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

BETWEEN

R. G.

CLAIMANT

AND

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

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

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Dates of Hearing: **February 27 – March 3, 2023**
Place of Hearing: **New Westminster, B.C**
Date of Award: **May 18, 2023**

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I. INTRODUCTION

A. The November 19, 2015 Road Accident

1. In the early evening on November 19, 2015, the Claimant, R.G, a twenty-six year old graduate student from Surrey, B.C., enrolled at Sarah Lawrence College in Yonkers, New York in a Master's Program in Human Genetics, was walking to her rental accommodation from classes at her college when stuck by a turning motorist as she crossed an intersection (the "Accident").

2. It was a dark, wet, miserable fall evening. It was raining and there may have been snow flurries. As R.G. crossed a somewhat unusual intersection in a residential area she was struck by a motorist, a Yonkers resident, who has admitted that she never saw the pedestrian. ICBC as the Claimant's UMP insurer and Respondent in this Arbitration, has not formally admitted that the motorist was at fault for striking the pedestrian in the intersection; however, in closing submissions, counsel for the Respondent argued that the Claimant should be found 50% to 70% contributorily negligent. The onus to prove a defence of contributory negligent rests upon the Respondent. I will discuss later in this Award the evidence related to the Accident and whether the Respondent has made out contributory negligence as a defence.

3. The Respondent accepts that the motorist met the definition of "underinsured motorist" in section 148.1(1) of Part 2, Division 10 of the revised Regulation (the "UMP Regulation") as an owner/operator of a vehicle who is legally "liable for the injury or death of an insured but is unable when the injury or death occurs, to pay the full amount of damages recoverable."

4. R.G.'s primary injury was a complicated right knee injury resulting in i) three fractures through the knee joint and ii) deformity in her leg alignment as I would describe it. Dr. Simon Horlick, an orthopedic surgeon with extensive experience in treating patients with lower extremity injuries and damage including joint replacements, provided two medical legal reports and gave oral testimony explaining in great detail the nature and extent of R.G.'s injuries, likely prognosis and course of treatment. The expert evidence of Dr. Horlick summarizes the complexity, permanence, and progressive nature of R.G.'s leg injury. R.G. is currently thirty-three years of age. Her primary injury will affect her for the rest of her life.

She will endure physical pain and physical limitations that will affect her vocationally, recreationally, domestically and socially.

5. The parties also agree that ICBC consented to a settlement between R.G. and the motorist's third party liability insurer, Geico General Insurance Company, which resulted in a release of the motorist in exchange of payment of the third-party limits on the motorist's vehicle. The settlement itself implies that the motorist is an "underinsured motorist" as defined in the UMP Regulation. It is agreed that the third-party limits paid in the amount of $25,000 US constitutes a deductible amount for the purpose of calculating an award to R.G.

6. I will turn later in this Award to the issues of contributary negligence, damages and mitigation; however, before doing so, I will describe some of the history and background to this Arbitration which unfortunately took more than seven years from the Accident date to a hearing date.

B. History of Litigation / Arbitration

7. At some point following the Accident, R.G. retained lawyers in New York state to sue the motorist for her loss, damage and expense. In the days following the Accident, the Claimant's brother G.G., attended his sister in hospital in New York and also attended the scene of the Accident. He obtained a short videotape apparently showing the Accident from a resident whose house looked out towards the intersection in question and had a video surveillance camera focused toward the intersection. G.G. testified that he provided a copy of the video to his sister's New York lawyers.

8. Surprisingly the videotape was never disclosed in this Arbitration until February 24, 2023, the Friday before the Monday start of the hearing on February 27, 2023. On March 22, 2023, I conducted a *voir dire* on the admissibility of the videotape into evidence given the inexplicable delay in the revelation of the existence of the video recording and the potential prejudice to the Respondent.

9. The parties had agreed to adopt the B.C. Supreme Court Civil Rules as governing the arbitration process, Rule 7-1(21) of the Rules provides that:

> Unless the court otherwise orders, if a party fails to make discovery of or produce for inspection or copying a document as required by this rule, the party may not put the document in evidence in the proceeding or use it for the purpose of examination or cross-examination.

10. I will return to the subject matter of the videotape and the results of the *voir dire* in my discussion of the issue of liability.

11. At this point, it suffices to point out that the Arbitration Act, S.B.C. 2020, c.2 (the "**Act**"), formerly the Commercial Arbitration Act, R.S.B.C. 1996, c.55, mandates the parties to an arbitration to "do all things necessary for the just, speedy and economical determination of the proceedings." The Act also mandates an arbitration tribunal to, *inter alia*, "strive to achieve a **just**, speedy, and economical determination of the proceedings on its merits" (s.23). I am not convinced that the R.G. and her counsel fully comprehended the legislative mandate to conduct an arbitration with appropriate dispatch and alacrity and "to do all things necessary for the just, speedy and economical determination of the proceedings." The last-minute production of the Accident videotape was a rather egregious example of failure to meet an expected standard of conduct but there were a number of other examples of late production and delay which shows an unfortunate pattern.

12. Little evidence was presented concerning the New York litigation. Ultimately, sometime in January 2016, the New York tort litigation was settled with the consent of ICBC by payment of the Geico third party limits of $25,000.00 U.S.

13. In February 2018, the Claimant initiated this Arbitration by delivery of a Notice of Arbitration with the B.C. International Commercial Arbitration Centre ("BCIAC") now called the Vancouver International Arbitration Centre ("VanIAC").

14. The Claimant filed a "Statement of Case" dated April 13, 2018. ICBC filed a "Response to Statement of Claim" on May 4, 2018.

15. Donald Yule, K.C. was appointed as sole arbitrator and conducted a pre-hearing telephone conference call with counsel on July 4, 2019.

16. An arbitration hearing of 10 days duration was to commence November 2, 2020.

17. In July 2019, counsel agreed to retain Dr. Simon Horlick, an orthopedic surgeon, as a joint medical expert. At that point, R.G. had a different lawyer than her present one.

18. The hearing of November 2, 2020 was adjourned apparently for reasons related to the Covid-19 pandemic.

19. Mr. Yule, K.C. retired in early 2021 and I was appointed as the sole arbitrator in January 2021.

20. In July, 2021 the arbitration hearing was reset to take place for 4 days commencing April 11, 2022. By February 22, 2022, at the latest, counsel had clearly agreed to narrow the damages issue and that Dr. Horlick would be the only medical witness who would be giving expert opinion evidence. Counsel for R.G. agreed that the Claimant would not be pursuing claims for specific psychological conditions nor for fibromyalgia.

21. I ordered an Arbitration Management Conference ("AMC"), the equivalent of a Trial Management Conference ("TMC"), to take place on March 9, 2022. Counsel for the Respondent delivered an Arbitration Brief in advance of the AMC. No brief was delivered on behalf of the Claimant. On March 8, 2022, current counsel for R.G. prepared a Notice stating that he had been appointed to act for the Claimant in place of R.G.'s original counsel and advised that the Claimant intended to apply for an adjournment of the April hearing. The AMC did not proceed. On March 29, 2022, I heard the application for an adjournment. I came to the conclusion that the essential basis of the application was that previous counsel for the Claimant was acting without the authority of his client in not expanding the claim for damages and in failing to commission expert opinion evidence to support an expanded claim for damages.

22. Given the gravity of the allegations against previous counsel, I ordered, *ex proprio motu*, i.) the application be adjourned to allow previous counsel to respond to allegations of acting beyond the scope of his authority and in breach of duties owed to his client and ii) the April hearing be adjourned. I also ordered that the Claimant would not be granted leave to amend her pleadings nor to obtain additional expert reports in the interim.

23. I also ordered that in view of the affidavit evidence of the Claimant concerning communications with previous counsel that solicitor/client privilege had been waived with respect to discussions and communications with counsel relevant to the content of her affidavits.

24. Previous counsel never intervened in the adjournment application to respond to the allegations of improper conduct against him. However, counsel for the Respondent did conduct a cross-examination on affidavits of the Claimant on August 24, 2022.

25. Ultimately on October 21, 2022, I heard a continuation of the Claimant's adjournment application and application to pursue further expert assessment and reports. I denied the Claimant's application for leave to obtain further expert assessments and to obtain further expert opinion evidence, including opinion evidence of a functional capacity evaluator, a future care evaluator and a psychiatrist. I did allow the Claimant to obtain a report from a future care expert on the specific costs of future care based on the opinion of Dr. Horlick. I allowed the Claimant to obtain an updated expert opinion report from Dr. Horlick. The updated report of November 10, 2022, of Dr. Horlick, in addition to his earlier initial report of September 10, 2020, were exhibits in the arbitration as was a Future Care Assessment Report dated February 22, 2023, of Mr. Paul Lakhani (Exhibit 1).

26. I was satisfied after reviewing the affidavit evidence, the transcript of cross-examination of the Claimant of August 24, 2022, and the submissions of counsel, both written and orally, that previous counsel had acted in accordance with his instructions and within the scope of his authority. It was clear from all the evidence that counsel had agreed upon the scope of the claims that would be pursued and the extent of expert evidence to be elicited. That was made clear by the fact previous counsel for the Claimant did not serve any additional expert reports before the January 14, 2022, 84-day deadline other than the September 10, 2020 report of Dr. Horlick. Nor were any amendments to the pleadings sought.

27. I also concluded that no evidentiary basis was made out for additional expert reports. The pleadings were also adequate to sustain the claims of R.G. Indeed, having concluded the arbitration hearing, the factual and opinion evidence was more than sufficient to support the claims of R.G.

28. I also concluded that there were inconsistencies between R.G.'s affidavit evidence and her evidence under cross-examination about whether previous counsel acted within the scope of his authority to limit opinion evidence to that of Dr. Horlick.

29. I concluded that the Claimant's application to adjourn the hearing lacked sufficient factual basis. I could not ignore the process over a considerable length of time that the parties properly pursued culminating in an approach as to how the issues would be determined.

30. I gave oral reasons for my decision pronounced on October 21, 2022 dismissing the Claimant's application to adjourn the arbitration hearing and to adduce additional expert evidence. In doing so, I made a specific finding that the Claimant's original counsel had acted within the scope of his authority and upon instructions from his client is agreeing to limit expert opinion evidence to the parties' joint medical expert, Dr. Simon Horlick. I accepted the submissions of counsel for the Respondent that specific evidence given by the Claimant on cross-examination and referenced in paragraphs 4-17 of the Respondent's Supplementary Submissions, supported my factual finding. I also agreed with Mr. Brun's review of the adjournment application in paragraph 21 of his Supplementary Submissions in which he stated:

> The forced adjournment of the arbitration was obtained in circumstances of incomplete and inadequate disclosure of the true facts in the affidavit materials submitted by the Claimant. The strategic decision to seek an adjournment on the basis of alleged failures of previous counsel should not be rewarded in the circumstances. The Claimant should proceed to arbitration as now scheduled on the basis of the Rule 11 evidence that had been obtained jointly by the parties in advance of the prior arbitration date.

31. Accordingly, on October 21, 2022, I ordered, *inter alia*, the following:

> 1. The arbitration currently set to commence on February 27, 2023, shall proceed as scheduled for six days;
> 2. The Claimant's application for leave to amend the statement of case dated April 13, 2018 is dismissed;
> 3. The Claimant's application for leave to obtain and serve further expert reports, including from a functional capacity and cost of future care evaluator and a psychiatrist, is dismissed;

4. The parties are at liberty to obtain a supplemental report from the joint expert, Dr. Horlick, and the costs of the supplemental report are payable by the Claimant;
5. The Claimant is granted leave to provide/lead factual evidence from an occupational therapist with respect to future cost of care items recommended by Dr. Horlick;
6. The costs of this application shall be determined at the conclusion of this matter.

II. ISSUES

A. Liability

32. Claimant's counsel argues that the evidence discloses that the underinsured motorist is 100% at fault for the Accident and responsible for the Claimant's injuries, loss and expense.

33. Although the Respondent did not formerly admit that the negligence of the underinsured motorist caused the accident, counsel for the Respondent in closing submissions wisely limited his argument to the issue of contributory negligence of the Claimant.

34. I also had to deal with a difficult evidentiary issue on liability: the question of the admissibility of the videotape of the Accident produced on the cusp of the hearing. Reluctantly, I admitted the videotape into evidence but gave counsel for the Respondent a reasonable opportunity to investigate the authenticity and technical adequacies of the tape with a view to reopening the question of its admissibility or weight. Counsel did not, as it turns out, seek to reopen. Therefore, I will address the evidentiary weight of the videotape in discussing the facts.

B. Damages / Guiding Legal Principles

35. The Claimant seeks damages under seven heads of damages which I will later discuss. Counsel for the Claimant argues that R.G. was a credible witness whose testimony ought to be accepted in its entirety. Counsel for R.G. submits her evidence is consistent with the totality of the evidence. He also submits that the medical opinion of Dr. Horlick should also be accepted in its entirety being consistent with the totality of the evidence. The evidence of R.G. and Dr. Horlick justify a substantial award of damages.

36. Counsel for the Respondent agrees that R.G. was a credible witness who suffered a significant injury to her right knee. The Respondent takes issue with the extent and magnitude of several of the heads of damages claimed.

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

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

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

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

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

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

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

> The court adopted the third approach, the "functional", which, rather than attempting to set a value on lost happiness attempts to assess the compensation

> required to provide the injured person with reasonable solace for his misfortune. Money is awarded not because lost faculties have a dollar value, but because money can be used to substitute other enjoyments and pleasures for those that have been lost.

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

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

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

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

> course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: Milina v. Bartsch, *supra*, at 79.

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

> [48] In summary, an assessment of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future hypothetical possibility will be taken into account as long as there is a real and substantial possibility not mere speculation. If the plaintiff establishes a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified.
>
> [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economical and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez* 2016 B.C.C.A. 211 at para. 21

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

46. The Respondent provided a rather lengthy written submission on the topic of causation in a negligence action. I do not view causation as a controversial issue in this Arbitration. The Respondent does not seem to contest that the Claimant has met the four requirements to prove negligence: a duty, a breach of duty, loss, factual causation as per the “but for” test and causation in law, i.e., that the loss is not too remote: *Mustapha v. Culligan of Canada Ltd*., [2008] 2 S.C.R. 114. See also *Saadati v. Moorhead*, [2017] 1 SCR 543. The Respondent suggested a causation argument was relevant to the conditions of depression and

fibromyalgia; however, Claimant's counsel pressed neither condition as specifically caused by the Accident. I will discuss later the plaintiff's psychological profile.

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

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

III. FACTS

A. Liability

49. R.G. was the only witness to testify about the Accident; but unfortunately, she suffered a concussion in the collision and has both pre and post traumatic amnesia surrounding the collision. At the hearing she testified she recalled walking home from her classes, a distance of about one and one-half miles traveling for part of the distance along the sidewalk on the east side of Kimball Avenue. She recalls it was cold and raining. She was wearing dark clothing. She arrived at the northeast corner of Kimball Avenue's intersection with Vredenburgh Avenue. With the assistance of Google Maps of the intersection in Exhibit 4, she identified her location and marked her intended route. There is a stop sign for vehicles coming along Vredenburgh Avenue intending to enter Kimball Avenue. Those vehicles must turn right northbound or left southbound as Vredenburgh is not a through road across Kimball. The intersection could be described as a "T" intersection but was described as a "Y" intersection. R.G. intended to cross Vredenburgh to its southeast corner in what has been referred to as an "unmarked crosswalk". The sidewalk continues down Kimball at the southeast corner of the intersection. The Claimant stopped at the sidewalk on the northeast corner. The stop sign was to her left.

50. Seeing no immediate hazards, such as vehicles in or close to this intersection, she proceeded to cross the street. She testified at the hearing that she recalls that she almost reached the other side of the intersection. After that, she has no memory of the Accident events. The Respondent cross-examined R.G. on her discovery evidence about her recollection of crossing this road. At discovery on March 24, 2021, two years earlier, she testified that she had no memory of where she was in the intersection before she was struck. At the hearing, she says she now recalls having passed the two yellow lines dividing Vredenburgh, which would mean she had crossed at least half of the intersection. The Respondent argues that R.G.'s recent change of evidence is not believable. The Respondent argues the Claimant's discovery evidence on this point should be preferred.

51. The parties entered into the record a Document Agreement, Exhibit 9. That Agreement made certain documents found in other Exhibits, consisting of various documents and records admissible as evidence subject to proof to the contrary and arguments about weight of the evidence, The Document Agreement made a New York State Department of Motor Vehicles Police Accident Report of the November 19, 2015 Accident admissible evidence of the truth of its contents as a record kept in the ordinary course of business. The intent was to make such documents and records admissible as business records under s. 42 of the Evidence Act, R.S.B.C 1996, c.124.

52. The Police Accident Report (15-126320) in Exhibit 8, Tab 1, contains the names and addresses of the persons involved in the Accident and describes the vehicle involved as a 2009 Acura owned by the operator of the vehicle. The date and time of the Accident is noted as Thursday, November 19 at 18:23 hours or 6:23pm. The videotape recording of the Accident records a time of 2 minutes earlier at 18:21 or 6:21pm. There are codes in the report, but no code sheet was provided. There is no evidence of any detailed accident investigation such as measurements, exact location of point of impact, nor speed, distance, and time analysis. Neither party offered any engineering evidence of accident reconstruction.

53. However, the Police Accident Report does contain a rudimentary sketch described as an Accident Diagram. Since the Claimant does not recall the collision and there apparently were no other witnesses to the Accident, the basis of the diagram must have been the motorist, the

owner/operator of the 2009 Acura. That diagram shows the Acura as making a right-hand turn from being northbound on Kimball Avenue turning to go eastbound on Vredenburgh Avenue. The diagram puts the pedestrian, obviously R.G., in the road closer to her destination of the southeast corner of the intersection then that of her staring point on the northeast corner. In other words, the diagram suggests the pedestrian had crossed much of the intersection before she was hit. Given the appearance in the Google photographs of quite a wide intersection, although not measured, at normal walking speed, R.G. must have been in the intersection for several seconds. There is no evidence she was running or hurrying.

54. The Police Accident Report also contains a section for "Accident Description/Officer's Notes" that states the motorist "was travelling northtbound on Kimball Avenue and made a right turn on Vredenburgh Avenue and struck pedestrian. Operator of Veh #1 [the Acura] stated that **she did not see the pedestrian** [my emphasis]. The pedestrian was walking from the northeast corner to the southeast corner of above listed intersection. No signal, no crosswalk." I take the last sentence to mean there were no traffic signal lights at the intersection and no marked crosswalk.

55. The Respondent did not call the motorist as a witness. The significance of the Police Accident Report is that it contains i) the statement of the driver that she did not see the Claimant crossing the road although she was there to be seen and ii) the Claimant had likely covered more than half the intersection before the motorist ran into her. In other words, the driver of the Acura failed to see a pedestrian who was there to be seen for an appreciable amount of time.

56. The other point that I will make at this point is that under s.148.2(6)(a) of the UMP Regulation, it is the law of the place of the accident, the *lex loci*, which an arbitrator must apply to determine liability including the degree of entitlement to recover damages, e.g. contributory negligence. In this arbitration, counsel have agreed that there is no substantive difference between the statutory law and the common law of New York state and the province of British Columbia. Accordingly, they have provided me with statue law and case law from both jurisdictions.

57. I have already alluded to the circumstances of the Accident scene videotape and its admission into evidence as Exhibit 7 after a *voir dire*. The Respondent vigorously opposed its admission as contrary, *inter alia*, to Rule 7-1(21), contrary to case law such as *Stone v. Ellerman et al.* 2009 B.C.C.A 294, and contrary to directions that I made on January 11, 2023, regarding document disclosure. The Respondent argued that i) it would suffer prejudice if it were admitted and also that ii) there was no reasonable explanation for the failure to disclose its existence until the last business day before the commencement of the hearing. During the *voir dire* conducted on March 2, 2013, I heard testimony from the Claimant's brother, G.G., how he obtained the videotape on November 22, 2015 and what he subsequently did with it. I also watched the videotape more than once, played on a computer screen using a USB stick. The USB stick became Exhibit 7. Exhibit 6 is an exchange of emails showing transmission of the videotape to G.G. on November 22, 2015, three days after the Accident, and an email dated February 24, 2023, by which G.G. sent the videotape to current counsel for the Claimant.

58. I gave oral reasons for my decision to allow the videotape into evidence. There is no need to repeat my oral judgment in this Award. Since liability remained a live issue, I considered the videotape of the Accident highly relevant. I also considered the late production to be potentially prejudicial to the Respondent. Also, I was not satisfied that there was a reasonable explanation for its late production. However, I concluded that the ends of justice, considering the circumstances of the case, including pre-Accident amnesia of the Claimant and the Police Report and other contemporaneous documents put into evidence by the Respondent (Exhibit 5, Tabs 1-5), required that the videotape be admitted into evidence upon condition that the Respondent have a reasonable opportunity to have experts examine the videotape and to apply to re-open the case to call evidence to have the videotape excluded as evidence. Respondent's counsel has not pursued that opportunity. Ultimately, there was no challenge to the authenticity of the videotape. The date and time do square with the other contemporary records. I also considered the case law cited by the Respondent, such as *Stone v. Ellerman et al*, to be distinguishable on the facts.

59. Based on the evidence of G.G. and Exhibit 6, I inferred that previous B.C counsel for the Claimant was not informed about the existence of the videotape and current counsel was unaware of it until the eve of the hearing although apparently the Claimant knew of its

existence but had never viewed it. In balancing the equities as required by case law, I concluded that the Claimant should not be prejudiced by the conduct of her counsel in failing to provide the videotape earlier in this Arbitration.

B. DAMAGES/INJURIES

60. In addition to the Claimant and Dr. Simon Horlick, four lay witnesses testified at the hearing including G.G., the brother, the Claimant's mother D.G. with the assistance of a Punjabi interpreter, a friend, A.G., and a former professional colleague, S.M.. Their evidence primarily related to damages. Their evidence assisted in showing the Claimant's original position and subsequent injured position and the effects of the Accident upon the Claimant.

61. Mr. Paul Pakulak, an experienced occupational therapist and future care evaluator, was required to testify for the purposes of cross-examination upon his report dated February 22, 2023, as amended, called a "Cost of Future Care Assessment Report" (Exhibit 1, Tab 4). Mr. Pakulak's report followed my ruling on October 21, 2022, dismissing the Applicant's application for a further adjournment of the hearing to obtain further expert reports beyond the opinion of Dr. Horlick. As noted, my ruling permitted the Claimant to have Dr. Horlick update his assessment of the Claimant and, *inter alia*, to give an expanded and updated opinion on the potential for future care. I also allowed the Claimant to obtain a factual report from an informed source providing cost estimates based on Dr. Horlick's opinion. My order resulted in Mr. Pakulak's factual report of February 22, 2023, which is based on Dr. Horlick's second report of November 10, 2022. On March 1, 2023, I admitted Mr. Pakulak's report into evidence, with the proviso that paragraphs 3 and 4 on page 1 of the report be deleted to make clear that Mr. Pakulak was not giving his opinion on future care but rather providing estimates of costs based on Dr. Horlick's opinion. With that proviso, which was not disputed, Respondent's counsel did not object to the admissibility of Mr. Pakulak's report nor to the admissibility of Dr. Horlick's report of November 10, 2022.

62. The Respondent also tendered a report of future care multipliers dated January 19, 2023, from Mr. Hassam Lakhani of Peta Consultants Ltd. The Lakhani report became evidence as Tab 3 of Exhibit 1. There was no objection to this report and no requirement for the witness to attend the hearing for cross-examination.

Dr. Simon Horlick, Orthopedic Surgeon

63. It is my view that of the above eight witnesses on damages, Dr. Horlick's opinion evidence was the most important evidence concerning the Claimant's knee injury, assessment, diagnosis, course of recovery, treatment, prognosis and future consequences. Accordingly, I intend to discuss Dr. Horlick's evidence first.

64. Dr. Horlick conducted his initial assessment and submitted his initial report of September 10, 2020, as a joint medical expert for both parties. His subsequent assessment and report of November 10, 2022 two years later was commissioned by Claimant's counsel only. Dr. Horlick also gave oral evidence on March 3, 2023. Not surprisingly there was no cross-examination on his qualifications. I accepted Dr. Horlick as an expert orthopedic surgeon entitled to give expert evidence in his surgical discipline. His curriculum vitae as of 2020 was reviewed. He has been an orthopedic surgeon for 30 years. Sixty to seventy percent of his practice is related to patients with knee injuries. His surgical practice continues. He sees 20-30 patients a week on average who present with knee injuries. Dr. Horlick was a most impressive expert witness who provided a very detailed and understandable explanation of the complexity of the Claimant's knee injury. I permitted him to use a model of a knee joint to explain the mechanism of injury and the resulting damage. His reports were also very thorough and well written. He offered a personal insight into articular fractures of human joints such as the knee. When Dr. Horlick started out as an orthopedic surgeon, he thought that by now medical science would have a cure for joint cartilage damage which occurs with osteoarthritis, traumatic or otherwise. Osteoarthritis is a progressive condition. Once cartilage is damaged and osteoarthritis sets in, the cartilage itself cannot be replaced or repaired. The most common and effective answer his discipline offers is joint replacement. That the Claimant suffered three fractures of her knee joint plus a valgus deformity (a knocked kneed presentation), a reversal of her normal varus (bow-legged) alignment, makes her injury quite complex. The Respondent does not dispute the Claimant's right leg injury was caused by the Accident. It is also accepted specifically that the Claimant sustained a closed displaced comminuted right lateral tibial plateau fracture associated with comminuted [fragmented] proximal tibial and fibular fractures. The Respondent accepts the Claimant is at risk of progression of post-traumatic osteoarthritis and likely will need knee replacement surgery in

the future. The Respondent accepts the Claimant has variable intermittent right knee pain and atrophy of the right thigh and calf. R.G. has several surgical scars on her right knee and no doubt will have more in the future.

65. Dr. Horlick described in detail in his reports and in oral evidence using a model, the three knee joint fractures: a closed depressed right lateral tibial plateau fracture, a very proximal unstable displaced comminuted tibial metadiaphyseal fracture and a proximal fibula fracture. He confirmed the development of post-traumatic osteoarthritis of the knee in 2020 and in 2022 as a consequence of the fractures. His most recent assessment of November 10, 2022 confirmed the persistence of his diagnosis of damage to the Claimant's knee joint from the three fractures, osteoarthritis and valgus deformity. Dr. Horlick considered it probable that R.G. would need further non-surgical and surgical treatment, including knee replacement. Dr. Horlick confirmed that not only were there fractures to the bones of the knee joint but also direct damage to the cartilage of the articular surfaces.

66. Dr. Horlick described in some detail the three surgeries that the Claimant has already undergone and likely future surgeries. The first surgery in New York on November 20, 2015 involved open reduction and external fixation involving the insertion of pins in her femur and tibia and an external rod. This surgery was done to stabilize her knee in view of extensive soft tissue swelling to allow for home nursing care and to wait for a more experienced surgeon to consider a more definitive surgical treatment given the complexity of the trauma. A second operation in New York a few weeks later involved open reduction and internal fixation surgery of the lateral tibial plateau fracture combined with a closed reduction suprapatellar intramedullary nail ("IM nail") fixation of the tibia. The IM nail remains in place. In oral testimony, Dr. Horlick showed it on an xray. It looks like a fairly large rod attached lengthwise to the tibia. After the second surgery the Claimant was discharged from the New York hospital.

67. The Claimant returned to Surrey for ongoing treatment and management of her injuries. She saw an orthopedic trauma surgeon, Dr. Pierre Guy, of the Vancouver General Hospital on a number of occasions. Ultimately on November 29, 2016, Dr. Guy did an arthroscopic surgery on the Claimant's knee removing some screws in the tibial plateau. The IM nail was left in

place. Dr. Guy also removed extensive scar tissue. In testimony, Dr. Horlick thought that the surgery to affix the IM nail was fraught with difficulty and risk since the IM nail was placed from above the knee and without a plate. However, before the Claimant has joint replacement surgery in the future, the IM nail must be removed. It has been recommended by Dr. Guy and Dr. Horlick that the IM nail be removed presently.

68. Since Dr. Horlick's second report is quite recent and based on an in-person assessment of November 10, 2022, I will quote from it:

> [R.G.] was involved in a pedestrian-motor vehicle accident November 19, 2015, resulting in injuries to the right knee and leg. She denied any prior history of similar injuries to these anatomic regions or functional limitations related to same and this was concordant with review of the medical records provided.
>
> As a direct result of the subject accident [R.G.] sustained a closed depressed right lateral tibial plateau fracture associated with a proximal unstable displaced tibial metadiaphyseal fracture and a proximal fibula fracture.
>
> [R.G.] has undergone three operative procedures to manage her injury. Despite this, she continues to have ongoing symptoms focal to the right knee and leg consisting of pain, a slight instability, some restriction in range of motion, as well as marked limitations with respect to functional capacity due to the onset of discomfort in the knee when undergoing same.
>
> The physical examination which has now been repeated over a two-year interval continues to show measures of impairment including a marked asymmetry in alignment of approximately 15 degrees on the right lower extremity. She also has some loss of full extension of the right knee and 2 cm of thigh atrophy on the right compared to the left. She had some elicitable tenderness to palpation under her patellar facets.
>
> [R.G.'s] diagnosis with respect to her injuries is [sic] due to the displaced comminuted tibial metadiaphyseal fracture and the tibial plateau fracture is post-traumatic osteoarthritis. Her clinical features today confirm the persistence of this diagnosis and perhaps slight worsening based on her subjective assessment only.
>
> Based on today's assessment with persistence of symptoms and clinical findings most notably that of the valgus alignment of the right lower extremity it is incumbent that [R.G.] continue to be mindful of her knee and invoke appropriate treatment strategies from a vocational, avocational and recreational standpoint to delay or defer the progression of post-traumatic osteoarthritis. These have been outlined in my prior report (Exhibit 1, Tab 2).

69. Dr. Horlick confirmed his opinion that the Claimant will require knee replacement surgery **ideally** in her late 40's or early 50's. She is currently 33 years of age. Dr. Horlick wrote in his second report that the Claimant may require a second knee replacement in her mid-60's at the latest assuming estimates of a primary knee replacement having a 95% change of lasting 20 years. Dr. Horlick describes a second revision knee replacement surgery and future care as follows:

> Given [R.G.'s] young age presently, with a diagnosis of post-traumatic osteoarthritis and its propensity for progression, it is more likely than not she will require a knee replacement surgery in her late 40s or early 50s. In that regard, using contemporary measures the primary knee replacement will take her until she is in her mid-60s at the latest. At that point, she will likely have to undergo a revision knee replacement surgery. This type of surgery is much more complicated than the index procedure with a lengthier time off work and recovery process. Revision knee replacements are not as predictable in relieving pain nor do they tend to last as long. They also have a higher complication rate. As such, anticipating that [R.G.] will be near the later stages of her career or retired, she will require assistance at home with household management and personal care requirements if necessary, given the revision knee replacement limitations. Accommodation would have to be considered that there is a greater risk for complication rates such as infection, instability, and stiffness with a revision knee replacement so assistance with home care and personal care should be undertaken with this in mind. I would also state that in the first phase to manage her present knee condition, access to physiotherapy on an intermittent basis usually once or twice a year for six weeks at a time, will be incumbent in trying to manage her present post-traumatic osteoarthritis in the knee. She will also need intermittent physiotherapy status post knee replacement surgery usually of three-month duration following the operative intervention.
>
> From review of [R.G.'s] clinical records, as well as from her assessment on the November 10, 2022, it remains my opinion that she has the presence of post-traumatic osteoarthritis that is clinically symptomatic and, that despite current nonsurgical measures, will more likely than not progress as documented above and need for future operative and nonoperative treatments arc medically necessary and mandatory. Finally, I did mention in my prior report that a possible operative intervention, aside from knee replacement surgery, by way of distal femoral osteotomy might be an option for her. After further discussion with her today and review imaging studies this would not be appropriate.

70. Dr. Horlick concluded his November 10, 2022 report as follows:

> From review of [R.G.'s] clinical records, as well as from her assessment on the November 10, 2022, it remains my opinion that she has the presence of post-

> traumatic osteoarthritis that is clinically symptomatic and, that despite current nonsurgical measures, will more likely than not progress as documented above and need for future operative and nonoperative treatments arc medically necessary and mandatory. Finally, I did mention in my prior report that a possible operative intervention, aside from knee replacement surgery, by way of distal femoral osteotomy might be an option for her. After further discussion with her today and review imaging studies this would not be appropriate. A corrective osteotomy would be difficult given the nature of where the anatomic deficiency is emanating from, i.e., the joint surface, and as such a distal femoral osteotomy would not be appropriate. Keeping this in mind, it remains incumbent then that she optimized all nonsurgical management strategies as discussed above and then knee replacement surgery would be the best operative intervention when clinically indicated. Indication for knee replacement surgery is essentially when patient can no longer tolerate the pain despite optimizing all nonsurgical measures and that there is associated significant restriction in functional capacity and deleterious impact on their quality of life. Regarding the latter, this has to be taken into consideration with [R.G.'s] pre-existing depression. As endorsed to me, [R.G.] states that when she gets prolonged periods of knee pain this exacerbates her depressive illness.

71. The parties disagree on whether the Claimant will require one or two knee replacement surgeries in the future and when those surgeries will occur. Since such surgeries are future hypothetical events much depends on one's interpretation of Dr. Horlick's prognosis and his view concerning the future course of the Claimant's compromised knee. In addition, the standard of proof related to future events and future loss must ultimately be considered. Findings of fact concerning future surgeries affect several heads of damages: non-pecuniary loss, loss of earing capacity and costs of future care.

72. In his original report of September 10, 2020, Dr. Horlick's opinion only spoke generally of increased risk of future knee replacement surgery based on i) his diagnosis of post traumatic osteoarthritis ii) the fact that the fractures did not heal in anatomic alignment and iii) her permanent altered valgus deformity. Unfortunately, as R.G. weight-bears on her right knee she loads the lateral side of her knee more than the medial side which causes increased cartilage damage to the lateral compartment of her knee originally damaged by the depressed tibial plateau fracture. The combination of residual misalignment and damage to the articular cartilage from the depressed lateral tibial plateau, puts the Claimant at significant risk for progression of post-traumatic osteoarthritis in the lateral compartment. Dr. Horlick also mentioned damage to the articular cartilage in the patellofemoral compartment likely due to

both the trauma itself and/or exacerbated by a suprapatellar insertion of the IM nail. Dr. Horlick also mentioned a further surgical option of a distal femoral osteotomy to re-align the right leg, a major surgery of only temporary benefit that would not eliminate the increased need for joint replacement. Subsequently, as noted in his second report of November 10, 2022, Dr. Horlick concluded that an osteotomy would not be an appropriate option. He did, however, elaborate on the question of future knee replacement surgery.

73. In the second updated report, dated November 10, 2022, based on an assessment of the Claimant on the same day as well as review pf additional source documents including clinical records. Dr. Horlick addressed the question of future knee replacement surgery in greater specificity. The opinion of Dr. Horlick is now more definitive to the effect that the Claimant "will require knee replacement." Dr. Horlick wrote that "it would be **ideal** if she could delay or defer this knee replacement until she is in her late 40's or 50's" [my emphasis], As I understood it from his report and his testimony, such initial joint replacements, if done, will have a 95% chance of lasting 20 years before a second more complicated and riskier revision surgery is required. As noted, revision surgeries are not as predictable in relieving pain and have higher complications rates including infection, instability, bone loss and stiffness. Nor do such replacements tend to last as long.

74. Dr. Horlick mentioned the prospect of technological advances in joint replacement which may result in greater longevity of artificial joints. However, in his second report he wrote "we do <u>not</u> have a 30-year lifespan knee available presently" [my emphasis]. I took from his evidence that there is sufficient clinical evidence proving the 95% chance of a 20-year artificial joint life span. Furthermore, artificial joints may in future last 30 years but that is not yet verified based on clinical experience.

75. In considering future hypothetical factual matters, I must be guided by the onus on the Claimant to prove such matters of future loss not on a balance of probabilities but as matters of real and substantial risk or possibility, sometimes referred to as a "simple probability", beyond mere speculation or theoretical loss. Guided by Dr. Horlick's evidence it is reasonable to conclude that the Claimant will have knee replacement surgery in her late 40's or early 50's but it may be earlier than that. Delay to that age would be "ideal". Thus, I find it reasonable to

conclude based on current experience and knowledge in the joint replacement discipline that it is a real and substantial possibility that the Claimant will have revision surgery, with all its inherent risks, approximately 20 years after the first replacement surgery but possibly earlier, which would mean in the range of her late 60's or early 70's. Depending on R.G.'s life span, I infer it is possible she may endure a third joint replacement.

The Claimant

76. The Claimant testified at the hearing over the course of a day and half plus a brief recall on the last day of the hearing to testify about the Accident videotape (Exhibit 7). It serves no useful purpose to recount all her evidence in detail. Her evidence concerning her injuries, symptoms, medical conditions, course of recovery and treatment corroborates the facts as summarized in the reports and evidence of Dr. Horlick. Her evidence about her life before and after the Accident is consistent with the evidence of the lay witnesses who testified at the hearing.

Impression as a Witness

77. Overall Claimant gave her evidence in a straightforward manner. She did not embellish or exaggerate her symptoms, nor, in my opinion, the physical and emotional difficulties caused by the Accident. If anything, she tended to minimize her limitations and challenges. In large measure she was quite stoical. Respondent's counsel conceded she was a credible witness concerning her injuries, medical problems, and their effect upon her. I found her evidence on loss and damage was credible.

Original Position

78. Before the Accident, R.G. was an active individual in good health with the exception of some mental health issues for which she sought appropriate medical attention including pharmacological treatment. She had no active or latent physical health problems although the clinical records reveal a minor right knee injury in the summer of 2015 which resolved with physiotherapy before she travelled to college in New York in September 2015. The clinical records also reveal a note of transitory right hip pain that might have been related to her pre-

existing varus alignment. In addition to attending university full-time, R.G. was physically active enjoying jogging, dancing and gym workouts.

79. The Claimant did well scholastically. She obtained a B. Sc. in Cell Biology and Genetics from UBC in 2012. She was admitted to attend Sarah Lawrence College in 2014 for a Master's program in Human Genetics, a program to which admission is limited. The Claimant's mental health issues had not prevented the Claimant from achieving her scholastic goals.

80. Those mental health issues are well described and discussed in the clinical records, pre and post-Accident, put into evidence in Exhibits 5 and 8. The records disclose a history of depression, anxiety and preoccupation with death dating back to her teen years. R.G. was diagnosed at age 21 with Major Depressive Disorder. Symptoms included insomnia, poor appetite, and thoughts of suicide. The records disclose that she was seen by two B.C. psychiatrists in 2014. She was never admitted to hospital for treatment, but physicians prescribed medication including Prozac and Wellbutrin. During her stay at Jacobi Medical Center from the date of the Accident to discharge on December 5, 2015, she was seen for psychiatric consultation. The Accident itself, confinement to a bed and postponement of surgery during her hospital admission caused feelings of depression and anxiety but no suicide ideation. She was diagnosed with Major Depression Disorder in partial remission and non-specific anxiety disorder. She continued her medications. Before discharge, she was seen again for a psychiatric consultation. At that time, she expressed an improvement in mood. She denied any suicide ideation and was in "good spirits". Her earlier feelings of depression and anxiety were considered resolved and situational in response to treatment uncertainty.

81. In 2014, the Claimant had an exacerbation of her depressed mood, anxiety and suicide thoughts. She was seen for a psychiatric assessment in June 2014 at Children's and Women's Health Centre. She was also seen by a psychiatrist as an outpatient at Ridge Meadows Hospital in August 2014, prior to attending Sarah Lawrence University and again in November 2014, upon returning to Surrey, B.C., after withdrawing from college because of a relapse in her depressed mood, anxiety, and suicidal thoughts. She took a medical leave. By the time she was seen in November 2014, she reported that her mood had improved. The treating psychiatrist recommended a change in her medication.

82. It is clear that the Accident did not cause the Claimant's depressive disorder and anxiety. I mention the immediate post-Accident hospital psychiatric consultations as they confirm, in my view, the ongoing psychiatric condition for which R.G. was being treated. The Accident was not responsible for any new conditions but did cause some exacerbation in symptoms temporarily. I conclude that she has experienced stressful situations such as attending university away from home and family for the first time in 2014 and again in 2015 while in hospital, being bedridden and fearing uncertain surgery after the Accident. However, despite her chronic conditions she seems resilient enough to recover in short order. Her psychological condition seems well-managed medically. Respondent's counsel argues that R.G. would have experienced depression and major depressive episodes absent the Accident sufficient to cause interruption in her vocational future and significant interference with her enjoyment of life. I agree that there is satisfactory proof that R.G. has a depressive disorder for the most part in remission, but the evidence is not sufficiently strong enough to convince me that the Claimant would have had significant depressive episodes substantively affecting her vocational ability and substantively curtailing her enjoyment of life. She seems too resilient for that to constitute a real and substantial possibility or negative contingency in any event of the Accident.

83. Claimant's counsel does not overplay an argument that the Accident caused serious and prolonged aggravation of her depressive symptoms and anxiety. Understandably, it did so for several days in the hospital in New York. He also points to occasions in 2018 and 2021 when she experienced temporary increases in depression and anxiety. R.G. downplays the significance of the two occasions. Claimant's counsel suggests that R.G. is stable psychologically and is medically well controlled and managed. That is borne out by the fact of her successful completion of her master's program, her employment history and the fact she was married in 2022. I do not accept that the Claimant's mental health issues should be treated as negative contingencies in assessing her damages.

Injured Position

84. The Claimant endeared a lengthy course of treatment, recovery and rehabilitation during which she suffered considerable pain, compromised mobility and dependance upon others, including her family. The clinical records corroborate her testimony about a lost year. The

Respondent concedes she suffered a one-year delay in her education and a one-year delay in her entry into the workforce. She took pain medication including narcotic medication, Tramacet and Tylenol with codeine. She underwent three significant surgeries for her right knee fractures, two in New York and the third in B.C on November 29, 2016, by Dr. Guy at Vancouver General Hospital. She used mobility aids such as a walker, crutches and a cane until she was fully weight-bearing by June 2016. She experience swelling, locking, stiffness and instability of her knee. She experienced an extensive course of physiotherapy, massage therapy and exercise program in the gym and at home. She received treatment and rehabilitation while in Vancouver and continued with it upon her return to Yonkers, New York in January 2017. She completed her Masters program in 2018 and commenced employment in California in October 2018.

85. The Claimant worked as a genetic counsellor in California from October 2018 until January 2022. She then returned to Canada. She continued working remotely for her California employer until June 2022. She married in June 2022. She is currently working online as a genetics counsellor for a new employer. Her gross employment income from employment in Riverside, California as a genetic counsellor was $81,846 US in 2019, $85,314 US in 2020 and $88,500 in 2021 in US dollars. She currently earns $47.00 US per hour working online providing genetics advice. Both parties accept a one-year delay in entering the workforce.

86. As documented by Dr. Horlick, the Claimant endures ongoing intermittent pain and stiffness in her knee. It is exacerbated with prolonged standing, sitting, walking and stair climbing. She cannot run or dance. She cannot comfortably kneel or squat. She has occasional flare-ups of increased right knee pain which necessities rest, ice and use of Advil or Tylenol. She currently avoids stronger pain medication. Pain may interrupt her sleep. Pain can be aggravated by weather changes. She has used an unloader brace for relief of symptoms. She intermittently attends physiotherapy when her pain flares. She has not tried any injections for pain relief. She continues to take medication for depression.

The Lay Witnesses

87. The evidence of the lay witnesses, G.G., a brother, D.G., R.G.'s mother, S.M., a work colleague from California and A.S., a close friend, was generally consistent and corroborated

the Claimant's evidence concerning her Original Position and Injured Position. I will deal with their evidence in summary form. I will deal with the evidence of Mr. Paul Pakulak on future care costs separately.

A.S.

88. A.S. met the Claimant at UBC in 2011 while both were students. A.S. obtained a B. Sc from UBC in 2012 in Biotechnology. They both did volunteer work in a program called Kid's Health Phone, took some of the same courses and socialized going out to restaurants and sometimes dancing. A.S. confirmed that R.G. was an active individual in good health, active in her studies, volunteer work and social activities. A.S. was aware R.G. had a depressive episode in 2014 resulting in a return to Vancouver and received psychiatric care. R.G. was open about getting care for depression. R.G. worked for several months in Vancouver starting in 2014 and returned to New York in the fall of 2015.

89. D.G., R.G.'s mother, called A.S. shortly after the Accident upon R.G.'s return to Surrey, B.C., her parents' home. A.S. visited R.G. who was using a wheelchair and was set up with a bed in the family room on the ground floor. A.S. visited R.G. while she was recovering her mobility. She observed D.G. providing assistance to R.G. including massaging her right leg. R.G. usually elevated her right leg. By June 2016, her mobility had improved; she was no longer using mobility aids. They went to a family wedding in June 2016 R.G. mostly sat.

90. In the spring of 2018, A.S. visited R.G. in New York for one week. A.S. was able to walk slowly over the Brooklyn Bridge because of a knee injury. R.G. was not able to walk the bridge even at a slow pace. Social activities were limited.

91. A.S. saw R.G. between June and October 2018. There were home visits and they went out to restaurants. A.S. observed R.G., avoiding putting weight on her right leg and limping. A.S. visited R.G. in November 2018 in California and observed that R.G. seemed to have pain in her leg and would limp by the end of the day's activities.

92. A.S. attended a bridal shower for R.G. in 2022, as well as her wedding. R.G. wore a knee brace. The guests at the bridal shower danced with R.G. who was limited to moving her arms while others danced. During prayer she sat cross-legged. She sat to rest. The wedding

ceremony was modified to accommodate R.G.'s leg problems. Since her wedding, R.G. spends time in Surrey at her parent's home and in Coquitlam with her in-laws. A.S. now lives in Surrey and visits R.G. at her parents' home.

D.G.

93. D.G. testified with the assistance of a Punjabi interpreter although it appeared she had some English language skills. Respondent's counsel submits that D.G. was argumentative at times during cross-examination and at other times her answers were "oblique", suggesting evasion or unresponsiveness. I did not come to the same conclusions. I detected a certain defensiveness and nervousness in her presentation. I do agree that she left the impression of being very protective of her daughter. Mr. Brun described her as a "doting mom" which seems apt. On the other hand, I agree with Claimant's counsel that D.G.'s evidence corroborated her daughter's evidence of ongoing care and the assistance D.G. provided as R.G. recovered from her knee injury.

94. D.G. and her son, G.G. attended in New York to attend to R.G. on November 20, 2015 after getting a telephone call from R.G.'s roommate, Vicky. D.G. stayed with R.G. during her hospital admission from November 20 to December 5, 2015. She provided extensive personal care as R.G. was in a lot of pain and was essentially confined to bed. D.G. helped R.G. with using the washroom and a "commode"; she gave her sponge baths; she assisted with personal care; she assisted with providing a vegetarian diet and fed her. She even slept in R.G.'s hospital room with permission. She also assisted with giving R.G. medication. Upon return to Surrey, B.C., D.G. cared for her daughter at home from December 6 to June, 2016. She observed that R.G. was in a lot of pain. Mobility problems continued until June 2016, D.G. continued to help with personal care, providing meals, driving R.G. to appointments and assisting her with stretching exercises. She massaged R.G.'s leg as R.G. had a lot of pain on certain days. From June 2016 to January 2017, she washed her daughter's clothes, made her meals, helped her clean her washroom and she went with her to medical appointments, and assisted with stretching exercise. D.G. confirmed that R.G. continued to limp, she did not walk normally and on a certain days she appeared to be in a lot of pain. D.G. went to New

York with R.G. in January 2017, to help her get re-established in Yonkers, New York in order to attend college. She helped R.G. set up her apartment and helped her purchase a vehicle.

95. Upon R.G.'s return home between May to September, 2017, D.G. drove her to Children's Hospital where she was doing a rotation. D.G. drove her to and from the hospital after R.G. experienced an increase in pain during rush hour delays.

96. R.G. went back to New York between September 2017 and June, 2018. She returned to Surrey, B.C. and stayed at her parent's home until moving to California in October, 2018.

97. D.G. noticed R.G. would have increased pain after walking or driving. She assisted R.G. with washing the bathtub and massaging her leg.

98. D.G. drove with her husband and R.G. in September, 2018 to Riverside, California to assist R.G. in getting set up in an apartment. They returned to Surrey and returned to California by airplane where they helped R.G. with apartment furnishings and the purchase of a vehicle. D.G. stayed with R.G. for two weeks.

99. In January 2020, pre-COVID, D.G. and her husband went back to California. D.G. noticed a change in R.G. – she was having more pain which resulted in R.G. going into work late. She was limping more and moving with more difficulty.

100. Post-COVID, D.G. returned to visit R.G. in October, 2021. R.G. was upset as her pain had increased. In January, 2022 R.G. came home. Since then, she has observed that R.G.'s pain seems to increase if she drives or walks too much. She can see the pain in R.G.'s face. At times R.G. limps and her gait does not appear normal.

G.G.

101. In addition to testifying about the Accident videotape, G.G., testified about his observations of R.G. in hospital after the Accident and upon her return to Surrey, B.C. up to January, 2017. From December 6, 2015 to February, 2016, G.G. observed R.G. was in a lot of pain and needed assistance with daily activities. G.G. drove her to medical appointments up to January, 2017. She did stretching and used ice. G.G. helped by picking up her medication and he helped her with activities around the house. He washed her car for her. He noticed her pain

was “up and down”. She had trouble walking upstairs and on longer walks. He continues to help R.G. by going into a crawl space at her in-law’s residence to retrieve items from storage. R.G. has trouble crouching.

S.M.

102. S.M., a former work colleague in Riverside, California testified about her observations and interactions with R.G. S.M. participated with hiring R.G. as a genetic counsellor. S.M. has been licensed as a genetic counsellor in California since 2011. She has a master’s degree from Brandeis University (1998), a B.Sc. from the State Collage of New York (1989) and a teacher’s certificate in California (1992). She has worked for Dr. Brar in Riverside, California since 2000 as a genetics counsellor. She has taught at a medical school since 2015.

103. She worked together with R.G. every Thursday and the occasional Friday. They shared an office at Dr. Brar’s Riverside Clinic starting in 2020 on Tuesdays.

104. S.M. observed that R.G. had problems with her right knee. R.G. often limped and had an odd gait. S.M. confirmed the parking lot at a remote site they worked at, the San Bernardino Clinic was located a five to seven minute walk from the clinic’s building. Dr. Brar accommodated R.G. if her knee was giving her problems by allowing her to come into the clinic late, leave early or stay at home. R.G. was allowed to make up the time she missed without losing pay.

105. S.M. occasionally would see R.G. socially at lunches or at potluck dinners S.M. hosted several times a year. R.G. would mostly sit at the potluck dinners.

106. R.G. left Dr. Brar’s officer in California in January, 2022 but worked remotely from Canada for Dr. Brar from February to June 2022. S.M. was disappointed that R.G. left Mr. Brar’s employment. She considered R.G. to be an excellent colleague. R.G. was, in her opinion, a competent, effective and hard-working counsellor. S.M. attended R.G.’s wedding in 2022.

107. I found S.M. to be a credible and objective witness.

IV. CONCLUSIONS / FINDINGS OF FACT

A. Liability

108. The only liability issue I must determine is whether the Claimant contributed to her injuries by failing to take reasonable care for her own safety. The tortfeasor, the owner/operator of the Acura vehicle, was not called as a witness to counter the obvious conclusion she failed to keep a proper lookout and failed to yield the right of way to the Claimant, a pedestrian who was crossing quite a wide street in what I conclude was an unmarked crosswalk. The Police Accident Report (Exhibit 5, Tab 1) establishes *prime facie* negligence on the part of the vehicle owner/operator and contains no facts establishing negligence on the part of R.G.

109. Counsel for the Respondent argues that the real unmarked crosswalk was actually on a diagonal joining the northeast corner of the intersection to a position east of the southeast corner of the intersection because arguably that is the shortest distance across the road. No physical evidence was adduced to support that argument. No distance or time measurements were presented. R.G. says she intended to proceed across Vredenburgh Avenue on a direct path from the sidewalk on the northeast corner to the sidewalk on the southeast corner. That makes sense to me and that route must constitute the unmarked crosswalk. It's not logical that the unmarked crosswalk would require crossing pedestrians in either direction to go up Vredenburgh east of the sidewalk to position themselves in an unmarked crosswalk. I accept Claimant's counsel's argument that R.G. was in the unmarked crosswalk when struck. It is a reasonable inference consistent with the known facts.

110. Counsel also agreed that the tort law of New York state and the province of British Columbia concerning the duties of pedestrians and motorists is strikingly similar. For example, sections s.179 of the *Motor Vehicle Act*, R.S.B.C 1996 c. 318 and s.1151 of Article 27 of Title VII of *New York State Vehicle and Traffic Law* are virtually the same. Essentially those provisions establish a statutory right of way for pedestrians in a crosswalk [marked or unmarked] unless the pedestrian has walked or run into the path of a vehicle that is so close that it is impracticable for the driver to yield.

111. The case law on the subject reflects both common law and the statutory duties on pedestrians and motorists within intersections. However, no two cases are alike on their facts; I see no

need to discuss specific decisions. Due regard for general principles is sufficient for my analysis.

112. The videotape, Exhibit 7, was not a very clear film of the circumstances of the Accident. I found it quite blurry. It does show that it was dark, raining and possibly snowing. It shows glare from vehicle headlights as they proceed along Kimball Avenue. The videotape seems to show a vehicle turning right from the northbound lane on Kimball to go east on Vredenburgh which strikes a pedestrian crossing Vredenburgh from north to south. The Claimant identified herself as the pedestrian. It could be that glare from the headlights of other vehicles and the fact that it was dark and raining, although there was some street lighting, contributed to the motorist's failure to see the pedestrian but it does not excuse it. The videotape seems authentic, and it is consistent with the evidence about the Accident. Its recorded time accords with a call to the police. However, the existence of the videotape is not essential to my findings of liability. The Respondent challenges the Claimant's testimony at the hearing to the effect that she had crossed that much of the intersection past the yellow lines dividing Vredenburgh Avenue thus putting her closer to the southeast corner of the intersection then the northeast corner from where she recalls started to cross the street. Respondent's counsel says that the Claimant's discovery evidence of lack of any recall of where in the intersection she was hit is more reliable. It may well be that the Claimant's testimony of where she got to in the intersection is a reconstruction, conscious or not. I accept that her discovery evidence on this point is likely more reliable. Nonetheless, the evidence that I have reviewed points to the conclusion that the Claimant must have crossed more than halfway into the intersection before the collision. Furthermore, the motorist on making her right hand turn onto Vredenburgh Avenue would have turned close to the southeast corner of the intersection to go into the eastbound right lane on Vredenburgh Avenue.

113. I conclude primarily based on the evidence of the contents of the Police Accident Report (Exhibit 5, Tab 1), the diagram of the Accident in the Report and the admission of the motorist of her failure to see the pedestrian at all, that the motorist is totally at fault for the collision. The videotape and the testimony of the Claimant does not contradict the Police Accident Report. Finally, there is no evidence from which I can draw an inference that the Claimant was negligent in not taking care for her own safety. There is no evidence at all that

she acted carelessly and ignored her duties as a pedestrian. There is no evidence she ran into the path of the vehicle that struck her. There is no evidence she was not keeping a proper lookout. The evidence establishes she had the right of way which never shifted legally. No time, distance, speed calculations were presented. Accordingly, I find that the Respondent has not met its onus of proving contributory negligence on the Claimant. I find the underinsured motorist 100% liable for the Accident.

B. Damages / Mitigation

114. The Claimant claims she suffered injuries, beyond her knee injury, including headaches, double vision and scrapes and bruises to her left knee and elbow, all of which resolved within 1-2 weeks of the Accident. The hospital records document a diagnosis of concussion which is consistent with pre and post-traumatic amnesia. Headaches and double vision are often related to concussions. Fortunately for the Claimant, her concussion was at the mild end of the spectrum and symptoms appear to have resolved before her discharge from hospital on December 5, 2015. The same is true of superficial soft tissue injuries.

115. The Claimant also claims an aggravation of her pre-existing depression and anxiety. The evidence suggests episodic dips in mood which resolved. Such changes in mood are documented during her hospital stay in New York and on two other occasions in the spring of 2018 and the fall of 2021. Such a psychological reaction to serious trauma, prolonged treatment and dealing with permanent injury, pain and disability is completely understandable especially with an individual with entrenched pre-existing mood conditions. However, the Claimant minimized the consequences of such episodic dips in mood. In all cases such episodes have been short-lived. Her underlying conditions of depression, anxiety and panic attacks have been well controlled and medically managed. She has not required hospitalization for her psychological condition. At some point several years post-Accident, she was given Cymbalta in pace of Prozac. The Accident did not cause new psychological deficits. In spite of temporary episodes of aggravation of her pre-existing psychological issues, R.G. has done well academically, vocationally and socially.

116. There is no dispute that R.G. sustained a complex and severe right knee injury involving damage to articular surfaces and anatomical displacement. Dr. Horlick explained in detail the

extensive nature of R.G.'s right knee trauma. R.G. has already undergone three operations and will shortly have a fourth for removal of the IM nail which on x-ray looks like a long rod attached to the tibia. The future holds more surgical procedures, likely at least two knee replacements. She has ongoing pain varying in duration and intensity often depending on her activity level and external circumstances such as the weather. She is partially disabled and compromised in walking, standing and even prolonged sitting. She is compromised kneeling and squatting. She can no longer run or dance as she once did. She does not like taking strong pain killers such as the narcotic medication which was prescribed initially following the Accident. She takes Advil and Tylenol to manage her pain and she ices her knee from time to time. She also has had a significant amount of physiotherapy treatment and massage. She has been going to physiotherapy recently. She also does a regular stretching program. She wears a knee brace as required. She limps at times. She has an abnormal gait. Her ambulatory and standing endurance is compromised. Prolonged sitting increases stiffness in her knee.

117. Not only was there direct articular damage to cartilage in her knee which lead to osteoarthritis with resultant pain but her valgus deformity resulting in anatomical misalignment causes asymmetrical loading in the lateral compartment of the knee which contributes to further damage to the articular cartilage. The combination of a comminuted tibial fracture, a lateral tibial plateau fracture and the angular right knee deformity of about 15 degrees all contribute to her current diagnosis of traumatic osteoarthritis which is progressive and will only worsen with time. Dr. Horlick confirmed osteoarthritis in both the lateral and patella-femoral compartments of her knee.

118. Dr. Horlick confirmed that patients undergo knee replacement surgery when pain becomes intolerable due to advancing osteoarthritis damaging the cartilage of articular surfaces and their quality of life suffers. In the report of November 10, 2022, he confirmed that R.G. has post-traumatic osteoarthritis, which is clinically symptomatic and will progress making joint replacement medically necessary while R.G. is in the prime of life. This means that R.G.'s pain and disability will increase significantly. Such pain and disability will increasingly affect her enjoyment of life and her ability to function. There should be improvement in her condition if surgery goes well, but likely future decline raises the prospect of a revision knee surgery as early as her mid-60's. Such surgery presents greater risks of complications such as

infection, instability, bone loss and stiffness. The Claimant faces a future of variable pain and permanent partial disability.

119. The Respondent argues that a defence of failure to mitigate is borne out by Dr. Horlick's evidence concerning viscosupplementation injections which a majority of like patients opt to have with good success in reducing symptoms without risk of complications. Injections do not cure or prevent the progression of osteoarthritis. Relief is temporary, perhaps lasting a matter of months. Injections may be repeated. A New York surgeon, Dr. Delamora, who saw R.G. in April 2018 recommended a trial of injections. I understand R.G.'s reluctance to have invasive treatment for her knee. Her pain is not constant and is variable. Her present approach is to have the IM nail removal surgery first and then consider treatment options including injections. Such an approach is not unreasonable; her choice to use other non-invasive treatment modalities including physiotherapy from time to time, rest, ice, massage and stretching may be cautious and conservative but, in my view, it does not merit a reduction in damages. Furthermore, the Respondent has failed to adduce medical evidence of the extent to which R.G.'s damages could be lessened. See *Noftle v. Bartosch*, 2018 BCSC 766 at paragraphs 314 and 315. R.G. has been generally compliant with treatment and care which has been recommended. It would not surprise me that she will try injections as her pain worsens.

120. The Respondent also suggests that I take into account a post-Accident diagnosis of fibromyalgia as a negative contingency in assessing future loss of earning capacity. A similar argument is advanced concerning R.G.'s depression and anxiety. In the absence of any admissible opinion evidence from an expert in fibromyalgia I am reluctant to make any findings about the condition as a negative contingency. Dr. Horlick is not qualified as an expert in fibromyalgia. He called it a diagnosis of exclusion. Beyond that, I do not find Dr. Horlick's evidence about the effects of fibromyalgia of any weight. Concerning R.G.'s diagnosis of depression, the condition is well managed and R.G. has functioned very well since the Accident. Her work history has been admirable since 2018. Even if a relative's death was one factor in her decision to stop working in California, she carried on working from home in B.C. I accept that R.G. essentially missed a year pre-Accident, beginning in 2014, in her efforts to obtain her master's degree but the circumstances of a move to a foreign country

from living at home all her life could be traumatic for some. However, since the dislocation caused by the Accident R.G. has been quite resilient and successful in her career.

IV. AWARD / HEADS OF DAMAGES

A. Non-Pecuniary Loss

121. I have already set out under Part II Issues, B. Damages/Guiding Legal Principles, my task in determining an award for non-pecuniary loss in accordance with the long-settled principles adopting a functional approach established by the Supreme Court of Canada "trilogy" in 1978. My primary task in awarding damages for non-pecuniary loss, historically referred to as damages for "pain and suffering" and "loss of amenities", is to assess R.G.'s unique individual loss and not overly focus on a comparison of injuries and loss from so-called comparable cases. Comparative cases provide only a rough guide.

122. In this Arbitration both counsel cite the appellate decision in *Stapley v. Hejslet*, 2006 BCCA 34 for a recitation of non-exhaustive relevant factors to be considered in determining non-pecuniary damages. However, I would stress that the Court emphasized the fundamental concept that appreciation of the individual's loss is the key in awarding general damages for non-pecuniary loss. The court stated:

> [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from Lindal v. Lindal, *supra*, at 637 is a helpful reminder:
>
> Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim 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 (q1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.). [Emphasis Added]

> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages included:
>
> (a) age of plaintiff;
>
> (b) nature of the injury;
>
> (a) severity and duration of pain;
>
> (b) disability;
>
> (c) emotional suffering; and
>
> (d) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (a) impairment of family, marital and social relationships;
>
> (b) impairment of physical and mental abilities;
>
> (c) loss of lifestyle; and
>
> (d) the plaintiffs 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).

123. Counsel has referred me to a number S.C.B.C. awards between 2017-2021. None involve a plaintiff in her 20's. The plaintiffs were individuals in their 30's, 40's and 50's. None seems to have involved knee injuries as extensive and complicated as those sustained by R.G. with multiple fractures and angular anatomical deformity. Granted some involved intra-articular knee fractures and the prospect of future knee replacement surgery. Claimant's counsel cites *Manky v. Scheepers*, 2017 B.C.S.C. 1870, *Lanthier v. Ritchey*, 2019 B.C.S.C. 2022 and *Madill v. Gill*, B.C.S.C 1991, in support of an award of $150,000. Counsel for the Respondent cites *Manky v. Scheepers*, 2017 B.C.S.C 1870 (non-pecuniary award of $126,000), *Provost v. Bolton*, 2018 B.C.S.C. 1080 (non-pecuniary award of $150,000), and *O'Mara v. ICBC*, 2019 B.C.S.C. 222 (non-pecuniary award of $185,000) in support of a submission that an award of non-pecuniary of $125,000 is appropriate.

124. The Respondent also suggests that a 10% reduction for failing to mitigate should apply to an award for non-pecuniary loss. The Respondent also submits that if the award for non-pecuniary loss includes damages for a psychological condition an award should take into account a substantial possibility that R.G. would have been affected by this condition in any

event of the Accident. I have already set out my reasons for not accepting that there should be a deduction of 10% for failure to mitigate. The Respondent has not met the evidentiary onus to establish that defence. Furthermore, I am not including in my award damages for a specific psychological condition of substantive or prolonged injury caused by the Accident. As I see it, R.G. did not claim anything more than transitory mood dips as opposed to any major aggravation of her pre-existing psychological condition as part of her claim for non-pecuniary loss.

125. I do not want to fall into the trap of comparative loss amongst injured plaintiffs and diminish the primary importance of individual loss. At only 26 years of age, R.G. has suffered a major complex joint injury which is permanent. She has suffered and will continue to suffer variable chronic pain and permanent partial disability in the prime of life and beyond. She has endured and will continue to endure significant limitations and restrictions of activities and functional abilities. She has already undergone three surgeries with a fourth surgery in the near future and likely two knee replacement surgeries. Six surgeries over a lifetime to one joint is a lot to endure. As her osteoarthritis progresses and joint cartilage damage increases, her pain and disability will increase until joint replacement surgery is inevitable. Since the Accident, more than six years ago, the Claimant's life has been adversely affected and her enjoyment of life reduced by her requirements for treatment and limitation of all aspects of her life. Her injury has forever changed her life. She has already dealt with many challenges imposed by her knee injury and those challenges will continue. Fortunately, she has shown resilience in carrying on with her life and achieving her goals academically and vocationally. Her social life had been greatly affected but she remains close to her family and now has a husband. She was overall a credible witness who did not embellish her problems. The evidence she gave about her injuries and ongoing difficulties is consistent with the medical evidence and the opinion of Dr. Horlick and the evidence of the lay witnesses.

126. R.G.'s counsel has put forward a pecuniary claim for a loss of housekeeping capacity in the arbitrary amount of $25,000. The B.C. Court of Appeal has confirmed that it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated head of pecuniary damage. See *Kim v. Lin*, 2018 B.C.C.A. 77 at paragraphs 28 and 33. While R.G. regained her mobility and independence during 2015 and much of 2016, she

had considerable assistance from her mother D.G. and to a lesser extent from her brother G.G. There is an in-trust claim for $20,000 primarily related to D.G.'s assistance while R.G. was in the hospital from November 19, 2015 to December 5, 2015, in New York, and from the period December 6, 2015 to June 2016, as R.G. regained mobility and treatment. D.G. also assisted R.G. in getting re-established in New York in January 2017 and in providing driving assistance for 2 weeks while R.G. attended B.C. Children's Hospital as part of a rotation. If I award loss of housekeeping capacity as a segregated pecuniary loss and make an "in-trust" award for the above time periods there will be a duplication in damages.

127. With minor exceptions, I accept the opinion of Dr. Horlick that R.G. is capable of self-care and housekeeping. I accept that she had difficulties in kneeling to wash a bathtub and I accept that difficulty crouching and squatting might prevent her from accessing storage in a crawl space. Beyond that, her limitations are not so much she is disabled from domestic tasks but that they may take longer to do, and she needs to pace herself. The case law does not accept such limited difficulty as compensable as specific pecuniary loss. Such limitations more appropriately go to non-pecuniary loss.

128. I conclude that a claim for loss of housekeeping, given the evidence, is best addressed within the claim for non-pecuniary loss.

129. I also accept the evidence of Dr. Horlick that R.G. may well require assistance with domestic tasks following joint replacement surgeries but compensation for such assistance is claimed as a pecuniary expense under costs of future care.

130. Taking into account my factual findings based on the evidence, the guiding legal principles and case law, I conclude that an award of $150,000 for non-pecuniary loss, including loss of housekeeping capacity, is both fair and reasonable.

B. Past Income Loss

131. Both parties agree that R.G. incurred a one-year delay in entering the workforce due to her Accident injuries which delayed her academic program from November 2015 to January, 2017. Instead of graduation in 2017, she graduated in May 2018 but she did not officially

graduate until August, 2018 because she had to redo a final required clinical rotation. The Respondent argues that the delay from May to August 2018 is unrelated to the Accident.

132. Claimant's counsel submits that the evidence leads to the inference that R.G. would have graduated with her master's degree in May 2017 and likely been in the workforce by June 2017. R.G. appears to have been a good student given her pre and post-Accident records. The testimony of A.S. confirms R.G. was in good health and functioning well in New York prior to the Accident. Claimant's counsel argues that the reasons for the four month delay from May to August 2018 were multi-faceted, non-Accident related in part but Accident related in that increased right knee symptoms made it difficult to commute to Stamford Connecticut to complete her clinical rotation satisfactorily. The clinical records from New York Orthopedics in April 2018, tend to support R.G.'s evidence of an increase in symptoms resulting in a visit to Dr. Delamora, on April 13, 2018. He recommended physical therapy 2-3 times a week for 6 weeks and he recommended viscosupplementation injections to decrease pain symptoms and to increase function related to osteoarthritis. R.G. did attend for physical therapy at Pro Sports Physical Therapy of Westchester at a clinic in Scarsdale, New York. Her first visit was on April 18, 2018. Their records confirm that R.G.'s symptoms had been worsening since January 2018. Physical therapy continued into June, 2018 as recommended. Pain symptoms were described as 4/10 on good days and 7/10 on bad days. In addition to manual therapy, a stretching program, passive and active, was part of the overall physical therapy program. R.G. did not follow-up on the knee injections. Apparently, the cost of an injection was $500 US and was not a medical expense that Geico, the tortfeasor's insurer, would pay. R.G. decided to postpone the injections. Instead, she attended physiotherapy and engaged in a home-based exercise and stretching regime.

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

Express Ltd., 2005 B.C.C.A. 141, which remains in my view the leading appellate authority on the assessment of past loss of earning capacity.

134. R.G.'s counsel submits an appropriate award for gross past income loss of $127,679.76 based upon R.G.'s 2019 salary of $81,846 US at Dr. Brar's clinic which equates to $106,399.80 CDN R.G. Then he adds about three months' delay. One must award past income loss net of tax R.G.'s counsel then arrives at a net award of $102,143.80 CDN estimating a 20% deduction for tax.

135. The Respondent projects a lower figure for net past income loss from a delay in entering work between May 2017 to May 2018, a 12-month time frame. R.G.'s alary with Dr. Brar's clinic reported as employment income on her tax returns from full years of employment were $81,846 US in 2019, $85,314 US in 2020, and $88,500 US in 2021. 2010 and 2022 were not full years of employment. In paragraph 85 of the Respondent's Closing Submissions counsel calculates a net income loss using as the starting point R.G.'s gross salary in 2020 as reported, $85,314 US then deducts $22,668 US as calculated from the tax return for federal and state taxes and other deductions such as Medicare. Counsel says that leaves a net of amount of $62,464 US, converted to $81,440 CDN at a conversion rate of 1.3. The difficulty that I have is that no evidence was given concerning the taxation of US employment income and deductions from gross income.

136. My review of the employment records of Dr. Brar and copies of tax returns suggests the $22,668 US figure represents withholdings from pay including for such US programs as Social Security and Medicare. The income tax actually paid from 2019 and 2020 based on the IRS returns in Exhibit 8 is $10,360 for 2019 and $11,230 in 2020. Neither counsel put forward any evidence or explanation to assist in interpreting the U.S. employment and income tax documents. Assuming the accuracy of the US tax returns put into evidence, R.G. paid about 12.5% of her gross income in tax, e.g. $10,366 as tax on 2019 income of $81,846 US. I cannot accept the Respondent's figure of projected net employment of $62,646 US using a deduction of $22,668 US in the absence of authority and persuasive objective evidence. On the other hand, I agree with the Respondent that the past income loss is closer to one year as opposed to 15 months. Even if R.G. graduated in May 2018, she may well have taken part of

the summer off before embarking on her career. In addition, I am hesitant to apply and just accept net income with a 20% deduction without evidence or authority.

137. At the end of the day, I must make a fair assessment of R.G.'s past net income loss as an impairment of her earning capacity. I find that the sum of $95,000 CDN is a reasonable assessment of her past net loss of income based on the theory of lost earning capacity.

C. Loss of Future Earning Capacity

138. I have already referred to the guiding legal principles governing the assessment of damages for loss of future earning capacity confirmed in several leading Supreme Court of Canada and B.C. Court of Appeal authorities. The courts have used such phrases as "simple probability", "real and significant risk" and "real and substantial possibility" in describing the standard of proof with respect to future hypothetical events. Proof according to a balance of probabilities is not required; but mere speculation is not enough. See paragraphs 48 and 49 in *Grewal v. Naumann,* 2017 B.C.C.A. 158 from the judgment of Goepel J.A. dissenting but not on this point.

139. Mr. Justice Voith, as he then was, conveniently summarized the guiding principles in *Pololos v. Cinnamon-Lopez,* 2016 B.C.S.C. 81 at para [133] as follows:

> The relevant legal principles are well-established:
>
> (a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
>
> (b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
>
> (c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
>
> (d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v.*

Golaiy (1985), 1985 CanLII 149 (BC SC), 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 BCCA 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.

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

141. In 2021, the B.C. Court of Appeal issued a trilogy of judgments addressing damages for loss of future earning capacity: *Dornan v. Silva*, 2021 B.C.C.A. 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. In *Rab v. Prescott*, *supra*, Grauer J.A reviewed a number of leading authorities in addition to *Grewal v. Naumann*, *supra*. Those included *Brown v Golaiy*, 26 B.C.L.R. (3d) 353 (1985 B.C.S.C.); *Steward v. Berezan*, 2007 B.C.C.A. 150 (para 14-17); and *Perren v. Lalari*, 2010 BCCA 140 para 32. Relying upon prior authority, Justice Grauer outlined a three-step approach in assessing loss of earning capacity:

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

142. The evidence is overwhelming in satisfying step one. The evidence of R.G., Dr. Horlick and the lay witnesses confirms the submissions of R.G.'s counsel of a permanent chronic injury. Chronic injury, future surgery and the risk of arthritis have all been proved well beyond that of a real and substantial possibility.

143. At the risk of repeating myself, Dr. Horlick's unchallenged expert opinion is that R.G. will experience progressing osteoarthritis to the point where pain becomes intolerable and joint replacement necessary. The nature of R.G.'s injury involving direct trauma to 2 of 3 knee compartments, the extent of fractures in the lateral compartment involving depressed, displaced comminuted fracture as well as valgus asymmetrical misalignment resulting in increased loading on the joint increases the risk of progression of osteoarthritis. Dr. Horlick has already confirmed clinical progression of osteoarthritis between his 2020 and 2022 assessment. One specific change noted by Dr. Horlick on clinical examination in 2022 was evidence of signs of osteoarthritis in the patellar femoral compartment. In his 2020 report he identified only likely articular damage in that compartment due to trauma and IM nail surgery.

144. In outlining his prognosis in his 2022 report, Dr. Horlick says "it would be ideal" if R.G. could delay or defer a first knee replacement until she is in her late 40's or early 50's. However, at no point in his evidence did Dr. Horlick rule out the prospect of the need for earlier joint replacement than his "ideal" projection. Obviously, surgery will depend on the rate of progression of osteoarthritis in the two damaged knee compartments and at what point R.G. finds the pain intolerable. Osteoarthritis has already progressed in the space of two years. In California, R.G. found an accommodating employer who allowed her to take time off from her expected duties and to make up the time when her symptoms improved. R.G. may not always enjoy such flexibility in the future, especially as her osteoarthritis progresses and her pain and limitations increase.

145. I am equally satisfied that R.G. has established on the evidence a real and substantial possibility of pecuniary loss, i.e. loss of earning capacity. The weight of the evidence easily satisfies the requirement that R.G.'s ongoing symptoms and limitations demonstrate a future pecuniary loss of capacity.

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

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

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

147. I am satisfied that a person with such a permanent complicated injury as suffered by R.G. satisfies those conditions according to the required standard of proof. She will likely have future, multiple surgeries; her physical function will always be impaired to varying degrees. The risks associated with surgery increase with revision joint replacement surgery. Her future of variable pain and variable functional limitation satisfies factors 2 – 4.

148. I am satisfied that R.G. has proven a diminishment of her capital asset of future earning capacity to the required degree of a real and substantial possibility. The case law refers to two equally valid approaches: the "earnings approach" and the "capital asset approach". As noted in *Pololos v. Cinnamon-Lopez, supra,* the earnings approach is more easily measurable. The earnings approach involves a more math-oriented methodology. The "capital asset approach" involves an assessment of such factors as set out in *Brown v Golaiy, supra*. I consider the "capital asset" approach is more appropriate in this case involving a young professional just getting started in her career and having a limited track record in her chosen field.

149. I am not convinced that the Respondent's approach to limit future income loss to future time out of the work force for surgeries and time loss for rehabilitation does justice at all to an assessment of loss of earning capacity on the "capital asset" approach. Nor am I persuaded that I should calculate a loss of capacity taking into account deductions for LTD benefits. My

duty is to arrive at an award that at the end of the day is an assessment, not a calculation, of what is fair and reasonable but not based on mere speculation. I am satisfied that R.G. has shown a strong attachment to her profession, her education and the workforce. She has also shown resilience. She has proven herself to be a reliable employee despite her physical impairments. She has found employment both in the United States and working from home in Canada. She is currently earning $47.00 US per hour doing online contract work. She strikes me as a young professional who would have likely receive promotions and advancements in her career. However, there is a real and substantial risk her injuries and the effects will create the types of employment barriers contemplated in *Brown v Golaiy*, *supra*, factors also approved by the Court of Appeal in Palmer v. Goodall (1991), 53 B.C.L.R. (2d) 44 (C.A.).

150. I have reviewed a number of authorities where the courts have assessed damages using the "capital asset" approach by i) taking a percentage loss approach to a projected life time of earnings, adjusted for contingencies, or ii) by adopting a global approach in awarding compensation based on an estimate of a number of years of annual earnings, often is the range of one to three years. See for example *Quezada v. Quezada*, 2019 B.C.S.C. 1732 at paras 131-134. The "global approach" seems more appropriate and fair in this case. Indeed, Claimant's counsel submits an award based on loss of three years of earnings based on a 40 hour work week. In her final full year of work in 2021 in California, she earned $88,500 US (approximately $118,590 CDN) using the conversion rate of 1.34. Claimant's counsel submits that awarding three years of annualized earnings at $132,953.00 CDN per annum is a fair and reasonable assessment of her future income loss and diminishment of earning capacity. That projection is based on a 40-hour work week at her current wage rate of $47.00 US per hour which computes to $97,760 US on an annual basis, $132,953 CDN. Currently she has contracted to work 20-30 hours per week. She has demonstrated a capacity to work full-time with some accommodations even in her injured state.

151. In my assessment $275,000 is a fair and reasonable global award for loss of future earning capacity. That equates to more than two and less than three years of annual income based on the early earnings of a young professional who is well paid and may have another 30 years of high earnings and some diminishment of loss of earning capacity over that time. Grauer J.A. in *Rab v. Prescott*, *supra*, refers to the "rougher and readier" Pallos Approach; see para 67-72.

R.G.'s situation is not exactly on point with *Pallos v. ICBC* (1995), 100 B.C.L.R. (2d) 280 as R.G. had not established a base line of professional earnings pre-accident, but, in my view, the approach is appropriate when the injured person is a young professional on the brink of a long career and will suffer some impairment of a capital asset over many years.

D. Cost of Future Care

152. The parties agree on the governing principles for an award of the cost of future care but differ widely on what should constitute a reasonable award. Claimant's counsel seeks an award of almost $100,000, specifically $94,672.12 based primarily on the costing evidence of Mr. Lakhani derived from the evidence of Dr. Horlick. Counsel then employes the multipliers provided by Mr. Lakhani of Peta Consultants. Counsel for the Respondent suggests a range for an award of $9,341 to $13,599, although actual cost projections are higher. To arrive at the lower figures, Mr. Brun has stated in written submissions that he has factored into the calculation of the cost of future care damages that i) many of the costs of future care items are the subject of deductible amounts under s. 148.1(2) of the UMP Regulation and ii) a 75% reduction for treatment by injections into the knee on the assumptions that IM nail surgery will alleviate her pain and injections will be covered by her husband's extended health benefits.

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

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

> The purpose of an award for future care costs is to restore the plaintiff to his pre-Accident condition, to the extent that is possible with a monetary award: Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at para. 29. The award is based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health. Claims must be reasonable and

> medically justified: Hardychuk v. Johnstone, 2012 BCSC 1359 [Hardychuk] at paras. 210-211.
>
> The test for determining the appropriate award under the cost of future care heading is objective and based on medical evidence. An award of future care costs requires: (1) a medical justification for claims for cost of future care, and (2) that the claims are reasonable: Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 35.
>
> Future care costs must be justified both because they are medically justified and also that they are likely to be incurred by the plaintiff. The award of damages for cost of future care predicts what will happen in the future, and thus is not a precise accounting exercise: Hardychuk at paras. 212-214.

155. The ultimate goal of an award of damages for future care is to sustain or improve the mental and physical health of the injured person: Andrews v. *Grand & Toy Alberta Ltd*., [1978], 83 D.C.R. (3d) 452 of p.462 [1978] 2 S.C.R. 229.

156. Mr. Pakulak's Cost of Future Care Report (Exhibit 1, Tab 4) as redacted, provides the projected costs based upon the expert report dated November 10, 2022 of Dr. Horlick, which in part, projects future medical expenses and care in accordance with his prognosis and R.G.'s future medical trajectory. Those projected costs include i) physiotherapy, pre and post anticipated surgery, ii) assistance with household chores at various stages in her life related to surgery, iii) costs of viscosupplementations and platelet-rich plasma injections to relieve symptoms of osteoarthritis and to prolong the lifespan of articular cartilage, iv) to have access to a Cryo Cuff post-surgery, v) an unloader brace and vi) pharmacologic measures including anti-inflammatories and supplements.

157. I do no intend to go through line by line the projections of costs by each party. Broadly speaking, projections from the Claimant seem over-stated and excessive; those of the Respondent seem understated and have incorporated deductions that seem at best speculative.

158. The evidence is convincing of a real and substantial possibility of medically justified future costs. Doing the best I can, keeping in mind that future care is not just a mathematical calculation, I award the sum of $45,000.

E. In-Trust Claim

159. I agree that D.G. provided a significant amount of care and assistance, especially during 2015 and 2016 which rises to the level of a compensable claim, R.G. seeks an award of $20,000 for the in-trust claim. The Respondent suggests no award should be made, or in the alternative, an award should not exceed $5,000. The Respondent suggests that neither the care and assistance provided by D.G., nor the assistance provided by G.G., rises to a level beyond what would normally be expected in a family relationship. I agree with that statement with respect to G.G. but I do not agree with the Respondent's position with respect to D.G. D.G.'s assistance in New York whilst R.G. was in the hospital and then her virtually daily care and assistance while R.G. gained her mobility and independence in 2016, in my view, was quite extraordinary. No in-trust claim is made for D.G.'s attendance with her daughter in 2018.

160. An in-trust claim is made for G.G.'s attendance in New York to assist her daughter in getting resettled in college in 2017. I am not convinced there should be an award based on G.G.'s hours spent in New York in 2017 nor am I convinced that the driving assistance given by D.G. and G.G. to take R.G. to Children's Hospital to complete a rotation there rises to the level of being compensable. In the result, I am satisfied that an award of $15,000 is reasonable for to the care and assistance provided to R.G. by her mother D.G. in 2015 and 2016, which, in my view, rose to a level beyond what would normally be expected in a family relationship.

F. Special Damages

161. R.G. claims the sum of $21,237.91 subject to any amounts "deductible under UMP". The Respondent submits of that amount, only $6,742.88 was reasonably incurred although nothing should be awarded because the expenses should have been paid by Geico, the tortfeasor's insurance company. I am not satisfied that the insurance declaration of coverage referred to in Exhibit 5 is sufficient evidence to say that special damages of up to $5,742.91, or $7,810.36 CDN ought to have been paid by Geico and that amount exceeds any justifiable special damage claim. The claim for purchase of a vehicle (later sold) does not seem to be an expense that forms a part of a reasonable expenditure for special damages although I accept that some measure of increased expense for work-related travels in New York seems plausible. The charge for rent for six months on R.G.'s New York apartment is also problematic. R.G. says the payments were required to be paid under a lease, but no copy of the lease was ever

produced in the Arbitration. R.G. submitted a series of copies of 7 rent cheques for $1,000 between November 2015 and April 2016. There are 2 cheques made out on April 1, 2016. No explanation was offered for the seventh cheque. No evidence was given that R.G. tried to sublet her unused portion of the leased suite. Ultimately, special damages must meet a reasonableness test. In this case, I am satisfied that an award of $10,000 for special damages is reasonable.

G. Deductions

162. I agree with counsel for the Respondent that $25,000 US converted to $33,500 CDN at an exchange rate of 1.34 should be considered a deductible amount under s.148.1(2) of the UMP Regulation. If counsel wishes to address the matter of other permissible deductions, I am prepared to hear them.

VI. SUMMARY OF AWARD

163. I assess damages for the following heads of damages:

1.	Non-Pecuniary Loss	$150,000
2.	Past Net Income Loss	$95,000
3.	Loss of Future Earning Capacity	$275,000
4.	Cost of Future Care	$45,000
5.	In-Trust Claim	$15,000
6.	Special Damages	$10,000
TOTAL		$590,000
7.	Deductible Amount	- $33,500
NET TOTAL		**$556,500**

164. I invite counsel to agree or set up a hearing to address the subject of costs. I also wish to add my gratitude to counsel for their able submissions and presentation of the evidence at the hearing.

Dated at Burnaby, British Columbia this 18th day of May, 2023.

_____

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