

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bloomfield v. Berg*,  
2023 BCSC 1089

Date: 20230623  
Docket: M163600  
Registry: Vancouver

Between:

**Leigh Warner Bloomfield**

Plaintiff

And

**Stephen Berg and Laure Solange Gervois**

Defendants

Before: The Honourable Justice Mayer

## **Reasons for Judgment**

Counsel for the Plaintiff:

T. O'Mahony  
M. Gladkikh

Counsel for the Defendants:

J. Milligan  
S. Baldwin

Place and Date of Trial:

Vancouver, B.C.  
May 8-12 and 16-18, 2023

Place and Date of Judgment:

Vancouver, B.C.  
June 23, 2022

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**Introduction**

[1] The plaintiff Leigh Bloomfield sustained physical injuries on January 23, 2015, when he was struck by the vehicle driven by the defendant Stephen Berg, while walking along Government Street in Burnaby, British Columbia. Mr. Bloomfield was hit on the right side of his body, pushed up onto the hood of Mr. Berg's vehicle and thrown approximately fifteen feet forward and landed on the ground on all fours (the "Accident").

[2] Mr. Berg has admitted liability for the Accident.

[3] The parties agree that as a result of the Accident Mr. Bloomfield sustained various soft tissue injuries, primarily to the right side of his body, including to his hip and lower back. The parties disagree on the impact of these injuries on Mr. Bloomfield, both past and prospectively.

[4] In addition, the parties agree that the Accident caused psychological conditions including an adjustment disorder with mixed anxiety and depression and somatic symptom disorder – the latter involving disproportionate and persistent thoughts about the seriousness of pain symptoms. The parties disagree on the impact of these conditions on Mr. Bloomfield.

[5] Mr. Bloomfield seeks non-pecuniary damages, damages for past and future loss of income earning capacity, loss of housekeeping capacity, cost of future care and special damages. Mr. Berg agrees that Mr. Bloomfield is entitled to damages under these heads, excluding damages for loss of housekeeping capacity, but disagrees on quantum, with the exception of Mr. Bloomfield's claim for special damages. In particular, Mr. Berg contends that a damages award in Mr. Bloomfield's favour must be adjusted to reflect the likelihood that a pre-existing condition would have resulted in hip pain in the future and what they allege was a failure on Mr. Bloomfield's part to mitigate his damages by seeking appropriate treatment for his psychological symptoms.

**Evidence at Trial**

[6] Mr. Bloomfield, his parents and a friend testified at trial and provided evidence concerning Mr. Bloomfield's pre and post-Accident activities, employment and physical and mental health. Mr. Bloomfield also called evidence from previous and current employers. In general, I find that Mr. Bloomfield and the other lay witnesses provided their testimony in a straightforward and credible manner.

[7] Both parties called expert witnesses who provided opinion evidence with respect to the nature, cause and prognosis for Mr. Bloomfield's physical and psychological injuries or symptoms, his future care needs and related costs and the calculation of income loss.

[8] Mr. Berg seeks an adverse inference as a result of Mr. Bloomfield not calling a psychiatrist, Dr. Waisman as an expert at trial. Dr. Waisman saw Mr. Bloomfield on one or two occasions in or about 2018 and provided an expert report which Mr. Berg contends informed other experts' opinions. Mr. Berg contends that Dr. Waisman, although not a treating physician, is a material witness over which Mr. Bloomfield had exclusive control.

[9] I decline to draw the adverse inference sought by Mr. Berg. I note first that Dr. Waisman apparently provided a report in 2018, which apparently concerned Mr. Bloomfield's psychological condition. Dr. Waisman's opinion, some five years old would have little weight compared with more recent psychiatric reports, such as that prepared by Dr. Muir. Mr. Berg had the opportunity to cross-examine Mr. Bloomfield's experts with respect to any reliance they may or may not have placed on the report of Dr. Waisman.

[10] Relevant witness testimony at trial is summarized below.

**Pre-Accident Activities**

[11] Mr. Bloomfield is currently 39 years old and lives in Killaloe, a small town in Eastern Ontario. He was born and raised in Ontario. He grew up in the small town of Hillsdale and studied in Windsor. After completing a masters degree he moved to

British Columbia to pursue a PhD and was living in this province at the time of the Accident.

[12] Mr. Bloomfield led an active life in his younger years and in the years leading up to the Accident. He was raised in an “outdoorsy” family and participated in a variety of outdoor activities including multi-day hikes, camping, canoeing and hunting. He played league sports such as baseball and volleyball, skied and rock climbed. Prior to the Accident, Mr. Bloomfield was seeing a personal trainer and participating in weight training and cardio exercises.

[13] Mr. Bloomfield had sustained some pre-Accident injuries. This includes a ligament injury to his left knee in his twenties, resulting from a toboggan accident, which bothered him from time to time before the Accident, but did not prevent him from participating in physical activities. In addition, approximately six months before the Accident, he sustained rib fractures during a downhill mounting biking crash at Whistler, British Columbia. He testified that the injury to his ribs and related symptoms had fully resolved within one or two months.

#### **Pre-Accident Education**

[14] Mr. Bloomfield received a Bachelor of Science in Kinesiology and a Masters in Human Kinetics in Ontario before moving to British Columbia to start a PhD at Simon Fraser University (SFU). While working on his PhD he met his then partner Andrea, who was also working on her doctorate.

[15] After realizing that it would take up to ten years to complete his PhD, due in part to issues with respect to the direction of his research and a poor relationship with his supervisor, Mr. Bloomfield terminated his PhD studies at SFU. He remained at SFU for a time to teach undergraduate coursework and also taught at other institutions in the Fraser Valley.

[16] In September 2013, Mr. Bloomfield entered the accelerated nursing program at the University of British Columbia (UBC). Despite the occurrence of the Accident

during his last semester of studies (in January 2015) Mr. Bloomfield completed the nursing program and received his degree in April 2015.

### **Condition After the Accident**

[17] Mr. Bloomfield testified that immediately after the Accident he was briefly examined by paramedics and then walked to his nearby home. When he arrived at home he felt pain, took Tylenol and rested for the rest of the day. He continued to feel pain over the next days and the following week went to a walk-in clinic where he was prescribed sleeping pills and pain medication.

[18] He testified that following the MVA he felt pain to his right wrist, elbow and shoulder. He also felt pain in both knees, his hips and lower back. He testified that as a result of his symptoms he missed clinical rotation days at school and was not sleeping. He says that he relied on classmates more than he should have.

[19] He testified that in the first few months after the Accident he initially went back to his personal trainer but was not able to do much. He says that he had to leave his first training sessions after a few minutes. He sought treatment from a massage therapist which helped him sleep.

[20] Mr. Bloomfield testified that the pain in his right arm, shoulder, wrist, left and right knee and left hip had resolved within a few months. During his direct examination he testified that he experienced and continues to experience low back pain from time to time. During his cross-examination he confirmed that in 2020 he reported to Dr. Leith that his lower back pain had improved by 80-90% towards pre-Accident levels.

[21] He testified that his right hip pain seemed to improve over time but pain in this area has been persistent. He testified that he still gets headaches, but not as frequently as he did after the Accident. He testified that for many weeks after the Accident he had difficulty sleeping and although his sleep improved he still wakes up in pain. He testified that he continues to experience low back pain flare-ups, the last being in January 2023.

[22] With respect to his left hip, Mr. Bloomfield testified that after the Accident he experienced deep burning pain radiating from the front of his hip. In March 2019 Mr. Bloomfield had surgery to repair a labral tear in his left hip and although the surgery reduced symptoms somewhat his pain did not resolve. He testified that he no longer has constant hip pain, but has pain daily which is made worse with increased activity – from as little as walking. He testified that he went to physio after this surgery and tried pool therapy but continued to experience pain symptoms.

[23] Mr. Bloomfield testified that he is no longer as physically active as he once was. He has tried to hike, hunt, play basketball, volley ball and ski, but is unable to participate at the same level he did before the Accident. He testified that he has tried canoeing with friends and his father, an activity he did often before the Accident, and had to rely on others to carry his gear during portages. He testified that all aspects of his life were and continue to be impacted by his pain related symptoms – both before and after his hip surgery. He testified that the only physical activity he does now is walking his dog.

[24] During his cross-examination Mr. Bloomfield confirmed that since the Accident he has continued to participate in outdoor activities such as canoeing, hiking, skiing, scuba diving, playing volleyball and hunting – but re-stated that his ability to do these activities is reduced. He testified that during a hunting trip he was able to drag a deer weighing approximately 150 lbs to his vehicle and lift it in, but with difficulty.

[25] With respect to his ability to perform household chores, Mr. Bloomfield testified during his direct examination that his ability to perform heavier tasks like deep cleaning, snow clearing and chopping wood have been impacted. He testified that he now relies on his parents to perform these tasks for him when they visit.

[26] During his cross-examination he testified that he is able to perform household chores, with the exception of scrubbing floors, but has to break them up over time to manage his pain symptoms. He also testified that he is able to perform harder work such as chopping wood but doing so inflames his pain symptoms.

### **Psychological and Social Impacts**

[27] Mr. Bloomfield testified that after the Accident he had several bouts of depression which lasted for several months at a time. He testified that he has become more irritable and has had suicidal thoughts in his darkest moments. He believes that his physical symptoms, and the resulting impact on his ability to be active and sexually intimate, and his psychological state contributed to the end of his six-year relationship with Andrea.

[28] During his direct examination Mr. Bloomfield testified that in the months following the Accident he felt anxious as a pedestrian and while driving. During his cross-examination he testified that he does not have driving anxiety in small towns but gets anxious driving in bigger centers. He confirmed that he has not sought treatment for driving related anxiety. He was taken to his examination for discovery evidence which did not suggest anxiety when walking his dog. The evidence at trial indicates that Mr. Bloomfield experiences some anxiety while driving in large centers or walking along the street, but this anxiety does not prevent Mr. Bloomfield from participating in these activities.

[29] Mr. Bloomfield testified that he started to feel depressed after the Accident when he came to believe that he might not be able to work as a nurse as a result of his symptoms. He says that in the summer of 2015 he told his partner Andrea, that “happy fun Leigh died in January 2015”.

[30] Mr. Bloomfield’s parents, Dawn and Alf Bloomfield, and his university friend Ben Haig provided testimony regarding Mr. Bloomfield’s pre-Accident personality and social life. Mr. Bloomfield’s parents were in regular communication with him before and after the Accident and had travelled to British Columbia on several occasions to visit with him. Mr. Haig, who has been a close friend of Mr. Bloomfield for 20 years, had been his roommate and had gone on a number of hiking trips and a vacation to Costa Rica with him and stayed with him a few times after the Accident.

[31] Mr. Bloomfield was described by his parents before the Accident as being adventurous, optimistic, motivated and hard working. They described his personality



as humorous and compassionate. Mr. Haig described Mr. Bloomfield as friendly, social and having a “salesman-type” attitude.

[32] Mr. Bloomfield’s parents testified that after the Accident Mr. Bloomfield is no longer a forward-looking, energetic or excitable person. Dawn Bloomfield testified that she believes he is unable to let go of his past. Alf Bloomfield testified that Mr. Bloomfield seemed to be isolating himself. Mr. Haig testified that Mr. Bloomfield seemed to be struggling with depression and recounted one conversation where the two friends discussed their suicidal ideations.

[33] During his cross-examination Mr. Bloomfield was questioned regarding the impact of a break-up with his fiancé Erin in September 2022. Erin had and Mr. Bloomfield had moved in together in October 2021. He agreed that the break up was difficult and was the catalyst for his decision to seek counselling. At the recommendation of his mother, Mr. Bloomfield underwent a course of psycho-drama counselling.

### **Post-Accident Employment**

[34] During his direct examination Mr. Bloomfield testified that while he was completing nursing studies at UBC his intention was to work as an emergency room or medical-surgical ward nurse after graduation. During his cross-examination Mr. Bloomfield’s evidence changed somewhat. He testified that while he was at nursing school he didn’t know what shape his nursing career would take and that he was considering a number of options including working as a flight nurse, expedition nurse or community nurse. He testified that after the Accident he began to focus on becoming a community nurse, but was told that he first needed to get experience working as an emergency room or medical-surgical ward nurse.

[35] Mr. Bloomfield testified that before the Accident he and Andrea had agreed that he would move wherever Andrea obtained an internship, which she was required to complete as part of her PhD program, and planned to return to Vancouver after Andrea finished her internship. As a result, when Andrea obtained a one-year internship in Manitoba the couple decided they would move there together.

[36] Mr. Bloomfield testified that he spent the mid-spring and early summer of 2015 job hunting and focussing on his post-Accident rehabilitation. There is also evidence that Mr. Bloomfield spent part of the summer of 2015 studying for his National Nursing Exam.

[37] When he was in Manitoba Mr. Bloomfield started to apply for nursing jobs and received two job offers, one to work as a nurse at a mental health center and another as a community care nurse. He testified that he did not apply for work as a public health nurse as he did not feel capable of working twelve-hour nursing shifts. Although Mr. Bloomfield was set to commence work in October 2015, after he broke up with Andrea in September, he made the decision to move back to Ontario.

[38] Mr. Bloomfield was unable to start working as a nurse in Ontario right away as a result of delays in obtaining his Ontario nursing licence. After he received his licence, in February 2016, he commenced full-time work as a visiting nurse with Paramed Home Healthcare in London, Ontario ("Paramed"). Mr. Bloomfield testified that his work with Paramed involved seeing between six and sixteen patients per day in their homes. He testified that he had the opportunity to pick up additional shifts but was unable to do so as he was struggling to perform his usual level of work. He says that in fall of 2016, as a result of his pain related symptoms, he asked to reduce his work hours, which he did for a couple of months, before returning to performing approximately 10 patient visits per day.

[39] In the Spring of 2017, Mr. Bloomfield took a job managing visiting nurses for Paramed in Huntsville Ontario. He testified that he looked for this job as the physical demands of his previous work with Paramed were too much for him. He worked as a nurse manager for approximately six months, until October 2017, before deciding that the job was not to his liking. Although this job was physically easier he found it to be stressful.

[40] In October 2017, Mr. Bloomfield took a job with the Ontario government as a care coordinator in Barry's Bay Ontario. He testified that this job involved work in the hospital and in the community, providing homecare needs assessments. He testified

that this job was not very physical and mostly involved conducting patient interviews, determining care needs and making referrals for homecare.

[41] Since June 2021, Mr. Bloomfield has worked as a rapid response nurse with an Ontario agency, Home and Community Care Support Services. He sees approximately two patients per day in their homes. His work includes performing needs assessments, checking vitals, reviewing medications, making referrals for therapy and providing education for patients. Mr. Bloomfield says that his accident related pain symptoms prevent him from taking overtime shifts. Mr. Bloomfield's manager, Ms. Simmons, testified that overtime opportunities will no longer exist after May 2023, as a result of additional nurses being hired.

[42] With respect to the impact of the Accident on his employment choices, in general, Mr. Bloomfield testified that his pain related symptoms caused him to look for less physically demanding jobs. He says that he enjoyed working as a visiting nurse but his capacity for this work is limited by pain. He also testified that as a result of his anxiety symptoms that he has moved to smaller towns as he is bothered by traffic and congestion.

[43] During his direct examination Mr. Bloomfield testified that he is not sure what type of nursing work he will do in the future, but likes his current job as a rapid response nurse. He does not consider himself capable of performing more physically demanding work such as working as an emergency room or medical-surgical ward nurse. He does not believe that he has the academic qualifications to study to be a nurse practitioner and testified that in any case, nurse practitioners typically work 12-hour shifts, which he does not think he is capable of performing. During his cross-examination he testified that going forward, his plan is to remain in Killaloe and to continue working as a rapid response nurse. He agreed that the advantage of this job is that he is able to work weekdays, 9:00 am to 5:00 pm.

**Expert Medical Evidence**

**Orthopedic Surgeons' Evidence**

[44] Mr. Bloomfield called evidence from an orthopedic surgeon, Dr. Keith Stothers, who was qualified to provide expert opinion evidence at trial. Dr. Stothers conducted examinations of Mr. Bloomfield and provided two reports prepared October 2017 and February 2022.

[45] In his 2022 report, Dr. Stothers stated that Mr. Bloomfield's right hip pain was his most significant ongoing problem. He stated under the heading "current condition" that for the most part Mr. Bloomfield does not have hip pain at rest but experiences pain at night and after physical activity. In Dr. Stothers' opinion Mr. Bloomfield has a right side femoral acetabular (hip) impingement ("FAI") which was not caused by the Accident. Dr. Stothers' opinion is that it is more likely than not that the Accident resulted in a tear to the labrum (made of cartilage) in Mr. Bloomfield's right hip or alternatively, that the Accident caused a previous asymptomatic tear to become symptomatic.

[46] Dr. Stothers does not know why Mr. Bloomfield continues to experience hip pain after having surgery in March 2019. He suggested it was possible that the surgical repair to the labrum was not successful or that a further bony impingement was causing pain. During cross examination Dr. Stothers testified that although it was possible, he did not consider it probable that Mr. Bloomfield would have developed hip pain at some point if the Accident had not occurred.

[47] In Dr. Stothers' opinion it is likely that Mr. Bloomfield will continue to experience hip pain which may impact his ability to work in more physically demanding nursing jobs, although he is able to continue to do the more sedentary nursing work he is currently performing.

[48] Dr. Stothers explained that ordinarily hip labral repair allows vigorous activity as evidenced by professional athletes who return to their sport after surgery. In his

opinion hip pain should resolve after the pain generator is removed – including for example from hip replacement.

[49] With respect to the potential future impact of a pre-existing degenerative hip condition, potentially leading to osteoarthritis, Dr. Stothers' opinion is that it is unlikely that the onset of this condition in the future will prevent Mr. Bloomfield from working in his current capacity as a rapid response nurse.

[50] Mr. Berg called evidence from an orthopedic surgeon, Dr. Jordon Leith, who was qualified to provide expert opinion evidence at trial. Dr. Leith conducted an examination of Mr. Bloomfield in September 2020, and provided a report in February 2021. Dr. Leith's report states that Mr. Bloomfield reported that his lower back pain was 80-90% back to normal. At trial, Mr. Bloomfield reported that this report was accurate and he could only recall two intense episodes of back pain since the Accident, one when he was living in Ontario, and one more recently, in December 2022 or January 2023, after riding a stationary bike two days in a row.

[51] Dr. Leith also considers that Mr. Bloomfield's hip and lower back pain were likely caused by the Accident. In his opinion, it is possible that Mr. Bloomfield's FAI related hip pain became symptomatic as a result of the Accident. Dr. Leith considered it possible that absent the Accident, Mr. Bloomfield would have experienced symptoms resulting from FAI as early as his mid to late 40's. Also, in Dr. Leith's opinion patients with FAI, such as Mr. Bloomfield, are predisposed to developing osteoarthritis.

[52] Similar to the opinion of Dr. Stothers, Dr. Leith's opinion is that Mr. Bloomfield will be able to continue to perform the more sedentary nursing work he is performing now.

### **Physiatrist Evidence**

[53] Mr. Bloomfield called evidence from a physiatrist, Dr. Sami Zaki, who was qualified to provide expert opinion evidence at trial. Dr. Zaki examined Mr. Bloomfield and provided reports in October 2017 and March 2022.

[54] Dr. Zaki diagnosed Mr. Bloomfield with right chronic hip pain. He deferred to orthopaedic specialists as to the cause of persistent hip pain but provided his opinion, based on the timing of manifestation of this pain, that this pain was related to the Accident.

[55] Dr. Zaki noted that Mr. Bloomfield reported that headaches and left knee pain reported after the Accident had now subsided and returned to pre-Accident levels.

[56] Dr. Zaki's opinion is that Mr. Bloomfield's chronic pain results in a functional limitation of his ability to pursue work on a medical or surgical floor working 8-12 hours shifts, or in his ability to return to his pre-Accident level of physical activities.

[57] With respect to Mr. Bloomfield's prognosis, Dr. Zaki's opinion is that in the absence of another hip surgery, it is likely that Mr. Bloomfield will continue to have functional limitations as a result of his chronic right hip pain. Dr. Zaki recommended that Mr. Bloomfield be assessed by an orthopedic specialist for possible treatment to resolve his hip pain.

### **Psychiatrists' Evidence**

[58] Mr. Bloomfield called evidence from a psychiatrist, Dr. Darcy Muir, who was qualified to provide expert opinion evidence at trial. Dr. Muir conducted a virtual medical examination of Mr. Bloomfield and provided a report in January 2023.

[59] Dr. Muir diagnosed Mr. Bloomfield with somatic symptom disorder with predominant pain, and adjustment disorder with mixed anxiety and depressed mood. In his opinion both of these disorders were caused by the Accident.

[60] With respect to Mr. Bloomfield's prognosis, Dr. Muir provided an opinion that his somatic symptom and adjustment disorders would likely continue to be partially disabling for two years while Mr. Bloomfield engages in treatment. Dr. Muir's opinion was that overall, Mr. Bloomfield's prognosis for a full recovery was poor. In his opinion, it is more likely than not that Mr. Bloomfield would have some residual

difficulties related to his disorders. Dr. Muir referred to statistics that approximately 50% of patients with somatic symptom disorders improve, while 10-30% deteriorate.

[61] Dr. Muir testified, and indicated in his report, that Mr. Bloomfield's disorders were likely resulting in treatment avoidance. He testified that it was likely that he was not intentionally avoiding treatment.

[62] Mr. Berg called evidence from a psychiatrist, Dr. Miriam Korn, who was qualified to provide expert opinion evidence at trial. Dr. Muir did not conduct an examination of Mr. Bloomfield, but rather reviewed relevant medical records and provided a response to the report completed by Dr. Muir.

[63] Dr. Korn agreed with the diagnosis of Dr. Muir. In her opinion Mr. Bloomfield's prognosis was slightly better than that reported by Dr. Muir, based on her view that Mr. Bloomfield may now be more inclined to particulate in, for example, pharmacotherapy and psychotherapy. As a result of the nature of Dr. Korn's retainer and the lack of any interaction with Mr. Bloomfield, and with all due respect to her expertise, I give her opinion less weight than that of Dr. Muir.

### **Functional Capacity and Vocational Rehabilitation Evidence**

[64] Mr. Bloomfield called evidence from Raph Kowalik, a kinesiologist who conducted a functional capacity assessment of Mr. Bloomfield on February 9, 2022, and provided a report in July 2022 dealing with functional capacity and cost of future care. Mr. Kowalik was qualified to provide expert opinion evidence on these subjects at trial.

[65] With respect to functional capacity, in Mr. Kowalik's opinion Mr. Bloomfield now has difficulty performing the activities of daily living (for example cleaning and cooking) and performing his pre-Accident recreational activities, as a result of pain symptoms in his neck, upper back, lower back and right hip. In addition, in Mr. Kowalik's opinion, for similar reasons, Mr. Bloomfield is unable to perform nursing work, beyond that at sedentary to light levels. During cross-examination Mr. Kowalik testified that Mr. Bloomfield may be able to perform emergency room

type work for some amount of time, but cannot do so consistently as a result of his physical limitations.

[66] Mr. Berg called evidence from a vocational rehabilitation and clinical counselling expert, Diana Cameron, who interviewed Mr. Bloomfield by zoom and provided a report in July 2022. Ms. Cameron was qualified to provide expert opinion evidence at trial.

[67] Ms. Cameron's opinion, relying in part on statistical data related to nurses leaving the workforce for various reasons, is that in the absence of the Accident, Mr. Bloomfield may have chosen to leave the nursing profession over the long-term. I consider this opinion to be highly speculative and therefore give it no weight.

[68] Ms. Cameron also provided an opinion concerning the potential for Mr. Bloomfield to work in other nursing roles. In her opinion, based on Mr. Bloomfield's academic background he would be a candidate training as a nurse practitioner. Ms. Cameron's report states that he may be eligible to complete a 24-month combined Master of Science in Nursing and Primary Health Care for Nurse Practitioners Graduate Diploma program at the University of Ottawa.

[69] Mr. Berg called evidence from Matt Gregson, an occupational therapist. Mr. Gregson did not see Mr. Bloomfield but only provided a report, dated March 16, 2023, critiquing the findings of Mr. Kowalik with respect to Mr. Bloomfield's functional capacities. Mr. Gregson provided an opinion that a functional capacity evaluation report is only valid for six months. In addition, he criticized the nature of the evaluation completed by Mr. Kowalik, on the basis that it did not include observations of Mr. Bloomfield performing functions analogous to those performed by a nurse on a regular basis.

## **Analysis**

### **Causation**

[70] A plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence



need not be the sole cause of the injury, so long as it is part of the cause beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17, 1996 CanLII 183; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[71] The primary test for causation asks: but-for the defendant’s negligence, would the plaintiff have suffered the injury? The “but-for” test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant’s conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23.

[72] The evidence of Mr. Bloomfield and the expert medical evidence establishes that as a result of the Accident Mr. Bloomfield sustained soft tissue injuries to his right side and hips and low back resulting in associated pain, headaches and sleep disturbance. Although it is unclear whether the pain in Mr. Bloomfield’s right hip was caused by a labral tear which occurred as a result of the Accident, I am satisfied that at a minimum the Accident caused Mr. Bloomfield’s right hip pain symptoms to manifest. In addition, the expert medical evidence establishes that as a result of the Accident Mr. Bloomfield developed psychological conditions including somatic symptom disorder and an adjustment disorder. I will provide my conclusions with respect to the severity and duration of the symptoms experienced by Mr. Bloomfield below.

### **Non-Pecuniary Damages**

[73] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[74] The factors to be considered in an assessment of non-pecuniary damages are those set out at para. 46 of *Stapley v. Hejslet*, 2006 BCCA 34, and they include:

- the age of the plaintiff;
- the nature of the injury;
- severity and duration of pain;
- disability;
- emotional suffering; and
- loss or impairment of life.

[75] Mr. Bloomfield was relatively young, thirty-one years old, at the time of the Accident. The Accident has resulted in symptoms and psychological conditions which have had a significant impact on his life.

[76] The evidence at trial establishes that the soft tissue injuries resulting in pain to Mr. Bloomfield's elbow, shoulder, right knee and wrist resolved within a few weeks of the Accident. The injury to his left hip resolved within a few months and the injury to his left knee resolved within eight months to one year. In addition, the evidence establishes that Mr. Bloomfield's lower back pain had substantially resolved by September 2020. Although he experiences occasional lower back pain, these events seem to be infrequent. I do not consider these injuries and the related symptoms to be severe or long lasting.

[77] With respect to headaches the evidence establishes that although Mr. Bloomfield experienced headaches daily after the accident, that they had substantially improved by October 2017. Although I accept Mr. Bloomfield's testimony that he currently experiences headaches up to four times per month, I am not satisfied that this symptom is severe or disabling and it is not clear whether they result from the Accident.

[78] The pain originating from Mr. Bloomfield's right hip continues to be a significant and partially disabling symptom. I find that this pain, in combination with Mr. Bloomfield's somatic symptom disorder, currently prevents Mr. Bloomfield from

participating in recreational activities at the same intensity as he did prior to the Accident. Further, I find that Mr. Bloomfield is currently unable to work in anything other than sedentary nursing roles, with limited ability to work overtime, and his symptoms have impacted, although not eliminated, his ability to perform most domestic tasks.

[79] I am not satisfied on a balance of probabilities that if the Accident had not occurred Mr. Bloomfield would have experienced hip symptoms as a result of a degenerative hip condition by this time or in the foreseeable future – until perhaps he is in his 50's. I accept that it is possible that with further surgery Mr. Bloomfield's right hip pain resulting from the Accident will improve.

[80] I find that as a result of the Accident Mr. Bloomfield experiences some anxiety driving in urban settings and when he is a pedestrian, in either urban or rural settings. I do not find this anxiety prevents Mr. Bloomfield from driving or being a pedestrian in any location.

[81] I find that Mr. Bloomfield's somatic symptom disorder and adjustment disorder were caused by the Accident. I find that it is possible, with psychotherapy and pharmacotherapy, these disorders may improve in up to two years but may not fully resolve. I do not find that these disorders are disabling although they have had a significant impact on the quality of Mr. Bloomfield's life.

[82] Although it is unclear whether Mr. Bloomfield's physical symptoms and psychological conditions were the only cause of his break ups with Andrea in 2015 and later with Erin in 2021, I find it more likely than not that these symptoms and conditions contributed to the end of these relationships, which by extension I find resulted in emotional suffering. I find that his break up with Andrea, likely contributed to his decision to move to a small community in Ontario and therefore resulted in his feelings of isolation.

[83] Mr. Bloomfield seeks non-pecuniary damages of \$200,000. He relies on a number of authorities to support a damages award under this head for this amount,

but refers in particular to *Culver v. Skrpnyk*, 2019 BCSC 807. In that case the plaintiff was 33 years old at the time of the MVA and sustained a number of injuries including a low back injury with sciatica, anxiety and depression. He was diagnosed with somatic symptom disorder. He was limited in physical activities he once enjoyed and his relationships with his partner and friends suffered. The plaintiff in *Culver* was awarded \$175,000 for non-pecuniary damages which is equivalent to \$201,250 in 2023 dollars.

[84] Mr. Berg submits that Mr. Bloomfield should receive non-pecuniary damages of \$110,000 to \$120,000, less a 15-25% deduction for alleged failures to mitigate. I will address Mr. Berg's failure to mitigate defence later in my reasons.

[85] With respect to the basis for Mr. Berg's position on non-pecuniary damages, he relies upon a series of cases, in which the court awarded damages in the range he proposes. In the most analogous case, *Martin v. Frederickson*, 2021 BCSC 1424, the plaintiff, a 36-year-old nurse, was awarded \$120,000 in non-pecuniary damages. She sustained soft tissue injuries to her neck and upper back which became chronic and gave up most of her previous athletic activities which included going snowboarding, going to the gym and hot yoga. She also suffered from migraines for several months and from low mood and depression and her personal relationships were affected.

[86] In *Martin* and the other cases cited by Mr. Berg a diagnosis of somatic symptom disorder was not made, nor did the plaintiffs experience the same level of disruption to their professional lives or recreational pursuits as Mr. Bloomfield.

[87] I award Mr. Bloomfield non-pecuniary damages of \$210,000, which includes an amount to compensate Mr. Bloomfield for a loss of housekeeping capacity – and in particular a diminished ability to conduct heavy household cleaning, home maintenance and heavy outdoor tasks such as snow clearing and chopping wood.

### Loss of Income Earning Capacity

[88] The applicable principles to be considered in an assessment of damages resulting from a loss of income earning capacity were well set out in the recent decision of Justice Giaschi in *Siu v. Regehr*, 2022 BCSC 1876. Justice Giaschi stated as follows:

[162] The pecuniary loss suffered by a plaintiff as a consequence of a motor vehicle accident, sometimes referred to as a loss of income claim, is addressed with an award of damages for loss of earnings capacity. The award is divided into two parts: past loss of earning capacity and future loss of earning capacity. The purpose of both awards is to restore an injured plaintiff to the position they would have been in if the accident had not occurred. *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, at para. 185; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53, at para. 49.

[163] In *Rab v. Prescott*, 2021 BCCA 345, at paras. 47-48 [*Rab*], it was clarified that there are three steps involved in the analysis of a loss of capacity claim: (1) Is there a potential future event that could lead to a loss of capacity; (2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss; and (3) What is the value of that loss, which must include an assessment of the likelihood of that event occurring. Steps 1 and 2 of the analysis go to entitlement to an award. Step 3 goes to the valuation of the award.

[164] An award for loss of earning capacity, whether past or future, is appropriate where the plaintiff establishes a real and substantial possibility that there has been a diminishment in earning capacity resulting in a pecuniary loss. The standard of proof, whether for past or future loss of earning capacity, is “a real and substantial possibility”, not a balance of probabilities: *Smith v. Knudsen*, 2004 BCCA 613, para. 5; *Grewal v. Naumann*, 2017 BCCA 158, paras. 43-48.

[165] A real and substantial possibility is a measurable risk as opposed to mere speculation: *Dornan*, para. 63.

[166] The existence of a real and substantial possibility of an event giving rise to an income loss may be obvious, such as where the plaintiff is unable to work at the time of trial due to injuries suffered in the accident; however, in other cases the assessment is more difficult, such as where the plaintiff is employed at trial and is earning at or near his or her pre-accident income but has continuing deficits or is exposed to future problems: *Rab*, paras. 28-29.

[167] Loss of capacity can be the event that gives rise to a possibility of a future income loss but is not sufficient in and of itself: *Rab*, at paras. 47-48.

[168] Some of the factors that go to entitlement are: (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and

(iv) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: *Rab*, paras. 35-36; *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353 [*Brown*].

[169] Once entitlement is established, which is to say once the plaintiff establishes a real and substantial possibility of a diminishment in earning capacity, the loss is quantified using either the earnings approach or the capital asset approach. The appropriate means of assessment will vary from case to case: *Brown*; *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232. The earnings approach is more appropriate where the loss is measurable. The earnings approach involves a calculation of the present value of the plaintiff's annual loss of income over the remaining years of employment.

[170] The capital asset approach is appropriate where the loss is not easily measurable: *Perren v. Lalari*, 2010 BCCA 140, at para. 32. Cases where the plaintiff is employed at trial and is earning at or near his or her pre-accident income but has continuing deficits, or is exposed to future problems because of accident caused injuries, lend themselves to the capital asset approach: *Rab*, para. 29. The amount of the award can be based on the plaintiff's annual income for one or more years. The income used in the assessment must be relevant to the plaintiff's pre and post accident circumstances.

[171] Under either the earnings approach or the capital asset approach, damages are assessed, not calculated: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. The assessment involves a consideration of hypothetical events and contingencies, both positive and negative. Hypothetical events need not be proven on a balance of probabilities but, provided they are not speculative, are given weight according to their relative likelihood: *Athey*, at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38. In *Rab*, the Court of Appeal has clarified that when utilizing the capital asset approach the Court must similarly provide a rational or principled basis for valuing the loss: *Rab*, paras. 72-75.

[172] The final stage of the assessment involves a consideration of the overall fairness and reasonableness of the award: *Parypa v. Wickware*, 1999 BCCA 88.

[173] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that for past loss of income, the amount of income tax payable must be deducted from the gross earnings lost: *Hudniuk v. Warkentin*, 2003 BCSC 62.

[89] The medical evidence establishes that primarily as a result of his pain symptoms, compounded by his somatic symptom disorder, Mr. Bloomfield has been rendered less capable overall of earning income from all types of employment. I am satisfied that although Mr. Bloomfield is capable of continuing his current employment as a rapid response nurse, his pain and the resulting inability to work in nursing roles which are not sedentary, for periods of up to 12 hours, makes him less

marketable and attractive as a nurse in other areas of practice, including for example, working as an emergency room nurse or in a medical-surgical ward. For the same reasons, Mr. Bloomfield has lost the ability to take advantage of all job opportunities that might otherwise have been open. Finally, I am satisfied that as a result of his reduced capabilities, Mr. Bloomfield, who previously considered working in a number of areas as a nurse, is less valuable to himself as a person capable of earning income in a competitive labour market.

[90] I am satisfied that Mr. Bloomfield has demonstrated a real and substantial possibility of diminished earning capacity which will cause income loss.

[91] The next step is to quantify Mr. Bloomfield's income loss. Mr. Bloomfield did not have a track record of working and earning as a nurse at the time of the Accident given that he had not yet graduated from nursing school. As a result, his loss is not easily measurable. For this reason, I consider that a capital asset earnings approach is the appropriate method of assessing Mr. Bloomfield's income loss – both past and prospective. Applying a loss of capital asset approach does not mean that calculations of income loss may not be considered in assessing damages.

### **Past Loss of Income Earning Capacity**

[92] Mr. Bloomfield submits that but for the Accident he would have had substantially more capacity to earn income, including from working longer shifts and overtime and in more strenuous nursing roles.

[93] Cindy Payne, who was Mr. Bloomfield's nursing manager while he was with Paramed, testified at trial. She testified that on average visiting nurses see between 16 and 20 patients per day. She testified that an experienced visiting nurse typically makes between \$105,000 and \$160,000 per year. The evidence of a factual lay witness, such as Ms. Payne, is admissible for the purposes of the likelihood of determining a particular income: *Giczi v. Kandola*, 2014 BCSC 508, at paras. 148, 150, 152 and 157.

[94] Mr. Bloomfield submits that a reasonable way to assess his damages for past loss of income earning capacity is to deduct the amount he made from 2015 to the date of trial from his potential earnings as a visiting nurse with Paramed for the same period. Mr. Bloomfield calculates, on the assumption that but for the Accident he would have seen 18 patients per day and been paid the usual per visit rate of \$28.15, and assuming 260 days of work, that a conservative estimate of his potential annual earnings is \$131,742, subject to adjustment after 2016 for inflation.

[95] Mr. Bloomfield seeks damages for past loss of income earning capacity of \$444,771. He determined this amount by calculating his potential earnings from October 2015 to trial and deducting his actual earnings for this period. His potential earnings for 2015 were estimated based on Mr. Bloomfield's average actual monthly earnings in 2016 and his potential earnings for each year or part year thereafter (\$131,742) adjusted annually for inflation. Mr. Bloomfield concedes that this "gross income loss calculation" would have to be netted down for taxes which he proposes can be left to be determined after issuance of these reasons.

[96] I do not find that this approach to assessing Mr. Bloomfield's damages for past loss of income earning capacity is appropriate. First, this calculation is made on the assumption that Mr. Bloomfield would see 18 patients per day. At trial, Ms. Payne testified that very skilled nurses see between 18 and 25 patients per day. Ms. Payne agreed that it would be unusual for a brand-new nurse to see 18 patients per day and it could take a while for a nurse to build up to 25 patient visits per day. Ms. Payne testified that on the lower end visiting nurses see approximately eight patients per day but on average see 16 to 20 patients per day.

[97] In addition, and more significantly I consider that assessing Mr. Bloomfield's past loss of income earning capacity claim based on the average earnings of a visiting nurse employed with Paramed to be highly speculative. It is entirely unclear whether, if the Accident and his break up with Andrea had not occurred, Mr. Bloomfield would have even moved to Ontario and commenced work as a visiting nurse. His evidence was that his intention was to return to Vancouver after



Andrea completed her internship in Manitoba. As well, his evidence was that he was unsure what area of nursing he intended to work in. Although it appears that he was considering working in community nursing after gaining experience as an emergency room or in a medical-surgical ward, he was also considering other possibilities such as, for example, working as a flight nurse.

[98] Given the uncertainties with respect to what Mr. Bloomfield would have done if the Accident had not occurred, I prefer Mr. Bloomfield's alternative method of assessing these damages.

[99] Mr. Bloomfield's alternative method is that his damages for past loss of income earning capacity be calculated based on statistical earnings data for males working as registered nurses in Canada, to determine what he could have earned and subtracting his actual earnings. With respect to his potential earnings based on statistics, Mr. Bloomfield relies on the calculations set out in a table, completed on his behalf by Nicholas Coleman. Mr. Coleman was qualified as an expert economist at trial and provided a report setting out his calculations of past and future wage loss. Mr. Coleman's calculations assume that Mr. Bloomfield would earn in the 3<sup>rd</sup> Quartile of males in his field (that is at the 75<sup>th</sup> percentile).

[100] Based on Mr. Coleman's calculations, after making deductions for potential earnings for the months of May to September 2015, which were incorrectly included by Coleman (Mr. Bloomfield concedes he would not have worked during this period), Mr. Bloomfield submits that his potential without Accident earnings could have been \$632,193. Subtracting his actual earnings of \$488,973 from potential earnings of \$632,193 results in a calculation of past income loss of \$143,220.

[101] Mr. Bloomfield submits that the Court can have some confidence on his alternative calculation of past income because of Mr. Bloomfield's evidence obtained from publicly available information from the government of Ontario which shows a number of registered nurses earning more than \$100,000 per year after 2018. Although this earnings data is admissible on the basis of the public document exception to the hearsay rule I do not find it overly helpful. It is unclear whether the

hours and nature of work of the nurses shown in these documents is comparable to that available to Mr. Bloomfield.

[102] Mr. Berg submits that Mr. Bloomfield should be awarded damages for past loss of income earning capacity of approximately \$50,000, less deductions for failure to mitigate. Again, I will deal with mitigation later in my reasons.

[103] Mr. Berg's submission is based on a \$8,316 gross income loss for 2016, when Mr. Bloomfield had to reduce the number of shifts he worked at Paramed as a result of his pain symptoms, \$2,919.43 for gross income loss while he was off work after his surgery in 2019 and \$38,000 for loss of possible overtime earnings for the period October 2015 to trial (calculated based on six, twelve-hour overtime shifts per year at \$69 per hour). I do not consider that Mr. Berg's method of calculating Mr. Bloomfield's past wage loss fairly assesses the impact of the Accident on his past income earning potential, as it does not fully reflect Mr. Bloomfield's loss of capacity to earn income over the relevant period of time.

[104] As I have stated I prefer Mr. Bloomfield's alternative method of calculating past wage loss, with some several caveats. In his expert report, Mr. Berg's expert economist Mark Szekely, who was qualified to provide expert evidence at trial, outlined his concerns with Mr. Coleman's calculation.

[105] First, Mr. Szekely says that in his opinion it was not appropriate to assume that Mr. Bloomfield would have earned in the 75<sup>th</sup> percentile, rather than assuming average earnings. Mr. Szekely says that the problem with Mr. Coleman's approach is that applying earnings at the 75<sup>th</sup> percentile may reflect earnings at higher levels by workers with the most accumulated work experience within a designated age range. Mr. Szekely says that by doing so Mr. Coleman significantly overstated the value of Mr. Bloomfield's past potential earnings (and future earnings – which I will address later).

[106] In addition, Mr. Szekely says that Mr. Coleman made no allowance in his calculation for the possibility that Mr. Bloomfield would work less than full-time hours at any time between 2015 and trial.

[107] I agree with the opinion of Mr. Szekely concerning the deficiencies in Mr. Coleman’s method of estimating Mr. Bloomfield’s potential future income. Unfortunately, I have not been provided with calculations which apply a lower percentile than the 75% applied by Mr. Coleman, that is a pre-trial earnings estimate based on average earnings, and which account for the possibility that Mr. Bloomfield might have worked less than full time hours before trial if the Accident had not occurred.

[108] Recognizing that the determination of damages for past loss of income earning capacity involves an assessment and not a calculation, and that the court’s determination with respect to damages must be fair, I consider it appropriate to apply a 10% deduction to the alternative calculation of past wage loss proposed by Mr. Bloomfield (\$143,220). Neither of the parties suggest that any positive or negative contingencies should be applied to a calculation of Mr. Bloomfield’s past wage loss. I agree.

[109] I award Mr. Bloomfield damages for past loss of income earning capacity of \$129,000.

**Future Loss of Income Earning Capacity**

[110] Mr. Bloomfield proposes the same preferred and alternative methodologies for assessing damages for future loss of income earning capacity that he did for assessing past loss of income earning capacity.

[111] Mr. Bloomfield submits, as his preferred position, that the starting point for assessing this head of damages is grounded in the actual evidence showing his loss – being the loss of his ability to perform other types of nursing work and earn more through, for example overtime. His submits that his first year of future income loss should be calculated by determining the difference between \$163,596 (\$131,742 –

being the average earnings for visiting nurses adjusted upwards for inflation) and \$95,238 (being his actual last full year of earnings, minus overtime pay which he will not earn going forward and a one-time government bonus). He submits that the resulting difference, \$68,357, multiplied by Mr. Coleman's multiplier of 18.086 results in a calculation of future income loss, assuming that he works until 75, of \$1,236,307. From this amount, to account for multiple layers of hypothetical contingency deductions, Mr. Bloomfield submits that a 10% contingency deduction should be made, resulting in an award for future loss of income earning capacity of \$1,112,677.

[112] For the same reasons outlined under the portion of my reasons dealing with damages for past loss of income earning capacity, I do not consider that this method of assessing Mr. Bloomfield's damages for future loss of income earning capacity is appropriate.

[113] In his alternative calculation, Mr. Bloomfield submits, relying on the calculations completed by Mr. Coleman, that his future income loss can be determined calculating the difference between third quartile earnings for males working as registered nurses in Canada until 75 (\$2,452,880) and an estimate of his earnings until 75 based on his current income, that is his 2022 income, less overtime and the one-time government bonus, multiplied by Mr. Cooper's multiplier of 18.086 (\$1,722,474). This results in a calculation of future income loss of approximately \$732,000. He again submits that a 10% contingency deduction should be made, resulting in an award under his alternative position of \$657,367.

[114] Again, I consider that the assumption that Mr. Bloomfield could have earned in the 75<sup>th</sup> percentile for male RN's from trial until retirement unreasonably inflates Mr. Coleman's calculation of potential future earnings. As well, I agree with the opinion of Mr. Szekely that Mr. Coleman's decision to reduce the census-based unemployment rates and part-time factors by approximately 50% (on average) during the first 10 years after trial unreasonably inflates the calculation of Mr. Coleman's potential without-accident earnings.

[115] Mr. Szekely has provided a table setting out a calculation of potential earnings based on statistical data for average earnings by male registered nurses in Canada and incorporating contingency deductions for unemployment and part-time work. His estimate of potential future earnings is \$1,973,549. Deducting from this amount Mr. Bloomfield's estimate of his earnings until 75 based on his current income (\$1,722,474) results in a calculation of future income loss of \$251,075.

[116] With respect to adjustments for future positive contingencies both parties agree that the court should consider contingencies including the possibility that with further hip surgery (either further labral repair or eventually hip replacement) Mr. Bloomfield's hip pain will resolve, although they disagree on the likelihood of improvement from hip surgery. It is not certain whether Mr. Bloomfield will be a candidate for further labral repair surgery and when hip repair surgery would occur. I do agree that there is a real and substantial possibility that Mr. Bloomfield will benefit from some form of hip surgery in the future.

[117] Mr. Bloomfield submits that the court should also consider a future negative contingency, based on the opinion of Dr. Muir, that his psychological conditions may get worse, which he submits may result in a complete loss of income. Based on Dr. Muir's evidence that up to 30% of patients diagnosed with similar conditions get worse, I agree that this contingency should be taken into consideration. I also note Dr. Muir's evidence that 50% of patients who undergo treatment for such psychological conditions improve.

[118] Given Mr. Bloomfield's testimony at trial which indicates that he is willing to consider further pharmacological treatment, if recommended by his doctors, and his willingness to undergo psychotherapy, I consider the risk of him getting worse psychologically to be low.

[119] Mr. Berg submits that the court should consider the real and substantial possibility that hip pain resulting from Mr. Bloomfield's pre-existing FAI would have affected him in his 40's or 50's even if the Accident had not occurred. In my view, making such a contingency deduction is not appropriate as it does not rise to the

level of a real and substantial possibility. Dr. Leith explained that although FAI can lead to symptoms over time, when this actually would have occurred cannot be predicted.

[120] In addition, Mr. Berg submits that there is a real and substantial possibility that Mr. Bloomfield could retrain and become a nurse practitioner. I am not satisfied that the evidence supports this submission. Ms. Cameron's evidence indicated only a possibility that Mr. Bloomfield may be granted admission to a nurse practitioner program. Mr. Bloomfield's evidence suggests to me that it is unlikely he will take up to three years off work to return to full time studies – even if he was granted admission to a nurse practitioner program. In addition, Mr. Bloomfield testified that he may not be able to work the 12 hour shifts he says nurse practitioners usually work.

[121] Considering the layers of hypotheticals in this case I agree with Mr. Bloomfield that a conservative contingency deduction of 10% to the estimate calculation of future income losses should be applied. This results in an assessment of damages for future loss of income earning capacity of \$226,000 (\$251,075 - \$25,107).

[122] An alternative method of assessing Mr. Bloomfield's damages for loss of future income earning capacity under the capital asset approach, is the "rough and ready" *Pallos* approach, as this approach as described in *Martin v. Frederickson*, 2021 BCSC 1424, at para. 71. In *Martin*, Justice Branch approach awarded damages for loss of future income earning capacity equivalent to two-years salary to a nurse who was limited to performing sedentary work: see paras. 75-76.

[123] In this case Mr. Bloomfield's last year of earnings, after deducting overtime and his one-time government bonus was \$95,238. Based on a two-year multiplier, this would result in damages under this head of approximately \$190,000.

[124] In consideration of the circumstances of this case, and the object of ensuring overall fairness and reasonableness, I award Mr. Bloomfield damages for future loss of income earning capacity of \$226,000.

**Loss of Housekeeping Capacity**

[125] Mr. Bloomfield seeks an award of \$40,000 for the loss of ability to perform heavy household chores – which he says are now largely being carried out by his parents when they visit.

[126] In *Steinlauf v. Deol*, 2022 BCCA 96, para. 222, the Court of Appeal cited with approval the approach taken by Justice Basran at trial with respect to loss of housekeeping services. The principles applied by Justice Basran include the following:

- a) Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award;
- b) A plaintiff who suffers an injury which would make a reasonable person in their circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages;
- c) When the loss is in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate for the loss;
- d) A plaintiff is entitled to an award to reflect a loss of capacity, whether or not replacement services are actually purchased; and
- e) Evidence that work is performed by others, even if done gratuitously, supports an award for loss of housekeeping capacity.

[127] I find that Mr. Bloomfield’s loss of housekeeping capacity, is more in keeping with a loss of amenities or increased pain while performing this work. I do not find

that Mr. Bloomfield is incapable of performing housekeeping work, but rather find that doing so causes him pain and requires him to take frequent breaks. I have included in my assessment of Mr. Bloomfield's non-pecuniary damages, consideration for loss of housekeeping capacity. No further award is warranted.

### **Failure to Mitigate**

[128] Mr. Berg contends that the awards made for all heads of damages, excluding cost of future care and special damages should be reduced by 15-25% to reflect what it submits is a proven failure to mitigate on Mr. Bloomfield's part. In particular, Mr. Berg submits that Mr. Bloomfield did not seek a second opinion after his treating orthopaedic surgeon, Dr. Beaulé, told him there was nothing to do after his hip surgery was not successful. In addition, Mr. Berg submits that Mr. Bloomfield did not attend at psychotherapy as recommended by his family doctor, Dr. Chen, in July 2018.

[129] Mr. Berg relies upon the opinion of Dr. Korn who stated in her report that it is possible that Mr. Bloomfield's psychological conditions would have improved if he had pursued psychotherapy.

[130] With respect to Dr. Muir's evidence that a lack of insight and avoidance [of therapy] result from Mr. Bloomfield's somatic symptom disorder, Mr. Berg submits that there is no evidence that Mr. Bloomfield was unable to seek out and participate in therapy.

[131] The test for failure to mitigate is set out in *Chiu v. Chiu*, 2002 BCCA 618, at para. 57. As the Court of Appeal indicated, the onus is on the defendant prove that a plaintiff could have avoided all or a portion of his loss by showing that the plaintiff acted unreasonably and that if they had not done so their damages would have been reduced.

[132] I am not satisfied that Mr. Bloomfield acted unreasonably in not pursuing further surgery for his hip pain or psychotherapy. I accept the evidence of Dr. Muir that Mr. Bloomfield's somatic symptom disorder impacted his ability to take



advantage of potential therapies. In any event, with respect to Mr. Bloomfield's psychological conditions, I am not satisfied that these conditions resulted in a loss of income – which would have been mitigated if Mr. Bloomfield underwent psychotherapy earlier.

[133] In conclusion, I do not find that Mr. Berg has met his onus of proving that Mr. Bloomfield failed to mitigate his damages and therefore decline to make any deduction to Mr. Bloomfield's damages award on this basis.

### **Cost of Future Care**

[134] Mr. Bloomfield seeks an award for costs of future care of \$292,180. He relies upon the recommendations concerning the types of care and suggested accommodations of Mr. Kowalik, who in some cases repeated recommendations made by medical practitioners, and Mr. Kowalik's estimate of future care costs.

[135] Mr. Kowalik made recommendations for and provided costs estimates in respect of, heavier home cleaning support, ergonomic and other equipment, a gym/pool pass, and various physical therapies and medical consultations, and cost of medications.

[136] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-Accident condition, in so far as that is possible. When full restoration is not achievable, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) [*Milina*]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[137] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and

(2) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[138] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

### ***Heavier Home Cleaning Support***

[139] Mr. Kowalik recommended that Mr. Bloomfield would benefit from support to complete deep cleaning, floor scrubbing and heavy activities such as splitting wood. Mr. Kowalik estimated the costs of obtaining these services assuming that Mr. Bloomfield would have some support from others (at the time Mr. Kowalik made his report from his then partner Erin) resulting in an estimate of homecare support work needs of two hours of work per week. Mr. Kowalik estimated monthly cost of these services to be \$4,160.

[140] During his testimony at trial Mr. Kowalik confirmed that his estimate of the amount of homecare support was based on statistical or other data regarding the typical number of hours of support that would generally be required to perform such duties. It does not appear that Mr. Kowalik's recommendation was based on Mr. Bloomfield's particular needs.

[141] With the exception of perhaps floor scrubbing, the evidence does not establish that Mr. Bloomfield is unable to perform the tasks outlined by Mr. Kowalik.

[142] I note that Mr. Kowalik performed his functional capacity evaluation of Mr. Bloomfield on February 9, 2022. Although I am not prepared to conclude on this basis, as Mr. Berg contends I should, that his recommendations should be considered "stale" and therefore discounted, I take the age of his assessment into consideration in determining the both medical justification for and reasonableness of his recommendations.

[143] I am not satisfied that the requirements of medical justification or reasonableness are met with respect to heavier home cleaning support and decline to award any amount for such costs.

***Ergonomic and Other Equipment***

[144] Mr. Kowalik made a series of recommendations for purchase of various ergonomic and other equipment.

[145] Mr. Kowalik recommends that an ergonomic chair and sit stand desk be obtained for home use by Mr. Bloomfield at a one-time cost of \$2,034. The basis of this recommendation is that Mr. Bloomfield reported he has difficulties sitting for extended periods of time. The evidence does not establish that Mr. Bloomfield is unable to perform work from home, to the extent he is required to do so in his capacity as a rapid response nurse. In addition, as noted by Mr. Kowalik in his report Mr. Bloomfield has not had an occupational therapist attend at his home to assess his needs. I am not satisfied that there is a medical justification for purchase of these items.

[146] Mr. Kowalik has recommended that Mr. Bloomfield purchase a heating pad. Mr. Bloomfield already owns and uses a heating pad therefore an award to purchase this item is not appropriate.

[147] Mr. Kowalik has recommended that Mr. Bloomfield purchase a massager for home use. The basis of this recommendation is that Mr. Bloomfield reported he finds massage helpful and had, at the time of Mr. Kowalik's evaluation, difficulty accessing massage therapy due to COVID-19. Given that the COVID-19 pandemic is now over I do not consider that Mr. Bloomfield will experience difficulty accessing massage therapy if he requires it in the future. As a result, I am not satisfied that there is a medical justification for purchase of a massager.

[148] Mr. Kowalik has recommended, repeating a recommendation made by Dr. Zaki, that various exercise equipment be purchased for a total cost of \$372. I find that this cost is both medically justified and reasonable.

[149] Mr. Kowalik has recommended that various items be purchased to assist Mr. Bloomfield in avoiding neck and hip pain during sleep. These include pillows, and a mattress topper for a total cost of \$535. The evidence establishes that Mr. Bloomfield has difficulty sleeping as a result of hip pain. I am not satisfied that Mr. Bloomfield has neck pain on an ongoing basis which was caused by the Accident. I find that the cost of a mattress topper in the amount of \$257.59 is both medically justified and reasonable.

[150] Mr. Kowalik has recommended that Mr. Bloomfield obtain a membership at a local fitness center, to provide Mr. Bloomfield an opportunity to continue his rehab exercises and avoid therapist dependence. Mr. Kowalik estimates the annual cost of a gym pass to be \$360, but did not provide a recommendation concerning how long a pass will be required, stating that duration is to be determined by physicians. I find that this cost is medically justified and in the absence of any guidance with respect to how long a gym pass will required. I award \$1,000, being the cost of a gym pass for approximately three years.

### ***Physical Therapies and Medical Consultations***

[151] Mr. Kowalik has recommended, based on recommendations of Dr. Zaki, that Mr. Bloomfield work with a physical therapist or kinesiologist. He estimates the cost of 13 weeks of sessions three times per month to be \$3,760. I find that this cost is both medically justified and reasonable.

[152] Mr. Kowalik has recommended, based on recommendations of Dr. Zaki, that Mr. Bloomfield receive massage therapy treatments on an intermittent basis to reduce pain when there is an aggravation or muscle tightness. He estimates the cost of 12 massage therapy sessions per year to be \$1,500 but does not specify a duration for this treatment. I find that this cost is medically justified and consider it reasonable to provide an award for massage therapy costs over a three-year period – for the total amount of \$4,500.

[153] Mr. Kowalik has recommended that Mr. Bloomfield undergo an ergonomic assessment performed by an occupational therapist to assess his current home

work station. The estimated cost for this assessment is \$850. I find that this cost is both medically justified and reasonable.

[154] Mr. Kowalik has recommended, based on a recommendation from Dr. Zaki, that Mr. Bloomfield undergo an assessment by an orthopaedic surgeon to determine his treatment options. Mr. Kowalik has provided an estimate for the cost of obtaining a private consultation, \$900, on the basis that there may be a wait time to obtain such a consult through the public healthcare system. I do not consider that it is reasonable to award the costs of a private consultation with an orthopaedic surgeon based on the potential that Mr. Bloomfield will not be able access such a specialist through the public healthcare system. I decline to award any amount for this cost.

[155] Dr. Zaki recommended that Mr. Bloomfield sees a psychologist to address his somatic symptom disorder and adjustment disorder. Mr. Kowalik estimates that the total cost of seeing a psychologist for twelve sessions would be \$2,700. He does not provide any recommendations with respect to the duration of such treatment. I consider it appropriate to award \$8,100, being the estimated cost of seeing a psychologist for three years.

[156] Mr. Kowalik has recommended an amount for the cost of post-surgical rehabilitation and assistance with home cleaning on the assumption that at some point Mr. Bloomfield will undergo further surgery to resolve his hip issues. He estimates the one-time cost of post-surgical physiotherapy and active rehab (based on a total of six months of post surgical treatment) to be \$6,630. He estimates that the cost of assistance with home cleaning over a three-month period will be \$1,820. The evidence establishes that Mr. Bloomfield's hip pain is the most significant pain symptom he experiences and the onset of pain symptoms was caused by the Accident. I find it possible that Mr. Bloomfield will undergo further surgery to his hip. As a result, I find that award for contingency costs, totalling \$8,450, is both medically justified and reasonable.

***Cost of Medications***

[157] Mr. Kowalik has recommended, in part based on recommendations from Dr. Zaki, that Mr. Bloomfield continue to take various medications and substances to address his symptoms including Tylenol, Naproxen, Gabapentin and marijuana.

[158] Marijuana was not recommended by any physician and I decline to award the cost of Mr. Bloomfield using this substance.

[159] With respect to the other medications, Mr. Kowalik estimates that the annual cost for Tylenol, Naproxen and Gabapentin will be approximately \$575 per year, with duration of use to be determined by Mr. Bloomfield’s physicians.

[160] Mr. Berg submits that Mr. Bloomfield should be awarded the costs of obtaining Cymbalta and Wellbutrin, in accordance with the opinion of Dr. Korn, for two years at an annual cost of \$600.

[161] Although it is unclear what medications Mr. Bloomfield will take over the next few years I consider that the costs of providing medication for a period of three years at \$600 per year, \$1,800 in total, to be both medically justified and reasonable.

[162] In total, I award Mr. Bloomfield damages for costs of future care, rounded to the nearest \$1,000, of \$29,000.

**Conclusion**

[163] In conclusion I award Mr. Bloomfield damages arising from the Accident as follows:

Non-pecuniary damages	\$210,000
Past loss of income earning capacity	\$129,000
Future loss of income earning capacity	\$226,000
Special damages — which are agreed	\$ 6,994
Cost of future care	\$ 29,000

**Total**

\$601,000

“Mayer, J.”