IN THE MATTER OF AN UMP ARBITRATION
PURSUANT TO Section 148.2(1) of the Revised Regulation to the *Insurance (Vehicle) Act* (B.C. Reg. 447/83) and the *Arbitration Act*, S.B.C. 2020, c.2 (formerly the *Commercial Arbitration Act* R.S.B.C. 1996, c.55)

BETWEEN:

G.D.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

ARBITRATOR: **Vincent R. K. Orchard, K.C., C. Arb.**

COUNSEL FOR THE CLAIMANT: **Nathan A. McQuarrie**
Border Solutions Law Group
408-837 West Hastings Street
Vancouver, BC
V6C 3N6

COUNSEL FOR THE RESPONDENT: **Joseph P. Cahan/Eric Lundberg**
Alexander Holburn Beaudin & Lang LLP
2700-700 West Georgia Street
Vancouver, BC
V7Y 1B8

Dates of Hearing: **October 28-31, November 1 and November 4-7, 2024**

Place of Hearing: **Vancouver, B.C**

Date of Award: **March 12, 2025**

TABLE OF CONTENTS

I. INTRODUCTION

A. The November 9, 2019, Motor Vehicle Accident in Anacortes, Washington (the "Washington Accident")

1. On November 9, 2019, on State Highway 20 in Anacortes, WA, the Claimant, G.D., age 30, a high energy, extremely fit, athletic person, dedicated to and adept at various adventurous outdoor pursuits, was injured as a restrained passenger in a stationary B.C. vehicle. The B.C. vehicle was struck from behind, by a following Washington motorist. The B.C. vehicle was insured by the Respondent Insurance Corporation of British Columbia ("ICBC") under a policy of automobile insurance which policy included coverage referred to as Underinsured Motorist Protection ("UMP"). G.D. qualified as an "insured" for UMP coverage under the B.C. policy. G.D. pursues her UMP claim under B.C. Regulation 447/83 as revised (the "**Revised Regulation**") under the Insurance (Vehicle) Act R.S.B.C. 1996, c. 231 (the "**Act"**). The Revised Regulation mandates arbitration to determine entitlement to an UMP claim if it is not resolved by agreement.

2. The case for the Claimant is that she suffered, as a result of the Washington Accident, multiple, debilitating injuries causing disturbing and unpleasant symptoms and partial disability, leading to substantial interference in her life which is ongoing. She has suffered and continues to suffer functional impairment, both physical and psychological, and a diminished enjoyment of life.

3. The Claimant changed her career plans as a result of the Washington Accident injuries; the evidence is that she is not the same dynamic person she was before it. Fortunately, she is not totally disabled, either vocationally or recreationally, but her activities and abilities have been compromised despite medical treatment and efforts to recover. G.D. determined that her career plan of choice, to become an accredited mountain guide, was no longer realistic given her limitations and diminished capacity. Accordingly, G.D. decided in the summer of 2021 to obtain a position in New Zealand as a schoolteacher. To achieve that goal, she attended university in New Zealand to obtain a master's degree in the field of education. Both G.D.'s parents were schoolteachers and G.D. did have some experience as an ESL teacher in Japan and in working with students for an adventure company in Hong Kong. It is fair to say that a career as a teacher had been a serious option for G.D. but at the time of the Washington Accident and for some time thereafter her career path of choice was to become a mountain guide.

4. In 2022 G.D. completed the master's program in education graduating "with distinction". In 2023 she became employed as a "kaiako" (schoolteacher) at a college in Christchurch where her classes initially included physical education and outdoor education. Her teaching colleagues and college principal speak highly of her teaching abilities. G.D.'s teaching contract has been extended; however, G.D. has reduced her position to part-time as a result of her ongoing symptoms and limitations. Currently she teaches French and outdoor education. As a result, G.D. claims a substantial award for loss of future earning capacity.

5. G.D. accepted $50,000.00 USD from the U.S. insurer of the Washington vehicle as the third-party limits on the vehicle in settlement of a Washington lawsuit. The parties also agreed that an UMP arbitration would proceed in B.C. to determine if G.D. was owed any additional compensation under the UMP provisions of the Revised Regulation. ICBC accepts that the Washington motorist met the definition of "underinsured motorist" in s. 148.1(1) of the Revised Regulation as an owner/operator of a vehicle who is legally "liable for the injury or death of an insured but is unable when the injury or death occurs, to pay the full amount of damages recoverable." In short, ICBC is obligated to pay damages in accordance with B.C. law and subject to the terms and conditions of the UMP provisions of the Revised Regulation.

6. ICBC has not raised a contributory negligence defence; however, ICBC challenges the extent and quantum of damages claimed by G.D. and, importantly, argues that the circumstances of a second motor vehicle accident of October 27, 2020, in which G.D. was a passenger in a New Zealand vehicle rear-ended by another New Zealand motorist on the South Island near the City of Nelson (the "New Zealand Accident"), curtails G.D.'s claim for damages quite substantially, factually and legally. ICBC also raises a causation issue related to two minor head injuries incurred by G.D. in November 2022. ICBC claims the injuries suffered by G.D. in October and November 2020 are divisible injuries for which the Washington State motorist (and therefore ICBC) is not responsible.

B. The Motor Vehicle Accident October 27, 2020 near Nelson, South Island New Zealand (the "New Zealand Accident")

7. The precise facts of the New Zealand Accident are not especially significant. Again, G.D. was a restrained passenger in a vehicle. As I understand the matter, New Zealand is a no-fault jurisdiction with an accident compensation scheme administered by the New Zealand Accident Compensation

Corporation (the "ACC"). G.D.'s testimony, echoed by the testimony of her husband, J.Y., is that her ongoing symptoms from the Washington Accident were temporarily aggravated; there were no new injuries. Their evidence is that the New Zealand Accident caused a "flare up" of pre-existing symptoms form the Washington Accident. The "flare up" lasted a matter of about six weeks to about six months before G.D. returned to a "baseline" of symptoms resulting from the first accident. However, the New Zealand Accident permitted G.D. to claim for additional medical treatments and benefits including a concussion assessment, physiotherapy, occupational therapy and neuropsychological testing/treatment, not available to G.D. on the visa she was issued by New Zealand upon entering the country, unless she paid privately. In August 2021 the ACC stopped paying for treatment benefits. The ACC is not a fault-finding administrative body; no decision by the ACC was put before me as to medical causation. The Respondent suggests that on both a factual and legal basis any award to the Claimant should be reduced by 30-50% to reflect that the New Zealand Accident caused new injuries, much more than a temporary flare up of old symptoms. The Respondent argues that, as a matter of law, ICBC is not liable for damages caused by a tortfeasor in a no-fault jurisdiction where the Claimant has no legal claim in tort and accordingly, ICBC could not seek contribution and indemnity from other liable parties. The question of divisibility of injuries arises at both the causation stage and the assessment of damages stages. The Respondent argues, as a matter of law, that the Claimant's injuries are divisible, leaving ICBC only responsible for the consequences of the injuries from the Washington Accident. The Claimant argues her injuries are indivisible and therefore ICBC is responsible, as an insurer in the shoes of the tortfeasor, for 100% of the Claimant's damages.

C. SUMMARY OF G.D.'S "Original Position" and "Injured Position"/General Legal Principles

8. The Respondent accepts that G.D. was an "avid and accomplished outdoorsperson" and currently endures "fatigue, low mood and headaches." Her credibility has not been questioned nor has the credibility of the lay witnesses been challenged. The evidence proves a consistent narrative that G.D. was a remarkably accomplished young woman who prior to the Washington Accident had an extremely active life of significant achievements. Since her early school days, she has been a gifted athlete. Her "Original Position" included, for example, expert skiing, a national level jump rope championship, intercollegiate track and field, mountaineering, heli-skiing instructor and

guide, sea-kayaking, long distance running, taking international students on adventure expeditions, mountain biking and planning and coordinating "women only" expeditions to remote parts of the world. She was extremely fit, happy, socially well-liked and vocationally active in adventure activities. Following the 2019 Washington Accident her life's trajectory was altered fundamentally; her life became circumscribed by a cascade or constellation of symptoms, both physical and psychological, negatively affecting virtually all aspects of her life. While she has experienced some improvement over the years and has established teaching as a career path, her "Injured Position" is drastically different than her "Original Position". While there is the prospect of more improvement, increased activity, greater achievements and greater enjoyment of life, it seems unlikely she will ever return to the very high level of athleticism and accomplishment which made up her "Original Position". It is the difference in those positions I must assess in arriving at an appropriate level of compensation.

9. In assessing loss and ultimately damages, I must focus on G.D.'s individual loss. I must consider her "Original Position" as it was and might reasonably have been against her "Injured Position" as she is now and will be. The difference between the two positions represents her loss, subject to final consideration of the overall fairness and reasonableness of the award. The central task of the trier of fact is to make a reasonable determination of the injured person "non-injured trajectory" in life compared with his or her "injured trajectory": Gregory v. Insurance Corporation of British Columbia 2011 BCCA 144 at para. 31.

10. In R.G. v. Insurance Corporation of British Columbia, (Arbitration award May 18, 2023), I summarized some guiding legal principles in determining damages for personal injury at paragraphs 37-45 and 47-48 of the award as follows:

> 37. My task and focus in assessing damages is to put the Claimant in the position she would have been in to the extent money may do so had she not been injured in the Accident. Compensation for pecuniary loss should be full in keeping with the principle of "*restitutio in integrum*"; however, compensation cannot be "perfect" or "complete" and there is a duty to be reasonable. As stated by Dickson J. in *Andrews v. Grand & Toy Alberta Ltd*. (1978) 83 D.L.R. (3d) 452 at 463, [1978] 2 S.C.R. 229, compensation must not be determined on the basis of sympathy or compassion for the plight of the injured person. What is being sought is compensation, not retribution. Reasonableness or fairness is achieved by assuring claims are "legitimate and justifiable".

38. However, as was established by the Supreme Court of Canada in the 1978 trilogy of cases, of which the *Andrews* case was one, the principle of restitution has only limited application in assessing non-pecuniary damages.

39. As Mr. Justice Dickson put it in Andrews (D.L.R. at 475):

> There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one.

40. Since the Supreme Court of Canada trilogy in 1978 the courts have adopted the "functional approach" discussed in the Andrews' case to assess non-pecuniary damages. As stated in Andrews [D.L.R. at 476]:

> The functional approach attempts to assess compensation to provide the injured person with "reasonable solace for [his or her] misfortune".

41. In *Lindal v. Lindal* [1981] 2 S.C.R. 629 (1982) 34 B.C.L.R. 273 (S.C.C.) Dickson J. summarized the functional approach as follows [B.C.L.R. 279]:

> The court adopted the third approach, the "functional", which, rather than attempting to set a value on lost happiness attempts to assess the compensation required to provide the injured person with reasonable solace for his misfortune. Money is awarded not because lost faculties have a dollar value, but because money can be used to substitute other enjoyments and pleasures for those that have been lost.

42. Therefore, as much as one would feel sympathy or empathy for the Claimant I must be guided by the above principles concerning pecuniary and non-pecuniary losses. I must also be guided by the principles of causation as it relates to damages. As McLachlin C.J. wrote in *Blackwater v. Plint* [2005] 3 S.C.R. 3 at 31.

> It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway.

43. The following passage from the majority judgment in *Reilly v. Lynn* 2013 BCCA 49 at para.101 remains good law when a trier of fact determines past and future hypothetical events including the trajectory of a person's career absent injury ("Original Position") and the Claimant's future trajectory taking in to account his or her loss ("Injured Position").

> The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati* [1996] 3 S.C.R. 458 (S.C.C.) at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of a loss occurring: *Athey v. Leonati, supra,* at para. 57, *Steenblok v. Funk* [1990] 46 B.C.L.R. (2d) 133 (B.C.C.A.) at 135. The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1995) 49 B.C.L.R. (2d) 33 (B.C.S.C.) at 93. However, that is not the end of the inquiry: the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* (2001) 84 B.C.L.R. (3d) 158, 2001 B.C.C.A. 1 at para. 11; *Ryder (Guardian ad litem of) v. Jubaal* [1995] B.C.J. No. 644 (B.C.C.A.). Moreover, the task of the court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995) 12 B.C.L.R. (3d) 248 (B.C.C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: Milina v. Bartsch, *supra*, at 79.

44. More recently the BCCA confirmed the legal test for assessing damages in line with the test enunciated in *Reilly v. Lynn*. In *Grewal v. Naumann* 2017 BCCA 158 at paras. 48 and 49 the court stated:

> [48] In summary, an assessment of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future hypothetical possibility will be taken into account as long as there is a real and substantial possibility 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 economical 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 B.C.C.A. 211 at para. 21

45. I am guided by the principles established in the authorities that although the burden of proof of damages remains on the plaintiff or Claimant, the burden of proof related to hypothetical events is "simple probability" explained as a real and substantial possibility or risk. In determining the Claimant's damages, one must "gaze deeply into the crystal ball". I must assess according to the foregoing principles what the Claimant's trajectory in life would have been had she not been injured and compare that with what is her trajectory is now.

47. In assessing damages, I must address, according to the common law, the nature and extent of the Claimant's injuries focusing on her individual loss and the extent of her loss that ought to be paid as compensation.

48. In assessing loss and ultimately damages, I must consider the Claimant's "Original Position: as it was and might have been against her "Injured Position", as she is now and will be. One hopes such hypothetical projections involve some **educated** "crystal ball gazing" measured by simple probabilities rooted in evidence not pure speculation. The difference between the two positions represents her loss, subject to final consideration of the overall fairness and reasonableness of the award.

11. In a recent UMP arbitration award in KG v. Insurance Corporation of British Columbia (Arbitration Award, August 9th, 2024), Arbitrator Quinlan set out the legal framework relevant to assessing the matters of causation and damages, which I consider relevant to this Arbitration. Arbitrators Quinlan stated:

> [121] The unique facts of this arbitration raise issues of causation, divisible and indivisible, divisible injury, and pre-existing condition which collectively lead into the assessment of damages."
>
> [122] I will set forth the legal principles which I view as governing my analysis.
>
> [123] The claimant must establish on the balance of probabilities that the tortfeasor's negligence caused or materially contributed to her injuries. The primary test for causation is the "but for" test which requires the Claimant to show that the injury would not have occurred but for the negligence of the tortfeasor: *Althey v. Leonati*, [1996, 3 SCR 458 at paras. 13-17].
>
> [124] Once causation is established, the role of damages is to place the Claimant in the same position she would have been had the accident not occurred - no better, no worse.
>
> [125] This objective is accomplished by determining not only what the Claimant's position is after the 2018 Accident (the "injured position") but also what they claim this position was before the 2018 Accident (the "original position"). The difference between those positions represents her loss: *Athey,* para. 32, *Blackwater v. Plint* 2005 SCC 58 at para. 78.
>
> [126] In circumstances where there are multiple causes, it is necessary to determine where the injuries are divisible or indivisible. In *Sediqi v. Simpson,* 2015 BCSC 214, Justice Fisher described the difference between the two types of injury at para. 36:
>
> > Divisible injuries are those that can be separated so that their damages can be assessed independently. Individual injuries are those that cannot be separated: *Bradley v. Groves*, 2010, BCCA 361 at para 20.
>
> [127] The question of whether an injury is divisible or individual impacts both causation and the assessment of damages: Schnurr v. In*surance Corporation of British Columbia*, 2015 BCSC 1630 at paras. 155, 156.

[128] First the causation analysis determines whether a party is liable for an injury. Each defendant is separately liable for the divisible injuries they have caused, and jointly liable for indivisible injuries they cause together with other defendants.

[129]. The damages analysis then determines what compensation a plaintiff is entitled to receive from a defendant. Once again individual defendants must compensate for the divisible injuries and indivisible injuries are compensated by the defendants jointly.

[130] When the situation involves a pre-existing condition, it is important to recognize if such condition is inherent in the Claimant's original position.

[131] *Athey* at para. 35 crystallized the correct analysis quote:
"The defendant need not put the plaintiff in a position better than his or her original position. The defendants liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyways. <u>The defendant is liable for the additional damage but not the pre-existing damage.</u>
Emphasis Added
[132] It is this framework which I now follow."

12. In considering specifically loss of earning capacity, Mr. Justice Voith, as he then was, conveniently summarized the guiding principles in *Pololos v. Cinnamon-Lopez,* 2016 B.C S.C. 81 at para [133] as follows:

The relevant legal principles are well established:

a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W&D Logging Co. Ltd.,* 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;

b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 32;

c) The assessment of loss must be based on the evidence but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop,* 2001 BCCA 1 at para. 18;

d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "Capital asset approach"; *Brown v. Golaiy,* [1985], 1985 CanLII 149 (BCSC), 26 B.C.L.R. (3d) 253 at para. 7 (S.C.); and *Perren v. Lalari,* 2010 BCAA 140 at paras. 11-12;

e) Under either approach, the plaintiff must prove that there is "real and substantial possibility" of various future events leading to an income loss; *Perren at para. 33;*

f) The earnings approach will be more appropriate when the law losses more easily measurable; *Westbroek v. Brizuela,* 2014, BCCA. 48 at para. 64. Furthermore, while assessing an award for future loss of income is not purely mathematical exercise, the Court should endeavor to use factual mathematical anchors as a starting foundation to quantify such losses; *Jurczak v. Mauro*, 2013 BCC A 507 at paras. 36-37;

g) When relying on an "earnings approach", the court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

13. Savage J., as he then was, gave a similar useful summary in *Parker v. Lemmon.* 2012 BCSC 27 at para 42.

14. In 2021, the BCCA issued a trilogy of judgments addressing damages for loss of future earning capacity: *Dornan v. Silva*, 2021 B.C.C.A 228; *Rab v. Prescott*, 2021 BCCA 345 and *Lo v. Vos,* 2021, BCCA 421. In *Rab,* Grauer J.A. reviewed a number of leading authorities and outlined a three-step process for considering claims for loss of future capacity. I will refer to the *Rab* three-step process later in this award.

II. ISSUES

A. Damages

15. The Respondent admits G.D. was injured in the 2019 Washington Accident. It is clear that G.D. has met the "but for" test sufficient to establish causation with respect to the liability of ICBC for damage and loss sustained in the Washington Accident. However, the role that the 2019 accident has played remains an issue to be determined in assessing damages. The Respondent argues the extent of G.D.'s damages is limited by the New Zealand Accident factually and legally. Therefore, I must also consider the role of the New Zealand Accident in contributing to G.D.'s losses.

16. As part of the analysis of damages, a factual question arises whether G.D.'s injuries from the two accidents are divisible or indivisible. The parties accept that DG was injured in both accidents. The Respondent argues that G.D. was substantially recovered by the time of the second accident and that G.D. suffered new and significant injuries in the New Zealand Accident as well as

additional head trauma when she bumped her head on the trunk of her vehicle and again on another metal bar while on a camping trip with her husband in November 2020. On the other hand, G.D. argues that injuries suffered by her in the New Zealand Accident and in subsequently bumping her head were not divisible injuries but instead involved a temporary exacerbation or a "flare up" of ongoing symptoms resulting from the first accident. The Respondent relies on a number of entries and reports in the clinical records of G.D.'s family physician to establish that G.D.'s symptoms from the first accident had substantially improved prior to her second road accident on October 27, 2020, and her head bumps on or about November 11, 2020. On the other hand, G.D. relies on her own testimony and the testimony of other lay witnesses to establish that her injuries from the 2019 Accident were ongoing in the fall of 2020 and although she had experienced some improvement over time, her symptoms from the Washington Accident continued to define her life and limit her activities.

17. All heads of damages are in issue generally.

B. Divisible and Indivisible Injuries

18. Not only must I consider the factual matrix to determine whether G.D.'s injuries are divisible or indivisible, the Respondent raises a legal argument that since the New Zealand Accident occurred in a no-fault jurisdiction barring a claim in tort, the Claimant's injuries are, perforce divisible and not compensable. In response, the Claimant argues that the injuries are factually indivisible and that the Respondent's legal argument is flawed and unsound: ICBC remains 100% responsible for G.D.'s damage and loss and therefore her damages are not subject to reduction by virtue of divisibility.

III. THE EVIDENCE

19. I will now turn to the evidence submitted at the arbitration hearing. My discussion of the evidence will be presented under the headings of, firstly, the evidence of expert witnesses and, secondly, a synthesis of the narrative of the evidence of the Claimant and lay witnesses. Ultimately, I view the evidence of G.D. as the most significant and compelling of the "dramatis personae" who were presented as witnesses in this proceeding. Moreover, the Respondent has not challenged her

credibility but instead suggests certain documentary evidence should be preferred to her *viva voce* evidence. In addition, I found that all nine lay witnesses were very credible and forthright in giving their evidence. The lay witnesses gave their evidence without embellishment or exaggeration and overall the narrative was internally consistent.

A. Expert Evidence

20. The Claimant relied upon two medical specialists, Dr. Mark Adrian, a physiatrist, and Dr. Sian Spacey, a neurologist, to prove the Claimant's objective injuries, medical conditions and their effect upon the Claimant. Dr. Adrian provided a medical-legal report dated July 25, 2022 and testified via Zoom. Dr. Spacey provided a medical-legal report dated July 7, 2022 and also testified via Zoom.

21. Claimant's counsel also sought to have a rebuttal report dated August 26, 2024 of Dr. Lee Rasmussen, psychiatrist, admitted into evidence in reply to the report dated August 2, 2024, of the Respondent's psychiatrist, Dr. Abi Dahi; however, in an oral ruling at the outset of the hearing I ruled Dr. Rasmussen's rebuttal report to be inadmissible.

22. At the arbitration hearing, the Respondent submitted Dr. Dahi's medical-legal report dated August 2, 2024 into evidence and he also testified in person. The Respondent also relied upon a medical-legal report dated July 8, 2023 of a physiatrist, Dr. Rehan Dost, who also testified via Zoom.

23. The Respondent also served an expert report dated July 31, 2024 of Dr. Pieter van den Berg, a psychologist and vocational rehabilitation professional, but elected not to rely upon Dr. Van der Berg's vocational rehabilitation report nor was he called as a witness. Counsel for the Claimant argued that I should draw an adverse inference from the failure of the Respondent to put Dr. van der Berg's report into evidence and the failure to call him as a witness for cross-examination. However, Claimant's counsel was served with the report and could have called him as the Claimant's witness and relied upon his report. Claimant's counsel did neither. In these circumstances where a witness is available to both parties, an adverse inference should not be drawn: *Lucas v. Canniff* 2021 BCSC 1014 at paras. 69-72.

24. The medical experts have concluded that the Claimant suffered a number of injuries stemming from the accidents. They have given a number of medical diagnoses. They have not always agreed on diagnosis nor prognosis. What cannot be denied is that the Claimant, an extremely healthy and fit individual, experienced a cascade of distressing symptoms and limitations from the Washington Accident and the effect of those symptoms and limitations have continued over the years. It has often been said that medical labels do not really matter. It is the effect of trauma resulting from the negligence of the tortfeasors that I must assess. It is the Claimant's individual loss and damage that I must decide, not whether the Claimant ticks all the boxes setting out the criteria for a recognized medical disorder. Such evidence may be helpful, but it is not conclusive. It has been established in the law of damages, that the Claimant's evidence alone, carefully scrutinized for consistency with objective evidence, may be sufficient to justify an award for damages. Yet in this matter, I was not only provided with credible evidence of the Claimant but also corroborative evidence of credible lay witnesses and the forensic evidence of medical specialists.

25. In *Scoates v. Dermott* 2012 BCSC at paras. 103-104 and 175, Smith J. summarized his views and the views of a number of other jurists about the need for certainty of medical diagnosis on the matter of causation of a plaintiff's damage and loss. If a trier of fact determines that a plaintiff's symptoms are genuine and real and flow from a tortfeasor's negligence, damages will be awarded. For example, whether an individual's symptoms and limitations arise from a mild traumatic brain injury ("MTBI"), chronic pain or mood disorders makes little causative difference except perhaps for treatment and the likelihood of improvement of the injured person's condition. For example, a structural brain injury may be permanent and even progressive, whereas treatment may eliminate or ameliorate the effects of chronic pain or of a mood disorder.

Dr. Sian Spacey

26. Dr. Spacey testified via Zoom. She was qualified, despite cross-examination on qualifications, as a medical expert in the field of neurology with special expertise related to patients who present with headaches. She has a clinical practice and teaches as an associate clinical professor at the University of British Columbia Medical School, Division of Neurology, Department of Medicine. Her qualifications as a neurologist are impressive. She was certainly qualified to give the opinion evidence presented in her thorough medical-legal report dated July 7, 2022 expanded upon in oral

testimony at the arbitration hearing. However, I had to consider the weight of her opinion as it relates to current circumstances, given that her opinions are based on an assessment of the Claimant on July 7, 2022. Since that assessment and review of records predicating the report, the Claimant successfully completed training as a schoolteacher and is employed as a teacher, albeit she is currently working part-time.

27. I accept Dr. Spacey's medical diagnoses concerning the Claimant arising from the Washington Accident which diagnoses include a post-concussive syndrome, (although she did not meet certain criteria for a mild traumatic brain injury ("MTBI")), a whiplash associated disorder (WAD II), persistent headache of the migraine type attributable to trauma or injury to the head and neck, a mood disorder with features of depression and anxiety and a degree of retinal dysfunction. The Claimant had none of these injuries and conditions prior to her accident in 2019.

28. Counsel disagreed on whether the Claimant met the criteria of a MTBI. The published criteria does vary from one authoritative medical body to another. I accept Dr. Spacey's opinion based on the objective clinical evidence that G.D. did not sustain any structural damage to her brain. As I have stated, in my view, diagnostic labels are not of prime importance in considering G.D.'s injured position. I accept that since her first accident she has experienced a constellation of non-specific symptoms including headaches, light and sound sensitivity, insomnia, cognitive difficulties and mood alteration, all of which Dr. Spacey attributes to post-concussion syndrome ("PCS"). The Claimant also described instances of "brain fog", difficulty with concentration and a sense of being overwhelmed. The descriptive term "brain fog" has seen more usage since the pandemic and its association with long Covid-19. Whether these symptoms and conditions relate solely to a concussion or relate to other medical issues as well is not determinative of causation. I accept Dr. Spacey's opinion that G.D.'s injured state is attributable to multiple factors casually related to the Washington Accident. Indeed, I accept Dr. Spacey's opinion that the persistence of G.D.'s cognitive dysfunction is disproportionate to PCS and more likely is a result of her untreated mood and pain disorders, and, I would expect, to her yet unresolved migraine type headaches.

29. That Dr. Spacey and other medical experts have ruled out a more serious structural brain injury means that G.D.'s injured state is more amenable to treatment. Moreover, Dr. Spacey recommended a number of modalities of treatment with an expectation of a decrease in headache

frequency and intensity but not complete resolution. Dr. Spacey recommended specific pharmacological treatment, occipital nerve blocks, over the counter supplements, Botox injections and CGRP receptor monoclonal antibodies by way of a six-month trial. As it turns out, G.D. has now undergone a trial of Emgality which is a CGRP receptor monoclonal antibody.

30. I have some difficulty accepting about Dr. Spacey's opinion about the etiology of chronic pain based on a theory of "central sensitization" (changes in the brain which facilitate the propagation of pain messaging). The theory suggests that a whiplash injury and direct trauma to the head from striking a headrest may lead to changes in the pain pathways in the brain causing headache and chronic pain. The Respondent argues that the theory is novel and unproven. I do note that the trial judge in *Rab, supra* para 48, found similar opinion evidence about the theory of central sensitization syndrome lacking in sufficient reliability to justify acceptance. Nonetheless, whether G.D. is experiencing a central sensitization of the brain makes little difference to my finding that her symptoms are real and genuine.

31. I accept Dr. Spacey's opinion that although persistence of symptoms is a poor prognostic indicator, treatment including a tricyclic antidepressant or a beta blocker, nerve blocks, uses of supplements, Botox injections, a CGRP receptor monoclonal antibody, working with a physiotherapist to improve her strength and endurance, Cognitive Behavioral Therapy ("CBT"), psychiatric consultation and visual therapy, should result in slow improvement. Improvement should positively affect G.D.'s vocational ability, ability to perform domestic tasks and her ability to enjoy recreational activities.

32. Dr. Spacey was also of the opinion that G.D.'s symptoms from the first accident persisted at the time of the second accident on October 27, 2020. The New Zealand Accident exacerbated her symptoms for a short period of time after which she returned to the pre-existing baseline.

Dr. Mark Adrian

33. Dr. Adrian is a practicing physiatrist, a specialist in physical medicine and rehabilitation. His medical-legal report dated July 25, 2022 concerning G.D, was based on a one-time assessment of her on June 27, 2022 and his review of medical records between November 2019 and September 2021. He testified remotely. Like the opinion of Dr. Spacey, Dr. Adrian's opinion is quite dated and does not take into account the fact that G.D. completed a master's program in education and

has functioned as a high school teacher for two years, 2023 and 2024, albeit on a part-time basis. Nor does it take into account different modalities of treatment that may result in improvement of physical and psychological function.

34. Dr. Adrian has a clinical practice with emphasis on the assessment and medical management of patients with non-surgical soft tissue and spinal disorders. He is on staff at Vancouver General Hospital ("VGH") Department of Orthopedics and Physical Medicine and Burnaby General Hospital ("BGH") Musculo-Skeletal Medicine ("MSK") & Interventional Spinal Medicine. He has a special interest and expertise in MSK Medicine and Spine Rehabilitation, both areas in which he is a teaching specialist. I accepted Dr. Adrian as a medical expert entitled to give opinion evidence in the field of physiatry.

35. Dr. Adrian's main diagnosis of G.D.'s injury was that of chronic mechanical neck and back pain resulting from the Washington Accident. His opinion was that the New Zealand Accident exacerbated her ongoing symptoms including headaches, neck and back pain as well as cognitive problems over the course of a few months after which her chronic mechanical neck and back pain returned to baseline, meaning the level experienced prior to the second accident. Also, over time some components of her headaches and cognitive symptoms have improved to a degree.

36. Dr. Adrian set out his medical opinion on causation, diagnosis, symptoms, prognosis, functional capacity and therapeutic recommendations at pages 9 and 10 of his report:

> **DISCUSSION AND CAUSATION**
>
> In [G.D.'s] situation, she describes a pattern of neck, upper mid back, and lower back pain symptoms consistent with a mechanical source of pain. The physical examination findings are consistent with the symptoms that [G.D.] experiences; the diagnosis of mechanical neck, upper mid back, and lower back pain; and the injuries suffered in the subject accident.
>
> [G.D.] did not experience pre-accident, regularly occurring, or physically limiting pain involving her neck, upper mid back, or lower back leading up to the first accident. She developed symptoms over these areas shortly following her first accident. The most limiting problem is her neck and upper mid back pain. The symptoms persist since the accident. In my opinion, [G.D]. probably suffered physical forces to the tissues of her neck, upper mid back and lower back during the course of the first accident, resulting in an injury and chronic mechanical spinal pain. Her spinal injuries were probably flared (temporarily exacerbated) due to the second accident. In my opinion, [G.D.'s] mechanical

neck, upper mid back and lower back paid symptoms are causally related to the first accident.

OTHER SYMPTOMS

[G.D.'s] experiences headaches. The headaches are triggered in part by neck pain. In my opinion, [G.D.'s] headaches are in part cervicogenic (related to her neck injury) in nature. She also experiences headaches associated with cognitive tasks. She reports visual symptoms, problems with multitasking, focus, concentration, mood, and energy levels. I will defer to her the specialists in neurology, psychology and psychiatry to provide further comments regarding the nature of those symptoms. [sic]

PROGNOSIS

In general, individuals experiencing mechanical spinal pain following an injury experience improvement over time. Some individuals, however, experience persistent pain despite the passage of time. In my experience, individuals suffering symptoms beyond two years from the injury date are unlikely to experience further meaningful improvement.

In [G.D.'s] situation, several years have elapsed since the accident. The prognosis for further recovery of her spinal injuries into the future is poor. It is unlikely the injuries suffered to her spinal column will undergo progressive deterioration over time. Due to the injuries suffered to her neck, upper mid back and lower back, these areas are vulnerable to future injury.

FUNCTIONAL CAPACITY

[G.D]. will probably continue to experience difficulty performing activities that place physical forces onto the painful and injured tissues involving her spinal column. Specifically, she will probably continue to experience difficulty performing scholastic, employment or recreational activities that require prolonged static or awkward spinal positioning; heavier lifting and carrying; prolonged sitting; or impact activities. These physical limitations are unlikely to improve into the future. In my opinion, [G.D.] is permanently partially disabled due to the injuries suffered to her spinal column in the subject accident.

I will defer to the specialists in neurology, psychology and psychiatry to provide further comments regarding functional limitations secondary to her cognitive and psychological symptoms.

RECOMMENDATIONS

Therapeutic

[G.D.] participates with osteopathic treatments. She experiences temporary benefit with osteopathic treatment. She will probably continue to experience temporary benefit with this form of treatment. If this type of treatment assists with pain management, allowing her to minimize her medications, it is reasonable that she continues on with these

> treatments in the future. She has been instructed in a home exercise program. I encourage her to continue with her home exercise program to maintain and optimize her level of fitness. It is unlikely, however, that exercise or osteopathic treatments will lead to further healing of her injuries.
>
> [G.D.] is not suited to employment whose core components involve the above -listed physical aspects. She is a student, with goals of becoming a high school instructor. She has goals of focusing on the area of outdoor education, physical education and English. Whether she is able to perform her role as a high school instructor on a full-time basis remains to be seen. She will likely require modifications of her role as an instructor, due to her injuries.

37. As it turned out, G.D. has been able to achieve her goal of becoming a become a high school teacher, just not on a full-time basis. Her colleagues and her principal have testified that G.D. is doing very well as a teacher.

38. Dr. Adrian remained of the view that it is reasonable for G.D. to continue osteopathic treatments and an exercise program. In argument, Respondent's counsel submitted that Dr. Adrian's opinion was not a foundation for permanent disability.

Dr. Lee Rasmussen

39. Claimant's counsel also sought to have a medical-legal report dated August 26, 2024, authored by Dr. Lee Rasmussen, psychiatrist, admitted into evidence as a rebuttal or reply report to the opinion evidence of the Respondent's forensic psychiatrist, Dr. Abi Dahi, contained in his medical-legal report dated August 2, 2024. I heard legal argument concerning Dr. Rasmussen's report on November 1, 2024. Counsel for the Respondent objected to its admissibility on a number of grounds including that a psychiatric opinion requires that the psychiatrist must base an opinion, at least in part, on meeting and observing the individual involved. In reading Dr. Rasmussen's report, I was struck by the fact that not only did it contain a critique of Dr. Dahi's methodology it also contained stand-alone opinions that should have been in an assertive report. I gave an oral ruling on November 1, 2024, that the report of Dr. Rasmussen was inadmissible primarily on the basis that his report was not a proper rebuttal or reply report under the Rules of the Court.

Dr. Rehan Dost

40. Dr. Dost is a neurologist with a private practice based in Ontario. He is also an electromyographer, but that qualification is not relevant to the assessment of G.D.'s presentation. Dr. Dost prepared a

medical-legal report dated July 7, 2023, based on a review of medical records and an in-person assessment of the Claimant on June 12, 2023. He also testified remotely. At least, his assessment of G.D. occurred part way through G.D.'s first year of employment as a teacher.

41. Dr. Dost suggested that his opinion was based on a standard of "a reasonable degree of medical certainty". I asked him what he meant by that term, and he replied that it is equivalent to probability, i.e. more likely than not. That is a legal test of proof not a scientific standard of proof. Certainty and probability are not the same concepts. Dr. Dost's response to my question raised some doubt as to whether Dr. Dost was giving his opinions as an impartial witness or whether he was advocating for the Respondent. However, I did accept Dr. Dost as an expert in neurology entitled to give opinion evidence in his field. Moreover, counsel for the Claimant did not argue against the admissibility of Dr. Dost's report in whole or in part. Cross-examination tended to show Dr. Dost's opinion was not markedly different from the opinion of Dr. Spacey. However, wherever their opinions were contradictory, on balance, I preferred the evidence of Dr. Spacey who, throughout her report and testimony, appeared to be impartial and was not, in any way, an advocate.

42. Dr. Dost did concede during cross-examination that all of the diagnoses he discussed in his report are attributable to the Washington Accident. Prior to that accident, the Claimant was asymptomatic and very active. Dr. Dost acknowledged that G.D. had PCS symptoms, as well as chronic post-traumatic headaches resulting in head pain, light and noise sensitivity, nausea, dizziness and imbalance. He attributed chronic headaches to a whiplash injury but he did not discuss specifically MSK injuries nor spinal injuries. He deferred to an MSK evaluator concerning G.D's neck and shoulder pain. I note Dr. Adrian would fall into that category of medical experts. Dr. Dost diagnosed a vestibular injury contributing to dizziness and imbalance. He diagnosed cognitive inefficiencies due to non-brain damage factors, specifically pain, sleep [lack of] and psychiatric factors.

43. Although Dr. Dost took great pains to rule out an MTB/concussion from the first accident, Dr. Dost testified that, he is not suggesting that G.D. is not experiencing a cluster of symptoms described as "post concussive symptoms", i.e. PCS, rather simply they are not the result of a traumatic brain injury . Dr. Dost found G.D. to be consistent, pleasant, and appropriate in his

assessment. He found no inconsistencies in her presentation. Dr. Dost conceded that whether G.D. suffered an MTB/concussion or not, her ongoing cognitive inefficiencies reflect the "interference" effects of pain, non-restorative sleep and psychiatric factors, which have been described as depression, anxiety and a pain disorder.

44. Dr. Dost recommended treatment for D.G.'s headaches including Botox trials and facet block injections. He was unaware that G.D. had recently trialed Emgality, a headache drug, which is similar to Aimovig and Ajovy which he mentioned in his report. He also discussed a treatment described as radiofrequency ablation if diagnostic facet blocks prove positive. However, one-third of patients resolve but need ongoing therapy, one-third of patients respond to therapy and do not need ongoing therapy and one-third of patients do not respond at all to therapy. No costs were associated with such therapy. Dr. Dost also points out that ninety-five percent of patients with post-traumatic headache disorders recover in six months, five percent (referred to as the miserable minority) do not recover. I suspect that is why Dr. Spacey's opinion, which I accept, is that with treatment G.D.'s headaches should lessen in terms of intensity and duration but will not likely completely resolve.

45. I prefer the evidence of Dr. Spacey to that of Dr. Dost concerning whether G.D. suffered a concussion in the Washington Accident. I accept she was concussed but fortunately she did not suffer damage to the structures of her brain that would lead to progressive or permanent brain damage. The causative factors leading to a constellation of symptoms and conditions are multi-factorial but all stem from the trauma sustained in the first accident with a period of exacerbation of symptoms for a relatively short period of time following the second accident.

Dr. Abi Dahi

46. Dr. Dahi, psychiatrist, authored a medical legal report dated August 2, 2024 on the basis of a Zoom interview of the Claimant on July 25, 2024 and a review of records provided by counsel for the Respondent. He was also asked to assume a number of facts and assumptions. Dr. Dahi also testified in person during the arbitration hearing.

47. Dr. Dahi established a clinical psychiatric practice in 1996 with a practice emphasis on assessing and treating patients with personality disorders and mood disorders. He was on staff at the

Richmond Hospital Outpatient Clinic beginning in 1996. He also was a director of the psychotherapy program at Richmond Hospital. Over the years he has carried out many independent medical (psychiatric) examinations including those involving occupational and disability issues. He has expertise in disability matters following trauma. He had admitting privileges at both Richmond hospital and VGH. He has taught in his field at the University of British Columbia, Faculty of Medicine, beginning in 2001.

48. In September 2024, Dr. Dahi retired from active clinical practice and gave up his hospital appointments and admitting privileges. He is continuing in his medical-legal practice in which he has authored more than 150 reports. He has been accepted as an expert witness in psychiatry in the B.C. courts. Despite cross-examination on his qualifications, I accepted Dr. Dahi as a medical expert in the field of psychiatry entitled to give opinion evidence. His report of August 2, 2024 was accepted into evidence.

49. Dr. Dahi diagnosed the Claimant with multiple psychiatric disorders including the following:

1. Driving related anxiety or driving phobia;
2. PTSD symptoms [mainly in remission but some still existing];
3. Major depressive disorder;
4. Generalized anxiety disorder ["GAD"]; and
5. Somatic symptom disorder with preoccupation with pain and panic attacks.

50. Dr. Dahi described somatic symptom disorder as a psychiatric condition with unconscious translation of emotional pain to body pain and chronic preoccupation with pain. Doctor Dahi was of the view that the Claimant had three pre-accident psychiatric vulnerabilities including a degree of restlessness, anxiety and intense perfectionist tendencies. However, the evidence indicates that even if the Claimant had such tendencies, they did not compromise her high levels of achievement and certainly could not be described as pathological. I do not disagree with Doctor Dahi that the Claimant has perfectionist tendencies, but I do not agree they are fairly described as intense. G.D. admits in testimony that she has a tendency to be a bit of a perfectionist. Her mother likely also has perfectionist tendencies which in the case of both mother and daughter seemed to contribute to high levels of performance. The Claimant says her perfectionist tendencies were related to performance matters. I accept that testimony.

51. Dr. Dahi was of the view that the cause of the Claimant's psychiatric symptoms and conditions are best described as multifactorial. However, I conclude that Dr. Dahi is of the opinion that the Washington Accident in 2019 was and remains a material cause of her Injured Position.

52. It is clear from the authorities that I have already cited that, even though, as stated by Chief Justice McLachlin *in Blackwater v. Plint, supra,* there may be several tortious and non-tortious causes of injury as long as the tortfeasor's negligence is a "but for" cause of the injured party's damage, the tortfeaser (and hence the Respondent) is fully liable for the damage. In other words, in my view, notwithstanding the evidence of Doctor Dahi about pre-existing restlessness and anxiety, the Washington Accident is a material cause which makes the tortfeasor in the 2019 accident fully liable and therefore makes ICBC fully liable in this UMP arbitration. Dr. Dahi identifies a number of other causative factors contributing to G.D.'s Injured Position but they do not reduce the damages for which ICBC is responsible. I accept the evidence of the Claimant and other lay and medical witnesses that the 2020 New Zealand Accident only temporarily made the Claimant more symptomatic.

53. No doubt, the Claimant has been challenged by a number of life events which contribute to anxiety, including establishing a new life in another country, perceiving that her role in the partnership with her husband has been less than anticipated and also dealing with financial pressures of owning a home with a mortgage. However, the Claimant has a very supportive husband who was taken on a greater domestic role than he anticipated and who has been very supportive of G.D. when from time to time she seems overwhelmed by the challenges of day-to-day living and exacerbation of some of her symptoms.

54. I also formed the view that Dr. Dahi rather exaggerated the significance of the Claimant's dyslexia which was discovered in grade school, but by attendance in a special educational program G.D.'s learning challenges were largely overcome. Although the Claimant took several years to complete her education, I do not believe that it related at all to any learning disabilities. The Claimant did obtain some accommodation from the University of Victoria in completing her first degree and in 2022 in obtaining her master's degree at the University of Canterbury. The Claimant has done well scholastically and has done well vocationally. G.D. testified that she was active in a number of adventure positions in Canada and in other countries while she was attending the University of

Victoria. She was in no particular hurry to finish her B.A. degree. When the Claimant gave up her career goal of being a mountain guide like her husband and focused on education, she completed her master's program on schedule and with distinction. She now has a full-time position with a college in Christchurch and has been employed there for two years, although she does not work on a full-time basis.

55. Dr. Dahi is optimistic that there is hope for improvement in G.D.'s psychiatric conditions. He supports long term psychotherapy to assist in dealing with her somatic tendencies. The Claimant has seen both a psychologist for therapeutic sessions and a psychiatrist and has a desire to obtain further psychological assistance.

56. Specifically, Dr. Dahi recommends as necessary treatment that the Claimant attend multiple in-depth and weekly psychological treatments. He suggests a minimum of once a week of psychodynamic psychotherapy for two years which could help her gain more confidence and emotional resilience with the hope of increased joy in her life and relationships. She might also benefit by revising her medication, either increasing the dosage of medication she is now taking or switching medication.

57. Dr. Dahi also believes the Claimant needs more frequent psychiatric follow-up. Psychotherapy may also significantly alleviate her neurological complaints. Dr. Dahi specifically recommends CBT treatment which would involve treatment by a psychologist.

58. Dr. Dahi remains of the view that. G.D.'s level of overall functionality, productivity, and creativity will improve significantly with more intense psychotherapy and medication adjustment. Dr. Dahi is of the view that with appropriate treatment including psychotherapy and CBT plus possible adjustment to medication the Claimant may be able to establish full-time permanent work in the teaching profession. Dr. Dahi is of the view that the kind of psychotherapy and behavioral therapy he discusses will likely be highly successful for a patient with perfectionist tendencies. However, the kind of treatment from which she might benefit will take years rather than weeks.

59. Dr. Dahi delved in great detail into the Claimant's family dynamics but I did not find his opinion on family dynamics of any great relevance and his musings, in my opinion, seemed to amount to a lot of speculation. On the basis of the evidence from the Claimant, her mother and other lay

witnesses, including G.D.'s husband, J.Y., the Claimant did not appear to have any pathological problems related to family conflict.

60. Dr. Dahi did refer to the Claimant's tendency to give lengthy answers lacking conciseness. Dr. Dahi pointed out that his psychiatric interview, usually lasting no more than one and a half hours, took three hours. The Claimant's mother agreed that at times her daughter is overly expansive and lacking in precision in conversation. I noted the same tendency when G.D. was giving her testimony. She tended to give very lengthy answers when shorter answers would have sufficed. Sometimes she would lose her train of thought, but that did not occur that often. She was, for the most part, responsive to questions and did her best to answer and be truthful. Dr. Adrian specifically referred to her tendency to be "over inclusive" in giving her history. That perhaps is a good way of expressing it. However, I do not believe that the tendency to be rather unfocused at times in providing information is in any way connected to the accidents in which she was injured. Despite some minor criticism in her teaching reviews of this particular tendency, this trait, without doubt, predated her accidents and was longstanding but it has not affected her levels of achievement. Moreover, I do not think it will impair her ability to lead a normal life in any way in the future.

Dr. Pieter van den Berg

61. Dr. Van den Berg is a registered psychologist and certified vocational rehabilitation professional. He conducted an assessment of the Claimant for the Respondent including psychometric testing and a clinical interview by Zoom. He provided a vocational assessment report dated July 31, 2024, to counsel for the Respondent, Mr. Cahan. Mr. Cahan's office served the report on Mr. McQuarrie's office in accordance with the BCSC Civil Rules. However, Mr. Cahan elected not to rely upon the report. Mr. McQuarrie argued that I should draw an adverse inference from the failure of Mr. Cahan to put the report in evidence which would have given Mr. McQuarrie an opportunity to cross-examine Dr. Van der Berg. As I have stated, Mr. McQuarrie could have served Dr. Van der Berg's report on Mr. Cahan. Mr. McQuarrie could have made Dr. Van der Berg an expert witness for the Claimant. He failed to do so. There is ample authority that a trier of fact may refuse to draw an adverse inference in those circumstances. See *Ho v. Eccles* 2021 BCSC 244 at paras. 91-93.

B. Evidence of the Claimant and of the Lay Witnesses: A Narrative Synthesis

62. The Claimant called eight lay witnesses not counting the Claimant; the Respondent called one. Broadly speaking, the lay witnesses consisted of family, friends, and work associates, past and present. Within those categories, family consisted of the Claimant's husband, J.Y., and her mother, D.D.; friends included the witnesses of J.M., M.K. and S.G.; work associates included the witnesses J.H., N.O., C.P. and R.S. I found that the evidence they gave was both credible and reliable. The evidence of the Claimant was also credible and reliable. Again, broadly speaking, the lay witnesses' evidence supports the view that following the Washington Accident, G.D. underwent a profound change in virtually all aspects of her life from her Original Position to her Injured Position.

63. Since I found all witnesses credible and forthright in their testimony, I do not intend to individually summarize the testimony of the witnesses. Rather, I will give a narrative synthesis of the Claimant's life before and after the first accident. This will assist in analyzing both the Claimant's Original Position and her Injured Position. It will assist in illuminating the difference in the Claimant's pre-accident trajectory and her post-accident trajectory. I had requested that counsel provide relevant chronologies but none were provided. I intend to do the best I can in giving a chronological narrative based on the evidence as I understood it. Any error in the narrative is a result of my error or misunderstanding of the evidence which in some instances seemed to be conflicting but not, in my view, in any really material way that would affect my factual findings.

64. G.D. was born and raised in the Fraser Valley. She is now 35 years of age currently living and working in Christchurch, New Zealand. She is employed at a college in Christchurch, essentially a high school. She has a part-time teaching contract. She has taught at the college the past two academic years beginning in February, 2023. She began her teaching career in outdoor education and physical education and she has added French as a subject matter she teaches but she has, at least for the present, dropped physical education. Her classes involve students between "Grades" 9 to 13.

65. G.D. is married to J.Y. who testified via Zoom. They married in December 2021 in New Zealand. They have known each other since 2018. They have made a life together as a couple in New Zealand since November 2019, shortly following the Washington Accident. J.Y. is an experienced

mountain guide, a career G.D. was very interested in before becoming a teacher. She had taken steps towards becoming a qualified mountain guide in New Zealand. Currently, G.D. and J.Y. do not have children nor have they ruled out having children.

66. G.D.'s parents both had long careers as teachers in the Fraser Valley. Her father is now retired. Her mother, D.D., also had a long career as a teacher and coach. She is retired as a teacher but continues to work in the field of education in administration at the university level in the Fraser Valley. D.D. testified in person at the arbitration hearing; her husband and G.D.'s father did not. D.D. gave testimony in a very straightforward and dispassionate manner. Mother and daughter have had a close relationship and continue to remain close. D.D. never taught G.D. in school but she taught G.D. skiing and was a coach of G.D.'s rope jumping team for many years which won a national championship at the high school level. In addition to being very athletic, G.D. did well academically in high school. She contemplated going to an Ivy league school but decided to stay in Canada to attend the University of Victoria ("UVic"). Overall, her grades were very good at UVic.

67. The Respondent, relying upon the evidence of Dr. Dahi, attempted to argue that G.D. had a long history of struggling with dyslexia thought her academic years. I prefer the evidence of G.D. and D.D. to the effect that a learning disability in terms of writing and visual perception challenges, was identified early during G.D's time in primary school. G.D. attend a special school district program and the program was quite successful in helping address the difficulties G.D. was experiencing. That is not to say, G.D. did not receive some education accommodation during her education, from time to time, but her academic achievements have been impressive and have not held her back. Her results in completing a master's program in education, graduating "with distinction" and on schedule in 2022, is ample proof of her academic prowess and work ethic.

68. D.D. described her daughter as a very bright, energetic child who chose to engage in lots of activities, especially sports. After getting assistance with managing her learning disability, she really turned a corner in Grade 3. D.D. taught at the same elementary school G.D. attended. D.D. described G.D. as "intrinsically motivated"; she was willing to try many extra-curricular activities, and was encouraged by her parents to always try her best. Mother and daughter skied together a lot at Manning Park. G.D. entered the French immersion program in middle school and developed

proficiency in the French language, a subject she now teaches. According to D.D., G.D. developed a career interest in teaching before going to university. G.D. challenged herself in high school by taking the more academically challenging courses such as Chemistry, Physics and Math. G.D. also was a track and field athlete specializing in middle-distance running events. She attracted the interest of the track coach of at least one prominent U.S. university. In high school she was employed as a ski instructor. G.D. graduated high school in 2006. That year she attended UVIC where ultimately, she received a B.A. in Recreation and Health Co-Operative Education with a minor in Psychology. She was also on the UVic intercollegiate track and field team. Her love for outdoor sports flourished during her time at UVic. She participated in long distance running, white water rafting, skiing/snowboarding, paddle sports and kayaking.

69. G.D's B.A. degree from UVic was not formally issued until October 2014. G.D. attended UVic on a full-time basis between 2006 to 2010 and part-time during the remaining years because of vocational pursuits within and outside of Canada, primarily in teaching ESL in Japan, and as a course coordinator and manager in outdoor adventure travel out of Hong Kong. She also worked as a ski instructor at ski resorts such as Whistler, B.C. and in Japan. I have not referred to all the vocational and recreational activities G.D. pursued during these years.

70. Beginning in 2013, G.D. worked out of Hong Kong as an expedition and training program manager for an adventure travel company catering to private school students. She continued with that company on a seasonal basis until 2019. She described the position of that of a project manager managing a large staff. The job was quite stressful with demanding clients. Essentially, she was responsible for organizing, planning and supervising students travelling as a group, independent of their parents and teachers, to China.

71. In addition to the above brief vocational history, prior to the Washington Accident, G.D. worked as a ski instructor, ski patroller and mountain guide in New Zealand (Treble Cone Mountain Resort), and in B.C. at Mt. Seymour in Vancouver, Revelstoke, B.C. and Whistler, B.C. Also, in 2018 she planned and led a mountain expedition for women only to Kyrgyzstan and again in 2019 to Patagonia. These expeditions are excellent proof of G.D.'s management skills, high level of physical fitness and outdoor adventure skills prior to the first accident.

72. Both G.D. and the witness M.K. gave first-hand accounts of the Kyrgyzstan and Patagonia expeditions. M.K. is a physiotherapist in Wanaka, New Zealand. G.D. and M.K. met in 2016 in Wanaka. M.K. is also a ski instructor. They were "flat mates" during the winter ski season, June to October 2016. M.K. observed that G.D. had an abundance of energy and was very fit. G.D. had the energy to get up at 4:00 a.m., ski all day and continue with other activities into the evening. They travelled a lot together. G.D. was a strong long-distance runner and would go on 50 km runs.

73. G.D., M.K. and a third woman organized, planned and lead the expedition to Kyrgyzstan in January 2018. The expedition involved changes in the route due to unexpected low snow conditions, having to do their own weather forecasting and encountering an avalanche. Fortunately, the organizers had avalanche training. G.D. was caught in the "fan" of an avalanche and was partially buried in the snow. Luckily, G.D. was able to be dug out. G.D. only suffered a minor knee injury.

74. The Patagonia expedition took place from September 29 to October 12, 2019. It was a much more extensive expedition than the Kyrgyzstan trip. The Patagonia expedition involved skiing in a glacial mountain range but also sea-kayaking. G.D. and M.K. did most of the planning, organizing, logistics and obtaining of grant funds. Planning for the expedition took about 9 months. The expedition involved traversing ice fields along the border of Chile and Argentina, an area for which there were no official maps. G.D. and her fellow partners had to study carefully Google maps. Travel over the glacier involved the use of ice picks and crampons. They spend a lot of time planning the sea-kayaking part of the trip which involved kayaking 100 km in "open waters" with 100 kg loads. The group had to train for "self-rescue". Acquiring the kayaks was a challenge. G.D. lead the sea-kayaking part of the trip. The expedition itself was very strenuous. G.D. was very fit before the expedition and returned home from Patagonia even more fit.

75. G.D. claims both past and future loss of earnings. Since G.D. has not settled into a definite career path before the Washington Accident one might view her pre-accident earnings history as somewhat lacking in relevance. Yet case authority supports the view that an individual's track record of earnings may be of some relevance. It is clear from the evidence that G.D. spent most of her 20's pursuing a university degree, travelling to various countries, engaging in employment related to adventure touring, teaching ESL and working as a ski instructor and mountain guide.

She was just about to turn 31 at the time of her first accident. In the decade before that G.D. led a peripatetic lifestyle, more focused on adventure as opposed to earning significant income.

76. The witness J.M. has been a lifelong close friend of G.D.. J.M. has an undergraduate degree from an Ivy League university and a Master's degree in Public Health from McGill University. She is currently a Ph. D. candidate at UBC. She lives in Victoria and does consulting work for an indigenous nation on Vancouver Island. J.M and G.D. grew up together in the Fraser Valley and played sports together. They and their families often skied together. They were both on a competitive rope jumping team until high school. J.M. was a grade ahead of G.D.. J.M. spent a lot of time together with G.D. prior to the Washington Accident. They lived together for several months in Vancouver in early 2019 and again just before the Patagonia expedition in September 2019. G.D. was an excellent roommate who did a lot of the cooking and cleaning. G.D. was very well-organized and kept very active vocationally and was involved in demanding sports such as rock climbing and alpine skiing. J.M. observed that the Patagonia expedition was a huge undertaking to plan and organize. J.M. did not work as such with G.D. but had taken multi-day mountaineering trips together in addition to other activities. G.D. came to watch J.M. play competitive tennis matches from time to time. J.M. described G.D. as a "high energy" individual with a vibrant personality, a person of strong mental health and physical health, a good public speaker and someone committed to achieving her personal goals. In the fall of 2019, after sorting out some visa issues, G.D. was "super-energized" to be going to New Zealand to start a new chapter in her life with J.Y. Her mood was very positive. All changed with the Washington Accident.

77. I will later describe J.M.'s contact with G.D. after the first accident. They remain close friends but due to geography and the pandemic they have not seen one another as much as they did before the first accident. Nonetheless, I found J.M to be an impressive witness whose testimony I accept without hesitation.

78. J.D.'s husband, J.Y. ,testified via Zoom from New Zealand. He gave his evidence in a forthright and responsive manner. J.Y. is a professional mountain guide. He also works in New Zealand's winters as a heli-skiing guide. He is taking his final exam soon to be a duly designated Mountain Guide with the Federation of Mountain Guides ("FMG"). He is an expert in mountaineering, rock

climbing and heli-skiing. He has climbed numerous mountains in New Zealand, Japan, Canada and the United States. He has worked in the United States and Canada, specifically in British Columbia.

79. J.Y. and G.D. began a relationship after meeting online. They met in person in June 2018 in Wanaka, New Zealand. Their relationship grew through a shared interest in outdoor and adventure activities including skiing. Wanaka is a mountain town on the South Island of New Zealand. It is close to two ski destinations, Treble Cone and Cadrona where G.D. has been a ski instructor. In 2018 J.Y. was working for a heli-skiing company. J.Y. and G.D. had common interests; as J.Y. said, "they clicked". Initially they saw one another two to three times a week. They participated together in mountain bike riding, rock climbing, skiing and enjoying campfires on the beach.

80. J.D. left New Zealand to return to Canada in mid-September 2018. At that time J.Y. was working in Mount Cook, a small mountain town in Mount Cook National Park. J.Y. and G.D. agreed to keep in touch. In May 2019 J.Y. attended a National Park Service Weekend exchange program on Mount Rainier, Washington. The couple made plans to see one another again. J.Y. came to visit G.D. in British Columbia; they dated again and went on rock climbing outings, including on the Chief in Squamish. They also went sea-kayaking and cycled in Vancouver. Their relationship evolved; they decided that G.D. would return to New Zealand soon. At that time the couple made a more serious commitment to being together. J.Y. went back to NewZealand at the end of May 2019.

81. J.Y. described G.D. as a very active and fit person. She was involved in completing 120 km bike rides, sea-kayaking, long distance running and skiing. J.Y. described her as "full of beans".

82. G.D. was very involved in 2019 in planning and organizing and went on the adventure expedition to Patagonia for a small group of women from September 29th to October 17th, 2019.

83. G.D. intended to return to New Zealand to continue her life with J.Y. Then the accident of November 9, 2019 occurred.

A Synopsis of the non-expert evidence from November 2019:
The Claimant's "Injured Position"

84. Following the Patagonia expedition ending in October 2019, G.D. returned home to visit with family and friends and to organize her travel to New Zealand to start a new chapter in her life with J.Y.

85. On Saturday, November 9, 2019, G.D., her mother D.D., her friend J.T. and J.T;'s daughter were travelling by car for a "girls' weekend" on Whidbey Island in Washington state. J.T. drove her car, a Toyota Sienna van. G.D. was a passenger in the right front seat. D.D. and J.T's infant daughter were passengers in the second row of seats. The route to Whidbey Island involved travelling on Washington State Route 20(aka Highway 20) near Anacortes.

86. J.T. stopped at a red light at the intersection of Highway 20 and Reservation Road. Unfortunately, a Washington state driver following the B.C. Toyota Sienna failed to stop. The Washington vehicle was a Toyota Tundra pick-up truck. Judging by the photographs of the Toyota Sienna van taken post-collision and the repair estimate documents put in evidence, there was significant vehicle damage (over $15,000) primarily to the rear of the van. The collision must have been significant and Highway 20, as shown in the photographs, is a multi-lane divided highway. The crash was unexpected and not anticipated.

87. At the time of the collision, G.D.'s upper body was turned to the right, facing the driver J.T. At first, G.D. heard a loud bang or "explosive" sound. G.D. was thrown forward and then back into her seat with her head striking the headrest. D.D. also testified as to the violent nature of the collision. G.D. was initially stunned and confused. She noticed the rear window of the van was blown out and there was glass in the interior of the van. One of G.D.'s first reactions was concern for J.T.'s young daughter in a car seat on the back seat. Emergency personnel attended the scene of the accident.

88. The Toyota van was undrivable, however, J.T.'s mother lived in Seattle and she provided the group a ride to Whidbey Island. By the time of their arrival at their destination on Whidbey Island, G.D. was experiencing cognitive , emotional and physical symptoms. She became extremely agitated, sensitive to light and sound, had a headache and felt soreness and stiffness in her neck

and back. D.D. and J.T. were also experiencing symptoms of neck and back soreness. J.T's husband drove from the Fraser Valley to Whidbey Island on November 10 and drove the group home.

89. G.D. went for medical attention to a doctor in Vancouver and one week later saw her G.P. G.D. was rambling and apparently was told she had a concussion. She was told to rest and to take things easy. Her G.P. recommended physiotherapy for her neck and back. She saw a physiotherapist in the Fraser Valley before her journey to New Zealand on November 25, 2019.

90. G.D. had never experienced such a traumatic injury. In 2011 a skier ran into her on a mountain. G.D. had a "bit of a sore neck" but only for a short time. She went to physiotherapy but continued with training and heli-skiing. In 2018 she twisted her knee in Kyrgyzstan in the fan of an avalanche but that injury had no lasting effects.

91. Respondent's counsel suggests G.D.'s history, given to more than one medical practitioner, concerning an estimate of the speed of the Toyota Tundra pick-up truck before the November 9, 2019 , is unreliable and self-serving. G.D's reported estimates of speed have differed from time to time. One estimate seemed to relate to the speed limit on Route 20 of 60 mph (100 km/.hr.). I don't think much turns on G.D.'s estimate of the speed of the offending vehicle. She had no forewarning of the collision; she had no opportunity to see the Toyota pick-up before it crashed into the Sienna van. I don't believe her statements were intended to be misleading. The statements were likely her best guesses based on a reconstruction. I am assisted by the photographs of the vehicles involved in the accident and the repair documents that the speed of the Toyota was significant and caused extensive damage to the Toyota Sienna. I also find that the evidence of D.D. is also corroborative of a high-speed collision. Of course, the severity of injuries is not a function purely of the velocity of the vehicles. I remain satisfied that G.D. gave her evidence honestly; nor is it required of me as the trier of fact to determine an accurate range of speed of the Toyota Tundra pick-up.

92. I do not intend to summarize in great detail the evidence of all of the lay witnesses. Nor do I intend to give a detailed chronology of G.D.'s life since the Washington Accident. For example, J.Y., G.D.'s future husband, testified about the profound change in G.D. post-accident. He was surprised that G.D. called him from the L.A. airport (LAX) and was confounded by not being able to negotiate the terminal to make her flight connection. She had been through LAX a number of

times. Upon arrival in New Zealand, it was J.Y.'s impression that G.D. was not the same upbeat, energetic, capable person he knew before. Instead G.D. was highly stressed, very emotional, and prone to tears. She was compromised physically and cognitively. Her activities such as mountain biking (J.Y. had bought her a new mountain bike) were reduced to short walks. Although there has been some improvement in G.D.'s health and activity level with the passage of time and medical treatment, J.Y.'s hope that G.D. would return to her pre-accident state, has not been fulfilled. G.D. seems significantly compromised in virtually all aspects of her life. J.Y. has become G.D's support person; he manages virtually all household domestic tasks and does most of the shopping and driving. Fortunately, they have a "roommate" who helps a bit around the home. J.Y's father is retired and has carpentry skills sufficient to undertake minor house renovations and repairs.

93. The marital relationship has been put to the test. G.D. is not happy about her dependence on J.Y.; their marriage is not the equal partnership it was intended to be. So far, the relationship has shown resilience and J.Y., from all appearances, is committed to supporting and assisting G.D. as much as he can.

94. The witness J.M., gave convincing evidence about the profound change in her close friend G.D. J.M. was in close contact with G.D. shortly after the November 9, 2019 accident. She noticed a profound change in her vibrant, physically and mentally strong friend. G.D. in fact stayed with J.M. post-accident while waiting to sort out her visa to New Zealand. G.D. slept a lot; not rising until noon. She was confused and sensitive to sound and light. As an athlete, J.M. has known other athletes suffering from concussion-like effects. J.M. and her sisters supported G.D. One of J.M.'s sisters is a resident neurologist at VGH Hospital. J.M. stayed in contact online with G.D. after she went to New Zealand. G.D. was forgetful, repeated herself and seemed to be in a low mood.

95. G.D. did not work in New Zealand in 2019 and 2020. Eventually she cancelled her application to the mountain guiding association. J.M. has kept in regular contact with G.D. She went to her wedding in 2021. J.M. has noticed some improvement in G.D.'s condition. However, in September 2023, for example, G.D. attended J.M's sister's wedding and G.D. struggled to attend all the activities. She did not adjust well to a lot of people in a small space. She was affected by bright lights and noise at the reception. G.D. slept until 1:00 p.m. the following day.

96. The witnesses J.K. and S.G., both knew G.D. very well before the November 2019 accident and both had considerable contact with G.D. after the accident. Both gave evidence of a profound change in G.D. As M.K. testified when she saw G.D. in June 2021, G.D. was a completely changed person. Her previous activities were much reduced. Her skiing ability was limited to "mellow skiing"; her biking activity was quite limited; she no longer surfed.

97. S.G. is a physiotherapist in New Zealand, who testified by Zoom. She has worked as a physiotherapist with the New Zealand Olympic Ski Team. She met G.D. in 2014 through mutual friends. G.D. was a fun person with a "go go" approach to life. She had an abundance of energy. They skied together, went on kayaking trips, did long distance running, country back packing trips, went out for group dinners and events and shows. They both lived in Wanaka. Both worked full-time and had full schedules of work, outdoor sports and recreation and busy social activities. G.D. worked at the mountain ski resort called Treble Cone, a 45 minute drive from Wanaka. S.G. trained with G.D. in preparation for the Patagonia expedition but ultimately S.G. did not go on the expedition. S.G. observed that G.D. did a lot of challenging preparation and organization for Patagonia. G.D. was well organized and a good communicator.

98. S.G. saw G.D. in January and May 2020. By then G.D. had lost a lot of muscle tone, slept a lot, was anxious, had low energy, balance problems and could not articulate how she was feeling. S.G. asked G.D. to move in with her in Wanaka; G.D. had been living with J.Y. in Mt. Cook, (about 2.5 hours from Wanaka). At that time G.D. was commuting to Wanaka for medical appointments.

99. G.D. and S.G. lived together from October 2020 to March 2021. G.D. received treatment at a different physiotherapy clinic for post-concussion symptoms and for neck and back pain. G.D. slept late and had low energy. S.G. supported G.D. and kept an eye on her energy levels. She assisted G.D. with basic activities such as shopping. In July 2021, G.D. returned to work at Cardrona Ski Resort for 4 hours a day as a ski instructor. She eventually took an administration job in the office of a helicopter company at the Mount Cook airport after she returned to live with J.Y. in Mount Cook. She worked there November, 2021 to January, 2022. She worked 9-4 depending on flights and earned minimum wage. G.D. struggled to get to work on time. S.G. has remained in contact with G.D. although G.D. has lived in Christchurch since 2022. Since G.D. has been employed as a teacher, S.G. would telephone G.D. only to find that by 5:30 p.m. G.D. was

asleep. S.G. believes G.D. loves teaching and wants to be a good teacher; however, she has trouble with unpredictable behavior in the classroom.

100. The lay evidence generally supports her counsel's submission that G.D.'s life has been drastically altered after she was injured in the Washington Accident. Her injuries have affected virtually all aspects of her life, limited her daily activities, work capacity and quality of life.

101. After moving to Christchurch in January 2022, G.D. began a university course at the University of Canterbury in February 2022 to obtain a master's degree in teaching and education. The course included two Practice sessions at two different schools ending in October 2022. To my knowledge, a Practice is the same as a Practicum in Canada. G.D. completed all the required course work and the two Practices which included a Practice at the college where G.D. has been employed as a kaiako (teacher) of Health and Physical Education since January 28, 2023. She is to start her third one-year contract term in January 2025. G.D. devoted all her energies to completing her master's program which involved lectures, workshops and the two Practices. She excelled in the course, graduating with distinction.

102. During her Practice session with her current employer, G.D. impressed the senior teachers with whom she worked. When a position came up at the college, senior staff recommended she be considered for a permanent position. According to R.S., the principal of the college, G.D. "was short listed and interviewed and we eventually offered her a role at the college". G.D. was first hired as a "provisionally registered teacher". Such newly graduated teachers must complete a two year program of induction and mentoring before becoming a fully registered teacher in a full-time capacity. G.D. has completed that two year program.

103. In her first contract year, R.S. noted that "in line with medical advice and in full agreement with the college management team, [G.D.] moved from a full-time to a part-time (0.8 FTE) teaching position on the 17th day of July 2023. This was due to persistent post-concussive symptoms, including a diminished capacity to focus for long periods. In this capacity (G.D.] is expected to be on-site at school for 32 hours per week and currently has a decreased timetable teaching load of 10 hours, almost half that of a full-time fully registered teacher." By letter dated June 27, 2023, G.D.'s teaching load was reduced to 20 hours per week.

104. During her second full year contract in 2024, G.D. continued on a .6 of a full-time teaching contract which required 20 hours of teaching per week, four hours per day, five days per week. According to counsel, a base salary scale for trained teachers puts G.D. at a Grade 5, Step 4 which is equivalent to $65,502.00 NZD annually for a full-time teaching position. G.D. is assured of a position with the college for a 3rd year. She has consulted with her physicians and intends to ask for a .5 contract. She finds .6 is not manageable in her current condition. She may drop outdoor education. She may focus more on classroom teaching which would include teaching French.

105. The college principal, R.S., was called as a witness by counsel for the Respondent. She has authored other letters found in the Joint Book of Documents. R.S. has been a teacher in New Zealand for 24 years and a principal for 5 years. In her current role she heads up a public school of 1750 students and 90 teachers of whom 7 work part-time, G.D. being one of them. Some teachers on the Physical Education staff were quite impressed with G.D. during her Practice session and they recommended her when a position came up starting in 2023. R.S. considers G.D. a great teacher, very professional and very good with children. During her first contract year, G.D. approached R.S. concerning her inability to adequately focus, due to medical reasons, in an open school plan a, ”collaborative environment”. G.D. also mentioned problems with fatigue. The school has a duty to accommodate and to modify workloads if necessary. The management team is happy to work with G.D. to increase her contact time with students when she is ready. R.S. is satisfied with G.D.’s teaching. R.S. observed that the parents like her as do the students. However, any contract below .5 would be difficult.

106. Both witnesses, N.O. and C.P., testified via Zoom. Both are senior teachers in the Physical Education and Outdoor Education Department at the same college that employs G.D. N.O. oversaw G.D.’s Practice session and G.D. took 2 of her classes in physical education including a Grade 13 class of 17-18 year olds and an outdoor education class. C.P. was in charge of the Outdoor Education department and his duties included managing staff, setting budgets, planning trips with students including tramping, mountain biking and river crossings. I agree with Mr. Cahan that both teachers spoke favourably of G.D.’s teaching abilities overall, however they did express concerns about her energy levels, fatigue and her ability to manage large classes in noisy environments.

IV. LEGAL ANALYSIS / FINDINGS OF FACT

107. It is important to note that the Respondent does not deny that G.D. was injured in the Washington Accident and has suffered loss and damage entitling her to damages in non-pecuniary loss, past and future income loss, cost of future care and special damages. The Respondent challenges the nature and extent of loss and damages attributable to the Washington Accident and therefore submits that the range of damages sought by G.D. is excessive. The Respondent does not challenge to any great extent the credibility of the Claimant and credibility of the lay witnesses. Nor does the Respondent challenge the evidence supporting the pre-accident description of G.D. as an impressive, healthy, young woman with a promising future. The Respondent raises a number of specific arguments including divisibility of injuries that, if accepted, would lower damages to be awarded. I will deal with those specific arguments later in this award.

108. The main focus of this arbitration is an assessment of damages in a negligence case involving multiple tortious and non-tortious causes. I am tasked ultimately with arriving at a fair and reasonable assessment of damages based on the difference between the Claimant's "Original Position" and her "Injured Position". I approach my task in line with the general legal principles to which I have already referred to in paragraphs 9-15, *supra.*

109. The Respondent does not contend that the Claimant has failed to prove the four essential averments of negligence (with one exception); a duty, a breach of duty, factual causation as per the "but for" test and causation in law, i.e. that the loss is not too remote: *Mustapha v. Culligan of Canada Ltd.* [2008] S.C.R. 114. See also *Saadati v. Moorhead* [2017] 1 S.C.R. 543. The exception relates to causation in law based on divisibility of injuries and that some of the loss arises out of the New Zealand Accident occurred in a "no-fault" jurisdiction.

110. It is not surprising that the parties differ significantly on the quantum of damages. I suspect one reason relates to the fact that the injuries and conditions for which significant compensation is sought are based primarily on self-report involving a constellation of trauma including concussion and post-concussion syndrome ("PCS"), chronic pain, psychological conditions such as depression, anxiety, a somatic disorder and a driving phobia as well as prolonged soft tissue symptoms. Such cases have challenged the courts and arbitrators from both a medical and legal

perspective. When injuries and medical diagnoses rely mainly on the injured person's self-report, a trier of fact must examine the evidence with careful scrutiny.

111. Other challenging factors in a case such as this relates to the complexity of subject matter especially an understanding of the human brain and chronic pain. Despite significant progress in the scientific study of the human brain, the complexities of the brain and the effects of trauma, whether physical or psychological, remain rather poorly understood. It is common knowledge that most people recover within weeks or months from a concussion but a small percentage have long-term if not permanent symptoms. The same can be said of chronic pain from soft tissue injuries and headaches. In a legal system, where injury claims involve chronic pain, minor head injuries/concussion and psychological conditions, the trier of fact faces a difficult challenge of evaluating and assessing loss and damage in order to arrive at a fair assessment of damages. Yet no matter how difficult the challenge, the trier of fact must weigh the evidence, determine the loss and damage and award damages considered fair and reasonable.

112. In determining my award, my task is made easier, by my finding that the Claimant's evidence is credible and reliable and is corroborated in large measure by the lay witnesses and medical opinion. Despite some difference in the opinion of the medical experts and despite the conflicting arguments of counsel, on the facts and the law, I am satisfied that the injuries suffered by G.D. in the Washington Accident (and briefly exacerbated by the New Zealand Accident) caused a profound and prolonged negative effect upon G.D. in virtually all aspects of her life. She has gone from a dynamic 30 year old woman with boundless energy and a remarkable level of fitness, able to pursue and succeed in a wide variety of challenging adventure and sporting activities and able to engage in various vocational positions around the world, to now, at age 35, she suffers from a constellation of difficulties substantially limiting her function and capacity, her energy level and detrimentally affecting her across all aspects of her life. Despite some significant functional improvement and educational and vocational achievements, G.D. has gone from a very outgoing and happy person, to one who is frustrated with her limitations including physical limitations, energy levels and cognitive limitations affected by pain and headaches.

113. Despite some speculation by Dr. Dahi about G.D.'s learning disability, dyslexia, I find that there was nothing in G.D.'s Original Position that would have manifested itself in future so as to affect her loss and damage. There is no convincing medical opinion that any pre-accident condition would have caused loss or damage, in any event of the Washington Accident.

114. There is an aspect of G.D.'s. personality that was the subject of some of the evidence. My impression, gained from seeing and hearing G.D. and her mother D.D. as witnesses, and based on the evidence of Dr. Dahi, to a limited degree, is that G.D. had and has perfectionist tendencies. She was indeed a very high-functioning and accomplished individual. Prior to the Washington Accident she had not experienced much adversity. If she worked hard at something, she usually enjoyed success. Unfortunately, when she was injured in the first accident, she did not intersect well with her traumatic injuries. Over time, when she did not recover as she had from earlier skiing injuries, she suffered a great deal of frustration. With ongoing symptoms and limitations, she remains frustrated that she has not recovered to her pre-accident state. Her frustration has made her anxious, depressed and unintentionally pain-focused. She has lost confidence and to a degree her sense of self-worth. Her perfectionist tendencies aggravate her frustration and loss of confidence. Nonetheless, it is elementary tort law, that a tortfeasor takes a plaintiff or claimant as they are.

Divisibility of Injuries: The New Zealand Accident

115. The Respondent seeks to limit the compensation it ought to pay the Claimant by arguing, based mainly on a selective sample of clinical records from G.D.'s family doctor in New Zealand between March 6 to November 17, 2020, a neuropsychological screen report dated December 14, 202 and other contemporaneous treatment records, that G.D. had substantially recovered from the effects of the Washington Accident by the time of the New Zealand Accident and that the injuries suffered by G.D. on October 27, 2020, and subsequently when she bumped her head about two weeks later, involved much more than a temporary exacerbation of pre-existing injuries and symptoms. The Respondent argues that the New Zealand Accident and two subsequent head bumps caused new divisible injuries for which the Respondent is not responsible.

116. I have reviewed in some detail the clinical records Mr. Cahan refers to and I do not accept the inferences the Respondent has drawn. In summary, the records paint a picture of someone with

unrelenting serious symptoms and partial disability from the date of her November 9, 2019 accident. That G.D.'s symptoms varied and fluctuated from time to time is not surprising. My impression is that it was part of G.D.'s character to want to improve and she was hopeful she was improving whenever her symptoms waned. It is apparent from the records and the evidence she and the other lay witnesses gave, that G.D. on numerous occasions attempted to increase her activity level but sustained progress was defeated by the intractable nature of her symptoms.

117. Throughout the time frame covered in the records, one infers a history dating from the first accident of neck and back soft tissue whiplash type symptoms, headaches, fatigue, nausea, dizziness, poor sleep, photo and phono sensitivity, brain fog, agitation, mood issues and cognitive and concentration difficulties. G.D's New Zealand family doctor treated G.D. with, *inter alia*, a working diagnosis of post-concussion symptoms. In my view, the forensic medical experts confirm that view although they may differ on the categorization of injury.

118. The overwhelming weight of the evidence, including that of G.D., J.Y. and medical opinion, supports the conclusion of indivisible injuries. In re-examination counsel for G.D. referred to the earliest clinical record in the assembly of records following the New Zealand Accident. It is dated October 29, 2022, two days after the accident. It describes the mechanism of injury and progression of symptoms as follows:

> Mechanism of Injury:
>
> rear ended by a truck trailer-lurched forward- experiencing whiplash from this.
>
> Exacerbation of pre existing dizziness and pressure in head, brain fog, difficulty concentration. Previous car accident in Nov 2019 – concussion/whiplash – reports she is still dealing with this and has not returned to work yet- anxiety, depression, difficulty concentrating, nausea, sustained concentrating.

119. Nor is it all that surprising that following the New Zealand Accident there was an increase in medical assessment and treatment. The fact that the accident occurred in New Zealand allowed G.D. to pursue more extensive medical assessment and treatment at the expense of the state due to New Zealand's no-fault accident compensation scheme.

120. I would also note that the apparent statement to the neuropsychologist in the report dated December 14, 2020 of substantial improvement up to the date of the second accident is in the

context of a much more detailed history which in part focused on panic attacks and feelings of very low mood. G.D. reported a history of attempting to begin ski guide training which she could not manage. G.D. had difficulty with slow processing on the mountain, having difficulty with unexpected changes such as terrain changes. G.D. had difficulty with time pressure. This is surprising for an expert skier such as G.D. Her challenges with skiing preceded the second car accident in October, 2020. New Zealand's winter ski season is the reverse of that of North America. In testimony, G.D. attributed improvement in the context of a better understanding of her condition and improved coping on her part. G.D. also credited assistance from her physiotherapist and psychologist. Moreover, I do not place much weight on a percentage estimate of recovery in the context of prolonged medical treatments over a number of years.

121. My interpretation of the evidence is that G.D. was strongly motivated to return to working as a ski instructor, to engage in training to become a mountain guide and to return to her previous high level of achievement. She believed that with treatment from her physiotherapist and psychologist she was gradually recovering. However, given G.D's established level of accomplishment, with her ongoing debilitating symptoms and persistently reduced level of functioning, she had a long way to go to ever achieve near full recovery. I give her credit that through sheer dint of effort she improved her function. A question I must address in assessing damage is whether there is a reasonable prospect for further improvement. The fact that G.D. is still young and has a strong attachment to the workforce are good indicators for potential improvement. She has already made the difficult but sensible decision to change career paths.

122. Based on the evidence, including my acceptance of the evidence of G.D. and J.Y., I find that G.D. suffered no new divisible injuries in the New Zealand Accident nor any from two subsequent head bumps. The contemporaneous medical records support the conclusion that the subsequent accident and incidents only aggravated and exacerbated pre-existing symptoms temporarily. Six weeks after the New Zealand Accident, the records disclose she was "feeling a lot better" and had "turned a corner".

123. As stated in *Sedigi v. Simpson* 2015 BCSC 214 at para. 36:

> Divisible injuries are those that cannot be separated so that their damage can be assessed independently. Indivisible injuries are those that cannot be separated: *Bradley v Groves,* 2010 BCCA 36 at para. 20.

I find that in a case of exacerbation of pre-existing injuries, such as presented in this arbitration, the injuries from the subsequent accident and incidents cannot be separated. Therefore, there is joint and several liability. However, that is not the end of the inquiry.

124. The Respondent asserts that even if the Claimant's injuries are indivisible, as I have found, the fact that the New Zealand Accident occurred in a no-fault jurisdiction where there is no cause of action against a tortfeasor leads to the legal result that the Respondent is not responsible for that part of the Claimant's loss caused by the New Zealand motorist in the October 27, 2020 accident. Even though there is joint and several liability between tortfeasors for indivisible injuries, tort law recognizes there may be contribution and indemnity between joint tortfeasors which may be assessed. For the purpose of my analysis, I do not believe the accidents where the Claimant bumped her head twice on or above November 11, 2020 are relevant to my analysis. I consider those head bumps to be "de minimis" in the context of tort liability. Rather than cause any compensable injury recognized in a tort jurisdiction, the head bumps seem to have caused temporary worry and anxiety on the part of G.D. resulting in a visit to a hospital out of an abundance of caution. It seems G.D. suffered a panic attack in the context of worry and anxiety regarding possible injury to her brain.

125. The New Zealand Accident Compensation Corporation (the "ACC") did take jurisdiction over G.D.'s claim of injury arising out of the second motor vehicle accident without any form of investigation into causation. According to file records, the ACC accepted "coverage" for the October 27, 2020 accident for whiplash injury, cervical spine sprain and concussion. The ACC determined in July 2021 that, as of that time, G.D.'s ongoing symptoms were not, in any way related to the October 27, 2020 claim and accordingly, the ACC closed its file and determined it would no longer pay for treatments. The ACC officially closed its file on August 5, 2021. Any claim related to the head bumps was revoked and coverage was denied. There was no need for the ACC to determine the causative roles of the two motor vehicle accidents which is an issue for me to determine.

126. There was considerable evidence from the lay witnesses and in the documentary evidence about the respective causative roles of the two motor vehicle accidents. As I have indicated, I accept the evidence of G.D. and J.Y. to the effect that the second accident caused no new injuries but rather worsened temporarily the ongoing injuries and symptoms that were continuing in October 2020 from November 2019. Both G.D. and J.Y. suggest about a six-week timeline of increased symptoms until G.D. returned to her "baseline" of symptoms and impairment just prior to the second accident. I have noted that on December 11, 2020, G.D. advised a psychologist that "she was feeling much better" and had "turned a corner". She continued with treatment, including treatments with a physiotherapist with experience in treating patients with PCS, as well as attending sessions with a psychologist. G.D. did not return to the workforce until June 2021 in accordance with medical advice. She was unable to pursue mountain guide training. She continued to see her G.P. in Christchurch whom she first saw in February 2020. She continued to report symptoms of fatigue, poor sleep, irritability, low mood, brain fog, headaches, impaired social function in groups, anxiety and dizziness as she had after her first accident. She reported a similar reduction of her pre-accident capacity. In short, she was back to baseline. Dr. Spacey and Dr. Adrian have accepted G.D.'s impression of the causative role of the October, 2020 accident, in concluding that the November 2019 accident caused all of her symptoms and impairment and continued to do so, allowing for the fact that the October 2020 accident caused only a temporary exacerbation. Counsel for the Claimant takes a conservative view in suggesting the date of August 5, 2021 as the end of any exacerbation period caused by the October 2020 accident when the ACC closed its file. I accept the evidence of G.D. and J.Y., to the effect that G.D. had substantially returned to baseline in a time frame of about six weeks; however I do allow for the fact that full return to baseline may have taken a matter of months, not just weeks.

127. The Respondent relies upon a number of B.C. authorities for the proposition that since there is no cause of action in New Zealand for tort liability, no action, even for contribution or indemnity, could be pursued in B.C., including in an UMP arbitration. In the normal course ICBC, as the UMP insurer, could pursue a joint tortfeasor for contribution and indemnity, arguing that the joint tortfeasor, should be assessed a relative apportionment of tort liability based on the usual principles of comparative fault and moral blameworthiness. The courts, and by extension, an arbitrator, could apportion fault even in the absence of a tortfeasor as a party before the courts or before the arbitrator: see *Wells v. McBrine (1988) 33 BCLR (CA) (2d) 86.*

128. Of the authorities discussed by counsel on this topic, the case of *Sandhu v. Vuong* 2018 BCSC 1490, citing *Pinch v. Hofstee* 2015 BCSC, 1888 is most illustrative. Sandhu involved a plaintiff injured in two accidents, the first in B.C., a tort jurisdiction, the second in Manitoba, a no-fault jurisdiction. The defendants brought an application to add as third parties the tortfeasors involved in the Manitoba accident. The putative third parties opposed and argued, *inter alia,* Manitoba legislation barred a tort action "before any court".

129. In *Sandhu,* Master Barber accepted the argument that if a tort claim is barred in Manitoba, it is also barred in B.C. and as a consequence there is no cause of action. It follows that third party proceedings against the same parties are also barred. Master Barber also accepted that when a plaintiff injured in a separate tortious accident in a no-fault jurisdiction where tort claims are precluded by legislation, a plaintiff cannot recover 100% of the total damages for indivisible injuries from the tortfeasors where an action is permitted based on tort. In my view, the same conclusions should prevail in an UMP proceeding involving indivisible injuries arising from two jurisdictions, one of which is a no-fault jurisdiction. I agree with Mr. Cahan that the Claimant cannot recover any apportionment of her loss and damage attributable to the New Zealand Accident.

130. The Respondent submits that the Claimant's award of damages should be reduced by 30-50% to account for a fair apportionment of fault for the New Zealand Accident. It is my view that the range is far too high and should not apply to all heads of damage. I have reviewed the evidence already which shows that the injuries sustained in the first accident more than five years ago, were life changing and are ongoing. The October 2020 accident caused no new injuries, only an exacerbation of pre-existing injuries principally for a matter of weeks, possibly with some lingering effects for several months. I find that an apportionment of 5% should apply to reduce the Claimant's damages for non-pecuniary loss and past income loss only.

V. AWARD/HEADS OF DAMAGES

A. Non-Pecuniary Loss/Housekeeping Capacity

131. Counsel has cited the oft-quoted passage from *Stapley v. Hejslett* 2000 BCCA 34 at paras. 45 and 46 which summarizes the underlying purpose of non-pecuniary damages and also provides an inexhaustive list of common factors to be considered. The court stated:

> [45] 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 conserving 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 (q1981) 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]
>
> [46] The inexhaustive list of common factors cited in ***Boyd*** that influence an award of non-pecuniary damages included:
> (a) age of 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).

132. In *Quezada v. Quezada* 2019 BCSC 1732 Madam Justice Horman, as she then was, stated at paras. 110 and 112:

> [110] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and in the future: *Tisalona v. Easton,* 2017 BCCA 272 [Tisalona] at para. 39.
>
> [112] An award of non-pecuniary damages must be fair and reasonable to each party. Fairness is measured in part against awards made in comparable cases. However, other cases only serve as a rough guide as each case must be decided on its own facts: *Trites v. Penner,* 2010 BCSC 882 at para. 189. The amount of the award does not depend on the seriousness of the injury, but rather on the loss in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39."

133. As I have already stated in my award, a functional approach focusing on "reasonable solace" for the injured party, governs an award for non-pecuniary loss. That this is so, is premised on the idea that "monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more that a legal or logical one" *Andrews, supra* D.L.R at p. 475

134. My main task is to focus on G.D's individual loss. Every injured person presents with their own unique circumstances and losses. An award of general damages attempts to compensate on a functional approach for loss of enjoyment of life, pain and suffering, loss of amenities and , if applicable, loss of expectation of life. As noted, it is common practice for counsel and judges to refer to "comparator" damages awards to determine quantum of damages. Such an exercise may be helpful to determine a potential range of damages, but since an assessment of an individual's unique loss is the goal, comparator cases are to be reviewed, if relevant at all, as a rough guide only. In this arbitration counsel have cited a number of awards for damages; however, with the exception of one of the awards I do not find the previous awards relied upon as particularly helpful to my task. None involves a person of exceptional energy and athletic ability as G.D. whose loss has been profound but not near catastrophic. Counsel for the Claimant suggests an award for non-pecuniary loss of $220,000 plus a pecuniary award for loss of housekeeping capacity of $50,000. Counsel for the Respondent submits an appropriate award should be in the range of $120,000 to

$140,000 before deduction for subsequent injuries. Mr. Cahan also submits the Claimant has not made out a claim for loss of ability to perform housekeeping and domestic tasks.

135. The claim for a "housekeeping award" is premised on the desire of G.D. and J.Y. to have a housekeeper come into their two-bedroom home to clean two days a week. No duration is suggested and no independent cost estimates have been submitted. Nor is it claimed that G.D. cannot physically perform household task; rather the basis of such claim is that G.D. is often fatigued, her "battery" has been depleted, and she lacks the energy and stamina to do work around the house. J.Y. is content to do the lion's share of the housework although he at times has very long workdays and it is challenging for him also to do the housekeeping. Fortunately, J.Y's father pitches in to do renovation projects and currently their roommate, at times pitches in to do some of the domestic tasks.

136. A trier of fact may compensate for a loss of housekeeping capacity through a separate pecuniary award or as part of an award for non-pecuniary loss. However, there must be a satisfactory evidentiary basis for an award. I find that such proof is lacking in this arbitration for a separate pecuniary award. The wishes of G.D. and J.Y to have a housekeeper twice a week is an insufficient evidentiary foundation for such an award. There is also a reasonable prospect that G.D.'s condition will improve in the future. However, I accept that G.D. demonstrates that she has some limitations in doing domestic tasks. She may experience some ups and downs in her energy levels. There may be times when J.Y. is unable to do domestic tasks due to his busy work schedule. Therefore I will take into account, as a contingency in assessing non-pecuniary damages, a reduced capacity in housekeeping on the part of G.D.

137. It is not my intention to repeat the multiple diagnoses of injuries given by the medical experts and the numerous symptoms and conditions suffered by the Claimant. As noted in a decision cited by Respondent's counsel, *Dhudwal v. Davis* 2021 BCSC 374, uncertainty the about precise medical cause of injury is not fatal to proof of cause. *Dhudwal* involved a 32 year old teacher, who suffered concussion-like symptoms after being struck by a taxi in a marked cross walk including headaches, nausea, dizziness, cognitive difficulties, sensitivity to light and noise, ringing in her ears, fatigue and irritability The trial judge emphasized that whether the symptoms were attributable to a brain injury or not, it was sufficient for causation that they originated with the collision; see para. 69.

However, the plaintiff was able, through a graduated return to work, to return to work as a full-time teacher.

138. I found the decision in *Lim v Busha* 2019 BCSC 1223, involving a 33 year old physiotherapist, to be of some assistance. The plaintiff suffered injuries in three accidents which ultimately dramatically altered her life, leaving her facing a future comprised by chronic pain. Prior to her injuries, she had found her dream job having embarked on a new career path. She lead an active, energetic lifestyle prior to her injuries. The plaintiff had chronic soft tissue injuries to her neck, back and shoulder coupled with neck-related headaches and migraine headaches. She suffered from low mood and anxiety. She did not appear to be suffering from PCS or a mild traumatic brain injury nor any psychiatric disorders. Smith J. found that disabling pain and symptoms would continue despite anticipated pain management treatment; however, there remained a possibility of improvement. Smith J. also found that the plaintiff's established career path was permanently impaired on the basis of partial disability. I note that *Lim* was decided in 2019 more than five years ago and that inflation would have an effect on the award of $160,000 for non-pecuniary loss.

139. Counsel did not refer in their submissions to a decision that I found to be a useful comparative decision on non-pecuniary loss: *Barsky v. Simms* 2023 BCSC 1826, a decision of Justice Majawa. The plaintiff was injured in a 2018 motor vehicle accident as a restrained passenger. Prior to the accident, she was active in full-time employment and in recreational fitness. At the time of trial in 2023 the plaintiff was a 45 year old single mother of one child. Following the accident she struggled with the effects of soft tissue injuries, chronic pain, post-concussion symptoms, mood disturbances, persistent headaches, cognitive deficits, poor sleep, fatigue , dizziness, irritability, light and sound sensitivity, visual changes, anxiety, major depression and reduced mental stamina and focus. In short, she experienced a constellation of symptoms very similar to those experienced by G.D. A difference was that the plaintiff was diagnosed with an MTBI; however, the defendants submitted that her ongoing symptoms were related to chronic pain and mental health issues. The defendants also argued that the plaintiff's injuries had largely resolved by the time of trial.

140. Majawa J. did not agree with the defendant's submissions. He found that the plaintiff's symptoms were caused by the accident whether or not they were related to an MTBI or to other injuries. She also continued to suffer from depression and cognitive difficulties. Her vocational ability and her

physical capacity had been adversely affected. In coming to an award of $200,000 for non-pecuniary loss, Majawa J. commented as follows:

> [138] I have already thoroughly discussed the effects of the Accident on Ms. Barsky earlier in these Reasons. For present purposes, I will highlight the following: Ms. Barsky suffers from frequent severe headaches, neck pain, back pain, shoulder pain, depressed mood, anxiety driving, visual disturbances, poor sleep, alcohol misuse, social withdrawal, lack of motivation, feelings of hopelessness, low self- esteem, a short-temper, poor memory, difficulty finding words, light sensitivity, and tinnitus. I find that the Accident and her related injuries have had a profound effect on Ms. Barsky's life. It has significantly impacted nearly every aspect of her life and, in particular, her ability to work, which formed a significant part of Ms. Barsky's self-worth and identity.
>
> [139] Before the Accident, Ms. Barsky worked two jobs, exercised regularly, frequently worked out at the gym and was physically fit. She helped organize and competed in various competitions related to physical fitness. She organized fundraising events for hospitals, had an active social life that included regularly going to sporting and music events, and volunteered at dog shows. Since the Accident, Ms. Barsky has had limited social interactions, struggled to work one job, her exercise has been sporadic, she has had limited involvement in volunteer activities including dog shows and fitness events, she has gained between 50-60 pounds, and is deconditioned.
>
> [140] Importantly, Ms. Barsky's work, which I accept used to be her outlet for stress, is now a significant source of her stress. Work aggravates all of her physical, emotional and cognitive symptoms. When Ms. Barsky returns home from work, she is exhausted and unable to do anything else. While she may have used alcohol in excess on occasion before the Accident, the Accident and her related symptoms have significantly increased her alcohol use.
>
> [141] The witnesses called on behalf of the plaintiff to testify about her pre-and-post-Accident presentation were supportive of the significant effect the Accident has had on Ms. Barsky. Despite some improvements, I accept the observations of these witnesses that Ms. Barsky is an entirely different person than she was before the Accident, both physically and emotionally.
>
> [142] I accept the expert's opinions that Ms. Barsky's prognosis for a full recovery is poor.
>
> [146] I have considered the principles and factors set out in Stapley – and in the authorities provided by counsel – and Ms. Barsky's circumstances and prognosis. In particular I note that Ms. Barsky's career progression, an aspect of her life from which she derived much of her self worth, has been undermined by the injuries she suffered in the Accident. I conclude that a fair and reasonable award is $200,000.

141. A major factor in considering G.D's "individual loss" is her pre-accident position of that of an elite athlete in outstanding physical condition with a high level of self-confidence and self-worth. She had achieved a tremendous capacity for work and play and her achievements were many.

142. One of the effects of the 2019 accident has been fatigue and loss of energy. The loss of physical ability, loss of energy, loss of cognitive ability, and to be compromised by pain and headaches must be devastating for such an individual. Amongst the litany of symptoms and deficits the Claimant has and continues to experience is that "her battery", her energy levels and performance abilities, dissipate, compelling her to rest or sleep. She has not regained her pre-accident levels of competence, physically or psychologically, but she has experienced some improvement. Through great effort and support, she completed a challenging academic year and she has established a new career path. I believe she is very motivated to continue improving and to increase her level of function in all ways possible.

143. Dr. Spacey recommends a variety of modalities of treatment for G.D.'s various conditions, which Dr. Spacey believes will result in slow improvement. G.D. has pursued treatment since her first accident and has followed the medical advice and treatment recommended. Dr. Dahi, the defence psychiatrist, has also made a number of recommendations for psychological and psychiatric treatment which he predicts will result in slow improvement in G.D.'s overall functionality, productively, creativity and in terms of somatic tendencies.

144. Dr. Dost, the defence neurologist, is of the opinion that G.D's headaches and associated symptoms (head pain, light and noise sensitivity, cognitive issues, vestibular complaints) may be ameliorated if her headaches can be treated. Dr. Spacey agrees treatment may improve G.D's headaches but they are unlikely to dissipate completely.

145. Taking into account the evidence that I have reviewed, the findings of fact that I have made, the *Stapley* factors and comparator cases, and factoring in a limitation to perform domestic tasks, my conclusion is that a fair and reasonable award for non-pecuniary loss is $210,000 less a 5% deduction for the aggravation of injuries caused by the New Zealand Accident. I therefore award $198,500.

B. Past Income Loss

146. Both counsel have provided me with differing calculations for past lost income. The Respondent submits a past wage loss of $80,000 NZD. The Claimant postulates a past wage loss of $150,064.60 NZD. It is customary to separate loss of past earnings from future loss of earnings to

allow for the applications of s. 95 of the *Act* as a past loss of earnings is awarded on an "after tax" basis.

147. The proper approach to an award of a loss of earnings is one of "assessment" not mathematical calculation. This approach is particularly apt in circumstances when the Claimant is a younger person not firmly established in a career path with a predictable income stream. At the time of the Washington Accident, G.D. was unemployed and on the cusp of establishing a new life in a new country. To her credit, she had proven a strong attachment to the workforce in seasonal work in different countries focusing on outdoor adventure and sporting activities. At the time of her first accident, her career plan seems to have been to become a duly qualified mountain guide like her husband J.Y., likely in New Zealand but possibly in Canada. The testimony of J.Y. indicates that to acquire such accreditation is a lengthy, arduous process. In addition, a predictable stream of income is not guaranteed. While completing her training as a mountain guide, it is likely G.D. would have continued seasonal work as a ski instructor or in other positions involving mountaineering. However, despite efforts to follow her career path, reality set in during the summer of 2021; G.D. accepted that her injuries and deficits would not allow her to function in the role of a mountain guide which requires a high level of physical strength and skill, fitness, stamina, plus strong cognitive strengths in decision-making which may involve high risk situations. No doubt this was a difficult decision for G.D. and for J.Y. who agreed with G.D.'s decision to pursue a career as a schoolteacher.

148. In *Quezada v. Quezada, supra* Madam Justice Horsman, as she then was, set out the legal framework for determining past loss of earning capacity at paras. 119-121:

> **Issue Ill: Past loss of earning capacity**
>
> ***Legal framework***
>
> [119] An award of damages for loss of earning capacity, whether in the past or the future, compensates for a plaintiff's pecuniary loss. Compensation for past loss of earnings is based on what a plaintiff would have, not could have, earned but for the accident-related injuries: *Rowe v. Bob II Express Ltd.,* 2005 BCCA 141 at para. 30.
>
> [120] The burden of proof for actual past events is the balance of probabilities. However, an assessment of both past and future earning capacity involves consideration of hypothetical events. an award for past loss of earning capacity requires the court to assess how a plaintiff's

> life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. Instead, they are given weight according to their relative likelihood and will be taken into consideration a long as the hypothetical event is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Grewal v. Naumann,* 2017 BCCA 158 at paras. 44, 48-49.
>
> [121] Pursuant to s. 98 of *The lnsurance (Vehicle) Act,* R.S.B.C. 1996, c., 231, a plaintiff is entitled to recover damages only for past net income loss. The loss that is recoverable is a loss of after-tax earnings."

149. In *Knapp v. O'Neill,* 2017 YKCA 10 at paras 17 to 21, the Court of Appeal endorsed both the capital asset and earnings approach as valid methods in assessing a loss of earning capacity grounded as much as possible in factual and mathematical anchors. The Court of Appeal also stated a general preference to first asses past income loss, then move on to assess loss of future earning capacity.

150. As I stated in *R.G. v. ICBC* (Arbitration May 18, 2023 at para 133):

> There is always an exercise of informed crystal-ball gazing when one considers a past hypothetical event such as past income loss and what an injured party would have done absent an Accident which knocked a person off course. This is particularly so with a younger person who is just starting out on a career. Accordingly, in a case such as this, the trier of fact "assesses", not calculates a loss of earning capacity, not a specific loss of earnings which may be a valid approach in appropriate circumstances. Claimant's counsel cites *Rowe v. Bovell Express Ltd., 2005 B.C.C.A.* 141, which remains in my view the leading appellate authority on the assessment of past loss of earning capacity.

However, in G.D.'s situation, as of 2023 she did commence a new career with predictable income as a schoolteacher which thereafter engages a consideration of both the capital asset approach and an earnings approach.

151. I now turn to consider the past hypothetical of past income loss starting with what G.D's income earning trajectory would have been absent her injuries. G.D. arrived in New Zealand on or about November 25, 2019 without prospective employment although she had worked in prior years as a ski instructor. In suggesting calculations for past income loss, neither counsel have dealt with the fact that early 2020 was the beginning of the Covid-19 pandemic. New Zealand, as a country, was shut down between April to June 2020. I think it highly unlikely G.D. would have had any employment in the first half of 2020 and perhaps beyond that. J.Y. testified that during the pandemic he was fortunate to have a "government" job allowing him to work from home as a

member of a search and rescue team. G.D. had no such employment. There is no probative evidence that G.D. would have had employment as a ski instructor or as a mountain guide in training during the 2020 ski season. Her first paid employment was during the 2021 ski season as a ski instructor with Cadrona Alpine Resort ("Cadrona") at $20 to $25 NZD per hour. In the middle of 2021, G.D. decided to change her long term career path. She worked from June to October 2021 as a ski instructor in New Zealand's ski season. From November, 2021 to January 2022 she worked in an administrative position with a helicopter company out of the Mt. Cook airport.

152. The Respondent concedes G.D. suffered an impairment in her ability to work in 2020 and 2021. Mr. Cahan estimates losses of $20,000 NZD in 2020 and $15,000 NZD in 2021 but without anchoring those losses in factual assumptions. As noted, G.D. secured part-time employment with Cadrona as a ski instructor from June to October 2021. She had taxable earnings of $3,268.34 NZD. G.D. also obtained employment with Southern Lake Helicopters between November 2021 and January 2022 in an administrative position in their Mount Cook office at the Mount Cook Airport. Pay was apparently minimum wage. She earned $8,235.75 between November 7, 2021 and January 31, 2022 working variable hours, averaging about $550 per week.

153. I accept as a simple probability that G.D. lost an opportunity to obtain employment in the later part of 2020 and in the first half of 2021. In my assessment the Respondent's estimate of loss for 2020 is on the generous side, if anything. The estimate for lost earnings in 2021 is not unreasonable. $35,000 loss for 2020-2021 is at the low end of the range of loss as put forward by Claimant's counsel. The Claimant's higher end of the range is based on, in my view, an unrealistic premise that G.D. would have earned an annual salary of $50,000 NZD as a full-time mountain guide in training between November 9, 2019 to February 7, 2022 when she started her master's program. The premise is not supported by any probative evidence. It does not meet the threshold of proof of a past hypothetical as a real or significant possibility.

154. There is no past income loss for 2022 as G.D. was taking her Master's course in education at the University of Canterbury. I now turn to 2023 and 2024 and a consideration of past loss of capacity.

155. The Respondent estimates G.D.'s income loss at $20,000 NZD in 2023 and $25,000 NZD for 2024. Claimant's counsel suggests that G.D. is at Grade 5, Step 4 of a high school teacher's full-time salary which equates to about $70,000 NZD in annual earnings. The evidence shows that

G.D. began her teaching career as of January 28, 2023 as a kaiako (teacher of Health and Physical Education) on a full-time contract, in accordance with a New Zealand Secondary School's Collective Agreement. As a beginning teacher the expectation is that she would have .8 contact with students and .1 to attend mentorship meetings and .1 to work on a professional portfolio. For medical reasons, G.D. moved as of July 17, 2023 to a part-time contract at .8 of full-time teaching (1.0). In 2024, G.D.'s contract was further reduced to .6 of full-time. She was expected to commit to 20 hours of teaching per week, 4 hours a day, 5 days per week. She is exhausted at the conclusion of a school day; she also finds the "open learning" classroom concept, referred to as a "collaborative environment", distracting and challenging to control and to maintain focus. However, according to her principal, the children and parents like her and the principal is satisfied with her work as a teacher . Nonetheless, G.D. is intending to seek a .5 contract in 2025, a further .1 reduction.

156. If I am correctly understanding Claimant's counsel projections for past income losses from teaching, his numbers are not, in total, substantially different than Respondent counsel's projection of total income loss of about $45,000 NZD for 2023 and 2024 combined. Mr. McQuarrie projects a total loss of earnings from teaching for 2023 and 2024 of $39,301.12 plus $2,707.37 for missed days for a total of $41,568.49. Mr. McQuarrie gets to a much larger aggregate past income loss by adding $41,568.49 to a figure of $108,500 based on loss from the date of the accident, November 9, 2019 to February 7, 2022, the start date of G.D's master's program using an estimate of $50,000 NZD as a full-time mountain guide. As I have stated, the evidence does not support the premise of loss for over 2 years at $50,000 NZD per annum.

157. Based on the facts that I have found, the period of loss is greatly overstated and full-time annual earnings as a mountain guide as projected are unrealistic and overly optimistic. I do not exclude from consideration that her uninjured trajectory may well have included pursuit of working as a mountain guide in training in her early 30's, perhaps starting after the Covid-19 lockdown. However, I believe that her desire to have children and to have a more predictable income and schedule would likely have seen a change in career path to a teaching career by age 35. Both G.D. and J.Y. are of the same mind that a career as a teacher is a more reliable course of employment in terms of income, schedule planning and longevity. Since the couple have wanted to start a family but have postponed starting a family due to G.D.'s injuries, I do not believe that both

partners in the marriage would have worked in the stressful, risky, unpredictable field of mountain guiding. G.D. and J.Y. would have agreed that G.D. would make the rational choice, in keeping with their domestic situation, to become a teacher, a career which she had considered from an earlier time in her life.

158. At the end of the day, a fair assessment of G.D.'s past income loss, including a positive contingency for working as a mountain guide, is $120,000 NZD less 5% for the non-compensable New Zealand Accident. From that amount of $114,000, the amount of actual earnings between June 2021 and early February 2022 should be deducted. Those earnings amount to $11,504.07 NZD leaving a net figure before factoring in tax of $102,495.93 NZD. I invite counsel to provide an agreed calculation of income tax to be deducted and a conversion rate to CDN dollars. My award for past income loss is $102,495.93 NZD less an agreed upon or determined percentage for a reduction for tax to arrive at a net of tax past income loss.

C. Loss of Future Earning Capacity

159. Counsel are generally agreed upon the legal principles and methodology to be applied in awarding damages for loss of future earning capacity. The common law in Canada is virtually unchanged since the Supreme Court of Canada 1978 trilogy of cases, of which the *Andrews* decision, *supra* is one. Since then, a body of case law has contributed accretions and refinements to the applicable law but the basic principles have not changed. I have already referred to excerpts from judgments of the SCC, BCCA and BCSC which provide useful summaries of the applicable principles.

160. Counsel also rely upon the recent trilogy of 2021 judgments from the BCCA which I summarized in *R.G. v ICBC* (Arbitration, May 18, 2023) at paras. 141 and 146:

> 141. In 2021, the B.C. Court of Appeal issued a trilogy of judgments addressing damages for loss of future earning capacity: *Dornan v. Silva,* 021 B.C.C.A. 228; *Rab v. Prescott,* 2021 BCCA 345; and *Lo v. Vos,* 2021 BCCA 421. In *Rab v. Prescott, supra,* Grauer J.A reviewed a number of leading authorities in addition to *Grewal v. Naumann, supra.* Those included *Brown v Golaiy,* 26 B.C.L.R. (3d) 353 (198 B.C.S.C.); *Steward v. Berezan,* 2007 B.C.C.A. 150 (para 14-17); and *Perren v. Lalari, 2*010 BCCA 140 para 32. Relying upon prior authority, Justice Grauer outlined a three-step approach in assessing loss of earning capacity:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event. That could lead o a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown.)* The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step much include assessing the relative likelihood of the possibility occurring - see the discussion in *Dornan* at paras 93-95.

……

146. In *Rab v. Prescott, supra,* Grauer J.A. mentions *Brown v Golaiy, supra,* in discussing step one. *Brown* has been approved in a number of Court of Appeal decisions. It set out important factors in considering a future loss of earning capacity. In any case, whether one considers such factors at step one or two, does not matter. Those factors are summarized as follows:

1. Has the plaintiff been rendered less capable overall from earning income from all types of employment;

2. Is the plaintiff less marketable or attractive as an employee to potential employers;

3. Has the plaintiff lost the ability to take advantage of all job opportunities which might otherwise have been open to him or her, had he or she not been injured; and

4. Is the plaintiff less valuable to himself or herself as a person capable of earning income in a competitive labour market.

See *Brown v Golaiy,* 1985, 26 B.C.L.R. (3d) 353 (S.C.)

161. Counsel are agreed that there are two possible, but not mutually exclusive, approaches to loss of future earning capacity: the "earnings approach" and the "capital asset" approach. A compendious statement of the two approaches is found in the judgment of Crossin J. in *Anderson v. Molon 2020 BCSC 1247 at paras 221-223:*

"[221] It is well settled there are two primary approaches to assessing loss of income: the "earnings" approach and the "capital asset" approach. Both require proof of a real and substantial possibility of pecuniary loss: *Perren v. Lalari,* 2010 BCCA at para. 32.

[222] The primary difference between these approaches lies in the nature of the loss in question. Under the "earnings" approach, a plaintiff must demonstrate a real and substantial possibility of some specific future or hypothetical event leading to a loss of income. Under the "capital asset"

approach, the plaintiff must demonstrate that the nature of her injuries are such that her general capacity to work, considered as a capital asset, has been lost or devalued. The "earnings" approach asks whether there is a real and substantial possibility that the plaintiff would have earned a specific sum of money, absent the tort; the "capital asset" approach, in effect, asks whether there is a real and substantial possibility her working life in general would have turned out differently, even if it is impossible to know exactly how.

[223] These approaches are not mutually exclusive. Indeed, they are simply different ways of attempting to assess the same head of damages: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 27. It is open to a plaintiff to adduce evidence of a specific hypothetical possibility foreclosed by her injuries. It is equally open to a plaintiff to demonstrate that her injuries have generally impaired her ability to pursue income earning opportunities in circumstances where it is possible to say that she would not have pursued these opportunities over the course of her working life; *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 at 59 cited in *Pallos* at para. 25.

162. More recently, the BCCA in *Deegan v. L'Heureux* 2023 BCCA 159 considered the "Pallos approach" as an example of the capital asset approach. The Court observed at paras 84-85 as follows:

[84] As noted above, the judge appropriately settled on the capital asset approach for assessing Ms. L'Heureux's loss of future earning capacity. In Pallos v. Insurance Corp. of British Columbia (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), this Court identified three acceptable methods for doing so:

> 43. The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiffs remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income.

[85] Given the state of the evidence, this is not an appropriate case to calculate the present value of a postulated minimum annual income loss for Ms. L'Heureux or to award the present value of a nominal percentage loss against her expected annual income. Rather, it is an appropriate case to award Ms. L'Heureux a multiple of her pre-trial annual income.

163. The courts have referred to the approach of awarding one or more years of income loss as the "rougher and readier" *Pallos* approach or the "rough and pragmatic approach". While most judges conceptualize such an approach as an example of the "capital asset" approach, others have categorized it as included in the "earnings" approach. For example, see Quezada v. Quezada 2019 BCSC 1732 at paras 131-134:

[131] There are two possible approaches to loss of future earning capacity: the "earnings approach" and the "capital asset approach". Both approaches are correct and will be more or less appropriate and pending on whether the loss in question can be quantified in a measurable way: *Perren v. Lalari,* 2010 BCCA 140 at para. 12.

[132] The earnings approach involves a math-oriented methodology such as either i) postulating a minimum annual income loss for the plaintiffs remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or ii) awarding the plaintiffs entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at 271.

[133] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: Brown v. Golaiy (1985), 6 B.C.L.R. (3d) 353 (S .C.) at 356.

[134] Ultimately, assessment of damages must be based on what is reasonable in all the circumstances. Projections, calculations and formulas are useful only to the extent that they assist in determining what is fair and reasonable: *Grewal v .Naumann*, 2017 BCCA 158 at para. 49.

164. My understating of Respondent counsel's submission is that the Claimant has satisfied the entitlement steps, one and two, of the *Rab* three step test. If I have misconstrued the position of the Respondent's counsel concerning the "two-entitlement steps", I nevertheless find that the evidence of the expert and lay witnesses is overwhelming that G.D. is only able to function at a reduced capacity as a teacher and such diminished capacity will continue into the future. I find that the cause of diminished capacity are the injuries she sustained in the Washington Accident. The real debate is the extent of the incapacity and its duration taking into account a comparative view of G.D's trajectories, uninjured and injured.

165. The parties differ on what G.D's vocational future will hold. Mr. McQuarrie submits G.D.'s reduced capacity will be permanent and will never be greater then that .5 of a full-time teaching position. Mr. Cahan submits that the evidence of G.D.'s very good performance as a teacher in her first two contract years of 2023 and 2024, in addition to the expert medical opinion suggesting improvement in her health and function, would only support a .4 reduction of a 1.0 teacher's contract limited to the next five years. The Respondent submits the result is a loss of capacity claim of $180,000 NZD. I view that as an "earnings approach". The Respondent submits that an alternative approach would be the "capital asset" approach.

166. The Respondent's position is in stark contrast to the Claimant's submission of a pecuniary present value loss for the next 30 years assuming a reduced capacity of 50% of a full-time teaching position. No contingencies, negative or positive, are considered. The result is a claim for an award up to $974,997 NZD, present value using a discount rate of 1.5%. Mr. McQuarrie factors in a tax rate of 22% apparently consistent with the New Zealand tax code, however, loss of future earnings is awarded on a gross basis without a deduction for future tax.

167. Mr. McQuarrie puts forward in his written submission that G.D. should be awarded an additional pecuniary award of lost summer income for 10 years on the theory that she would have earned $500 per day for 30 days each summer during her annual break from teaching working as a mountain guide. The claim is a straight-line calculation without taking in account contingencies or a present value calculation. There was no evidence of any probative value supporting such a claim although J.Y. testified that he makes $500 per day as an experienced mountain guide. There was no specific evidence from G.D., or any other witness, that she had definite plans to use her long vacation as a teacher to work as a mountain guide. The only evidence given by G.D. and J.Y. was the general evidence of a plan to pursue training and certification as a mountain guide but teaching was a better choice as a career given her injuries and challenges. No evidence was presented suggesting any specific plan for G.D. to obtain the training and testing necessary to become qualified as a mountain guide in New Zealand in order to pursue such temporary employment. I view the claim for an additional $150,000 for lost "summer" income lacks an evidentiary basis and is not justifiable. I view it as too speculative to justify an additional pecuniary award.

168. My task in determining the assessment for quantification of loss, the third step in the *Rab* analysis, is to estimate pecuniary loss by weighing possibilities and probabilities or hypothetical events. This requires some "educated" crystal ball gazing anchored in evidence, measured by "simple probabilities" or risks, not mere speculation. As I have said, I most consider the Claimant's "Original Position": as it was and might have been compared against her "Injured Position", as she is now and will be. The difference represents her loss, subject to the overall fairness and reasonableness of the award.

169. A most important evidentiary analysis involves whether G.D.'s health and overall function will remain the same indefinitely or whether she will improve and to what extent, or whether her

condition will worsen. No medical expert has suggested G.D. has a progressive condition such that her condition will worsen. In fact, the evidence suggests that G.D.'s condition and function has improved over the years albeit slowly despite temporary exacerbations such as in October and November 2020.

170. From a medical perspective, the Claimant's expert in physical and rehabilitation, Dr. Adrian, does not view G.D.'s chronic mechanical neck and back pain as a condition which precludes employment as a teacher. However, according to Dr. Adrian, she may have difficulty if required to engage in prolonged static or awkward spinal positioning involving heavier lifting and carrying, prolonged sitting or impact activities. There is no evidence that her teaching role involves such activities. In any event there is no objective evidence that G.D. is not able to perform her vocational role from a physical standpoint. Her teaching role is currently somewhat less physical as she has dropped teaching physical education. As I assess the evidence, it is my impression that G.D. is limited in pursuing full-time employment due to headaches and fatigue, brain fog and concentration difficulties. However, she did advise her physiotherapist in May, 2021 that she felt "about 60% of her normal life capacity". Since that time, she has increased her activities to the level of i) working as a ski instructor, ii) working in an office organizing heli-skiing flights, iii) completing a Master's degree on time and "with distinction", and iv) working and doing well in her first school teaching job although, her teaching contract as of July, 2023 had been reduced to a .8 contract and further reduced to a .6 contract in 2024.

171. There is also the medical evidence of two neurologists, Dr. Spacey and Dr. Dost, and from a psychiatrist, Dr. Dahi, suggesting that with further treatment, G.D. should be able to experience further improvement with headaches, fatigue, chronic pain, cognition and with mood issues. Dr. Spacey predicts slow improvement with further treatment, in cognitive function, depression, anxiety and intermittent insomnia. I have already referred to Dr. Spacey's opinion regarding a number of modalities for treatment for headaches. Dr. Spacey does not predict "headache freedom" but rather a "decrease in headache frequency and intensity". Medication will not be a cure; and will need to be taken long-term to control symptoms. G.D. has not yet tried Botox injections as recommended by Dr. Spacey and Dr. Dost. Dr. Spacey recommended visual therapy and G.D. now has glasses to deal with convergence insufficiency. Dr. Spacey also recommended ongoing psychological counselling and psychiatric assessment to deal with

symptoms of anxiety and depression which will help with cognitive function and coping with chronic pain. Dr. Adrian recommended ongoing osteopathic therapy and an exercise program; similarly, Dr. Spacey recommended working with a physiotherapist to improve strength and endurance.

172. I have already discussed the opinion of Dr. Dost, neurologist. Dr. Dost diagnoses that G.D. has chronic headaches due to whiplash from the first accident. The chronic headaches cause or contribute to symptoms of cognitive problems, light and noise sensitivity, nausea and dizziness. Like Dr. Spacey, he recommends various modalities of treatment for headaches including two trials of Botox, a 6 month trial of a CGRP receptor monoclonal antibody and possible facet joint injections. G.D. is taking Emgality which is a CGPP antibody. There is no medical record in the clinical records of the results of the trial of Emgality, although G.D. believes it is not effective. Dr. Dost's opinion is that, if G.D's headaches can be treated, G.D. may improve to the point of being able to work full-time. Dr. Dost described G.D.'s disability post accident as due to i) headaches and associated symptoms and ii) psychiatric issues. As to the later, her deferred to a psychiatrist.

173. The only psychiatrist to testify in the arbitration was Dr. Dahi. I have already discussed his report and his testimony. Dr. Dahi diagnosed or accepted previous diagnoses of generalized anxiety disorder, major depressive disorder and symptoms of somatic symptom disorder with pre-occupation with pain. As for treatment, Dr. Dahi recommends long-term psychotherapy and consideration of a change in medication for anxiety and depression. G.D. would also benefit from frequent psychiatric follow-up. He recognized Cognitive Behaviour Therapy ("CBT") as the "gold standard" in treatment for better coping with chronic pain. Dr. Dahi believes such treatment could take several years. He also suggests that a course of psychotherapy may be particularly beneficial in treating someone with perfectionist tendencies such as the Claimant.

174. The consensus of the medical experts conveys some optimism that G.D's health and function will improve. Her headaches may persist but with treatment their effects will be ameliorated. There is a reasonable prospect that with psychological therapy and psychiatric consultations her mood issues will be remitted and she will be able to cope better with chronic pain such that her fatigue and limited energy will resolve to the point she will not be as limited as she is now in terms of vocational and avocational pursuits. The evidence is that G.D. has improved over the

years and more recently her activities and accomplishments suggest she has experienced additional recovery from her injuries.

175. In considering G.D.'s original vocational trajectory, I have concluded that she is essentially on the same trajectory as she would have been although without the limitations she now experiences. By age 35, she would have started her career as a teacher in New Zealand, i.e., her current trajectory. The difference is that her Injured Position and current trajectory is affected by limitations causing a reduction in her vocational capacity. However, I find that with her attachment to the workforce, her motivation to recover and to excel, her vocational capacity will improve.

176. Neither counsel has tendered in evidence a report of a labour economist who could have provided estimates of earnings and losses of future earnings based on assumptions. Such a report could have been grounded in official labour statistics and data including labour market contingencies. I would have found such a report quite useful.

177. Claimant's counsel assumes that G.D. would have worked full-time as a teacher in New Zealand for up to another 30 years to the age of 65. He then projects only a capacity of .5 and therefore projects annual earnings half that of a full-time teacher. Counsel have included in a Common Book of Documents a salary scale for trained teachers in New Zealand which shows income levels bases on categories involving 10 steps. Mr. McQuarrie provides concise projections based on the scale showing an annual salary of $70,040 NZD effective July 2021. I am asked to assume that will be the rate for 2025. Mr. McQuarrie's projections follow a yearly jump in the income levels assuming a one step jump. For example, by 2029 the full-time salary level (1.0 FTE) is $90,960 NZD. The problem is that Mr. McQuarrie's projections for 2025 to 2054 do not match the annual income numbers in the Salary Scale located at tab C8 of the Exhibit 1. The principal of the college where G.D. teaches, describes G.D. at salary level in Grade 5, Step 4 in 2023 equivalent to $65,502 annually. A grade 5 salary is awarded to teachers holding, *inter alia,* a Master's degree. Although, the numbers in the records don't seem to align with counsel's projections, they are close.

178. In considering G.D's original position and vocational trajectory and in considering the evidence in its entirety and inferences which I draw from the evidence, I conclude that, absent her injuries, G.D. would have worked to age 60, possibly to age 65, at no more than a .8 contract as a school

teacher in New Zealand, and quite possibly at contracts less than .8 of a 1.0 full-time contract. Educated "crystal ball gazing" suggests a current trajectory of a .5 contract for the next 3 to 5 years as G.D. receive further treatment. Assuming continual gradual improvement with treatment as outlined by the medical experts, I anticipate G.D. will be able to perform well as a teacher but likely on a .6 contract. In his opening statement, Mr. McQuarrie suggested basing future loss of earnings on 30 years of loss of the difference between a 1.0 contract and a .6 contract.

179. I find it is overly optimistic to hypothesize that G.D., absent injury, would have worked full-time for the next 30 years. G.D. has never actually taught full-time on a 1.0 contract. Her first contract was 1.0 but .2 of the contract as a teacher in training involved non-teaching duties. In July, 2023 her 1.0 contract as a teacher in training was reduced to a .8 contract. The most she has worked for one-half of the year was a .8 contract. She is now at .6 and wants to move to .5. My sense is that G.D. like many members of her generation, wants a healthy work-life balance. G.D. was an extremely active outdoors enthusiast and athlete. I believe that in her mid-thirties she likely would have started a family. A geographic location like the south part of the South Island of New Zealand is an ideal area for an outdoors sports person. I would have expected that in an effort to balance family, recreation and work as a teacher, the most she likely would have worked would have been at a .8 level contract on a year-to-year basis, and quite possibly less in some years. Using Mr. McQuarrie's figures, means a 30 year earning capacity, with adjustments for positive and negative contingencies. Unfortunately, I was presented with no specific evidence of contingencies, positive or negative. Mr. McQuarrie now projects a permanent incapacity at 50%. He projects a loss on that basis of $759,720 to $974,997 NZD. I find that permanent incapacity of 50%, is overly pessimistic. The evidence from the experts of continued improvement over time and the evidence of G.D.'s gradual return to past activities, as well as academic and vocational achievements, suggests that on a global basis the degree of impaired vocational capacity would equate to less than 50% and likely no more that 30%. I also consider it a real possibility that G.D. would have retired at an earlier age than 65, perhaps at age 60, even though she would not have started her teaching career until her mid-thirties. It is not at all uncommon in today's world that young individuals delay professional careers in order to pursue other interests.

180. Assessment of loss of earning capacity is not a mathematical exercise despite an “earnings approach”. It remains an assessment and arriving at a fair and reasonable award is the goal. Taking into account such obvious negative contingencies as illness, mortality and early retirement in the original trajectory and a positive contingency that I may be overestimating the degree of improvement G.D. will enjoy over the next several years, I conclude that a fair and reasonable award for loss of future capacity is $480,000 NZD.

D. Future Care Costs

181. Counsel are generally agreed on the well-settled principles related to an award of future care. However, they differ greatly on what constitutes a reasonable award. The Claimant seeks the sum of $265,000 CND based on estimated costs of medical treatment etc., as recommended by the medical experts plus an award for “loss of housekeeping” at $50,000 CND. The Respondent estimates future care cost at $25,000 CND and rejects the loss of housekeeping claim. I agree with Respondent’s counsel concerning the housekeeping claim. I have included any loss of housekeeping ability as a factor in the award for non-pecuniary loss.

182. The test for an award of future care costs is that the expenses have medical justification and are reasonable. Reasonable costs are justified if they sustain or promote the health of the injured person. The standard of proof is the same for loss of future earning capacity, "a real and substantial possibility" rooted in the evidence. It is an assessment not a mathematical calculation. Again, what matters is whether the award is fair and reasonable.

183. The ultimate goal of an award of damages for future care is to sustain or improve the mental and physical health of the injured person: Andrews v. *Grand & Toy Alberta Ltd. supra,* DLR at p. 462.

184. In Long v. Thanes, 2019 B.C.S.C. 2255 at paras 109-111, the court summarized the legal principles underlying an award of damages for future care:

> [109] The purpose of an award for future car costs is to restore the plaintiff to his pre-Accident condition, to the extent that is possible with a monetary award: Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at para. 29. The award is based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiffs mental and physical health. Claims must be reasonable and medically justified: *Hardychuk: v. Johnstone*, 2012 BCSC 1359 [Hardychuk] at paras. 210-211.

> [110] The test for determining the appropriate award under the cost of future care heading is objective and based on medical evidence. An award of future care costs requires: (1) a medical justification for claims for cost of future care, and (2) that the claims are reasonable: Milina v. Bartsch (1985 , 49 B.C.L.R. (2d) 33 (S.C.) at 35.
>
> [111] Future care costs must be justified both because they are medically justified and also that they are likely to be incurred by the plaintiff. The award of damages for cost of future care predicts what will happen in the future and thus is not a precise accounting exercise: *Hardychuk*: at par . 212-214.

185. As noted, an award for future care is not "an accounting exercise" as the ultimate aim of this head of damage is to ensure an adequate level of care to a person injured as a result of tortious conduct: *Townsend v. Koopmans* [2004] S.C.R. 315 at p. 326. Nonetheless, the BCCA in *Rab* observed that the consideration of an award of future care should involve a breakdown and analysis of the care that is itemized.

186. The difficulty that I have is trying to rationally assess the components making up the cost of care claim put forward by counsel is that I do not have the benefit of a cost of care report nor an economist's report setting out present values of the individual care items. For the most part the actual costs, their frequency and duration are estimates of counsel base on assumptions. The exception is Dr. Spacey's recommendation for Botox treatments where she provides approximate costs for injections and projects 3 cycles of trials of injections. Duration of treatment is unknown. Dr. Spacey also sets out an estimated cost for treatment with a CGRP antibody for headaches but G.D. has already undergone a trial of Emgality and provided no evidence of cost. Moreover, the estimate of the Respondent of $25,000 CND for future care provides no breakdown of that amount.

187. I accept that, generally speaking, the type of treatment outlined by the Claimant's counsel is medically justified but, for the most part, there is no evidentiary basis for the pecuniary amounts claimed. My overall impression is that a global award of $100,000 CDN is a fair and reasonable award for future costs including, psychotherapy, Botox injections, medications, supplements and osteopathic and physiotherapy treatments. Since there was no specific analysis of the items claimed it remains an open question whether some of the services and treatment will be covered under health benefits provided to union schoolteachers.

188. An alternative to my global award of $100,000 for future care is to request counsel to arrange another half day or full day, withing the next two months, to make further submissions on each and every item of future care costs.

E. In Trust Claim

189. The Claimant has included in the heads of damages an amount of $25,000 NZD based on an in trust claim for gratuitous services provided by family members necessary for the care of the inured person. The award represents compensation to the Claimant, not to the service provider, on the theory that if uninjured the Claimant would be able to provide the care herself without reliance on others. Counsel for the Claimant cites *Bystedt v. Hay* 2001 B.C.S.C. 1735 at para. 180 summarizing the prerequisites for such an award. One of the prerequisites for compensation is that the services rendered by a family member must be over and above what would be expected from the family relationship, e.g. by one partner in a domestic relationship to another partner.

190. Mr. McQuarrie submits that an increased housekeeping role taken on by J.Y. from the date of G.D.'s arrival in New Zealand in late November 2019 to the present is compensable as an in trust award. Secondly, he submits that G.D.'s friend, S.G., provided domestic tasks over and above that expected of a friend when G.D. moved in with S.G. in 2020 to 2021 in Wanaka in order for G.D. to be closer to medical treatment not available in Mt. Cook where she was living with J.Y. No authority was cited to me that S.G.'s status as a live-in friend is included in the *Bystedt* factors referring to services provided by family members. In principle, I see no reason to exclude a live-in friend/roommate from the concept of such an award. However, for reasons that follow I do not need to decide the point.

191. I reject any claim for domestic services provided by S.G. primarily on the ground that whatever "extra" household/domestic services were provided because G.D. had a reduced capacity due to her injuries, they simply do not rise to a level beyond what would have been expected from the relationship.

192. I note S.G. had been a close friend of G.D. since 2017. In 2020, according to S.G., G.D. was quite housebound in Mt. Cook because of the pandemic. Mt. Cook is a small mountain town; whereas Wanaka is a somewhat larger regional center and offers a range of medical

practitioners. Mt. Cook and Wanaka are about 2 hours apart. S.G. is an experienced physiotherapist. She recognized that G.D. wanted to improve her health and access medical treatment.

193. In her capacity as a good friend, S.G. invited G.D. to live with her in Wanaka in order to access medical care. G.D. attended physiotherapy sessions, psychological counselling and vision therapy in Wanaka while staying with S.G. They cooked meals and shopped together. S.G. says she prepared dinner 5 out of 7 nights a week. In doing so, my impression is that S.G. was merely doing what good friends often do, help out a friend for several months, here in 2020 and 2021. I do not find S.G.'s services rose to a compensable level.

194. In terms of the "services" provided by J.Y. no doubt he falls in the "family member" category discussed in *Bystead*. However, context is important. J.Y. and G.D. started cohabitating in late November 2019 after the Washington Accident. Both had planned a "50/50" partnership. Unfortunately, G.D., due to her injuries, was unable to contribute to that standard. She is disappointed she has not been able to contribute more equally in terms of domestic tasks. The problem for G.D. in doing domestic tasks is not that she is physically unable to do them; the difficulty appears primarily to relate to fatigue, her "battery" runs low, particularly when she is working. Moving to a less demanding work schedule allows G.D. to have a more balanced life in recreation and domestic activities. By reducing her teaching contract level, according to J.Y., she can avoid a "work/sleep/work" cycle.

195. J.Y. testified that to date he does the majority of the domestic tasks, including cooking, shopping, cleaning and yard work. Fortunately, his father is a carpenter and enjoys doing renovation projects. Their roommate helps defray the mortgage expense by paying rent but occasionally helps out with housework. J.Y. is very fit and quite able to handle the domestic tasks on his own. He works an average of 15 days per month but his workdays can be very long and often take him away from home for extended periods of time. Overall, J.Y. is not adverse to doing the domestic tasks. There have also been two lengthy periods of time when G.D. and J.Y. did not cohabitate; in 2020-2021 when G.D. lived with S.G. in Wanaka and from January to June 2022 and when G.D. lived with J.Y.'s parents in Christchurch while she attended the University of Canterbury in 2022.

196. I conclude that J.Y.'s past domestic services to G.D. merit an in trust award of $10,000 NZD.

F. Special Damages

197. Counsel for the Claimant states that $14,974.04 CDN has been agreed as special damages. The Claimant seeks an additional sum of $16,375.20 CDN as itemized in a Schedule (Exhibit 2, Tab D1). There was no specific evidence given about the reasonableness of the charges incurred. The general categories seem appropriate for the dates December 1, 2019 to October 14, 2024; however a mileage claim for 13,590.4 km totalling $8,926.80 CND for travel to medical appointments, December 1, 2019 to November 13, 2020, seems excessive. The Respondent proposes special damages at 50% of the amounts claimed subsequent to the New Zealand Accident.

198. I am prepared to allow $10,000 CDN for special damages less 5% for the non-compensable New Zealand Accident for a total of $9,500 CDN.

VI. DEDUCTIBLE AMOUNTS

199. The sum of $50,000 USD, the third-party insurance limits, paid to G.D. from the tort settlement arising from the Washington Accident is deducted as a deductible amount under s.148.1(1)(g) of the Revised Regulation. If there are any other deductible amounts, I invite counsel to so advise.

VII. SUMMARY OF AWARD

200.

A.	Non-Pecuniary Loss	$198,500.00 CDN
B.	Past Income Loss	$102,495.93 NZD
C.	Loss of Future Earning Capacity	$480,000.00 NZD
D.	Cost of Future Care	$100,000.00 NZD
E.	In Trust Claim	$ 10,000.00 NZD
F.	Special Damages	$ 9,500.00 CDN
	Less $50,000 USD	

201. I request counsel to provide agreed upon conversion exchange rates for NZD to CDN and USD to CDN. I also request counsel to provide an agreed upon net tax deduction for past income loss.

I also invite counsel to make submissions on costs failing agreement. Finally, I expect counsel to advise me if they wish to make further submissions on specific items of future care and on any additional deductible amounts.

Dated: March 14, 2025

Vincent R. K. Orchard K.C.
Arbitrator