

IN THE MATTER OF AN ARBITRATION
PURSUANT TO s.148.2 OF THE *INSURANCE (VEHICLE)* REGULATION,
BC REG. 447/83 (“the REGULATION”) AND
THE *ARBITRATION ACT*, R.S.B.C. 2020, c. 2 (“the Act”)

BETWEEN

EFP

CLAIMANT

AND

INSURANCE CORPORATION COMPANY OF BRITISH COLUMBIA

RESPONDENT

Arbitrator: Kenneth Glasner, Q.C.

Counsel for the Claimant: David Greig
Robert Mostar

Counsel for the Respondent: Kenneth Armstrong, Q.C.
Andrew Gray

Dates of Hearing: August 23 - 27 and
August 31, 2021

Place: Vancouver, BC

ARBITRATION AWARD

Introduction

[1] Pursuant to Section 148.2 of the *Insurance (Vehicle) Regulation*, B.C. (“the Regulation”), the Claimant, [REDACTED] seeks compensation from the Insurance Corporation of British Columbia (“ICBC”) in what is commonly referred to as Underinsured Motorist’s Protection (“UMP”).

[2] The claim is for damages resulting from a car accident on June 7, 2017. The governing legislation is the *Arbitration Act* which came into force on September 1, 2020.

[3] Pursuant to agreement between counsel, the arbitration was guided by the provisions of the British Columbia Supreme Court Civil Rules. These proceedings were commenced by a Notice to Arbitrate, dated January 16, 2021. The particulars of the injuries suffered by the Claimant and the damages sustained are set out in paragraphs 6 and 7 of the Nature of Dispute.

[4] ██████████, born June 5, 1979, is a schoolteacher practicing in Abbotsford. She was injured on June 7, 2017, when she was rear ended in a car crash.

[5] ██████████, now 42 years old is married and living with her husband ██████████ and her 3 children: ██████████ now 11, ██████████ now 8, and ██████████ now 4.

[6] The Respondent does not deny that the Claimant was injured as a result of the accident – only the scope of damages sought.

[7] I have attached the Agreed Statement of Facts (Appendix 1) and the Supplemental Agreed Statement of Facts (Appendix 2).

[8] On February 7, 2019, the Plaintiff commenced action in the Supreme Court of British Columbia, the result of which the case settled on December 9, 2020 in the

Claimant's favour in the amount of \$205,325.55 the maximum of third-party liability coverage held by the Defendant.

[9] ██████████ having purchased excess UMP coverage was insured with a \$2 million policy limit.

Credibility

[10] I found the Claimant and the witnesses to be both credible and reliable. It was clear from all of the testimony that the Claimant was not a malingerer. Her testimony was not prone to exaggeration or embellishment.

Chronology

[11] Because much of this case is fact driven, I requested counsel provide me with the chronology of events both pre and post-accident. There are essentially no inconsistencies with their contents. I have attached the Claimant's copy as Appendix 3 and the Respondent's copy as Appendix 4. The chronology sets out the path embarked by the Claimant in resolving her health issues and her attempts at moving forward in her career and life.

Prior to the Accident

[12] ██████████ has been a schoolteacher with the Abbotsford School District (the "District") since 2004. She holds a Bachelor of Arts degree from the University of the Fraser Valley. She holds a Master's degree from the University of Western

Washington, Bellingham, Washington. The Master's degree was achieved with a GPA of 3.97.

[13] Under the Collective Agreement, her salary schedule is the highest – Category 6, Step 10.

[14] ██████████ was an active member of her profession and a committed and passionate grade 8 teacher with plans to advance her career by becoming a principal.

[15] She also had an active personal life with her husband and 3 children.

[16] It was clear from her testimony that she enjoyed playing basketball (which she also coached), swimming, cycling, and going on camping style vacations with her family.

[17] She was also responsible for all of the cooking, cleaning, laundry work and some gardening.

[18] She testified that she had no previous physical limitations.

Accident

[19] Immediately following the collision, she was able to drive herself to Emergency. Her thoughts were directed towards the health of her children. One of her children was left with a seatbelt mark. She wanted them all examined.

[20] She was suffering from a growing headache. She was also concerned about her pacemaker. The pacemaker was surgically implanted some months before the accident in order to stabilize her sinus tachycardia. The pacemaker was fine.

[21] As a result of the accident [REDACTED] suffers with intense headaches and suffers pain on a daily basis.

[22] Claimant's counsel describes her as stoic and understated. I had the same impression.

[23] She describes her injuries as multiple aches and pains, predominately in the area of the upper back, neck, and left shoulder.

[24] In closing argument, "The Respondent acknowledges the Claimant suffers ongoing headaches, ongoing musculoskeletal complaints in the left neck and shoulder, which have limited the Claimant's ability to participate as fully in recreational activities as she had pre-accident."

[25] An issue to be determined is to what extent did these injuries affect her employment opportunities.

Witnesses

[26] The Claimant produced two lay witnesses, the Claimant's husband, [REDACTED] and [REDACTED], a close friend and colleague.

[27] The Claimant also produced Dr. James Schmidt, a neuropsychologist; Dr. Anthony J. Salvian, a vascular surgeon; Dr. Rhonda Shuckett, a specialist in internal Medicine and Rheumatology and Dr. Ojaghi, her family doctor – together with various expert reports and notes.

[28] In addition in support of the claim for economic loss, the Claimant produced the reports of Samantha Gallagher, a vocational rehabilitation consultant and Christiane Clark, an economic consultant – together with their reports and notes.

[29] Their evidence was accepted as experts in their respective fields. The Defence called one witness, James Beck – a principal of Abbotsford Middle School.

[30] The viva voce evidence of [REDACTED], Schmidt, Ojaghi and Beck was taken virtually.

[31] [REDACTED] is a colleague and close friend of [REDACTED]. They met some 16 years ago. The families are close. They in fact were both married on the same day - July 7, 2007.

[32] While both were teachers, they had never worked in the same classroom together. She is clearly a confidant of the Claimant.

[33] [REDACTED] also completed the Master's Program which she found to be vigorous and demanding. Both had worked part-time (similar hours) in order to achieve their goal of a Master's Degree.

[34] The witness had a concern about her friend's decline in mental health after the accident and the numerous efforts to recover from the accident.

[35] As the witness expressed, "what concerns me enormously is her mental health." She noted the how depression changed [REDACTED] from someone who was a team leader among grade 8 teachers to someone who displayed little hope.

[36] [REDACTED] describes [REDACTED] trademark was to remember details and to follow-up. Now she doesn't remember.

[37] Where [REDACTED] was an active swimmer prior to the accident; she can no longer, "swim like she used to."

[38] As a result of her relationship with [REDACTED], she was aware that [REDACTED] had exhausted every treatment.

[39] She described [REDACTED] as one who now takes a more active role in the family's daily routine, including making the breakfast, dinner and helping with the laundry.

[REDACTED], Husband

[40] [REDACTED] is a full-time employee of a distributor of alarm systems, headquartered in Port Coquitlam. He earns about \$50,000 annually.

[41] It was clear from both the Claimant's and her husband's testimony that he is very supportive of her situation. He takes an active part in helping her with various family chores.

[42] [REDACTED] described family life pre- and post-accident.

[43] His employer's head office was in Port Coquitlam. At times he would go straight to the job site. He would generally leave home between 7:30 – 8:00am – returning between 4 - 4:30pm.

[44] [REDACTED] was involved with sports and outside activities with the older children. [REDACTED] was involved in coaching kids, after leaving home around 7am. [REDACTED] did

the cooking and the laundry. [REDACTED] would barbeque. Their outings included camping at provincial parks with their 26-foot travel trailer.

[45] They, together with her parents, had purchased a part ownership in a place at Green Lake. They still go to Green Lake.

[46] He describes his wife as being patient and understanding – never complained about going to work. She always enjoyed working with the kids.

[47] He described his wife's behaviour post-accident as being short tempered and easily aggravated. She has lost her ability to multi-task. She now naps every afternoon. She is never her old self. He tries to do more to take things "off her plate". He describes the cleanliness level of the home has suffered since the accident.

[48] He can tell when she has had a bad day. He has also observed there is no discernable improvement.

Dr. James Schmidt, Neuropsychologist

[49] Dr. Schmidt prepared a medical legal report dated February 3, 2021. He had reviewed documents prepared by Drs. Mast, Purohit, Salvian, and Shuckett in preparation of his opinion.

[50] Dr. Schmidt saw [REDACTED] on December 2 and 3, 2020, some 3½ years after the accident. At the time she was seen, the report indicated she was working four days a

week, but her family doctor suggested she cut back to three days a week because of the increasing depression and the onset of Covid.

[51] He prepared a comprehensive report addressing at page 3 a number of areas on which he was directed to opine.

[52] He confirmed in direct examination that having completed his report, he was then made aware that ████████ had attended the Surrey Pain Clinic before the December 2 and 3, 2020 interview.

[53] The report suggested that she “might” benefit from cognitive counselling. Essentially the course at the Pain Clinic dealt with a form of cognitive counselling but within a group session. She took the eight-week course. When asked, Dr. Schmidt thought that “possibly” she would benefit from one-on-one counselling rather than the group session. In reply, Dr. Schmidt also admitted that such one-on-one treatment possibly would not help.

[54] Dr. Schmidt reviewed records, conducted interviews, and administered a battery of tests together with factual assumptions from the various sources for his opinion. As a result, Dr. Schmidt set out at some length his opinion and conclusion.

[55] His opinion and conclusion suggested that ████████ had functioned well prior to the accident. She was a qualified teacher earning her Master’s Degree. He found no previous evidence of any neurological or psychological conditions or substance abuse.

[56] The pacemaker resolved the heart arrhythmia issue.

[57] He concludes... "that is it possible, but by no means certain that [REDACTED] suffered from neuropsychologically significant and mild injury in the accident in question". He then defined those terms.

[58] He did find that the accident was emotionally dramatic with the major impact being persistent headaches, coupled with neck and left shoulder pain together with numbness in the left hand. She also suffered from sleep disturbance, which persists today.

[59] The Claimant's counsel describes [REDACTED] condition as having 1,500 consecutive days of headaches.

[60] Dr. Schmidt continues in his opinion finding that [REDACTED]... "performed well within the expected ranges in virtually all cognitive functions that were assessed, including mental efficiency, basic focused attention, ability to both learn and retain verbal and visual information and executive, visuoperceptual and language function."

[61] He went on:

"I did not identify a pattern of cognitive dysfunction that would point to be the presence of neurological disorder or, more particularly, that would likely be a result of a neuropsychologically significant dramatic brain injury suffered in the accident in question."

[62] He essentially concludes by stating,

“The prognosis in this case is uncertain. The fact that her symptoms have persisted for a significant period of time is very concerning, having a significant negative impact on the prognosis”.

[63] At paragraph 7 of his opinions:

“It is further in my opinion more likely than not that, as a result of the accident in questions, ██████████ has developed a depressive disorder as well as a Somatic Symptom Disorder with persistent pain.”

Dr. Anthony J. Salvian, Vascular Surgeon

[64] Dr. Salvian authored a report dated January 19, 2020.

[65] He carried out a physical examination on June 12, 2019.

[66] His report outlines ██████████ efforts at dealing with daily activities and sleep pattern.

[67] He refers to information supplied by Dr. Elhan Ojaghi, her family doctor. He also makes comment regarding the physiotherapy, massage, acupuncture, kinesiology and Botox injections by Dr. Mast, a pain specialist.

[68] His report also refers to Dr. Purohit, where Dr. Purohit had recommended continued massage therapy, “as a method to destress and help ██████████ tightness”.

[69] Dr. Salvian's report makes reference to Dr. Purohit prescribing supplements and Cambia for severe headaches as well as increasing the Amitriptyline.

[70] The attached chronology refers to the treatments by Drs. McDowell, Purohit and Mast.

[71] The Respondent's counsel refers me to page 30. I have also included the first sentence of that paragraph.

"In [REDACTED] case, she is not a candidate for surgery at this time. Her main problem is a severe ongoing headache and left sided neck pain and it is unlikely that the thoracic outlet surgery would resolve those symptoms."

[72] He goes on:

"[REDACTED] has had these symptoms now for about 2.5 years and is considered to now have chronic mild facial pain syndrome. Given that injury, it is unlikely that she will ever be completely pain free. Her symptoms of neck pain and headaches will tend to wax and wane depending upon the activity and use of the arm. However, patients with neck pain typically find difficulty with prolonged static positions such as standing or sitting or even lying down."

[73] Dr. Salvian confirmed that he is not a headache specialist.

Dr. Elham Ojaghi, [REDACTED] family doctor

[74] Dr. Ojaghi confirms that she has been [REDACTED] family physician since August 2011.

[75] Dr. Ojaghi prepared a report dated February 12, 2021, in which she refers to her notes.

[76] Dr. Ojaghi testified that in a conversation with [REDACTED], [REDACTED] had found the anti-depressant medication had improved her feelings of being "in a dark place".

[77] The pattern outlined in part by the specialists are consistent with the evidence provided by [REDACTED] which includes the observations made by her family physician Dr. Ojaghi.

[78] Dr. Ojaghi's report, states:

"I was asked if in my opinion, [REDACTED] condition which is post traumatic headache arose from the accident. [REDACTED] has been under my care since 2011. I have never documented any information about headaches or migraines in her chart prior to the car accident. She also never had any type of chronic pain or myofascial pain documented in her chart from 2011 until the car accident date.

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I was also asked to comment on whether the injury has affected [REDACTED] personal life as well as her employment. She was a very active healthy mother of 3 children and full-time high school teacher prior to the accident. She played and coached basketball and was active with her children. She used to swim and bike with them. She reported during multiple visits in the last 3 years with tears in her eyes that she has not been able to play with her children like she used to do before the accident. After her third child was born she had difficulties with nursing and lifting him as well. She also felt that the chronic headache makes her short tempered and finds that she gets upset with her children a lot easier than before.

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With the regard to the effects of the accident on her employment, the accident happened during her summer holiday of 2017, for September of the same that year I advised [REDACTED] to do a gradual return to work through November 2017. After November 2017 she only worked 4 days a week. [REDACTED] too her Wednesdays off to attend appointments and recover from her headaches. She also used her day off to finish her Master's degree hoping this would give her the opportunity to apply for a more sedentary position. She has continued the same pattern of work until recently I diagnosed her with anxiety and depression as a result of her chronic pain.

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It is difficult to determine exactly how much this patient will be able to work long term. In a sedentary position and a less stressful position she might be able to work full time. In her current job, in the last three and half years she has not been able to work full time. I do not expect a major change in the future."

Dr. Rhonda Shuckett, Internal Medicine & Rheumatology

[79] Dr. Shuckett provided two medical reports; one dated December 30, 2019 based on an assessment of May 16, 2019; the second dated May 14, 2021 based upon an independent medical examination of January 26, 2021.

[80] Her first report sets out the basis of her opinion, most of which had been canvassed by other medical experts and the Claimant. She would not opine on whether there was a concussion or mild traumatic brain injury and would defer to neurologist.

[81] Her first report concluded with the following prognosis:

Soft tissue pain that is present after the 2 year or so mark after an injury is less likely to improve or regress, after this lengthy point of chronic symptoms. I believe that there is a probability that she has reached maximum medical improvement and will have to continue living and dealing with these symptoms.

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I consider it in keeping with her injuries as far as trouble which she had caring for and breastfeeding her newborn young child and lifting her other children and doing general childcare and cleaning of the house. She did not miss work after the MVA as she was on a maternity leave at the time of the 2017 collision. However, her graduated return to work was more delayed I gather due to her injuries. It is in keeping with her injuries and my physical findings that she is finding it necessary to work an adjusted part-time work week.

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It is not surprising, with her left shoulder and shoulder girdle symptoms and left TOS symptoms, that she has trouble writing on the black board with her dominant left hand in her job as a teacher. My physical exam showed that the classic provocative tests for thoracic outlet syndrome reproduced her left ring and pinky finger numbness and tingling. Unfortunately, it is her dominant left upper extremity that has been most affected along with the left side of her neck and shoulder girdle, by the subject motor vehicle accident. By now, I gather she has seen Dr. Salvian of vascular surgery as an IME and he would be best to opine on whether or not surgery is indicated for her left sided TOS. A conservative approach is usually applied to TOS, but her symptoms are quite intrusive, especially on her work.

Furthermore, she has a pacemaker in place in the left upper chest and this would be a deterrent to surgery in the area.

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I believe that her abridged work weeks is in keeping with her injuries and my diagnoses. I believe that it is in keeping with her injuries and my findings that she has to work an adapted part time work week. I am not clear as far as to what degree her abridged teaching hours may, in part, relate to raising a young family and this was not clear to me when I was assessing her. I am not aware as to what work hours she would be pursuing at this time, for her MVA injuries. I believe, related to her injuries alone, she will probably continue just working a 3 day work week in the longer term future.

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It sounds like she finds it hard to work, even her shortened work week, as a teacher. She is limited in her ability to contribute to the housework and her husband has to do the bulk of this. I believe that she will have to continue to adapt and modify and limit her work and household, and recreational activities related to her MVA injuries.

[82] She concluded by suggesting a referral to the Surrey Pain Clinic at Jim Pattison Centre. In March 2020, ██████████ attended an 8-week course at the Pain Clinic.

[83] The comments on her second report concludes with:

At the point I saw her on this occasion, I did not find her to be significantly improved from when I saw her previously in 2019; her symptoms and signs were quite in keeping now with when I had seen her previously in May 2019, about 2 years ago. By this point I saw her in January 2021, it was over 3-1/2 years since the subject MVA and she had ongoing symptoms and signs which did not appear to be improving.

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In general, once 3 or so years have ensued after an injury such as hers, patients with ongoing symptoms and signs are unlikely to further improve. I do believe that ██████████ has attained maximum medical improvement by this late point in time.

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I believe that she is probably going to be living with her current symptoms for the long-term future and is going to have to

continue to make adaptations at the workplace and at home, as well as in recreational activities.

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I expect that she is going to continue to have to be restricted to working part time and it may evolve that she is unable to sustain her 3 days a week of teaching. She is struggling with her symptoms and is finding it increasingly difficult to do her work. It will remain to be seen whether or not she can continue working 2 to 3 days a week, or whether she may have to forgo her work. I do not believe that she will ever return to full time remunerative employment.

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She will probably continue to need assistance from her family with housework. The symptoms she has are in her left upper extremity which is her dominant extremity. This also makes tasks of teaching, such as writing on the board, to be extremely difficult. She is a gym teacher and has to share teaching with another teacher because she cannot demonstrate many of the gym moves. I believe that these are going to be ongoing adaptations for her.

[84] Her reports did not have the full benefits of Dr. Ojaghi's chart notes nor did she believe she had Dr. Schmitt's report and was not aware of her diagnosis of depressive disorder and of somatic symptom disorder.

[85] Her second report again refers to making a referral to the Jim Pattison Pain Clinic, a resource that the Claimant attended to in 2020.

[86] Her report must be taken in light of her limited resource material.

[87] Having commented on the limited resources I found her opinion helpful in the overall assessment of the Claimant's medical condition.

Samantha Gallagher

[88] Ms. Gallagher's report is dated January 25, 2021. She indicates that she did not interview the Claimant. She relied upon the facts and assumptions provided to her.

[89] Her report provides the following helpful information, particularly as it relates to making an assessment on economic loss.

17. As [REDACTED] is currently employed by the Abbotsford School District and has been for many years, I have assumed that she would be seeking administrative positions such as Vice Principal or Principal within that school district. Despite numerous attempts to contact members of the HR department at the Abbotsford School District, I was unable to obtain any information directly from the Abbotsford School District on the process for becoming a Vice Principal/Principal, the requirements and the timeline for this.

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18. In speaking with [REDACTED], I was able to get a general sense of the process for becoming a Vice Principal or Principal. As per [REDACTED], a Master's degree is the minimum level of education required to move into an administrative position. An applicant applies for an open posting for a VP or Principal role. There is a panel interview for the applicant to be entered into the VP and Principal pool of applicants. If the applicant is entered into the pool then they are pre-qualified for positions and it is typically a matter of time before they are offered a VP or Principal position. Typically, people will move into a VP position prior to a Principal position. The pool is for all VP and Principal applicants regardless of whether it is elementary, middle or high school. However, as per [REDACTED] report a person is typically slotted into the type of school where they have the most experience teaching. For example a teacher who has experience working at the elementary level will often be posted in an elementary school in an administrative position.

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19. [REDACTED] indicates that in the pool there is the opportunity for the Leadership Academy which consists of workshops and courses on administrative topics. Applicants can also be offered the Leadership Academy prior to being formally entered into the pool. The leadership program is two years but some applicants may be moved into positions during those two years. Others may stay in the pool longer. [REDACTED] indicated that one factor in determining acceptance into the pool and placement into administrative position is leadership activities within the district such as coaching or running extracurricular activities.

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20. [REDACTED] indicated that to the best of her knowledge each school year there are typically one or maybe two Vice Principal positions that become available. These are generally due to retirements, leaves or people leaving the district. [REDACTED] indicated she has heard of part-time Vice Principal positions in other districts but was not aware of any Vice Principal's working on a part-time basis within the Abbotsford School District.

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21. In terms of salary for administrative roles in the Abbotsford School District the current salaries for school district employees can be accessed through the Public Sector Salaries Database. In looking through all of the current Principals in the Abbotsford School Board, the range for annual salaries was \$75,159 - \$136,019. There were 49 Principals listed and the average annual salary was \$119,710.

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22. Information from the Public Sector Salaries Database indicates that for Vice Principals in the Abbotsford School District the salary range was from \$82,953 – \$122,454. There were 33 Vice Principals listed and the average annual earnings were \$105,066. Unfortunately this database does not provide information regarding whether the Vice Principals or Principals work full-time or part-time.

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23. Administrative professionals retain their teachers pension and also receive a Principal's pension, as per [REDACTED].

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24. Based on the information provided by [REDACTED], with regard to her being unaware of any part-time Vice Principal positions or Principal positions in her district, in my opinion if [REDACTED] is unable to work on a full-time basis this would make her less competitive for future administrative positions. If she is only capable of part-time work then she would not be eligible for any full-time positions that became available which would significantly decrease the positions available to her. Applicants capable of working full-time would be chosen over her as they would meet the scheduling demands of the job.

Christiane Clark

[90] Ms. Clark, an economist, prepared an assessment of [REDACTED] past and future wage loss and benefits. I will deal with her comments on past wage loss and the Respondent's position later in the Award.

[91] Her arithmetic tables provided, as the Respondent's counsel suggested, over 30 different combinations. The case law, to which I will refer, suggests that the test is not an arithmetic calculation but rather on an assessment. I glean from her comments coupled with much of the evidence that an assessment must take into consideration the following:

1. Her present condition of working less than 5 days a week.
2. Her age.
3. Whether she would be working to age 65.
4. A discount rate of 1.5% per year.
5. What are her chances of becoming a Vice Principal.
6. How long would she have to wait in the Vice Principal's position before becoming a Principal?
7. The competition and labour market.
8. The suitability of becoming a Vice Principal at the relevant time.

[92] Having regard to the various permutations and combinations set out in Ms. Clark's report, I am mindful that depending upon the factual matrix, one could arrive at numerous figures/combinations. There was no similar report in evidence.

James Beck, Principal at Abbotsford Middle School

[93] The Respondent's witness has been a middle school principal for approximately 6 ½ years. Prior to that he became a Vice Principal in 2013.

[94] He knows [REDACTED] personally but cannot recall when she was made a department head.

[95] He agreed with the suggestion that she was ambitious and enthusiastic before the accident.

[96] They had taught Grade 8 at the same school.

[97] Mr. Beck described the process of becoming a Vice Principal. There was no formal process. One served as a department head. One could be in a pool before having the chance of moving up.

[98] Generally, one needed a Master's Degree although some had been without that degree.

[99] Extracurricular activities such as coaching, clubs, leading assemblies were all required as part of moving up.

[100] He emphasized the position of a vice principal was a full-time position. He was not aware of any part time vice principals.

Adverse Inference

[101] The Respondent (not the Claimant as set out in the Respondent's closing argument) seeks to make an adverse inference as the Claimant did not file an expert report from the independent medical examination with Dr. Robinson. The Respondent also suggests that an adverse inference should be drawn against the Claimant for its failure to call Dr. Mast, treating anesthetist, or either Dr. Purohit or Dr. McDowell, treating neurologist.

[102] The Claimant addressed this issue in her reply to the Respondent's argument.

[103] The Respondent cites a number of cases. I am initially drawn to *MacTavish v.*

MacGillivray, 38 BCLR (1997), 38 BCLR (3d) 306 at para. 14:

[14] It is clear that a plaintiff who seeks damages should ordinarily call all doctors who have been consulted: *Barker v.*

McQuahe (1964), 49 W.W.R. 685 at 689. At the same time, it is clear that the plaintiff can provide an explanation as to why one of the doctors is not called. As well, it is clear that the court may and not must draw an adverse inference from the failure of the plaintiff to call such a witness: *Staples v. Monacelli* (28 April 1977), Vancouver B942808; [1995] B.C.J. No. 986 (S.C.) and *Ritchie v. Thompson* (1994), 155 N.B.R. (2d) 35; 398 A.P.R. 35 (C.A.).

[104] I am drawn to the words underlined – may and not must. In addition, I note the words, “should ordinarily call all doctors who have been consulted”.

(emphasis added)

[105] Counsel quite properly directed my attention to the test set out in *Parhar v. Dawe*, 2014 BCSC 580, at para. 102:

[102] I decline to do so as the onus remains on the plaintiff to prove all elements off its case throughout. There is no onus on the defendant to call any evidence unless it raises a defence to the action. The defendant is free to rely on inconsistencies raised in the evidence called at trial by the plaintiff: *Love v. Lowden*, 207 BCSC 1007 at paras. 35, 38.

[106] In considering the request, I have reviewed the medical legal reports and notes of the experts with respect to the information provided to them.

[107] Dr. Schmitt refers to Dr. Mast and Dr. Purohit at page 4 of his report:

1. Dr. Mast, an anesthesiologist, saw ██████████ on a number of occasions, most recently in September of 2019. Dr. Mast saw ██████████ to treat her headaches and did so using medication and nerve blocks although the nerve blocks were not ultimately helpful.
2. Dr. Purohit, a neurologist, examined ██████████ and provided a report dated 3 October 2018, also focusing on her complaints of headaches. He reported that she had a CT scan of the brain, which was normal, as was his neurological examination of her. He made various recommendations with respect to medications that might be helpful with her headache problems.

[108] Dr. Salvian in his report also refers to Drs. Purohit, McDowell and Mast.

Dr. Purohit recommended continued massage therapy as a method to distress and help with [REDACTED] tightness.

Dr. Purohit prescribed supplements and Cambia for severe headaches as well as increasing the Amitriptyline.

Dr. Timothy McDowell, neurology, clinical records May 10, 2018 to March 15, 2019.

The initial consultation of July 3, 2018 noted referral for headaches, chronic neck pain and tinnitus. Noted a diagnosis of most likely post traumatic headaches of whiplash.

February 9, 2019 noted consultation of Dr. Ken Mast of anesthesiology for the management of headache. Dr. Mast carried out greater and lesser occipital blocks.

Consultation of Dr. Mast of February 26, 2019 noted the ongoing headache and further injections of occipital and bilateral auriculotemporal injections.

Dr. Mast carried out several further injections throughout 2018 until the final injection of October 29, 2018 noting [REDACTED] ongoing continuous headaches and further injections.

[109] Dr. Ojaghi makes note of Dr. Mast in Exhibit 3:

she is here for headaches she continue to see Dr. Mast getting her injection, she has continues headaches and problems with coping with her daily life, she is getting depression from chronic pain, she is trying to thinks positive but also has 3 children to look after. She wants to know when she is going to get better as everything she has tried has had no results.

[110] Dr. Shuckett referred to source material provided by Drs. McDowell, Mast, and Purohit. These comments are a matter of record and part of Dr. Shuckett's report.

[111] The Respondent suggest that I infer from the failure of calling Dr. Robinson that he would have offered a more positive prognosis. That is of course a generic assumption with no guidance to any degree of specificity.

[112] I am also mindful of Section 12.1 of the *Evidence Act*.

[113] In considering the adverse inference I have considered the whole of the evidence before me and whether failure to provide the reports would have advanced knowledge of the case.

[114] In the absence of an explanation I have relied upon what I could glean from the expert reports. I am also mindful that the witnesses not called were not within the exclusive control of the Claimant but available to both parties.

[115] Weighing the facts before me and in these circumstances, I do not consider it appropriate to draw inference from the Claimant's failure to call the medical doctors or submit medical legal reports.

The Law

Non-Pecuniary Damages

[116] In coming to my decision on damages I have reviewed all of the case law submitted by counsel together with their written and oral argument. In addition, I have considered two cases which I brought to the parties' attention prior to the closing argument.

[117] They are; *Gill v. Huber* 2020 BCSC 519 and *Cole v. Sandhu* 2020 BCSC 709.

[118] I have taken the approach as cited in *Toleau v. Huang*, 2021 BCSC 260, at pages 135 and 126 in citing the cases in support of an award for non-pecuniary damages by the citing case and the amount assessed by the court.

[119] *Cole* at para 50 cites *Stapley v. Hejslet*, 2006 BCCA 34, reciting the factors to be considered in the approach in considering non-pecuniary damages.

[120] At para 45 of *Stapley* puts into proper perspective the need not limit the award to seriousness of the injury alone. At para 45 it states:

[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 considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[Emphasis added.]

[121] *Stapley* at para. 46 sets out the inexhaustive list of factors:

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

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

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[122] Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[123] A strong factor to be considered is ██████████ desire to become a principal. But for the accident, this became a realistic goal. The effect of the accident not only diminished and effectively extinguished those reasonable chances.

[124] This is best summed up in *Gill v. Huber*, 2020 BCSC 519, at para.137:

[137] She has lost a job of 37 years that she loved which has had profound emotional impact on her. Ms. Gill's emotional connection to her job is not unusual. As quoted by the Court in *Boyd v. Harris*, 2004 BCCA 146 at paragraph 54, from Dickson J. in dissent in *Reference re Public Service Employee Relations Act*, [1987] 3. W.W.R. 557 (SCC) at 618, "Work is one of the most fundamental aspects in a person's life...A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."

[125] Quantification of the Claimant's non-pecuniary damages:

1. *Gabert v. Krist*, 2018 BCSC 2109, where the court assessed non-pecuniary damages at \$160,000
2. *McCullagh v. Rozinbaum*, 2020 BCSC 429, where the court assessed non-pecuniary damages at \$175,000
3. *Geddart v. Stokes*, 2021 BCSC 656, where the court assessed non-pecuniary damages at \$225,000
4. *Neufeldt v. Marcellus*, 2020 BCSC 427, where the court assessed non-pecuniary damages at \$200,000
5. *Flomo v. Hanna* 2019 BCSC 2024, where the court assessed non-pecuniary damages at \$175,000
6. *Khakh v. Josol*, 2020 BCSC 286, where the court assessed non-pecuniary damages at \$90,000
7. *Leung v. Draper*, 2020 BCSC 219, where the court assessed non-pecuniary damages at \$81,000
8. *Achan v. Jin*, 2020 BCSC 1430, where the court assess non-pecuniary damages at \$90,000

[126] Having applied the guidelines and factors cited to the facts as found, I find the assessment of damages more clearly aligned with, *Geddart, Neufeldt and Flomo*.

[127] Accordingly I assess non-pecuniary damages at **\$190,000**.

Economic Loss, Future Income Impairment, Lost Opportunity

[128] Such assessment is not arithmetic formula but requires an assessment approach, in this case as submitted by counsel, on an earnings basis.

[129] In coming to a fair assessment, I am mindful that Ms. Clark's report presents over 30 different models, each dealing with a multitude of factors.

[130] Again I am guided by the courts' decision on how to deal with a claim for economic loss.

[131] I set out their comments. Both *Cole* and *Gill* provide the similar quote from *Perren v. Lalari*, 2010 BCCA 140.

[132] I quote from *Gill*:

[172] In a claim for future loss of earning capacity, the plaintiff bears the onus of proving that there is a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari*, 2010 BCCA 140 at paras. 30-32.

[174] The court must consider both positive and negative contingencies when conducting this analysis: *Kellett v. Stam*, 2018 BCSC 1127 at para. 77.

[133] *Gill* sets out in some length the legal principles applicable where at para. 55:

[55] Ms. Gill's psychological injuries include severe anxiety, depression, and personality changes. The defendants do not deny that Ms. Gill suffers from psychological injuries, but dispute their cause and extent, and say that her current psychological state is attributable to non-accident-related factors for which they are not liable.

[134] In *Hay v. Hofman*, 1999 BCCA, 0026:

[67] I believe that a consistent theme running through the authorities is that a trial judge, in deciding on an award of damages under the heading of anticipated future loss, whatever term one actually uses, ought to endeavour to make an informed estimate or assessment of anticipated loss as opposed to merely undertaking to do a computation. Because one is considering the future which has about it always an aspect of the unknowable, contingencies positive and negative fall to be considered. Ultimately, a best estimate is required and while there will almost invariably be mathematical calculations to be considered, a purely mathematical approach will usually not be appropriate because such an analysis is too limited in scope.

[135] The *Cole* decision quotes extensively from the legal principles to be assessed for lost earning capacity as follows:

[55] The legal principles applicable to the assessment of lost earning capacity were summarized by Justice Voith in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133:

[133] 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 a 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), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;

- e) Under either approach, the plaintiff must prove that there is a “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 loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCA 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.

[136] The Claimant cites para. 10 of *Woelders v. Gaudette*, 2016 BCSC 1066 at para 130:

[130] In a nutshell, my task is to compare the likely future of Ms. Woelders’ working life if the Accident had not happened, to her likely future working life in light of its occurrence: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 [Gregory] at para. 32.

[137] In assessing contingencies, both positive and negative I have also considered the following factors.

[138] In addition to my description of the Claimant in these reasons I concur with the Claimant’s opening statement that, “█████ was a fit and healthy teacher and sports coach. She was also a talented and committed Grade 8 teacher, and was fully functional in all aspects of daily living....█████ was also passionate about her work as a teacher, and planned to become a principal”.

[139] Evidence was led that she was told she needed additional experience in an application. Statement was made without any context, including an explanation as to what that meant.

[140] Mr. Beck, a school principal outlined what was necessary to become a school administrator. However, he was not involved in the selection process. The major issue, accepted by the Claimant was one of competition. The competition for becoming a school administrator was described in Samantha Gallagher's report.

[141] ██████████ had participated in many professional development activities, including after school sessions with other principals and administrators from the district in the months after completing her Masters Degree: "I tried in the first three months when I graduated, when things were far more hopeful", and even after having not been accepted into the leadership pool in the fall of 2019. "I sat on several of these sessions. Many were difficult because of my head. I still attended and participated".

[142] In addition, the Respondent's closing argument contained the following dialogue:

Q: Do you still hope to be a principal one day?

A: I still hope. My window of hope is very [thin].

Q: Is it competitive?

A: Yes, it's super competitive.

[143] Her background indicates a strong possibility that she would have worked to age 65. That was a viable option for this person.

[144] Fundamentally, but for the accident, her teaching experience, interpersonal skills, and a Masters Degree, with a 3.97 average in hand, she would have been in the race.

[145] I have some concern over the fact whether or not being involved in the district leadership program had any effect. It was known by then that she could not work a full

week – a requirement which I assume from the evidence was necessary in the position of a school administrator.

[146] One starting point is to apply the sample set out in paras. 80 to 82 of the Claimant's argument.

[147] I refer to paras: 80 and 81 of the Claimant's closing argument. Based upon on a series of calculations made in Ms. Clark's report, the calculation is based upon ■■■■ ■■■■ securing a position as a full-time vice-principal in 2021 and then securing a position as principal in 2027 working to retirement at age 65. The calculation reflects a figure of \$2,415,988. To this one must discount but ■■■■ would have earned as a result of the accident based upon working 3 days a week from 2021 until 2027 inclusive and then working 2 days a week until 2044 – her retirement age. The total potential earning in this sample is \$863,720.

[148] The Respondent's calculations are set out in their closing argument. It suggested a figure substantially less which is reflected in their final position.

[149] The bottom-line figure reflects a total of \$1,552,268. This figure needs to be discounted considering:

- a. Becoming a successful candidate for a Vice-Principal, and when.
- b. Becoming a successful candidate for a Principal, and when.
- c. Whether she would work to age 65, or to a lesser age.
- d. The competition.

[150] I have outlined the guidance from the case law applying same to the facts of the case.

[151] I have taken into consideration a downward adjustment of approximately 30%.

[152] In my view and based upon my findings with respect to ██████████ career path and having regard to the positive and negative effects I find a fair and reasonable assessment of economic loss of \$1,100,000.

[153] I award damages for economic loss at **\$1,100,000**.

Past Loss of Earnings

[154] Ms. Clark's report provides her estimate of total past loss of earnings together with payments received in the form of sick pay.

The losses in column (4) of Table 1 are determined by deducting the "with Accident" earnings in column (3) from the estimates of "without Accident" earnings in column (2) in each year or portion of year. As shown at the bottom of the table, ██████████ **total past loss of earnings** is estimated to be about **\$33,213**.

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██████████ received total sick pay of \$25,900.52 between September 2017 and December 2019. In 2020, ██████████ received total sick pay of \$10,920.66. Up to March 31, 2021, ██████████ paid sick leave was a negative balance of - \$656.64. Total sick pay received by ██████████ from the Abbotsford School District between September 2017 and March 2021 therefore was **\$36,164.54**. This amount is already included in ██████████ "with Accident" earnings in column (3) of Table 1.

[155] There appears to be no dispute with respect to an estimate of past loss of earnings. I accept the evidence provided by Ms. Clark's report where she states:

The Court's valuation of past loss must be reduced for provincial and federal income taxes. It must also be reduced for an employee's portion of EI premiums. Percentage deductions for taxes and EI premiums may be calculated using a "year-by-year" approach, as in *Laxdal v. Robbins (2010 BCCA 565)*. Using the method that was adopted in this case, ██████████ **total "net" past loss of earnings** is estimated at about **\$25,045**, as shown in column (6).

[156] Accordingly, I find “net” past loss of earnings at **\$25,045**.

Deductions

[157] The Respondent takes the position that from certain funds awarded to the Claimant an amount should be paid back under the UMP provisions.

[158] I agree with the fundamental principles stated by the Respondent that underinsured motorist protection is to provide a safety net for the motorists who are seriously injured by underinsured motorists. It has been said that UMP is a policy of last resort.

[159] The Respondent suggests that the following sections of the Regulation are particularly relevant.

116. Section 148.1 of the Insurance (Vehicle) Regulation [Tab 12] provides the following benefits are deductible;

(c)paid or payable under Part 7 or under legislation of another jurisdiction that provides compensation similar to benefits,

(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, or

(j)paid or able to be paid by any other person who is legally liable for the insured’s damages.

[160] I have read and considered the case law (both court and arbitral) in reaching my conclusion on deductions.

[161] The Respondent sets out in its closing argument the amount paid to the Claimant in the form of sick pay, short term coverage under salary indemnity plan. The Respondent speculates on a figure should the Claimant take advantage, if available of benefits provided under a long-term disability plan - (BCTF). The burden of proving the

deduction is repayable rest with the Respondent – here ICBC. See *Lynn v. Pearson* (1998), 55 B.C.L.R. (3d) 401 (C.A.) at para 18; *Aarts – Chinyanta and Luck v. Shack*, 2020 BCSC 1074.

[162] In considering *Re Czombas and Insurance Corp. of British Columbia* (arbitration, November 30, 1993) Arbitrator Stewart dealt with a situation where the parties had agreed that pursuant to the Plan, the Claimant would be required to repay his benefits subject to the cost of collecting those monies. The payback was pursuant to the I.W.A. – Forest Indemnity Plan.

(emphasis added)

[163] In *Puchotta v. Bennett* (arbitration, April 23, 1999), Arbitrator Boskovich dealt with CPP benefits. The parties agreed that CPP disability benefits were within the definition of “any benefits” pursuant to section 148.1(1)(i).

[164] At II, the Arbitrator Boskovich ponders the issue of continuance and certainty with respect to future payments.

- II. “The deductibility of future payments raises some difficult considerations. Since I have found that the long-term disability and CPP benefits paid to date are “applicable deductible amounts”, such future benefits could certainly also be “applicable deductible amounts” however, there is a lack of evidence presented regarding the Plaintiff’s injuries and there current status. Am I to assume that these benefits will continue in the future? There should be some evidence tendered as to the likelihood of the continuance and certainty of such future payments before I consider the question put to me. I am accordingly, not prepared at this juncture to make a decision on what sums relating to these future benefits should be deducted from the Plaintiff’s UMP award (at pp. 12-3).”

[165] I share a similar concern.

[166] In *S.P.W. v. Insurance Corporation of British Columbia* (arbitration, December 10, 2007) it appears that Arbitrator Boskovich ponders the same question.

“In order to determine if future payments should be considered as “applicable deductible amounts” under the Regulations the law is quite settled that there has to be some evidentiary foundation to determine likelihood of the continuance and certainty of such future payments. The onus of proof that these payments will continue is on the Respondent. While the evidence given with respect to payments having been received in the past is of assistance, it does not provide conclusive evidence that the payments will continue in the future.”

(emphasis added)

[167] Claimant’s counsel refers to *Rab v Prescott* 2021 BCSC 1206. The principles set out for consideration are as follows:

[12] The principles applicable to a s. 83 assessment were recently summarized by Justice Davies in *Boparai v. Dhami*, 2020 BCSC 1813 at para. 30:

1) Two purposes are served by the deductibility of benefits that a plaintiff in a tort action is entitled to receive from ICBC. The first determines the sum that the plaintiff receives when her tort claims are adjudicated. The second is to prevent the plaintiff from being compensated twice. See: *Quigley v. Jonsen*, 2020 BCSC 216 [*Quigley*] at para. 3; *Luck v. Shack*, 2020 BCSC 1074 at para. 19 [*Luck*].

2) A defendant who seeks a deduction under s. 83 of the *Act* has the burden of establishing that a deduction should be made. See: *Lyn v. Pearson*, (1998), 55 B.C.L.R. (3d) 402 (C.A.) at para. 18.

3) There must be strict compliance with the statute in determining what deductions, if any, should be made. Any “uncertainty as to whether a Part 7 benefit will be paid must be resolved in favor of the plaintiff”. Any uncertainty created by the *Regulation* may lead the court to conclude that only a nominal deduction is appropriate: See: *Li. V. Newson*, 2012 BCSC 675 at paras. 14(c) and (i); *Luck* at para. 28.

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5) The filing of the affidavit of an adjuster authorized to “irrevocably, unequivocally and unconditionally” agree to pay for any treatment referenced in the reports of the medical experts who testified at trial up to the amount awarded by the jury may fully resolve uncertainty as to whether a benefit will be paid as Part 7 benefits. See: *Wark v. Kang*, 2020 BCSC 196 at para. 44; *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at paras. 80 and 81 [my emphasis.].

6) Although the filing of such an affidavit may carry considerable weight it does not, however, relieve the court of its obligation to independently analyse the evidence and then determine to the extent that it is able to do so the Part 7 benefits which the plaintiff is likely to receive in the future: See: *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 [*Sangha*] at paras. 15 and 16.

7) Judges must be cautious when assessing a suitable amount to deduct from a cost of care award. Examples of uncertainties a judge should consider includes: how long the plaintiff will need the service; and, the possibility of legislative changes that may take away (or alter) a plaintiff’s eligibility for Part 7 benefits. See: *Cikojevic v. Timm*, 2012 BCSC 574 at para. 14; *Sangha* at para. 9.

[168] In the present case there is no evidence that BCTF would file a form of affidavit, similar to that referred to above. The Claimant outlines the lack of certainty set out in the BCTF Salary Indemnity Plan which has yet to be accepted by the Claimant.

[169] *Rix v. Koch* 2021 BCSC 1526, the court quotes at para. 18:

[18] In *Aarts-Chinyanta* and *Luck v. Shack*, 2020 BCSC 1074, I undertook an extensive review of the law regarding the Part 7 benefit scheme and the various obligations of ICBC and the plaintiff involved. In *Tench v. Van Bugnum*, 2021 BCSC 501, Justice Fleming summarized the principles articulated in these previous cases:

[38] *Aarts-Chinyanta* and *Luck v. Shack*, 2020 BCSC 1074, include particularly helpful discussions of the legal principles arising from the legislative framework, and the cases including cases that have addressed post-trial representations/waiver evidence, which I summarize as follows:

a) The defendant bears the burden of proving that the plaintiff is entitled to the Part 7 benefits which they seek to deduct.

b) Entitlement refers to conditions precedent to receiving benefits not the discretionary granting of benefits by ICBC once entitlement is established.

(emphasis added)

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g) If the benefits are discretionary, meaning, ICBC *may* pay the benefits or they are subject to ongoing medical certification, they are too uncertain and the court should decline to deduct the benefit amount from the award, or alternatively deduct a nominal amount to reflect the uncertainty that the plaintiff will receive the benefit(s).

h) An exception arises where ICBC, through affidavit evidence, undertakes or promises to pay discretionary benefits going forward.

i) The court must be satisfied by the affidavit evidence that the undertaking or promise is sufficient to overcome the uncertainty that benefits will be paid.

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k) However, the court must be cautious when assessing the amount to deduct from a cost of care award. Examples of uncertainties to be considered include: how long the plaintiff will need the service and the possibility of legislative changes that may take away or alter a plaintiff's eligibility for Part 7 benefits

[170] The Claimant then cites *Anthony Montgomery v. Insurance Corporation of British Columbia* (arbitration award, November 30, 1999).

[171] Arbitrator Yule in dealing with the obligations to pay back Canada Life raises a concern dealing with the integration issue. I also have the same concern.

[172] He states at para. 81:

With respect to the integration issue, the outcome, in the view I take, is different. The integration provision does not involve any

question of reimbursement; it addresses only the obligation to pay.

[173] He goes on at para. 81:

In this circumstance, I think the rationale of *Baker v. ICBC*, *supra*, applies. One looks to the ICBC Regulations and, in this case, the definition of deductible amount. One item to be deducted is an amount “payable to the insured under any benefit.” One then looks to the Canada Life Policy to see whether the future disability benefits will be payable in the sense that they are going to be paid. In this case, the result of the payment of the UMP claim is that the future Canada Life benefits will not be paid because of the integration provisions of the Policy. In my view, then, the future Canada Life benefits are not payable and do not constitute a deductible amount.

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If I had concluded that the Canada Life disability benefits were a deductible amount, I would have afforded the parties the opportunity of a further hearing with the calling of evidence if necessary to determine the amount of any appropriate contingency.

(emphasis added)

[174] At para. 67 Arbitrator Yule cites the integration provisions of the Canada Life Policy:

“Once the above reduction has been made, if the amount of a Employee’s monthly gross income from all sources listed below still exceeds the Integration Level, we will reduce our Benefit to the extent necessary so that his total monthly amount of gross income from these sources is equal to the Integration Level.”

[175] Referring to the Respondent’s closing argument para. 21:

██████████, later in direct examination, after noting that she had never applied for long term disability benefits, was asked whether she was “thinking of doing that”. She answered, “I don’t want to be in a position where I have to apply. She noted her belief that there is a “rather large stigma” on teachers who apply for long term disability benefits that they are disabled, incompetent or can’t function, and “I still try to hang on to a glimmer of hope that something will help me. [I’m] really trying to avoid the stigma.”

[176] The Claimant suggests a similar provision in the BCTF Long Term Disability Policy and refers me to the terms and conditions of the BCTF Salary Indemnity Plan and in particular para. 6 which states:

I agree to release the British Columbia Teachers' Federation from obligation under the Salary Indemnity Plan Long-term Disability Plan, to the extent of my recovery as a result of a settlement, judgement or award in respect of the tort-feasor includes compensation for future loss of wages and/or loss of ability to earn income.

[177] I note in para. 3 of the Subrogation Agreement attached to the BCTF's Salary Indemnity Plan – Long Term which states:

I agree that I will not conclude any settlement with the tortfeasor or tortfeasors' insurers without the consent of the British Columbia Teachers' Federation.

[178] For the reasons set out above, I find:

1. In this case the degree of certainty should in the circumstances be determined at the adjudication stage and not left open for some form of determination at a later time.
2. The issue is not limited to whether or not the Claimant will elect to take benefits at a future date, but requires a degree of certainty that the payer will be obligated to pay and what terms including present and future terms.
3. When dealing with uncertainties, the Claimant may be put in a position that any future rights may be extinguished to the extent that she has no further recourse.

[179] The issue of uncertainty also includes the possibility of future changes the BCTF policy.

[180] Accordingly, based on the case law cited, I find in all of the circumstances that the Respondent has failed to meet the burden imposed upon it and therefore decline awarding the deductions sought regarding the BCTF Salary Indemnity Plan.

The Parties' Position as Per Closing Argument

Claimant's Position

[181] The Claimant says that by reason of her permanent and debilitating injuries, she is entitled to the following damages (as set out in the Claimant's "Opening"):

*non-pecuniary damages	\$200,000
*net past wage loss	\$25,000
*future care costs	\$25,000
*future income impairment	\$1,600,000 (inclusive of pension loss)
*unreimbursed special damages	\$14,958.33

Plus

*costs and disbursements since December 2020 (when the underlying Tort action was settled).

Respondent's Position

[182] In summary, the Respondent submits the Claimant is entitled to damages as follows:

a. Non pecuniary damages:	\$90,000 to \$100,000
b. Past wage loss:	\$25,045 to \$52,313
c. Lost teaching capacity	\$310,000 to \$550,000
d. Lost opportunity – administration	\$90,000 to \$120,000
e. Lost pension	\$60,000 to \$111,600
f. Past specials	not proven
g. <u>Future care</u>	<u>not proven</u>
Total	\$575,045 to \$933,913

The Respondent further submits the following deductibles should be made:

a. Tort settlement	\$187,265.51 damages (agreed)
b. Tort settlement	\$18,060.04 costs (agreed)
c. Reimbursed special damages	\$4,691.06 (agreed)
d. Sick pay paid	\$36,164.54
e. Sick pay payable	\$69,760.71
f. Salary indemnity (short term)	\$28,141.20
g. <u>Long term disability payments (to 61)</u>	<u>\$175,301.20 to \$350,602.40</u>
Total	\$519,384.26 to \$694,685.46

The difference is \$55,660.74 to \$238,627.54

The Claimant claims \$25,000 for future care. As submitted above, the quantification of that claim has not been proven. Should the Arbitrator choose to make an award for future care, it is submitted that same figure should be allowed as a deduction as there is plenty of extended health coverage and part & coverage available.

The Claimant claims costs and disbursements of this matter. Significantly, the UMP limits are inclusive of costs and disbursements. If the quantification of this claim exceeds \$2,000,000, as sought by the Claimant, then costs and disbursements become moot. If the claim does not approach \$2,000,000, then costs and disbursements should be payable in accordance with the Supreme Court Civil Rules, mindful of the \$2,000,000 total limit.

[183] From the amount awarded the parties have agreed pursuant to Appendix 1 to certain deductions.

[184] In addition, counsel have agreed to amend the Supplemental Agreement Statement of Facts, points 2 and 4. The claim for damages for future care in the amount of \$25,000 will be incorporated into point 4 to reflect that ICBC agrees to fund up to \$25,000 for massage therapy or counselling or both under Part 7, at prevailing rates. This figure appears to be an appropriate deductible under section 148.1(1)(b).

[185] In summary, I assess the Claimant's damages as follows:

1.	Non-pecuniary damages	\$ 190,000.00
2.	Net pass loss earnings	\$ 25,048.00
3.	The economic loss of future earning capacity	\$1,100,000.00
4.	Unreimbursed special damages as per agreement	\$ <u>14,958.33</u>
	Total Damages Awarded	\$1,330,006.33

[186] Deductions as per Agreement

1.	Tort settlement (damages)	\$ 187,265.51
2.	Tort settlement (costs)	\$ 18,060.04

3. Reimbursed special damages \$ 4,691.06

Deductions pursuant to the definition of “deductible amount” under section 148.1 of the Regulation

4. Total sick pay received \$ 36,164.54
(See Ms. Clark’s report, page 7)

5. The Respondent’s obligation by agreement with the Claimant (see items 2 and 4 under Appendix 2) for Part 7 benefits

\$ 25,000.00

Total deductions \$ 271,181.15

[187] I leave it to counsel to sort the issue of costs, failing same I will hear counsel at a date to be set before December 4, 2021.

[188] It is hereby awarded.

Vancouver, British Columbia

Kenneth Glasner, Q.C. FCI Arb.
Arbitrator
November 2, 2021

Appendix 1

VanIAC File No. 2326-UMP

IN ARBITRATION, PURSUANT TO THE PROVISIONS OF THE BRITISH
COLUMBIAINSURANCE (VEHICLE) ACT AND REGULATION 148.1

BETWEEN:

CLAIMANT

AND:

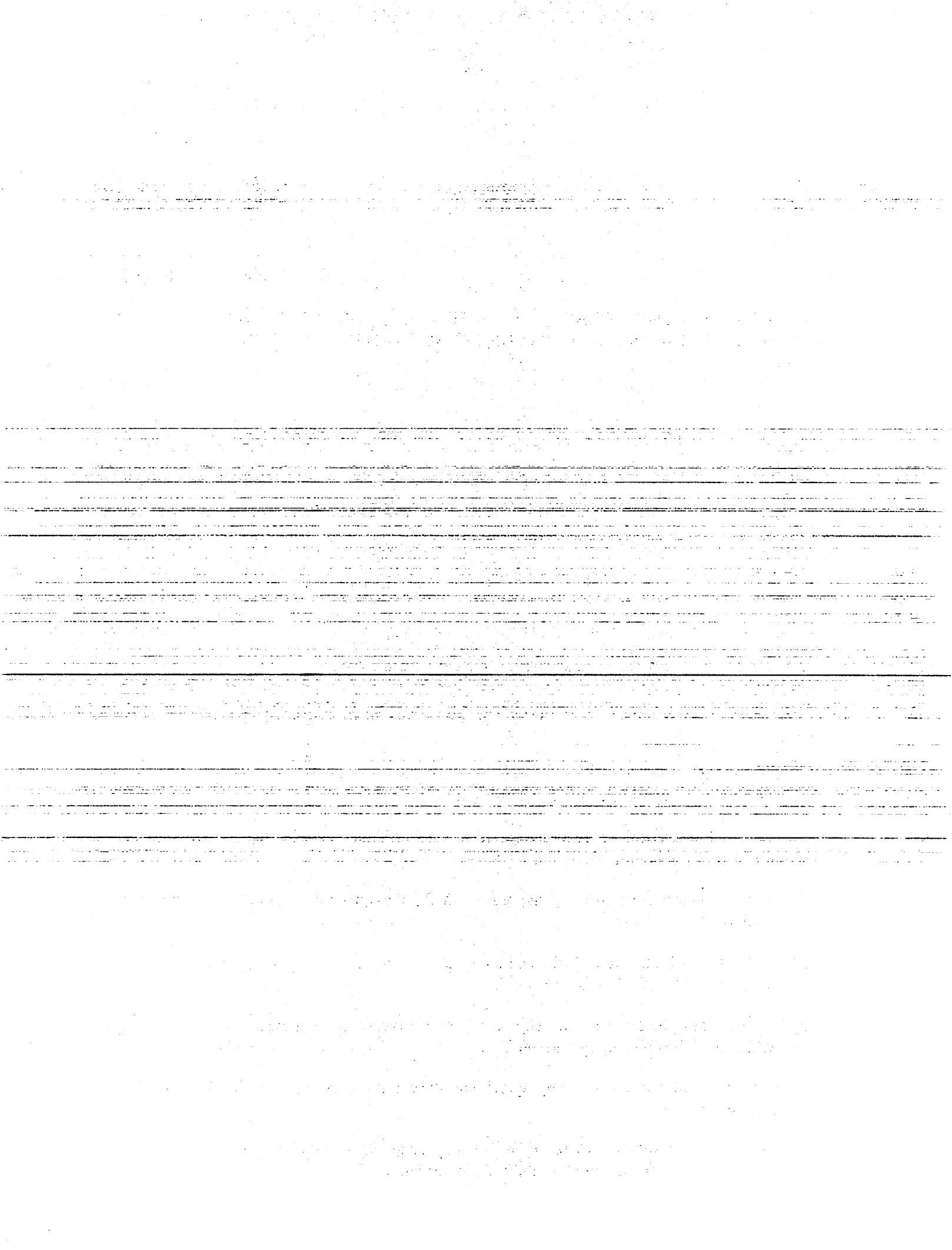
BRADLEY WILLIAM MOLLIN

RESPONDENT

**AGREED STATEMENT OF
FACTS**

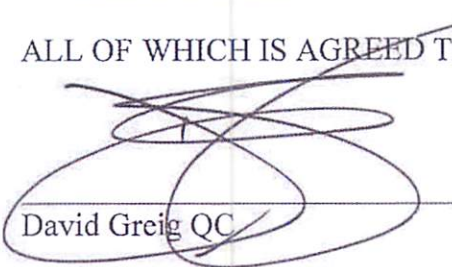
The parties agree as follows:

1. The claimant was born June 5, 1979.
2. This matter arises from a motor vehicle collision of June 7, 2017 ("the collision"), in respect of which the Claimant is blameless.
3. The claimant is covered by an aggregate UMP policy providing for indemnity up to \$2,000,000.
4. At the time of the collision, the claimant was on maternity leave from her job as a teacher at Abbotsford Middle School.
5. As a teacher, the claimant was subject to a collective bargaining agreement which describes her salary and benefits.
6. Under the collective bargaining agreement, the claimant may make claim for 15 paid sick days per year.
7. Once the claimant has exhausted her sick days, she may make claim for 120 days of short term salary indemnity, at 50% compensation.



8. The above noted benefits may be available to a teacher depending on the circumstances of disability.
9. The claimant received a total of \$36,164.54 in sick pay between June 7, 2017 and March 31, 2021. These benefits may need to be repaid.
10. The claimant had exhausted her sick days for the 2020/2021 school year before March 31, 2021.
11. The claimant may make claim for benefits under her collective agreement (including long term disability benefits), subject to the terms and conditions of the policy.
12. The long term disability benefits, if payable, are currently calculated in accordance with Schedule A of tab 24 of the Claimant's Documents Binder.
13. The claimant has received reimbursement for \$4,691.06 toward past special damages.
14. The claimant may make claim for benefits under her extended health benefits (provided as part of the collective agreement), as set out at tab 23 of the Claimant's Documents Binder.
15. The claimant settled the underlying tort action arising from the collision as follows:
 - a. \$187,265.51 damages
 - b. \$18,060.04 costs and disbursements.
16. The following past payments are deductible as contemplated under s. 148.1 of the Insurance (Vehicle) Regulation:
 - a. The tort settlement of \$187,265.51 damages and \$18,060.04 costs and disbursements, and
 - b. The \$4,691.06 reimbursed special damages
17. The conduct of this Arbitration is guided by the provisions of the BC Supreme Court Civil Rules.

ALL OF WHICH IS AGREED THIS 23rd DAY OF AUGUST, 2021



 David Greig QC



Appendix 2

VanIAC File No. 2326-UMP

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH
COLUMBIA


RESPONDENT

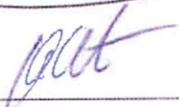
SUPPLEMENTAL AGREED STATEMENT OF ACTS

The parties further agree as follows:

1. The Claimant is entitled to the sum of \$14,295 in full and final satisfaction of past special damages, payable promptly and separately, in care of her counsel.
2. The Claimant is entitled to \$25,000 damages for cost of future care.
3. Future care is deductible as payable under part 7.
4. ICBC agrees to fund up to \$25,000 for massage therapy or counselling or both under part 7, at prevailing rates.

ALL OF WHICH IS AGREED THIS 31ST DAY OF AUGUST, 2021


 David Greig QC
 Lawyer for the Claimant



 Kenneth Armstrong
 QC Lawyer for the
 Respondent

Appendix 3
APPENDIX "B"

CHRONOLOGY: IMPORTANT DATES

- 2004: Claimant begins full time career as teacher
- 2010: Birth of first child () in June. Claimant returns to full time work in following February, after abbreviated leave.
- 2012: Birth of second child () in December. Again, Claimant returns to full time work after abbreviated leave (in September 2013).
- 2015: Claimant begins inquiries into Masters program
- 2016: Birth of third child () in October. Claimant plans to return to full time work early September, but Car Crash intervenes.
- 2017: Car crash occurs on June 7th. Claimant attends hospital to have children and pacemaker checked. Sees Dr. Ojaghi the following day and begins course of treatment (medications, RMT, Acupuncture, Physiotherapy).
- 2017: Initially, the Claimant starts graduated return to work in fall. The process began with half days (every "other" day), then longer days, and by mid December, Claimant is working full days Monday, Tuesday, Thursday and Friday, with every Wednesday off.
- 2018: Claimant continues with medications and ongoing therapy and treatment, and remains hopeful of full recovery. She and colleagues begin the Masters program. Most classes at Claimant's existing school (worksite) or "on line".
- 2018: During January to June, Claimant continues with her Team Leader position
- 2018: Claimant exhausts sick days and applies for SIP for the first time.
- 2018: In September, Claimant gives up team leader position, but continues with Masters program. Ongoing therapy includes variety of repeated painful injections and treatments with Dr. McDowell, Purohit, and Dr. Mast.
- 2019: By March, Claimant graduates from Masters program
- 2019: In May, Claimant sees Dr. Shuckett
- 2019: In June, Claimant sees Dr. Salvian
- 2019: In Fall, claimant applies for first "administrative" opening to get into the selection "pool." During the interview the "mood" changes as discussion arises regarding part-time.
- 2019: Through balance of the year, Claimant continues to work 4 days a week, and undergoes multiple therapy injections, RMT, and physiotherapy

- 2020: First examination for discovery, February 14, 2020
- 2020: In March, claimant attends Jim Pattison pain clinic, and meets with doctor, pharmacist then in August, begins the 8 week-course
- 2020: By fall, Claimant losing faith in recovery as constant headaches continue. She feels she may be in a "dark place". Discussions with GP.
- 2020: In November, Claimant attends for second appointment with Dr. Robinson at request of Defence (first appointment cancelled without notice).
- 2020: In late November, the GP placed the Claimant on a new anti-depressant. It is of some assistance.
- 2020: On December 2nd and 3rd, Claimant attends for testing with Dr. Schmidt
- 2020: Mid-December: Dr. Ojaghi (GP) feels it's best to try reducing to 3 days per week after the winter break. That occurs.
- 2021: Late January: Claimant's 2nd appointment with Dr. Shuckett. Other treatments, therapies, and appointments continue
- 2021: May 12th-----Second Examination for Discovery
- 2021: June Dr. Caillier: Claimant attends for Nerve conduction testing
- 2021: July---Claimant starts another new drug, Ajovy, by injection. It is the most recent of several "headache" therapies, all of which have been ineffective to date

Appendix 4

VanIAC File No. 2326-UMP

IN THE MATTER OF AN ARBITRATION PURSUANT TO
PART 10 OF THE INSURANCE (VEHICLE) ACT

BETWEEN:

CLAIMANT

AND:

ICBC

RESPONDENT

RESPONDENT'S CHRONOLOGY

_____ born	June 5, 1979 (currently 42)
June, 2010	_____ born
December 2012	_____ born
September 2016	Maternity leave begins
October 2016	_____ born
June 7, 2017	MVA
September 2017	Graduated return to work commences
November 2017	Graduated return to work peaks with the plaintiff working 4 days per week
January 2018	Plaintiff commences Masters degree, continues teaching 4 days per week
September 2018	Plaintiff takes education leave and reduced work week to 3 days per week
March 16, 2019	Plaintiff attends first IME with Dr. Shuckett
March 2019	Plaintiff completes Masters degree with 3.97 GP
Three months later	On a date unknown, the plaintiff unsuccessfully applies for the vice principal applicant pool
June 12, 2019	Plaintiff attends IME with Dr. Salvian
July 29, 2019	Plaintiff attends Dr. Ojaghi complaining of depression arising from chronic pain
September 2, 2019	Plaintiff returns to 4 days per week teaching
September 4, 2019	Plaintiff attends Dr. Ojaghi complaining of getting to a dark place
August 19, 2020	Plaintiff reports to Dr. Ojaghi attending the 8 week education program at Jim Pattison Centre (the plaintiff also testified this took place in August and September 200 via Zoom)
October 2020	Plaintiff exhausts her sick bank and applies for SIP
December 2, 2020	Plaintiff attends Dr. Ojaghi and discusses reducing her work week to 3 days per week, with Dr. Ojaghi noting "she's been dealing with a lot of emotional challenges and she has been talking to me a lot about being in a dark place."
December 2/3, 2020	Plaintiff attends neuropsychological evaluation with Dr. Schmidt
January 2021	Plaintiff reduces work hours to 3 days per week
January 26, 2021	Plaintiff attends second IME with Dr. Shuckett