IN THE MATTER OF AN ARBITRATION PURSUANT TO S. 148.2 OF THE INSURANCE (VEHICLE) REGULATION, B.C. Reg. 447/83 and the ARBITRATION ACT [SBC 2020] c. 2

BETWEEN:

EM

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

SUPPLEMENTAL AWARD ON DEDUCTIBLE AMOUNTS

AND COSTS

Counsel for the Claimant, EM	Tyler F. Dennis
Counsel for the Respondent, Insurance Corporation of British Columbia	Joseph P. Cahan
Place and Date of Hearing	Vancouver, B.C. Via Zoom January 22, 2026
Date of Supplemental Award	February 13, 2026
Arbitrator:	Dennis C. Quinlan, K.C.

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I. INTRODUCTION

[1] On February 26, 2025, I delivered my arbitration award (the "Award) in respect to the underinsured motorist protection ("UMP") claim advanced by EM (the "Claimant").

[2] The Claimant was awarded damages totaling $324,000 broken down as follows:

Non-Pecuniary Damages	$175,000
Past Loss of Earning Capacity	$ 10,000
Future Loss of Earning Capacity	$100,000
Cost of Future Care	$ 30,000
Special Damages	$ 9,000
TOTAL	$324,000

[3] At the conclusion of my Award I stated the following:

> [242] The Claimant is entitled to her costs unless there are considerations of which I am not aware.
>
> [243] If the parties wish to make submissions on deductible amounts, costs, or special damages, a telephone call can be scheduled to arrange the necessary steps going forward.

[4] By notice of application dated December 19, 2025, the respondent Insurance Corporation of British Columbia (the "Respondent") sought a determination of deductible amounts to be deducted from the award of damages as required by s. 148.1 (1) of the *Insurance (Vehicle) Regulation* B.C. Reg. 447/83 (the "Regulation"),

and an order for costs of the arbitration from December 30, 2024 being the date of an offer to settle purported to have been made pursuant to Rule 9-1 of the *Supreme Court Civil Rules* (the "Rules").

[5] The Claimant opposes the orders sought and seeks her own orders for costs of the arbitration, and double costs in respect to an order made November 29, 2023, to adjourn the arbitration at the request of the Corporation (the "November 2023 Order").

[6] The Claimant asserts the Respondent's failure to comply with the terms of the November 2023 Order is analogous to contempt of court warranting of consequence.

II. BACKGROUND

[7] This arbitration arises from an accident that occurred on November 28, 2016, when the pedestrian Claimant was hit in a marked crosswalk by a left turning vehicle (the "Accident"). I found the driver to be 100% at fault for the Accident.

[8] The main issue in the arbitration was the claim of the Claimant for future loss of earning capacity related to the assertion that her career plan of becoming a lawyer was significantly impaired.

[9] On July 18, 2017, the Claimant commenced an action in the Supreme Court of British Columbia against the driver and owner of the left turning vehicle (collectively the "Defendant").

[10] The action was settled on October 26, 2021 for the Defendant's liability insurance limit of $200,000 and the Respondent's consent to the Claimant submitting her claim for UMP compensation to arbitration pursuant to section 148.2 (1) of the *Regulation* and *Arbitration Act* [SBC 2020] c. 2.

[11] The parties agreed the *Rules* would govern the UMP proceeding as applicable.

[12] The arbitration was originally scheduled for November 29, 2023, but was adjourned on a pre-emptory basis to January 2, 2025, pursuant to the terms of the November 2023 Order.

[13] On December 30, 2024, the Respondent offered to settle with the Claimant for $260,000 all-inclusive new money for a release of all claims.

[14] The arbitration proceeded as scheduled on January 2, 2025.

III. DEDUCTIBLE AMOUNTS WITHIN UMP LEGISLATIVE SCHEME

[15] UMP is a statutory form of first party insurance which provides compensation to an insured person in the event an at-fault motorist has insufficient or no liability insurance or other assets with which to pay a judgement.

[16] It is a fund of "last resort" in that compensation is payable only after all listed amounts set out in section 148.1 (1) of the Regulation are deducted from the Corporation's liability: *S.A. (Re), 2020 BCSC 1323* at para. 25.

[17] The relevant provisions of Section 148.1 (1) are as follows:

> "deductible amount" means an amount
>
> (c) paid or payable under Part 7…
>
> (g) paid or payable to the insured under a certificate, policy or plan of insurance providing third party legal liability indemnity to the underinsured motorist…
>
> (i) paid or payable to the insured under any benefit or right or claim to indemnity.

[18] The intent of the legislation and purpose of deductible amounts is to ensure that the total amount received from all listed sources does not exceed the limit of UMP coverage as described in *Hosseni-Nejad v. ICBC*, (Arbitration Award December 21, 2000, Arbitrator Yule) at para. 67:

> "...the purpose of having deductible amounts in s. 148.1 may not be explicitly to avoid double compensation, which is a rational behind the s. 25 deduction. The rationale for deductible amounts in the UMP compensation scheme is to ensure that a clamant exhaust all other potential sources of benefit before accessing this fund of last resort. But the fundamental rationale is the same. The deductions exist to avoid the possibility of the claimant receiving more payment than is intended, or excess recovery...[I]n the UMP scheme, because it is intended to be a fund of last resort, the claimant must obtain recovery from all other listed sources which benefits are deducted, so that the total amount received from all sources does not exceed the limit of UMP coverage."

Emphasis added

[19] The interaction between the amount of UMP compensation and deductible amounts is illustrated in s. 148.1 (5) which provides that the liability of the Respondent shall not exceed the limit of coverage set out in Schedule 3 minus the sum of the applicable deductible amounts.

[20] It is apparent from *Hosseni-Najad* that the principles for deductions from a tort award under s. 83 of the *Insurance (Vehicle) Act* [RSBC 1996] Chapter 231 (the "*Act*") are generally applicable to the determination of deductible amounts under s. 148.1 (see para. 68).

[21] The onus of proof to establish a particular deductible amount lies with the Respondent: *KP et al v. ICBC* at para. 11 (Arbitration Award April 30, 2019, Arbitrator Yule).

[22] While there is no requirement for "matching" between the deductible amount and a particular head of damage, the payment must be related in some relevant and meaningful way to the claim for damages against the underinsured motorist: *KP,* at para. 59, 64.

[23] Strict compliance is required in determining deductible amounts and any uncertainty as to whether a benefit will be paid so as to constitute a deductible amount must be resolved in favour of the Claimant: *Courchesne v. Chau*, 2025 BCSC 2513 at para. 14.

IV. DEDUCTIBLE AMOUNTS SOUGHT BY RESPONDENT

(a) Third Party Legal Liability Policy

[24] An amount paid to an UMP insured under a plan of insurance providing third party legal liability indemnity to the underinsured motorist is a deductible amount pursuant to sub-section (g) of s. 148.1 (1).

[25] The Respondent seeks a declaration that the amount of $200,000 paid on behalf of the underinsured motorist by the third-party liability insurer is a deductible amount. The Claimant consents to such declaration.

(b) Wage-Replacement Benefits

[26] An amount paid or payable under any benefit or right is a deductible amount pursuant to sub-section (i) of s. 148.1 (1).

[27] The Respondent asserts that following the Accident, the Claimant received wage-replacement benefits in the amount of $10,000 from her disability insurer

Manulife Financial for lost income through her employment with TD Bank. The Respondent submits such benefits are a deductible amount.

[28] The arbitration evidence was that the Claimant was completely off work following the Accident until January 11, 2017. Thereafter she periodically missed shifts until October 2017. Using that factual framework, I awarded the Claimant $10,000 for past loss of earning capacity as set out in paragraphs 179 to 183 of the Award.

[29] The evidence in support of the Respondent's notice of application consisted of two affidavits from NB, a legal administrative assistant employed by counsel for the Respondent.

[30] NB deposed without stating the source of her information, that the Claimant received wage-replacement benefits in the total amount of $10,000 for the specific period November 28, 2016 to January 10, 2017 under a short-term disability designation. She attached as exhibits portions of the Claimant's TD Bank employment file ("TD Records") and Manulife Financial disability file ("Manulife File').

[31] At the outset of the arbitration, the parties reached a document agreement which was entered as Exhibit 9. The agreement included the term that all documents identified in Schedule "A" were authentic and business records within the meaning of the Evidence Act, RSBC 1996. The TD Records and Manulife File were included within Schedule "A".

[32] Although only certain pages from the respective records became exhibits in the arbitration (the balance were marked for identification), I am prepared to consider the exhibits attached to NB's affidavits given the document agreement entered as Exhibit 9.

[33] In reviewing the TD Records, they only support wage-replacement benefits (described as STD 100%) totaling $2,530.33 as being paid to the Claimant for the period November 28, 2016 to January 10, 2017.

[34] The TD Records do indicate wage-replacement benefits totaling $551.73 were paid to the Claimant in September and October 2017. However NB did not address those payments (see paras. 13-15 of NB affidavit # 2) and there was no other evidence to explain whether they were related to the Claimant's Accident. In the absence of evidence, I cannot speculate.

[35] The Claimant in opposing the relief sought by the Respondent, objected to the affidavits of NB and observed there was no evidence on any issue from a representative of the Respondent.

[36] With particular reference to wage-replacement benefits, the Claimant objected to the sworn statement by NB in her first affidavit that "…to the best of my knowledge and belief, there is no evidence that the Claimant repaid, or is required to repay, the wage-replacement benefits received" on the basis that it was speculation without knowledge and did not address the common law doctrine of subrogation.

[37] I agree with the Claimant that the affidavit evidence of NB on this point is of no assistance.

[38] However in my view once the Respondent established the Claimant received some wage-replacement benefits, it was for the Claimant to put forward evidence of a required re-payment or intention to subrogate. As was stated in *Courchesne* at para. 31, "…the plaintiff is in the best position to provide evidence of coverage."

[39] I find the sum of $2,530.33 is a deductible amount in accordance with sub-section 148.1(1) (i) of the Regulation.

(c) Special Damages Under Part 7

[40] An amount paid or payable under Part 7 is a deductible amount pursuant to s. 148.1(1)(c) of the Regulation.

[41] The Respondent seeks a declaration that the sum of $1,347.32 "...being the portion of the special damages award that overlap with benefits paid or payable under Part 7 of the Regulation...", is a deductible amount.

[42] The Claimant testified to out-of-pocket expenses totaling $12,485.03 as set out in Exhibit 5. In respect to those expenses, the parties came to an agreement that $7,652.68 would constitute special damages.

[43] The Claimant also testified to additional expenses totaling $1,410 for which receipts were not included in Exhibit 5, being a back brace costing between $30 and $40, medication totaling $50, two short term disability notes costing $400, pillows totaling $200 and a kick boxing membership which the Claimant had to continue paying for five months when she could not use it. The total special damage claim including the additional expenses was $9,062.69.

[44] The evidence of the Claimant concerning the additional expenses was not challenged in cross examination or final argument.

[45] I awarded $9,000 for special damages which reflected a nominal reduction for the fact there were no receipts for the additional expenses claimed.

[46] As I understand the Respondent's argument, the additional expenses which I awarded as special damages should be a deductible amount as a payment under Part 7.

[47] I pause here to say there is a fundamental procedural difference between the parties involved in respect to a s. 83 deduction in a tort action, and the parties involved in determining a deductible amount in an ump arbitration. In the tort action, ICBC as the part 7 insurer is not a named party and in the normal course only becomes involved once the court has assessed damages. In an ump arbitration, ICBC as the UMP insurer is a named party from the outset and has control over the process.

[48] This distinction was illustrated in *Luck v. Shack,* 2020 BCSC 1074, where in the context of a s. 83 application the Court stated at para. 16:

> "ICBC is not a party to this application. It is the tort defendants, not ICBC, who seek these deductions. The legislative scheme is designed to remove the burden of future care from the tortfeasor and place it on the insurance provider, ICBC. The purpose of this post-trial hearing is to determine the appropriate deductions, if any, from the Judgment. It is not to conclusively determine the legal obligations between Ms. Luck and ICBC."

[49] In the UMP scenario, the Respondent as UMP insurer seeks the benefit of a deduction while transferring responsibility for payment to itself as Part 7 insurer.

[50] The insured in both instances is the Claimant. In my view it is incumbent for the Respondent to provide confirmation that the benefit it seeks to deduct will be paid under Part 7. As was concisely stated by Arbitrator Yule in *Hosseini-Nejad*, there can be no deductible amount without a corresponding payment:

> 69. Either the expenses are payable as benefits under Part 7 and are deducted from the limit of UMP compensation or they are not payable under Part 7 and are not deductible from the limit of UMP compensation.

[51] As noted earlier there was no evidence from the Corporation as whether the "overlapping" special damages were a mandatory or a discretionary benefit under

Part 7, or whether the Corporation intended on paying the expenses under Part 7. I was advised by counsel that the parties are engaged in Part 7 litigation. Given the length of time that has passed since delivery of my Award with no payment being made for a relatively small amount and no explanation offered as to why not, uncertainty arises.

[52] Uncertainty as to the likelihood of payment is to be interpreted against the Respondent.

[53] I decline to make a declaration that the amount of $1,347.32 is a deductible amount. It is implicit in my decision that the Claimant will not seek payment under Part 7 for the additional special damages awarded to ensure there is no double recovery.

(d) Future Care Under Part 7

[54] The Respondent seeks a declaration that such portion of the cost of future care award that corresponds to Part 7 medical and rehabilitation benefits paid or legally payable within the meaning of s. 148.1 (c) of the Regulation is a deductible amount.

[55] Section 88 of the Regulation sets out the medical and rehabilitation benefits payable under Part 7. Section 88 (1) specifies those benefits that the Respondent must pay, and s. 88 (2) describes those benefits which the Respondent has discretion to pay.

[56] Section 83 (5) of the Insurance (Vehicle) Act [RSBC 1996] Chapter 231 (the "Act") then requires Part 7 benefits paid or payable to be deducted from a plaintiff's tort damages entitling the plaintiff to enter judgment for the balance after the Part 7 benefits have been deducted.

[57] Sections 148.1(1) and (5) of the Regulation applicable to UMP effectively operate in a similar manner.

[58] In its material in support of the notice of application, the Respondent stated that "[t]he Arbitrator awarded the cost of future care globally and declined to assess individual items on an itemized basis". This statement was repeated in both affidavits of NB.

[59] In fact the Award stated the following:

> [238] The Respondent without providing any breakdown suggested a future care award of $25,000.
>
> [239] Doing the best I can on the evidence available including Ms. Clark's present value evidence, I award the following for future care:

(a)	Assistive devices (Mr. McNeill)	$5,000
(b)	Seasonal cleaning (Mr. McNeill)	$10,000
(c)	Chiropractic therapy (Dr. Waseem)	$5,000
(d)	Pain management program (Mr. McNeill)	$10,000
	TOTAL	$30,000

[60] It was the submission of counsel for the Respondent that I should allow a deductible amount of approximately $15,000, which it was suggested would be reflective of what has been allowed in other cases.

[61] Once again the Respondent asserts in its capacity as first party UMP insurer that it is entitled to a deductible amount related to a benefit. In its capacity as first party Part 7 insurer, it offers no evidence as to whether the benefit will be paid.

[62] Such approach again in my view raises uncertainty as to the likelihood of payment.

[63] I acknowledge the principle that I am not to presume the future conduct of the Respondent will be other than honorable: *Norris v. Burgess*, 2016 BCSC 1452 at para. 35.

[64] However it should be relatively straightforward for the Respondent to review the care items awarded and confirm which items of care it is prepared to pay under Part 7. Instead, the affidavit of NB attached Part 7 of the Regulation in its entirety as an exhibit. While in some circumstances that might be a sufficient approach, I view it as insufficient in the circumstances applicable to this claim, including the Respondent being a party to the UMP arbitration.

[65] As stated in *Zhang v. 328633 B.C. Ltd.*, 2021 BCSC 650 at para. 30, there have been a number of cases providing direction to the Respondent as to what is required to support a s. 83 deduction (see *Luck*; *Courchesne*; and *Purewal v. Uriate,* 2021 BCSC 1935.

[66] In the absence of similar type evidence, I am left with concluding that the Respondent has not met the standard required to support a declaration for a deductible amount in respect to the future care award.

V. COSTS CONSEQUENCES OF OFFER TO SETTLE

(a) Offer to Settle

[67] The Respondent seeks an order for costs of the arbitration based upon what it submits was a formal offer to settle made pursuant to Rule 9-1 which was greater than the ultimate amount awarded the Claimant.

[68] Specifically the Respondent in its Notice of Application sought the following:

> 3. An order that the Respondent is entitled to its costs of the arbitration from December 30, 2024, being the date of the Respondent's formal offer to settle, onward, or such other order as the Court (sic) considers just, having regard to the Respondent's offer to settle made pursuant to Rule 9-1 of the Supreme Court Civil Rules, which offer the Respondent has beaten.
>
> Emphasis added

[69] The offer in question was sent in a December 30, 2024 email from Respondent's counsel to Claimant's counsel marked "w/p" and bearing time stamp of 9:42:33. The email in its entirety read as follows:

> ICBC's final offer is $260,000 all-inclusive new money for a signed release for all claims (Parts 6, 7 and 10), open for acceptance until noon tomorrow.
>
> (the "Offer")

[70] It is notable that the Offer was made three days before commencement of the arbitration with one of those days being a holiday and left open for acceptance for fourteen hours.

[71] Rule 9-1(1)(c) defines an offer to settle:

> (1) In this rule, **"offer to settle"** means
>
> (c) an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that
>
> (i) is made in writing by a party to a proceeding,

(ii) has been served on all parties of record, and

(iii) contains the following sentence: "The.....,...*[party(ies*].....,....[name(s) of party(ies)] ....., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

[72] Rule 9-1(5) provides that where an offer to settle is delivered, an order may be made to deprive a party of any or all costs, award double costs, or award costs to a defendant in respect to some steps taken after delivery of the offer.

[73] Rule 9-1 (6) sets forth the factors that may be considered in making an order under subrule (5), including whether the offer ought reasonably to have been accepted at the time of delivery, the relationship between the terms of the offer and final judgment, the relative financial circumstances of the parties and any other factor considered appropriate.

[74] The position advanced by the Claimant in opposing the order sought is that the Offer was not a formalized offer as defined in Rule 9-1(1) (c) because it did not contain the essential language indicating the offer would be brought to the attention of the court (in this case Arbitrator) once judgment was pronounced.

[75] The Claimant also submitted that the Offer was not served in the manner required and, in any event, it was not an offer that ought reasonably to have been accepted when it was delivered.

[76] An "offer to settle" is a defined term with core requirements that while modest, must be followed: *Hoisington v. Johnson & Johnson Inc.,* 2016 BCSC 1973 at para. 27, 29.

[77] The leading authority addressing the requirements of Rule 9-1 (1)(c) and its predecessor Rule 37B is *Roach v. Dutra,* 2010 BCCA 264. After noting that Rule 37B was to be applied less rigidly than previous versions, the Court stated:

> [52].....[T]hat said, I am also of the view that the wording of the offer must be substantially compliant with the wording of subrule 1(c)(iii) such that no reasonable person could be misled as to the intent of the offer or the fact that it was an offer within the meaning of Rule 37B. In other words, the offer must be in writing, the wording must make it clear what party is making the offer and to whom it is made, and it must include the fact that the party making the offer is reserving the right to bring the offer to the attention of the court in relation to costs after judgment on all other issues in the proceeding.
>
> Emphasis added

[78] In *M.S.G. v. S.K.R.*, 2015 BCSC 913, the Court in considering identical language found in the Supreme Court Family Rules stated:

> [14] As I noted in *Henry v. Bennett*, 2014 BCSC 1963, at para. 38, the phrase "without prejudice" in a letter by counsel that proposes settlement, without more, does not serve as proximate language for the express reservation mandated in the definition of an "offer to settle".
>
> Emphasis added

[79] Following the principles set out above, I find the Offer does not meet the definition of "offer to settle' prescribed by Rule 9-1(1)(c). As such there is no basis to make an order under Rule 9-1(5) as requested by the Respondent.

[80] Given my finding, I need not consider the Claimant's submissions that the Offer was not properly served and was not one that ought reasonably to have been accepted.

[81] The Respondent stated the following in its Supplemental Submissions:

> 21. An offer to settle need not strictly comply with the formal requirements of Rule 9-1 to be relevant to costs. What matters is the substance and reasonableness of the offer, not technical compliance. In *Bailey v. Jang*, 2008 BCSC 1372 (at paras. 18-22), the Court held that a settlement offer may properly be considered as part of the costs analysis even where it does not meet the formal criteria of the Rules, provided it was capable of acceptance and reflected a genuine attempt to resolve the dispute.

[82] I reviewed the referenced paragraphs 18-22 in *Bailey*. The comments of the court only went so far as to state that recent amendments had "brought about [a] reversion from a strict code to a reliance on judicial discretion with respect to costs…" There was no statement that an offer to settle need not to comply with the formal requirements of the applicable rule.

[83] It is notable that the offer in question in *Bailey* contained the statement that the defendants "reserve the right to bring [it] to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in the proceeding."

[84] The Respondent's Offer contained no such wording.

[85] The Respondent also relied upon the arbitration award of *SM v. Insurance Corporation of British Columbia* (Supplemental Arbitration Award, 17 August 2023) in support of its position that an offer need not strictly comply with the formal requirements of Rule 9-1.

[86] *SM* involved the situation where the Claimant's application for a declaration that she was an insured was dismissed outright. Upon dismissal, the Respondent sought its costs as it was entitled to do. The cost order ultimately made favored the Claimant and the Respondent's offer was not relied upon.

[87] Similarly in *JLS v. Insurance Corporation of British Columbia* (Arbitration Award, October 8, 2021) there was no dispute that the offer in question met the formal requirements of Rule 9-1(1)(c). However because it was not clear and unambiguous, the arbitrator was not prepared to depart from the ordinary rule that the claimant was entitled to her costs.

[88] The Respondent conceded in oral argument and then in para. 30 of its Supplemental Submissions (which I accepted over the objection of Claimant's counsel) that the Offer did not meet the requirements of Rule 9-1(1)(c). Nonetheless it continued to assert I could and should rely upon it (see paragraphs 3, 6, 7, 8, 9, 11, 17, 22, 26, 28, 29, 30, 38, 39 and 40) as a relevant circumstance to be considered in the exercise of my discretion as to costs.

[89] The answer to the Respondent's alternative position is found in the following statement by Justice Grauer (as he then was) in *Wong v. Rashidi*, 2011 BCSC 66:

> [40] In argument on this point, the parties sought to rely on various exchanges of without prejudice correspondence that canvassed settlement but did not constitute offers to settle within the meaning of Rule 9-1. In my view, that was wrong, and I ignored all such evidence. Correspondence concerning or proposing settlement does not lose the protection of having been written without prejudice unless it complies with Rule 9-1(1)(c) in which case the party preparing the document will have reserved the right to refer to it in relation to costs. <u>Otherwise it is not only inadmissible, but also irrelevant to the exercise of discretion reserved to the court by the rule.</u>

Emphasis added

[90] As stated by Justice Grauer in *Wong*, the Offer was inadmissible and irrelevant.

[91] I find there is no basis for my considering the Offer in the exercise of my discretion as to costs.

(b) Exercise of discretion

[92] The Respondent further submitted that sub-section 148.2(2) and (3) of the Regulation limit recoverable costs to party and party basis and vest in the arbitrator discretion to determine costs. As to that statement, there is no debate.

[93] While agreeing the parties adopted the Rules to procedurally govern their arbitration, the Respondent submitted the Rules were necessarily subject to and constrained by the statutory and regulatory framework governing UMP proceedings such that costs are determined "in light of the outcome of the arbitration and conduct of the parties, rather than on the mechanical application of civil costs rules".

[94] The Respondent offered no insight as to how this relationship might impact on the exercise of the arbitrator's discretion in determining costs, or how civil costs principles differ from those principles to be applied in an arbitration. The decision cited by the Respondent in *Insurance Corporation of British Columbia v. E.B.*, 2023 BCSC 120 dealt with the issue of the arbitrator's jurisdiction to award arbitrator's fees as a disbursement. The paragraphs from the decision relied upon by the Respondent in its Supplemental Submissions reflect the position advanced by ICBC which was rejected by the court.

[95] In my view the general principles for the exercise of discretion in the assessment of costs are largely consistent as between a civil proceeding and an

UMP arbitration particularly when the parties agree the Rules will govern, albeit subject to the qualifications in sub-sections 148.2 (2) and (3) of the Regulation.

[96] Pursuant to Rule 14-1(9) costs of a proceeding must be awarded to the successful party unless the court otherwise orders. At its most basic level the successful party "is the plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case": *Loft v. Nat*, 2014 BCCA 108 at para. 46.

[97] The fact that a plaintiff obtains a judgment in an amount less than the amount sought is not, on its own, a proper reason for depriving that party of costs: *Loft* at para. 47.

[98] Rule 14-1 (15) provides for an order to be made in respect to discrete issues, which effectively is what the Respondent now seeks. In *Ding v. Canam Super Vacation Inc.,* 2024 BCCA 102, the court stated the following at para. 201:

> "...an order under Rule 14-1(15) to deny a successful party their costs on discrete matters is not a regular part of litigation and should be confined to relatively rare cases: *Sutherland* at para. 43. Such cases may certainly include those where the court rules against the successful party on an issue that took a discrete amount of time at trial (*Loft* at para. 49) as well as cases involving some kind of misconduct in the litigation, such as where the successful party prolonged the case unnecessarily on an issue on which they were unsuccessful: *Sutherland* at paras. 34 - 36."

[99] There is no dispute that the Claimant received awards for loss of future earning capacity and cost of future care that were significantly less than what she sought.

[100] She received $100,000 for loss of future earning capacity in the face of a claim for $1,300,000. The award for future care was $30,000 in comparison to a claim of $510,000.

[101] The Respondent on the other hand disputed liability by alleging the Claimant was contributorily negligent notwithstanding there was video evidence showing how the Accident occurred.

[102] In final argument, the Respondent submitted that the Claimant was entitled to non-pecuniary damages of $80,000 to $100,000, past wage loss of $10,000, special damages of $7,652.68, future care costs of $25,000 and nothing for loss of future earning capacity. Those amounts were subject to a deduction for the Claimant's contributory negligence.

[103] There was no suggestion of misconduct in the litigation, and I found the Claimant to generally be a good witness, both from a credibility and reliability perspective. The arbitration was efficiently run and there was no wasting of hearing time.

[104] The difficulties in the Claimant's case were evidentiary, as indicated by my findings that she failed to establish a reasonable and substantial possibility of becoming a lawyer in British Columbia for reasons set out in paragraphs 202 to 213, and did not establish on a balance of probabilities that she suffered a mental injury as described in paragraphs 149 to 160.

[105] The majority of the claim for future care related to driving assistance until age 75 in the amount of $380,000 based upon the premise that it was not safe for her to drive due to mental injury sustained in the Accident.

[106] The claims advanced for loss of earning capacity and cost of future care were largely matters of argument as advanced in final submissions. The arbitration was

not unnecessarily or improperly lengthened by the Claimant in advancing these claims and in fact there was, as I commented at para. 205, an evidentiary void.

[107] In the result, the Claimant was the successful party in establishing liability which was in dispute and obtaining a pecuniary judgment well in excess of what the Respondent argued for. I do not view this as one of those rare cases where the Claimant as the successful party should be denied her costs.

VI. ISSUES RAISED BY CLAIMANT'S COUNSEL

[108] Claimant's counsel alleges the Respondent included without prejudice communications in its application materials on "multiple occasions" to support cost consequences.

[109] Reference is made to a 299 page affidavit sworn October 11, 2024 from TG, a legal administrative assistant in Respondent counsel's office, which was filed in support of an earlier application for a further expert medical assessment. Buried in the affidavit at pages 234 and 235 is an email exchange between counsel where the words "without prejudice" appear above one of Claimant counsel's statements commenting on alleged ICBC negotiation tactics.

[110] No settlement offer appears in the email and the only reference to settlement is a request to "reconsider your assessment, authority and last offer. I think the ball is in your court."

[111] In *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37 the court at paras. 13 and 18 confirmed that the purpose of settlement privilege is to promote settlement which is achieved by the parties having confidence that negotiations will not be disclosed, whether or not settlement is achieved.

[112] The court in *Repp v. Butler*, 2026 BCSC 107 at para. 33 commented on use of the phrase "without prejudice":

> "The law is clear that the use of the phrase "without prejudice" is not, in and of itself, sufficient to protect a document from disclosure; rather, the content of the document must contain a settlement offer or refer to settlement indirectly by either inviting compromise or some other approach to resolution."

[113] In my view the communication in question might fit within the bounds of settlement privilege but only at its most remote edge. There clearly was no settlement offer and the communication was found within three hundred pages of records. I expect if counsel had not raised the issue, it would never have come to my attention or that of Respondent counsel. I note when the issue was raised, TG delivered a redacted affidavit removing the statement some ten days later.

[114] The second complaint relates to the December 30, 2024 email containing the settlement offer. This was only disclosed after the delivery of my award and in support of the Respondent's assertion that the email was an offer to settle within the meaning of Rule 9-1(1)(c) so as to entitle it to costs.

[115] I ruled against the Respondent on this issue. The disclosure of the offer was no more than what the unsuccessful applicants did in *Hoisington* and *Henry* referred to earlier.

[116] This issue is not deserving of cost consequences.

[117] Last it is asserted the Respondent has not complied with an order I made November 29, 2023 granting an adjournment of the arbitration hearing requested by the Respondent because counsel was in another trial and unavailable.

[118] It is submitted the conduct of the Respondent amounts to contempt of court which should be punished by way of an order of double costs for the costs and disbursements thrown away that have been outstanding for over two years.

[119] The order I made was as follows:

> The arbitration scheduled to commence November 29, 2023 is adjourned to January 2, 2025.
>
> The Claimant is entitled to her costs of the adjournment application in any event of the cause, including disbursements thrown away as a result of the adjournment, payable thirty days following presentation of a Bill of Costs and as agreed upon or assessed.
>
> The Respondent may not seek to deduct the above amounts associated with this cost order from the ultimate award.

[120] I was told a bill of costs was sent by Claimant counsel to Respondent counsel on January 26, 2024. No agreement was reached and the Claimant never took out an appointment to have the costs assessed.

[121] While it is unfortunate that costs were not agreed to and then paid by the Respondent, I see no basis upon which to conclude the failure to pay by the Respondent in the absence of an assessment is analogous to contempt of court warranting an award of double costs. Interest will be the remedy once there is an assessment.

VI. CONCLUSION

[122] The Claimant is awarded damages of $324,000 as particularized in paragraph 241 of the Award.

[123] There will be deductible amounts of $200,000 being the amount paid on behalf of the underinsured motorist by his third-party liability insurer and $2,530.33 wage replacement benefits paid by Manulife Financial.

[124] The Claimant has been largely successful in defending this application and is entitled to 85% of her costs in respect thereto. I have taken into account the

unsuccessful issues raised on her behalf together with the deductible amount in respect to wage replacement benefits.

[125] The Claimant entitled to costs of the arbitration as initially set forth in paragraph 242 of the Award, with the added proviso that costs will be at Scale B.

Dated: February 13, 2026

Dennis Quinlan

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Arbitrator – Dennis C. Quinlan, K.C.