire early because of depression, or another psychological condition, or would have chosen to retire early for family reasons.

209. Taking into account various factors, I award \$250,000.00 for future loss of earning capacity.

210. With respect to loss of capacity dealing with the revenue properties, the Claimant claims the amount of \$150,000.00. The Respondent argues that no damages should be awarded for this.

211. The Claimant and D [REDACTED] swore Affidavits regarding their property investment histories. Both the Claimant and D [REDACTED] have also provided evidence regarding his ability and history renovating rental properties. There is also evidence to support that property investment has been financially beneficial to both of them, including investing in their primary residences and investing in rental properties. The couple was looking for a property to invest in at the time of the Accident.

212. It has not been proven on a balance of probabilities that “but for the Accident”, the couple would have been able to invest in further properties. Little evidence regarding their financial situation was provided. It has not been proven that the couple would have qualified for further financing if the Claimant had continued to work. The Claimant had recently become employed at the time of the Accident and it has not been proven that their combined income would have been sufficient for them to qualify for financing on further properties, or how long he would have had needed to have been employed for before that happened. Little information was provided concerning the couples’ joint and separate assets and liabilities. They had not qualified for further financing or made an offer on a further property at the time of the Accident. As a result, I decline to provide an award for loss of investment opportunity.

COST OF PAST AND FUTURE CARE

213. With respect to past loss of housekeeping and cost of past care, the Claimant claims the amount of \$94,774.50. For future loss of housekeeping and costs of future care, the Claimant claims \$385,340.50. The total claim for past and future loss of housekeeping and past and future care is \$480,115.00.

214. The Respondent argues that the award should be \$5,000.00 for past loss of housekeeping capacity and \$48,280.00 for future loss of housekeeping capacity. The Respondent further argues that the cost of future care award should be \$25,227.50. As a result, the Respondent argues that the total amount that should be awarded for past and future loss of housekeeping capacity and cost of future care should be \$78,507.50.

215. The Claimant supports his claims under these heads of damage with medical evidence, his Affidavits and those of family and friends, and the reports from Julie Jacquet and Curtis Peever.

216. Pursuant to *Campbell v. Banman*, 2009 BCCA 484, referred to in paragraph 189 of *Kim v. Lin*, 2016 BCSC 2405, “It is now settled law that in British Columbia an injured plaintiff is entitled to an award for loss of housekeeping capacity if s/he can establish such a loss”. This includes both past and future housekeeping capacity.

217. In the case of *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232 the Court of Appeal in paragraph 65 found that “...it was a relevant consideration for the judge to consider the actual amounts spent on house-cleaning following the accidents -- as a single factor among others -- when determining how much benefit Mr. Reynolds would have received through his own house-cleaning capacity but for the accident.”

218. The claim for past housekeeping includes claims for interior housecleaning, house maintenance, yard maintenance tree care, vehicle maintenance and maintenance to five rental properties.

219. Loss of housekeeping was discussed in *O’Connell v Yung*, 2012 BCCA 57 at paragraphs 65 to 67. Paragraph 65 provides as follows:

As explained by Professor Cooper-Stephenson in *Personal Injury Damages in Canada*, 2d ed. (Scarborough: Carswell, 1996) at 315, the claims for loss of home making capacity and for future cost of care are distinct:

The claim for loss of homemaking capacity is for the loss of the value of work which would have been rendered by the plaintiff, but which because of the injuries cannot now be performed. The plaintiff has lost the ability to work in a manner that would have been valuable to her- or himself as well as to others. The claim is not the same as that under future cost of care, which is for the value of services that must now be rendered to the plaintiff. It is true that the two claims may overlap—just as the normal claim for loss of earnings and cost of care may do so—because the cost of care claim may include items which the plaintiff-homemaker would have performed but for the accident. However, a large portion of homemaking involves the performance of work for others, namely, the family unit, and in many cases the claim for loss of homemaking capacity is wholly distinguishable from that for cost of

care, particularly if the plaintiff is hospitalized. The loss is a "negative" loss, in the sense that it is the loss of something the plaintiff would have had (her homemaking work) but which she now does not have because of the accident. This places it squarely under the head of loss of working capacity. In contrast, the expense of services provided by others to care for the plaintiff are "positive" losses—the addition of an extra expense—and they clearly fall under cost of care.

220. The Respondent is concerned about the reliability of the Julie Jacquet's report in several respects.

221. In legal argument, the Respondent pointed out that the Claimant was able to devote more time to home maintenance and repair during the three and a half years he was on stress leave than he would have been able to when he was working. I agree that working would have reduced the hours that the Claimant had to participate in non-work-related activities. The change in lifestyle that the Claimant had undergone just had weeks before the Accident was not addressed in the Claimant's case, but was brought up during cross examination. There is nothing in Julie Jacquet's report to address the significant decrease in time available to the Claimant to perform non-work-related tasks once he returned to work. It was also difficult to know from the evidence how efficient the Claimant was at performing household tasks, including cleaning and renovating, before the Accident. The Respondent points out that a professional may have been more efficient in performing tasks, but no allowance has been made for this.

222. The Respondent also argues that the Claimant was able to perform some house cleaning. This is consistent with the evidence. The Claimant agrees that he has been performing some cleaning tasks post-accident. Julie Jacquet also referred to some adaptive cleaning techniques that he could utilize. However, she recommends that professional cleaning be provided to 83.3 years old, all on the basis that he would have been living in the same size home for his lifetime and following the same cleaning and maintenance and repair routines for that entire length of time, had the Accident not occurred.

223. The Respondent further argues that the Claimant has been able to cut his lawn, as evidenced in Julie Jacquet's report, which outlines his adaptive technique. Yet, the report recommends hiring outside help 26 times a year to mow the lawn, which is every second week, including in the winter months.

224. The Respondent also points out that one of the investment properties mentioned is in Arizona and is managed professionally. It is further pointed out by the Respondent that when a rental property requires work, there are often time constraints, such as performing renovations during a change in tenancy, and much of this work may have been performed by a third party due to the fact that the Claimant would be under time constraints to drop everything to perform these tasks. I find that had the Claimant continued with his employment, he would likely not have had the time to do a significant amount of repair and maintenance work on the rental properties.

225. Julie Jacquet points out in her report that Statistics Canada provides that males spend an average of 58.44 hours per year on home maintenance and repairs. "Activities included in this category include interior and exterior maintenance and repairs, vehicle maintenance, and other household improvements". Julie Jacquet is suggesting that the Claimant, while working, would be performing housekeeping, house maintenance, yard maintenance and vehicle maintenance for many more hours than the average male spends. For cleaning alone, she has provided recovery for 104 to 156 hours per year based on a professional performing the tasks.

226. I find that had the Accident not occurred the Claimant was unlikely to perform the regular tasks provided for in Julie Jacquet's report with the frequency with which she is suggesting. The Claimant's time for frequent tasks would have either been limited or some tasks would have been performed partially by someone else, or would have been performed by the Claimant to the exclusion of the more time consuming, one-time tasks, such as renovations. There simply would not have been time to do everything after he returned to full time work.

227. For the tasks that would be performed on a one-time only basis, either to his home or to the rental properties, I find that he may have performed them over several years and would have had limited time to do so. I base this finding on several factors. The Claimant is close with his elderly parents and assists them as best he can, sometimes with every day tasks and sometimes with larger ones. He had also taken on a new full-time job, which may have involved some overtime. His new position at [REDACTED] allowed for two weeks holiday per year to start. He and D [REDACTED] enjoyed going on holidays and had planned on continuing to do so. If the Accident had not occurred, much of his holiday time would have been spent travelling. That leaves statutory holidays, weekends and weeknights for visiting and helping his parents, socializing and enjoying fitness activities, shopping, housework, yard work, house maintenance, home renovations, looking for rental properties and maintaining and renovating the rental properties. Had the Accident not occurred, it is likely that the Claimant would have spent more than the 58.44 hours per year on the activities included in the home maintenance and repair category for the average male, but I find that the level of support proposed by Julie Jacquet is excessive.

228. The Respondent expressed a further concern that Julie Jacquet delegated the task of obtaining the cost quotes for homemaking and renovation services to the Claimant. As a result, I have considered this when determining the appropriate dollar value for the services. There is also the possibility that the Claimant can retain someone to perform the tasks at a lesser cost than the companies that were approached.

229. With respect to past loss of housekeeping, receipts have not been provided for costs that have been incurred retaining others to perform services that the Claimant would have performed, but for the Accident. Although the lack of receipts does not mean that the Claimant did not suffer a loss, it is a factor that I have considered.

230. With respect to past loss of housekeeping, I have used the low cost estimates from the report of Curtis Peever as a starting point. I have considered that the Claimant still cleans the house,

although not to the standard and frequency he did before. I have allowed for a reduced amount of housekeeping support. Given that the Claimant has been able to mow the lawn, albeit in stages, I have not provided compensation for this.

231. I award \$25,600.00 for past loss of housekeeping.

232. With respect to future loss of housekeeping, many of the same considerations apply. I have allowed a claim for interior housekeeping, at a reduced amount. I have reduced the amount awarded by not allowing the amount for lawn mowing, as the Claimant appears able to perform this task. I have not allowed the amount for building the retaining wall, since based on the evidence, the Claimant would have retained someone else to do this project, albeit perhaps he would have been able to assist with it. Given the priority that the Claimant places on his home, I believe that on a balance of probabilities if the Claimant had not been injured in the Accident, he would likely have worked through the renovations to his home over a number of years. I also find that he would have spent a limited amount of time repairing and maintaining the rental properties. I consider that had the Accident not occurred, he would have performed some housecleaning for his lifetime and the compensation provided accounts for that. It is also reasonable to consider that he would not have been performing the exterior house maintenance, yard maintenance, tree care and vehicle maintenance in his old age. I make this finding because individuals often decide to move to a home that is easier to care for as they age, or if they stay in the same home, they perform less physical work and sometimes hire others to do it. The amount awarded for future loss of housekeeping is \$92,000.00.

233. With respect to costs of future care, the award includes an amount for all of the pilates sessions claimed by the Claimant, as well as for the pain clinic and psychological counselling as these may benefit the Claimant in the future. I have included support for an aquatic membership at a value of \$1,500.00, taking into account that the Claimant may very well not participate in a fitness community for his entire lifetime. The importance of a proper exercise routine and further psychological counselling was supported by the medical evidence. I consider that the claim for the heating pad is not supported by the medical evidence, but the claim for the mouth guard is. I have allowed for the claims for medication, as there is no guarantee that he will continue to receive Cymbalta without charge. The amount awarded for future costs of care for the Claimant is \$47,326.00.

SPECIAL DAMAGES

234. With respect to special damages, the Claimant claims \$12,003.47. The Respondent argues that the award should be \$9,032.47. I have included compensation requested for all of the prescriptions. No receipts have been provided for vehicle maintenance. Also, there is a question as to how much was paid by the Claimant for gas when he borrowed his parent's car. I have allowed for the mileage charged at 25 cents per mile as opposed to the 50 cents per mile claimed for the Lakeside Fitness visits. I have allowed the claim for removal of the poplar of \$504.00 but not the removal of the Siberian Elm, which properly was performed by professionals. As a result, I award \$9,032.47 in special damages.

COSTS AND DISBURSEMENTS

235. Counsel has agreed that they would like the opportunity to make submissions on costs after having an opportunity to review the award.

AWARD

The Claimant is awarded damages as set out above and summarized below:

a) Non-pecuniary damages	\$130,000.00
b) Loss of past income earning capacity	\$230,000.00
c) Loss of future income earning capacity	\$250,000.00
d) Past loss of housekeeping, future loss of housekeeping, cost of future care:	
a. past loss of housekeeping	\$25,600.00
b. future loss of housekeeping	\$92,000.00
c. cost of future care	\$47,326.00
e) Special Damages	<u>\$9,032.47</u>
Total	\$783,958.47

I consider the damages awarded to be fair to both parties.

Counsel for the parties have agreed that they will deal with adjustments that arise from my award. The previous payment made by ICBC to the Claimant pursuant to the tort limit from the other driver's policy must be taken into account. This award is subject to adjustment pursuant to section 98 of the *Insurance (Vehicle) Act*. The award for loss of future income earning capacity must also be reduced by an amount equal to the disability payments the Claimant receives up to the time he is no longer eligible for such payments. No evidence was lead and submissions were not made with respect to a management fee or tax gross-up on this award. The parties are invited to make submissions on adjustments to me, if they are unable to come to an agreement on these issues. The parties are also invited to make submissions regarding costs. If the parties decide to make further submissions they must contact me within 90 days of the award being released to them so that arrangements can be made.

Elaine T. McCormack