

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Broman v. Pang*,
2023 BCSC 353

Date: 20230309
Docket: M53518
Registry: Kamloops

Between:

Shella Aivit Broman

Plaintiff

And

Jiyeon Pang

Defendant

Before: The Honourable Justice Majawa

Reasons for Judgment

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Place and Dates of Trial:

Kamloops, B.C.
October 17-21, 24-28, 2022

Place and Date of Judgment:

Kamloops, B.C.
March 9, 2023

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INTRODUCTION

[1] The plaintiff, Shella Broman, was involved in a single-vehicle, highway speed rollover motor vehicle accident on November 1, 2014, (the “Accident”). Ms. Broman was the passenger and the vehicle was driven by the defendant, Jiyeon Pang. Liability is admitted.

[2] Although Ms. Broman claims to have suffered a number of injuries as a result of the Accident, many of those have since resolved and Ms. Broman’s main complaint at the time of trial is the injury to her right hip. Ms. Broman claims that this hip injury has progressively worsened over time and causes her a significant amount of pain on a daily basis. She claims that the injury has impacted her life in every respect. She seeks damages for pain and suffering, loss of earning capacity (both past and future), special damages, and the cost of future care.

[3] As is often the case in motor vehicle actions before this Court, the parties are very far apart on quantum, particularly in respect of the plaintiff’s entitlement to an award for the loss of future income earning capacity. The plaintiff’s claim for all heads of damages is approximately \$1.9 million. The defendant’s principal position is that Ms. Broman is entitled to an award of approximately \$97,000 and that she is not entitled to any amount for the loss of future income earning capacity. In the alternative, if she is entitled to an award for loss of future income earning capacity, the defendant suggests that Ms. Broman would be entitled to a further award of between \$77,000 and \$220,000. I have determined that Ms. Broman is entitled to a total award of approximately \$910,518¹, which includes an award for loss of future income earning capacity in the amount of \$650,000.

CREDIBILITY OF THE PLAINTIFF AND LAY WITNESSES

[4] The Court heard evidence from the plaintiff and a number of lay witnesses including her husband, former colleagues, and friends.

¹ The total amount awarded is an approximation because the award for loss of past earning capacity is a gross award and is subject to applicable deductions.

[5] The defendant does not take issue with the credibility of the lay witnesses called on behalf of the plaintiff. However, the defendant argues that Ms. Broman is neither a credible nor a reliable witness. Given the nature of the injuries that Ms. Broman claims to have suffered, her self-reported symptoms are integral to the determination of the issues before me, and consequently, her credibility and reliability are at issue. In *United States v. Bennett*, 2014 BCCA 145, Justice Neilson commented on the distinction between credibility and reliability:

[23] Before considering these arguments, it is necessary to understand the distinction between reliable evidence and credible evidence. The definition of both concepts provided by Doherty J.A. in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.) at 526a is helpful in distinguishing them:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously, a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[6] I have considered the often-cited factors summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, aff'd 2012 BCCA 296, in assessing the credibility of the plaintiff and the other lay witnesses and determining whether I will accept all, some, or none of their evidence: *Currie v. Taylor*, 2014 BCCA 51 at para. 33. The factors at para. 186 of *Bradshaw* include:

...the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally [citations omitted]. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[7] A witness's testimony is to be assessed in the context of all the circumstances before the Court. Justice Dillon put it this way in *Bradshaw* at para. 187:

It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the Court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". [Citations omitted.]

[8] I generally found the lay witnesses to be credible. In particular, I found Terri Stockwell to provide very credible and reliable evidence. I did, however, find that James Bradford, although credible, was not particularly reliable. His answers were often vague and he was uncertain of a number of matters he testified to.

[9] I do not agree with the defendant that Ms. Broman is neither credible nor reliable in respect of her evidence of the nature and extent of her injuries and their effect on her life. Nor do I agree that Ms. Broman was argumentative when being cross-examined by counsel for the defendant.

[10] The defendant points to inconsistencies between the plaintiff's evidence at trial and the evidence she provided at examination for discovery. Most of the inconsistencies relied upon are minor and of no import in respect of Ms. Broman's credibility. While there is a discrepancy in the evidence Ms. Broman has provided with respect to when she returned to full duties at 7-Eleven following the Accident, the difference is rather minor. The defendant also relies upon an inconsistency in respect of the date upon which she says she met her husband. Ms. Broman explained the discrepancy as resulting from being nervous during the examination for discovery. The discrepancy can also be explained by the difference in the phrasing of the question on the two occasions: one being when she first met her husband and the other being how long she has known him for. These are not the same thing. In any event, the defendant has not explained how this very minor

discrepancy, if it is in fact a discrepancy, is actually relevant to Ms. Broman's credibility.

[11] I have come to a similar conclusion with respect to Ms. Broman's testimony regarding her participation in hiking before the Accident. The defendant suggests that Ms. Broman is not credible or reliable because she told some of the experts retained in this matter that she went on "hikes" before the Accident. At trial she testified that she did not hike in the "Canadian" sense of the term before the Accident. Ms. Broman grew up in the Philippines and explained that she used to consider hiking to be what Canadian "outdoorsy" types would consider to be walking. The tenor of the defendant's argument is that Ms. Broman exaggerated her pre-Accident level of activity to certain treatment providers. Ms. Broman's explanation is completely understandable and the difference in semantics is not, in my view, a persuasive argument in respect of her credibility.

[12] The comments of then Chief Justice McEachern as relied upon by Justice N. Smith in *Edmondson v. Payer*, 2011 BCSC 118 at para. 31, are apposite to these examples, amongst others, of what the defendant has pointed to in the present case:

In *Diack v. Bardsley* (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:

... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.

[Emphasis added.]

[13] I place little weight on the fact that Ms. Broman neglected to mention a motor vehicle accident that she was involved in subsequent to the Accident at issue in this case when she was being assessed by the occupational therapist and orthopaedic surgeon retained by the plaintiff to provide expert reports in this matter. While on its face such an omission might be expected give rise to a concern, in this case, it does

not. That is because Ms. Broman was completely forthcoming about her involvement in the subsequent accident when she was later assessed by the orthopaedic surgeon retained by the defendant. Had she been trying to hide her involvement in the subsequent accident, she would not have shared this information with the expert retained by the defendant. Considering this, and the fact that Ms. Broman knew that what she told, and did not tell, each of these individuals could be used at trial, I accept her explanation that she was focused on the incidents that she believed to be the cause of her current condition, namely the Accident. It is quite likely that the way in which particular questions were asked by those individuals had an effect on her understanding of the information being sought.

[14] In my view, the handful of photographs put to the plaintiff that depict her standing on a paddleboard, sitting on a rock, standing by the side of the highway, and jumping in the air, do not detract from her credibility. I find the same with respect to the fact that she attended some social events and danced for a short period of time. None of these are inconsistent with her descriptions of her injuries and the effect they have had on her life. In my view, her explanations were believable when assessed in the context of the entirety of the evidence. For example, although she makes modifications to accommodate her injuries, she finds paddleboarding very enjoyable. The occupational therapist who testified gave evidence that such activity would be beneficial in promoting stability in Ms. Broman's injured hip. I also note that, contrary to evidence that the defendant expected to lead, no evidence was led by a witness who personally witnessed Ms. Broman dancing energetically for hours at an event shortly before the trial commenced. In fact, no evidence was led to contradict her and her husband's evidence that Ms. Broman danced for one or two songs at most at this event. As Ms. Broman herself said in testimony, she "still wants to live" even though she is injured. In my view, the words of Justice Murray in *Senger v. Graham*, 2018 BCSC 257, are applicable to the case at hand:

[18] While defendant's counsel tried to discredit her evidence by introducing photos that have been posted on the internet of Ms. Senger engaging in physical activities, I do not find that the fact that she has tried doing physical activities or travelled detracts from her evidence in the least. In fact, it makes her evidence more compelling.

[19] Prior to the accident the plaintiff was an active young woman. She has always participated in sports. She is trying to keep active and in shape. As the majority of the activities she enjoyed prior to the accident now cause her pain she is trying others. She is to be commended for that.

[20] Plaintiffs cannot be expected to cease living once they commence a lawsuit.

[15] The tenor of the defendant's remaining arguments on Ms. Broman's credibility can be fairly summarized as follows: Ms. Broman should not be believed because it is simply not credible that anyone would have continued working and progressing in their career and education if they were truly in the amount of pain that Ms. Broman reports to have been in. The problem with this argument in this case is that it ignores the plaintiff's specific cultural background and circumstances which serve to explain this conduct, at least in part.

[16] Ms. Broman faced significant socio-economic challenges during her childhood in the Philippines. She provided compelling evidence about the lack of a social safety net and the difficulties of finding and retaining employment in the Philippines and the understandable fear that she, and many similarly situated to her, have of losing their employment as a result of illness or other factors. I accept that this fear has persisted even after immigrating to Canada. Ms. Broman also provided compelling evidence of the commitment that she has to financially assisting her family members in the Philippines and the value placed on higher education in her culture.

[17] Considered in this context, the importance that Ms. Broman places on her economic independence, the use of education to achieve this, and her willingness to work through significant amounts of pain where others might not, is understandable. As stated by Justice Griffin, as she then was, "I have kept in mind that motives and conduct that might seem improbable to a person raised in a Canadian culture might not be improbable in another cultural context": *Fu v. Zhu*, 2018 BCSC 9 at para. 41. This is not to say that those raised in cultural contexts other than Canada will have their credibility assessed on a different standard than those raised in Canada. The standard is the same. Considering the cultural context

of a witness, (so long as the context of the witness's cultural background is properly in evidence and is not derived from stereotypes that are not in the evidence), simply permits the trier of fact to properly assess a witness's credibility on the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" [emphasis added]: *Bradshaw* at para. 186. The witness's cultural background can, in certain circumstances, be informative of those "places" and "conditions", and therefore, can be relevant to the assessment of credibility. I find that this is one of those cases. When Ms. Broman's evidence is properly considered in its proper context, I find it to be "consistent with the probabilities affecting the case as a whole and shown to be in existence at the time": *Bradshaw* at para. 186.

FACTS AND SUMMARY OF EVIDENCE

The Plaintiff, the Accident and the Injuries

[18] Ms. Broman was 38 years old at the time of the trial. She was born in the Philippines and moved to Canada in 2010 following a two-year period during which she worked as a domestic worker in Hong Kong. When she came to Canada, Ms. Broman was first employed as a nanny for a family in Merritt, BC.

[19] Ms. Broman's culture, childhood, and the environment in which she was raised in the Philippines has had a marked effect on her approach to life as an adult. Ms. Broman's mother died when she was six years' old and her father died while he was working overseas when she was age 12. Prior to her father's death, Ms. Broman's family lived a relatively comfortable lifestyle. After her father died, Ms. Broman and her four cousins, whom she viewed as siblings, were thrust into poverty. Ms. Broman and her cousins sold food during their lunch hour and after school in order to earn money to live.

[20] Ms. Broman began working in a factory at age 12 or 13 in order to support her and her cousins' schooling. Ms. Broman graduated from high school in 1996. With some financial support from relatives, Ms. Broman attended university in the Philippines where she studied accounting. It is not clear to me whether she received

a degree. Ms. Broman described the employment situation in the Philippines as being dire; she testified that workers, including those who are university educated, must “fight” to obtain and maintain employment.

[21] Ms. Broman was in good health prior to the Accident.

[22] The Accident occurred on November 1, 2014. Ms. Broman was the passenger in a vehicle driven by the defendant, Ms. Pang, on an icy Highway 91 between Merritt and Kelowna. The Accident was a single-vehicle rollover accident that took place while the vehicle was travelling at approximately 100 km/h. All of the airbags deployed and the insurer determined that the vehicle was a write-off. Ms. Broman and Ms. Pang were both transported by ambulance to a hospital in Kelowna.

[23] Ms. Broman immediately experienced headaches, low back pain and right hip pain following the Accident. Ms. Broman complained of these symptoms at the hospital. Ms. Broman understood that she might have a concussion.

[24] Ms. Broman spoke with her friend, Vanessa Guirpo, from the hospital and arranged for Ms. Guirpo and another friend, James Bradford, to pick her and Ms. Pang up from the hospital and drive them back to Merritt later that same day. Ms. Broman was in significant discomfort on the approximately 1.5 hour drive. At some point, she began vomiting on the way back. Ms. Broman recalls that Mr. Bradford took her to the hospital in Merritt because he was concerned about the pain she was reporting and her vomiting given her reported headache and concussion symptoms. Ms. Broman recalls undergoing an assessment in the emergency room in Merritt and being sent home with some over-the-counter pain medication. However, at trial, Mr. Bradford did not recall taking her to the hospital. Given my concerns with Mr. Bradford’s reliability, I prefer Ms. Broman’s evidence on this point.

[25] When Ms. Broman awoke the next day, she was unable to move her head from side to side or front to back, and her hip was painful. Her headache was still

present. Her landlord was concerned for her wellbeing and took her back to the emergency room in Merritt where she believes X-rays were done. She was provided with a neck brace and discharged a few hours later.

[26] During the first weeks after the Accident, Ms. Broman's headaches came and went and her neck was still tender. Her right hip pain was present every day. Within a few months of the Accident, Ms. Broman's concussion symptoms and neck pain had resolved. Her low back pain has improved and at the time of trial, she was experiencing flare-ups two to three times per year.

[27] Ms. Broman's principal physical complaint following the Accident is with respect to her right hip. Ms. Broman's hip pain has progressively gotten worse over time. The pain in her right hip has been present since the Accident but was more manageable in the months following the Accident than it was at the time of trial. She used to experience the pain approximately once a week but now experiences a high level of pain in her hip on a daily basis. She describes the hip pain as a combination of spasming, sharp shooting pain, and feeling like something is constricting inside her hip area. Sometimes the pain goes down to her knee and causes it to lock up. Ms. Broman often walks with a pronounced limp. I accept that Ms. Broman's hip pain affects her mobility, range of motion, lifting, and her ability to rest and sleep.

[28] Ms. Broman's hip pain has affected her work, recreational activities, mood, and relationships with her family. Ms. Broman has tried to stay positive and hopeful that her pain will improve but as the pain has gotten worse over the years, she has begun to lose hope. She now regularly feels sad and hopeless. She has thought of suicide but testified that doing so would be against her faith. She was prescribed anti-depressants by her family doctor. Mr. Broman, Ms. Guirpo and Ms. Stockwell all testified that Ms. Broman's mood and mental wellbeing have deteriorated over the years.

[29] Ms. Broman's symptoms have impacted the relationship she has with her husband and step-children. She and her husband are less intimate than they were in the earlier days of their relationship because of the pain she has in her hip.

When the pain is bad, which is often, Ms. Broman is impatient with her husband and step-children. She feels that she is a burden on her family.

Subsequent Motor Vehicle Accidents

[30] Ms. Broman was involved in two motor vehicle accidents following the Accident in 2014. The insurer found her liable for both. In January 2017, she was the driver of a vehicle that collided with a truck at an intersection (the “January 2017 Accident”). Ms. Broman went to the hospital following the January 2017 Accident, which appears to have been quite significant. The airbags deployed in the vehicle and the insurer determined that the vehicle would be written-off. Records indicate that Ms. Broman missed two weeks of work following this accident; however, she did not recall missing work.

[31] Ms. Broman had neck, back and chest pain as well as some concussion-like symptoms following the January 2017 Accident. Ms. Broman testified that her injuries from the January 2017 Accident resolved within weeks and that her hip pain was not aggravated by that accident. There is no indication in the medical records that she reported an aggravation of her hip pain following the January 2017 Accident.

[32] Ms. Broman was involved in another motor vehicle accident in October 2017 when the vehicle she was driving collided with a deer (the “October 2017 Accident”). This accident appears to have been relatively minor compared to the Accident and the January 2017 Accident. She did not seek medical treatment following the October 2017 Accident and I accept that any injuries arising from it resolved quickly. There is no indication in the records that the October 2017 Accident aggravated Ms. Broman’s hip injury.

Recreational and Social Activities

[33] Prior to the Accident, Ms. Broman was very active in the Filipino-Canadian (“Phil-Can”) community in Merritt. She often took a leadership role in planning celebrations and parties. These celebrations often included games for both children

and adults. She would participate in these physical games such as badminton, sack races, and musical chairs. There was often dancing at the events which Ms. Broman actively participated in. As her pain has worsened following the Accident, she reduced her involvement in these events. While she still attends some events, she does not stay as long and is not involved in organizing in the same manner as she used to be. The defence attempted to make much of Ms. Broman's attendance at the Phil-Can community events after the Accident, and in particular at a wedding in September 2022, shortly before this trial commenced.

[34] In my view, Ms. Broman's evidence with respect to her reduced participation in her community activities following the Accident was not shaken on cross-examination, nor was it materially contradicted by the witnesses called by the defence on this matter. Ms. Broman admitted to dancing at the September 2022 wedding but denied that she did so for more than a couple of songs because of the pain and she categorically denied that she had been dancing for hours as suggested by the defence. Mr. Bradford was present at the wedding in September 2022 and observed Ms. Broman dancing. However, he was not asked how long he observed her to be dancing for on that occasion. Furthermore, Mr. Bradford admitted that he had only seen Ms. Broman at a handful of events since the Accident and that he does not know when Ms. Broman left those events nor how her attendance affected her in the following days.

[35] Ms. Pang also gave evidence on behalf of the defence. She testified that Ms. Broman continued to dance at Phil-Can community events after the Accident much like she did before. However, Ms. Pang did not provide any specifics as to the frequency or duration that she observed Ms. Broman dancing. She did testify that attendees spent a lot of time sitting and talking at these events but acknowledged that she did not know how long Ms. Broman would sit at these events for and that she did not observe her afterwards. Given that Ms. Broman's symptoms have significantly worsened in the last five years, Ms. Pang's evidence on these points is of limited use because she acknowledged that she only saw Ms. Broman a handful

of times since the Accident and had not seen Ms. Broman in person for many years because she moved from Merritt in 2016.

[36] Before the accident, Ms. Broman spent much of her time with other members of the Phil-Can community. She would spend time with her friends walking in the community or in the local hills and would sometimes go on bicycle rides. Occasionally she would go on day-long road trips to places like Banff and Cultus Lake and she had no difficulty being in a vehicle for many hours. As her hip pain worsened, she no longer participated in many of these activities. Ms. Broman declined numerous invitations from her friends because of the pain she was in and they have stopped inviting her. She now spends most of her social time sitting and talking with her friends instead of being active. I accept that her injuries are partially responsible for her reduced social activity since the Accident. However, part of this reduction is attributable to her attendance at college to obtain her Licensed Practical Nurse (LPN) certification between September 2018 and February 2020. Ms. Broman acknowledged that her attendance at this program would have significantly reduced, or almost eliminated, her social life even if she was not injured because she had very little free time outside of school and work.

[37] Ms. Broman met her husband shortly after the Accident and they began dating in February 2015. They were married in May 2016. Mr. Broman testified that Ms. Broman's ability to participate in physical activities has declined markedly since the early part of their relationship. On their first date, Mr. Broman took Ms. Broman on a 20-minute walk on what he described as an uphill walk but not a challenging one. After approximately 400-500 metres up the trail, he observed Ms. Broman limping and she explained her hip pain to him. They turned around, did not complete the hike and went for a drive instead. Mr. Broman, who is a self-described outdoor enthusiast, encouraged Ms. Broman to try new outdoor activities such as kayaking and canoeing during the first year of their relationship. Ms. Broman would experience some pain during these activities but it was not debilitating at that time.

[38] By the time Mr. and Ms. Broman moved to Princeton, BC in 2016, Mr. Broman began to notice a significant decline in Ms. Broman's capacity for physical activity. She was frequently in pain when she returned home from work and it began to affect their intimacy. She would limp around the house and hold herself up with the door frames. Her sleep was disrupted. Nonetheless, Ms. Broman still tried to participate in activities with her husband and step-children. On one occasion shortly after moving to Princeton, the family went camping and on a hike. Ms. Broman was in significant pain by the time they got to the top of the hill and could not put one foot in front of the other on the way down because of how much pain she was in.

[39] Ms. Broman started stand-up paddleboarding approximately two years ago. She finds that she can manage this activity as she does not do it for very long periods of time and she is able to switch positions while on the board. She has been advised to stay active and believes that paddleboarding is a good means of doing so. I do not agree with the defendant that her participation in this activity is an indication that her hip pain is significantly less debilitating than she has described. Similarly, I do not accept that her going on a trip to Europe with her family in the summer of 2022, or on relatively short drives in BC, as an indication that she has exaggerated her symptoms. She testified as to the limits she had while on these trips because of her hip pain. I do not find her participation in these activities to detract from her evidence. As the plaintiff testified, she still wants to "live" and participate in some things with her family. As stated by Murray J. in *Senger* at para. 20: "[p]laintiffs cannot be expected to cease living once they commence a lawsuit."

Employment and Education

[40] Ms. Broman worked as a nanny in Merritt immediately following her arrival in Canada in 2010 and worked full-time as a nanny until 2013 or 2014. She did not have any physical limitations with respect to the cooking, cleaning, walking, and childcare activities that she was required to do as a nanny. In February 2013, Ms. Broman began working full-time at a 7-Eleven while maintaining part-time hours

as a nanny. She took on the full-time position at 7-Eleven to enable her to send more money to her family in the Philippines. Before the Accident, Ms. Broman had no difficulty with the physical demands of her job at 7-Eleven which included sweeping, mopping, garbage removal, and stocking shelves. Ms. Broman worked hard; she took extra shifts and was promoted quickly. Ms. Broman's performance reviews at 7-Eleven were excellent.

[41] Following the Accident, Ms. Broman was completely off of work and did not return until January 2, 2015. At trial, Ms. Broman stated that when she returned to work at 7-Eleven, she was on modified duties until she left 7-Eleven in February or March 2015. At her examination for discovery, she stated that she was on modified duties for one-and-a-half months following her return. Employment records indicate that Ms. Broman's employment with 7-Eleven ended in April 2015.

[42] Ms. Broman came to understand that she could begin a career in healthcare through a means of 'bridging'. Through this process, she would obtain her qualification to be a care aide, work as a care aide while she earned money and credits towards the next step as a LPN, then work as an LPN and earn credits again towards the final step and her final goal of being a Registered Nurse (RN). Ms. Broman began her studies to become certified as a care aide in September 2014. The job aligned well with her interest and desire to help elderly people. She was a full-time student and attended the program from 9 am to 4 pm, Monday to Friday. During this time, she continued to work full-time hours in the evenings and on weekends at 7-Eleven. Following the Accident, Ms. Broman found some of the physical requirements of the practicums required by the care aide program challenging but she pushed through because she had a strong desire to graduate.

[43] Ms. Broman completed her care aid certification in or around April 2015. Ms. Broman did very well in the care aide program and was offered a number of positions following graduation. She accepted a position at Coquihalla Gillis House ("Gillis"), a long-term care facility in Merritt, in April 2015. Ms. Broman began in a

casual position and picked up as many shifts as she could. In 2016, she was given a permanent 0.7 full-time equivalent position.

[44] The care aide position at Gillis was physically demanding and included transferring patients from chairs to beds, the use of ceiling slings, washing and toileting patients, assisting patients with feeding and their personal care, and doing laundry. The job required a significant amount of walking and standing. Ms. Broman had difficulties with walking, morning and evening care, night rounds, toileting, and bending a lot. At that time, Ms. Broman's hip pain was less severe and her limp was less pronounced than it was at the time of trial. In 2015 and 2016, Ms. Broman's hip pain would mainly flare up after working two days in a row or when she picked up overtime shifts.

[45] In the spring or summer of 2016, Ms. Broman moved to Princeton with Mr. Broman because of Mr. Broman's employment. She began working at the Ridgewood Lodge near Princeton as a care aide and she maintained her casual position at Gillis because she felt certain that she and Mr. Broman would return to Merritt at some point. She found the drive between Princeton and Merritt to be difficult as it aggravated her hip pain.

[46] Mr. and Ms. Broman moved back to Merritt in June or July of 2018. In September 2018, Ms. Broman commenced her studies to become an LPN. The LPN program was full-time and Ms. Broman described it as being intense; it required attendance at lectures, labs and practicums, and many hours of studying in the evenings and weekends. During her LPN studies, Ms. Broman maintained her casual employment as a care aide at Gillis and worked between seven and 21 hours per week in addition to her full-time studies.

[47] The LPN practicum shifts were typically 12 hours' long. She found the practicums to be physically difficult and her pain worsened. Ms. Broman took a lot of pain medications in advance of these shifts in an effort to manage the pain. She also made some informal accommodations during both the classroom and practicum

components. Driving to facilities in Kamloops and Kelowna from Merritt aggravated her hip pain.

[48] Ms. Broman completed the LPN program in February 2020 and was immediately hired as an LPN at Gillis. The job duties of an LPN were still physically demanding and required a significant amount of standing and walking. Despite policies requiring two persons to lift patients, LPNs at Gillis often found themselves performing one person lifts due to constant staff shortages. Ms. Broman's hip pain had become considerably worse by the time she began as an LPN at Gillis and her pain was aggravated by her work there. By halfway through her shifts, Ms. Broman would find herself frequently hanging onto the wall or a chair because she was limping so much and the pain was so severe. Carol Parsons, a care aide who worked with Ms. Broman at Gillis since approximately 2016, observed Ms. Broman to be clearly in pain at work and saw her limping, favouring her right side, and preparing herself for shifts by applying medicated cream to her hip area. Ms. Parsons and others would assist Ms. Broman by taking on some tasks for her. Ms. Broman's mental health deteriorated during this time.

[49] In August 2020, Ms. Broman was hired by Terri Stockwell (a manager and RN) to begin a community-based LPN position with Nlaka'pamux Health Services Society ("NHS"). The community-based program offered a variety of healthcare services to various First Nations in and around the Nicola Valley. The position required less heavy lifting and walking than the facility-based LPN position that Ms. Broman held at Gillis. However, the NHS position required a considerable amount of driving; often for many hours per day in order to reach the more isolated communities. Ms. Broman was first hired in part-time position but quickly moved to a full-time position.

[50] Ms. Stockwell had the opportunity to observe Ms. Broman on a frequent basis while they worked together at NHS and she had also been Ms. Broman's supervisor at Gillis for a time in 2015/2016. Ms. Stockwell testified that Ms. Broman had deteriorated significantly between the time she worked with her in 2015/2016 and

when she worked with her again in 2020, at which time Ms. Stockwell said that she could see that Ms. Broman was in pain. In 2020 and 2021, Ms. Stockwell spent nearly every working day with Ms. Broman, at remote nursing sites and in the car on long drives between locations. She observed the plaintiff limping. She noticed bags under Ms. Broman's eyes and Ms. Broman told her she was not sleeping.

Ms. Broman's mood was different than it was in the years before; she was less happy and did not joke and smile as much as she did before. On one occasion, Ms. Stockwell was so concerned about Ms. Broman's pain levels that she insisted that Ms. Broman make an appointment to follow up with her general practitioner. On other occasions in 2020 and 2021, she would send Ms. Broman home when she arrived at work in so much pain that she would be in tears.

[51] Ms. Broman found the constant driving to be very difficult and it aggravated her hip pain. Ms. Stockwell, who invariably travelled with Ms. Broman as the registered nurse on duty, informally accommodated Ms. Broman by assuming the responsibility for driving so that Ms. Broman could try to manage her pain. She observed Ms. Broman to put her legs up on the dashboard and / or recline her seat so she could stretch and relieve pain. She observed Ms. Broman hitting or pounding on her hip on a frequent basis. Ms. Broman exhibited this behaviour in court and explained that she did this to provide distraction from the pain and discomfort. Despite Ms. Stockwell's informal accommodation, Ms. Broman found that she was in a similar amount of pain after a day of driving in the community-based program as she was after a shift at Gillis.

[52] Ms. Stockwell left her position at NHS in September 2021. The employer offered Ms. Broman a raise to stay in her position. Ms. Broman considered quitting but felt obligated to stay and assist the communities affected by the significant floods in the fall of 2021. Ms. Broman left her position at NHS on December 31, 2021.

I accept that she left this position for a number of reasons including the fact that she had to drive more after Ms. Stockwell left which was more aggravating for her hip than being a passenger. I also accept that Ms. Broman left this position, in part, due to her concern of putting her LPN licence at risk because she was not working under

the direct supervision of an RN after Ms. Stockwell left and because there were some other concerns with the work environment.

[53] In January 2022, Ms. Broman returned to Gillis and obtained a full-time permanent position as an LPN on the evening and night shifts. She found this to be very physically difficult. Her hip pain got worse and she found that on her days off she was unable to do anything because she was in so much pain. By February 2022, Ms. Broman could barely walk through the door when she got home after a shift. However, she was reluctant to give up her position because finances were tight, and she still had student loans to pay and family to support in the Philippines. She persevered a little longer but eventually gave up her full-time position at the end of March 2022.

[54] In the summer of 2021, while still employed by NHS, Ms. Broman trained to become qualified in foot care nursing. She had seen a need for such care in many of the communities she visited as part of the NHS community-based position. She had planned to start offering her services as a foot care nurse in the fall of 2021 but she delayed that when the fires and then the floods occurred. After she left the NHS position at the end of 2021, Ms. Broman visited a handful of clients in their homes for foot care while working at Gillis. After she left Gillis in April 2022, Ms. Broman was presented with an opportunity to purchase a manicure / pedicure spa business. She purchased the business for \$30,000 and converted it into a foot care nursing facility in the spring of 2022. Ms. Broman limits the number of clients she sees each day because of her hip injury. She finds that sitting is painful but her symptoms are not as bad as when she worked for NHS or Gillis. Ms. Broman still picks up the odd shift at Gillis because she wants to maintain some seniority in case the foot care business does not work out and also because retaining some shifts allows for some student loan forgiveness.

Housekeeping and Home Renovations

[55] Ms. Broman lived in a basement suite with Ms. Guirpo and another roommate at the time of the Accident. Ms. Broman describes herself as a “neat freak” and I

accept that she did much of the cleaning in the suite. She also shovelled snow and removed garbage when the landlord was not there. Ms. Broman had no difficulties with the physical demands of these tasks before the Accident. Ms. Broman also enjoyed cooking.

[56] When Mr. and Ms. Broman first began living together in May 2016, they shared some of the household duties, including cooking. They informally agreed that Ms. Broman would take care of the chores inside the house and Mr. Broman would be responsible for the upkeep of the outside and yard.

[57] In recent years, Ms. Broman has had increasing difficulty with household chores. She finds cooking painful because she cannot stand for long periods of time without being in pain and she uses a stool to prop herself on while cooking and doing dishes. She is not able to keep the house to the same level of cleanliness as she did before. Mr. Broman and her step-children have stepped up to assist.

Treatments

[58] Ms. Broman's family physician recommended that she receive physiotherapy and massage therapy. She underwent physiotherapy in Merritt shortly after the Accident. However, there were few, if any, physiotherapists based in Merritt, and Ms. Broman was advised that the physiotherapist who travelled from Kamloops to Merritt to see clients weekly did not accept clients with ICBC claims. Consequently, Ms. Broman travelled to Kamloops for physiotherapy with a different therapist. However, Ms. Broman did not have a vehicle of her own and had to rely upon others to drive her there, so she only attended a handful of physiotherapy sessions from November 2014 to October 2015.

[59] At the time of the Accident, Ms. Broman could not afford massage therapy and had been advised that it would not be covered by insurance. She eventually attended massage therapy sessions beginning in October 2016. She attended for approximately 24 visits between then and March 2022.

[60] As I understand it, Ms. Broman did not receive much, if any benefit, from her physiotherapy and massage therapy visits.

[61] Ms. Broman was advised that the insurer would pay for the cost of a kinesiologist and she began seeing a kinesiologist in May 2022 and had approximately 23 sessions between then and September 2022.

[62] I accept that Ms. Broman faced a number of barriers to accessing treatment because of the cost and lack of funding provided by the insurer as well as a lack of resources available in Merritt due to its relatively small size.

[63] As the pain persisted, Ms. Broman visited her family doctor on numerous occasions in search of assistance. Ms. Broman was referred to a number of specialists in respect of her hip pain including a rheumatologist, two orthopaedic surgeons, and a physiatrist who specializes in pain management. Ms. Broman has also undergone a significant amount of imaging including X-rays, MRIs and CT scans on her hip.

[64] In 2019, Ms. Broman had surgery to repair a torn labrum and a mini-fracture in her right hip. The surgery was performed by Dr. Mark McConkey who specializes in hip surgeries. Dr. McConkey did not testify at trial. As I understand it, Dr. McConkey performed a labral repair, acetabular osteoplasty, femoral head osteoplasty, and microfracture of an osteochondral defect. Ms. Broman was on crutches and did not weight-bear for six weeks following the surgery and she was off work entirely for three months. Although she was hopeful that the surgery would relieve her pain, it did not; the pain returned as soon as she returned to work and she was off work for another two months. Follow-up investigations showed that the surgery itself was successful in repairing the torn labrum and the fracture so it appeared that was not the cause of her hip pain.

[65] In 2020, Dr. McConkey referred Ms. Broman to a physiatrist who specialized in pain management. The physiatrist performed fenestration of some calcific deposits in Ms. Broman's hip area. He also administered injections. Ms. Broman

found the injections to be very painful and the first injection provided her with some pain relief for only three to four days afterwards. She returned for another round of injections approximately six months later and again was provided with some very short-term relief. She was told that there was nothing further that the physiatrist could do for her.

[66] In a clinical note dated May 9, 2022, approximately three years after the surgery he performed, Dr. McConkey appears to have concluded that the only remaining possible intervention to try and relieve Ms. Broman’s hip pain was a trochanteric bursectomy. However, in the same clinical note, he stated that there was “limited evidence” that it would help her. After being advised of this, Ms. Broman testified that she reached the “end of her rope” and lost hope that she would ever get better.

[67] In 2019, Ms. Broman’s family doctor recommended that she obtain counselling. Options for counselling in Merritt are limited. Ms. Broman attended a group therapy session provided by the Interior Health Authority but she was uncomfortable in the group setting and did not continue. She attempted to obtain counselling over the phone but could not find a therapist that she had a connection with.

[68] Ms. Broman has taken a variety of prescription and over-the-counter pain medication and topical ointments in an effort to manage her pain. She has had some limited success. She was prescribed anti-depressants by her family doctor to address her significantly depressed mood.

EXPERT MEDICAL AND CAPACITY EVIDENCE

Orthopaedic Surgeons

[69] The plaintiff and the defendant each tendered an expert report from orthopaedic surgeons. Both were qualified as expert witnesses to give opinion evidence on the diagnosis, prognosis, causation, and treatment of orthopaedic injuries.

[70] Dr. Fay Leung examined Ms. Broman on November 16, 2018, and prepared an independent medical report on behalf of the plaintiff dated February 20, 2019. She prepared an addendum report dated July 22, 2022. The addendum report was based upon a review of documentation; Dr. Leung did not examine Ms. Broman a second time.

[71] Dr. Olli Sovio examined Ms. Broman on May 5, 2022, and prepared an independent medical report on behalf of the defendant dated that same day.

[72] Drs. Leung and Sovio both testified at trial. I do not agree with the defendant's submission that Dr. Leung did not "grasp the seriousness of the proceedings" or that she was advocating for the plaintiff. In light of the careful approach that Dr. Leung took to her reports and the careful and considered way that she answered questions, it is my view that the behaviour that the defendant points to in support of her submission is more likely the result of Dr. Leung being nervous to provide testimony in court for the first time.

[73] In her first report, Dr. Leung concluded that Ms. Broman's cervical spine pain had resolved and she diagnosed Ms. Broman with lower spine mechanical back pain and right hip pain. At that time, she queried whether the cause of Ms. Broman's hip pain was related to a labral tear that was visible on an MRI she reviewed. However, in her view, Ms. Broman's specific symptoms of pain were not consistent with pain arising from her labral pathology. Dr. Leung opines that the 2014 Accident is the cause of Ms. Broman's hip pain, and that the most likely diagnosis is trochanteric bursitis.

[74] In preparation for her addendum report, Dr. Leung reviewed clinical documentation relevant to Ms. Broman's hip pain that had been created since her first report, including the records of Dr. McConkey. Dr. Leung considered that Ms. Broman's pain had not resolved following the surgery and following interventions by the physiatrist. She considered MRIs done on Ms. Broman's hip in 2020 and 2022 and concluded that the most likely diagnosis of Ms. Broman's hip pain is trochanteric bursitis. Dr. Sovio similarly concluded that trochanteric bursitis is the

most likely diagnosis. Dr. Leung explained that trochanteric bursitis can develop as a result of trauma or as a result of wear and tear.

[75] Drs. Leung and Sovio also agree that the Accident is the cause of Ms. Broman's hip pain. When Dr. Leung came to this conclusion, she was unaware that Ms. Broman had been in the January and October 2017 Accidents. However, after reviewing the relevant clinical records related to the January 2017 Accident, Dr. Leung testified that her opinion on causation had not changed. Ms. Broman told Dr. Sovio about the January and October 2017 Accidents during his examination of her and he confirmed that he was aware of those accidents when he formed his opinion that the 2014 Accident caused Ms. Broman's hip pain. In his report, Dr. Sovio concluded that "... there does not appear to be any question that the patient's current symptomatology is in fact coming from injuries suffered in the specific motor vehicle accident."

[76] Drs. Leung and Sovio disagree, to an extent, on Ms. Broman's prognosis and treatment options. Dr. Leung opined in her 2019 report that Ms. Broman's back pain is likely to persist for the foreseeable future but that no further treatment is necessary. Also in her 2019 report, Dr. Leung concluded that Ms. Broman's hip pain is likely to persist without intervention, although she did not expect it to get worse. In her 2022 addendum report, Dr. Leung provided her opinion on prognosis following the interventions conducted by the physiatrist and the surgery in the time since her 2019 report. She concluded that Ms. Broman's hip pain will persist. However, she opined that Ms. Broman is not at risk of developing a degenerative condition in her hip or of incurring further injury to the anatomy of her hip.

[77] Similar to Dr. Leung's opinion, Dr. Sovio stated in his report that Ms. Broman's symptoms are not likely to improve without further treatment. He testified that the pain associated with trochanteric bursitis can wax and wane, and while not usual, the pain can get worse over time. During cross-examination, he agreed that Ms. Broman's continued activity likely caused the worsening of her hip injury.

[78] Drs. Leung and Sovio do not agree on whether further surgery would be likely to help Ms. Broman. Both surgeons reviewed Dr. McConkey's May 2022 clinical note in which he references the possibility of performing an arthroscopic trochanteric bursectomy with fascia lata lengthening on Ms. Broman. Dr. Sovio is of the opinion that Ms. Broman should consider the arthroscopic trochanteric bursectomy. In his view, the procedure recommended by Dr. McConkey has a 90% success rate.

[79] Dr. Leung's opinion is that there is limited evidence to support the use of this particular procedure for Ms. Broman. She cites academic literature in support of her conclusion that the scientific literature regarding surgical outcomes for trochanteric bursitis is not robust. Dr. Leung notes that there are risks of surgery should Ms. Broman elect to proceed. She concludes that even if she undergoes surgery, Ms. Broman's prognosis remains guarded because of the lack of objective findings of lateral hip pathology on MRI, the duration of her symptoms, and her overall experience of disability arising from the injury.

[80] I prefer Dr. Leung's opinion with respect to the likelihood that the arthroscopic trochanteric bursectomy would help to alleviate Ms. Broman's symptoms. Her opinion in this respect is supported by academic literature. Furthermore, it seems to be a reasonable position to take given the difficulties that Ms. Broman has had in finding a solution for her pain in spite of trying numerous different treatments.

[81] In his report, Dr. Sovio seemed to suggest that Ms. Broman was not disabled from her hip injury, partly because Ms. Broman continued to work as an LPN. However, in court, Dr. Sovio agreed that Ms. Broman was experiencing a significant disability due to ongoing hip pain from the Accident. He came to this conclusion based on what Ms. Broman told him and based on her presentation during examination and interview. He also opined that, if surgery was unsuccessful and Ms. Broman was left with some or all of her existing pain, he would recommend that she avoid tasks that aggravate her hip pain and occupy herself with tasks that do not aggravate it.

Functional Capacity Evaluators

[82] Wendi Wright and Mary Jo Mulgrew are occupational therapists and work capacity evaluators. Both were qualified to give their expert opinions in functional capacity evaluations and cost of future care assessments. Ms. Wright assessed the plaintiff on November 9, 2021, and prepared a report at the request of Ms. Broman dated January 17, 2022. Ms. Mulgrew prepared a report at the request of the defendant dated May 11, 2022. Ms. Mulgrew did not meet with nor assess Ms. Broman; rather, she was instructed by defence counsel to prepare a “detailed document critique and review” of Ms. Wright’s report. Both Ms. Wright and Ms. Mulgrew testified at trial.

[83] Based on her assessment findings, Ms. Wright opined that Ms. Broman’s end of day capacity to perform her work duties is reduced; she observed instability in the plaintiff’s right leg such that her leg was not able to hold her weight. Ms. Wright noted that Ms. Broman’s co-workers often assist her with the more physically demanding jobs but that if she did not have those accommodations, she would struggle to perform her job duties even more than she already does. Ms. Wright concluded that Ms. Broman does not meet the physical demands for either the LPN or care aide occupational role because she does not meet the strength requirements and because she has limitations with prolonged periods of standing and walking, as well as kneeling and crouching, particularly when combined with moderate to severe stooping. She also concluded that Ms. Broman would not be physically capable of meeting the job demands of an RN. Ms. Wright is of the view that Ms. Broman’s injuries have rendered her less competitively employable within the nursing field.

[84] Ms. Wright also concluded that Ms. Broman is expected to have difficulty with leisure activities requiring prolonged periods of standing and walking – especially walking on inclines – and with tasks requiring prolonged periods of sitting. Ms. Wright encouraged Ms. Broman to continue to engage in paddleboarding because in her opinion, paddleboarding uses a significant amount of lower body stabilizing muscles, and may help to improve her hip stabilization.

[85] Ms. Wright attempted to assess Ms. Broman's capacity to perform work as a foot care nurse by conducting a simulation of her working position. Given Ms. Broman's reports of hip pain during the simulation which followed her participation in Ms. Wright's repetitive stair test, Ms. Wright concluded that Ms. Broman will experience functionally limiting pain related to the seated posture required by the foot care nursing when she is experiencing right hip pain flare-ups, which is daily.

[86] Ms. Mulgrew disagreed with most of Ms. Wright's conclusions. For example, she was critical of Ms. Wright's decision to have Ms. Broman engage in a repetitive stair-climbing test. In Ms. Mulgrew's opinion, this unnecessarily aggravated Ms. Broman's hip and skewed the testing for the remainder of the testing day. However, I accept Ms. Wright's explanation for why she included this test. While Ms. Broman may not be required to quickly go up and down stairs as part of her job as a nurse, she is sometimes required to go up and down stairs in community nursing settings. More importantly, I accept that Ms. Broman often arrives at work in pain. I agree with the plaintiff that the testing was appropriate to approximate her work duties on any given day as her regular job duties and activities of daily living also aggravate her hip injury. In my view, Ms. Mulgrew's other criticisms of Ms. Wright's methodology were adequately addressed by Ms. Wright's explanations during her cross-examination and they do not detract from the reliability of Ms. Wright's report.

[87] In her critique report, Ms. Mulgrew provides her opinion on Ms. Broman's functional capacity. In essence, Ms. Mulgrew is of the opinion that Ms. Wright's conclusion that Ms. Broman does not meet the physical demands of an LPN or RN is inconsistent with the fact that Ms. Broman worked full-time as a care aide and as an LPN. In my view, Ms. Mulgrew's "opinion" in this respect is little more than argument; this Court does not need the assistance of an expert to make such an inference. Furthermore, this conclusion is itself inconsistent with Ms. Mulgrew's opinion that Ms. Broman meets the criteria for jobs that require "light strength" but does not fully meet the demands of "medium strength" jobs (such as nursing).

[88] Additionally, Ms. Mulgrew acknowledged that just because someone does a job does not mean that they should do the job. Ms. Mulgrew's opinion entirely ignores Ms. Broman's stoicism and work ethic that drove her to continue in nursing despite her pain. Rather, Ms. Mulgrew appears to have come to the conclusion that no one, including Ms. Broman, would work through as much pain as Ms. Broman reported to have endured. In essence, Ms. Mulgrew does not believe that Ms. Broman is in as much pain as she reported. It is difficult to see how she can reliably come to such a conclusion considering that Ms. Wright's testing did not indicate that Ms. Broman's reports of pain were unreliable and considering that Ms. Mulgrew never met or tested Ms. Broman herself.

[89] I have decided to give Ms. Mulgrew's opinion very little weight. I found Ms. Mulgrew to be evasive, defensive, non-responsive and argumentative when under cross-examination. On more than one occasion she would not answer a question directly until instructed by the Court to answer the question put to her. She did not agree to almost any of the propositions put to her on cross-examination, even ones that reasonably called for agreement.

[90] Moreover, Ms. Mulgrew acknowledged that it is best practice to provide an opinion on functional capacity after having assessed the client in person and making her own observations instead of simply reviewing another practitioner's test results. Yet that is exactly what Ms. Mulgrew was instructed to do and what she did do. Ms. Mulgrew's conclusions are seriously undermined by the fact that she did not meet (or even speak) with the plaintiff and thus did not conduct any of her own testing. This Court has commented on the limited utility of these "critique" style reports in a number of other cases and I adopt those conclusions: for example, see *Wong v. Campbell*, 2020 BCSC 243 at paras. 51-56 and the authorities cited therein, and *Donovan v. Parker*, 2014 BCSC 668 at para. 37.

CAUSATION

[91] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury before damages are

assessed. 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 minimis*. 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.

[92] There is no real disagreement that the Accident caused Ms. Broman to suffer some injuries. The principal issue is whether the Accident caused Ms. Broman's hip pain to the extent that she experiences now.

[93] The plaintiff's position is that the Accident is the cause of her current right hip pain. She also argues that her low back pain (which now only flares up two to three times per year) was caused by the Accident. While she acknowledges that her neck pain and headaches resolved within months of the Accident, she submits that the pain she did experience was a result of the Accident. Finally, Ms. Broman argues that her depressed mood was also caused by the Accident.

[94] The defendant concedes the plaintiff sustained an injury to her neck, back, and hip as a result of the Accident. However, she says that not only did her neck pain and headaches resolve, but her back and hip pain had substantially resolved by 2017. The defendant argues that the 2017 Accidents, particularly the January 2017 Accident, are the true causes of her present-day symptomology. In taking this position, the defendant relies heavily on the fact that Ms. Broman's right hip pain has increased significantly since 2017. Without saying it in so many words, the defendant is essentially arguing that Ms. Broman is not being truthful about the progression of her injuries and that she is motivated to place the blame on the 2014 Accident for her current hip pain because she was found to be at fault for the 2017 Accidents. Therefore, if that was the cause of her hip injury, she would not be entitled to the damages in the quantum she seeks.

[95] I agree with the defendant that Ms. Broman's hip deteriorated some years after the Accident. Ms. Stockwell and Ms. Parsons both testified that they noticed Ms. Broman struggling more after 2017 than she did in 2015 and 2016. Mr. Broman also testified that Ms. Broman's physical health deteriorated compared to when they

first began dating in early 2015; however, he first noticed significant deterioration in 2016 when they moved to Princeton.

[96] The main problem with the defendant's position on causation is that it ignores the opinions of both expert orthopaedic surgeons. As discussed earlier, both Drs. Leung and Sovio opined that Ms. Broman's current symptomology is a direct result of the 2014 Accident. Both surgeons came to this conclusion with the knowledge that Ms. Broman was involved in the January and October 2017 Accidents. As discussed, both Drs. Leung and Sovio opined that Ms. Broman likely has trochanteric bursitis and that it was caused by the Accident. Neither have opined that the 2017 Accidents caused further injury to her right hip. The worsening of her pain is not inconsistent with the nature of trochanteric bursitis according to both experts. While both surgeons are somewhat perplexed by the amount of pain that Ms. Broman is in, they readily acknowledge that pain is a subjective concept and may also be influenced by other factors.

[97] I also find it compelling that the clinical records following the January 2017 Accident make no mention of Ms. Broman having aggravated her right hip injury. The same is true with respect to the October 2017 Accident. Rather, the records are consistent with Ms. Broman's testimony, which I accept, that her injuries in the January 2017 Accident were limited to her neck, upper back, chest, and concussion symptoms, all of which resolved rather quickly, and that the injuries sustained in the October 2017 Accident were minor and transient. As discussed earlier, I find Ms. Broman to generally be a credible witness. I am not of the view that she has created an elaborate untrue story in order to shift the blame from the 2017 Accidents to the 2014 Accident.

[98] I also do not accept the defendant's argument that an accident that Ms. Broman was involved in in 2013 materially contributed to her present-day complaints. There is simply nothing in the evidence that supports such a conclusion.

[99] I am also satisfied that Ms. Broman has suffered a psychological injury that was caused by the Accident and her subsequent experience with chronic pain. The

psychological injuries included depressed mood, suicidal ideation and significantly increased irritability. I do not accept the defendant's argument that Ms. Broman's depressed mood is attributable to her finding out that she could not bear her own children. While this was admittedly difficult for her, I accept that it was not devastating to her in the way in which the defendant has characterized it.

Ms. Broman takes great comfort and joy in being very involved in her step-children's lives. Furthermore, Ms. Broman was exhibiting symptoms of depression before she found out she was unable to bear children as evidenced by the fact that she was prescribed anti-depressants before this news was delivered to her.

[100] I find that Ms. Broman has met the burden upon her of proving that the Accident caused her present-day right hip and low back symptomology and the other physical injuries which have since resolved. I also find that the Accident caused Ms. Broman's psychological injuries.

DAMAGES

Duty to Mitigate

[101] A plaintiff has an obligation to take all reasonable measures to reduce their damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

[102] Once the plaintiff has proved the defendant's liability for their injuries, to establish a failure to mitigate, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.

[103] *Sulinska v. Payne*, 2021 BCSC 202 recently referred to the test for failure to mitigate by not pursuing recommended treatment:

[62] *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 sets out the test for failure to mitigate by not pursuing recommended treatment:

In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

[63] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, Justice Garson further discussed the nature of the test as follows:

[56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is “the extent, if any to which the plaintiff’s damages would have been reduced” by that treatment.

[Emphasis in original.]

[104] The defendant’s mitigation argument is two-pronged: the first is with respect to Ms. Broman having “refused” to proceed with the trochanteric bursectomy referenced by Dr. McConkey in his May 2022 clinical note. The second is in respect of what the defendant says is Ms. Broman’s “refusal” to seek formal accommodations from her employer.

[105] On the evidence before me, I infer that the first time that Ms. Broman was made aware of the trochanteric bursectomy procedure was around May 9, 2022. This is the date that that Dr. McConkey created the clinical note in which he states that Ms. Broman may want to consider the procedure. As discussed earlier, there is disagreement amongst the orthopaedic surgeons who testified in this trial as to whether that surgery would likely be effective in alleviating Ms. Broman’s hip pain. Ms. Broman testified that she is not leaning towards having the surgery at this time.

[106] In the circumstances, I have no trouble in concluding that the defendant has not met her burden in proving that Ms. Broman has acted unreasonably in not having had the procedure. First, the reference to the procedure was made in May 2022, merely five months before trial. It seems extremely unlikely that Ms. Broman would have been able to have the surgery before trial, even if she had wanted to, owing to long wait times. If she did have the surgery, it would most likely be far too early to tell if it was successful in alleviating her pain. Moreover, Dr. McConkey’s

reference to the trochanteric bursectomy in the May 19, 2022, clinical record falls well short of a recommendation; Dr. McConkey simply states that it is something that they could “try” and that he “cautioned her that [the procedure] is simply a trial to see if we can help her... there is really limited evidence that it would help”.

Dr. McConkey was not called to testify at this trial to further explain this statement. In light of what she was advised by Dr. McConkey, and in light of Drs. Leung’s and Sovio’s conflicting opinions on efficacy, it was, in my view, entirely reasonable for Ms. Broman to decide not to proceed with the surgery.

[107] There is no doubt that Ms. Broman has not sought formal accommodations from her employer at Gillis (the Interior Health Authority) or at NHS. However, I do not agree with the defendant’s characterization that Ms. Broman has “refused” to seek accommodations. There is no evidence that anyone has told or instructed or recommended that Ms. Broman seek formal accommodations and that she has refused to do so. Ms. Broman explained that her understanding was that formal accommodations were only provided for employees who were injured while at work, and since she was not injured at work, she did not believe they were available to her. Ms. Broman also explained that she is fearful of being seen as a complainer by her employer because she thinks that this may result in her losing her job. She attributes this to her upbringing in the Philippines where employment is extremely tenuous and job security is almost non-existent.

[108] In light of Ms. Broman’s particular circumstances, I do not find it unreasonable that she did not seek formal accommodations from her employer. The context in which she was raised cannot be ignored in assessing the reasonability of her actions. Moreover, her understanding of the availability of accommodations to those who were not injured at work is very similar to Ms. Parson’s who started working at Gillis in 2007 and became a care aide there in 2015. Ms. Parson understood that the accommodations were only available for on-the-job injuries and for a limited time until the individual was able to return to regular duties, and if unable, the employee had to be retrained for a different role. The only employee that Ms. Broman and Ms. Parson know who was accommodated was injured at work and had to be

retrained. Ms. Guirpo, who grew up in the Philippines and came to Canada at a similar time as Ms. Broman and currently works as an LPN at Gillis, is also unaware of what formal accommodations are available to Gillis employees.

[109] If I am wrong and it was unreasonable for Ms. Broman to not seek formal accommodations, I would nonetheless conclude that the defendant has not met her burden of proving that Ms. Broman's losses arising from her injuries would have been reduced or eliminated if she had sought accommodations.

[110] In her written submissions, the defendant states that formal accommodations are not limited to an employee being given reduced or light duties. Rather, she says that it is a holistic process that reviews an injured employee's restrictions and aptitudes to find them suitable work that takes their unique circumstances into consideration. However, this submission is not based upon evidence before me. Instead, it appears to be based on findings of fact made in *Marcon v. Lacasse*, 2022 BCSC 1133, which the defendant cites "for guidance". In that case, Ms. Marcon was employed as a nurse in the interior of British Columbia and, like Ms. Broman, her employment was governed by the collective agreement between the Health Employers Association of BC and the Nurses Bargaining Association: paras. 9 and 53. Ms. Marcon was injured in a non-work-related accident and made a request for and received formal accommodations: para. 47. In that trial, the "Coordinator of Duty to Accommodate Search" for the Interior Health Authority provided evidence of the duty to accommodate process in general and with respect to Ms. Marcon's file in particular: para. 56. Based on this, the defendant in this case suggests that Ms. Broman would have had a high likelihood of receiving formal accommodations if she had asked. While that may have been the evidence in the *Marcon* case, it is not the evidence before me.

[111] Ms. Stockwell provided the most reliable evidence of the process of receiving formal accommodations within the Interior Health Authority and her evidence left me with doubt as to whether Ms. Broman would have received accommodations if she had asked. Ms. Stockwell has been an RN since 1996 and has held positions as a

manager, supervisor, nurse and assessor within the Interior Health Authority in and around Merritt. She was the RN manager of Gillis for approximately ten years beginning in 2010. She explained that the process is comprehensive and involves the employer working with the employee, the employee's family doctor, and other care providers. The employee's union is also likely to get involved. In her experience, it is far more difficult to obtain accommodations if an individual's injury or limitation arises from something that did not occur on the job than if the employee was injured while working. In any event, Ms. Stockwell stated that there are no light duty jobs available at Gillis for care aides or LPNs. Relocation to a new community anywhere in BC would be required if an employee required light duty accommodations. As an aside, if Ms. Broman had made a formal request and had been offered a relocation in response, this Court would have had to consider the reasonability of Ms. Broman being required to make such a relocation as part of the mitigation analysis.

[112] Ms. Stockwell's evidence was not shaken on cross-examination and I accept it. I am unable to find that the defendant has met her burden of proving that Ms. Broman's damages would have been reduced if she made a request for formal accommodation.

[113] The defendant has not met her burden of proving that Ms. Broman failed to mitigate her damages by not undergoing the trochanteric bursectomy and by not making a request for formal accommodations.

Non-Pecuniary Damages

[114] 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, are only a rough guide as each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[115] The factors that should be considered in making an award of non-pecuniary damages are well established and were set out by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. They include the plaintiff's age, nature of the injury, severity and duration of the pain, disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships, impairment of mental and physical abilities, loss of lifestyle, and the plaintiff's stoicism.

[116] I have thoroughly described the injuries and their effect on Ms. Broman earlier in these Reasons. For the present purposes, I will highlight the following.

[117] Ms. Broman is in a very significant amount of pain on a daily basis due to her hip injury. She also experiences pain in her low back two to three times a year. Her pain has affected almost every aspect of her life, including participation in recreational activities and in particular with respect to her ability to work in her chosen profession. Her prognosis for recovery from her physical symptoms is very guarded.

[118] Although she continued to work as a care aide and received her LPN certification after the Accident, I attribute this to her stoicism and her outlook on life and employment arising from her particular background as opposed to it being an indicator that she was not in as much pain as she testified to. Ms. Broman has a strong desire to work and an extremely strong work ethic. She wants to be able to earn enough to send money back to relatives in the Philippines. She wants to earn money to pay back her student loans. Given her upbringing, it is not surprising that she fears being unemployed and fears rocking the boat with her employer. In my view, Ms. Broman is the definition of a stoic individual and she should not be penalized for her stoicism when it comes to the assessment of damages.

[119] Ms. Broman's mental health has deteriorated as a result of the Accident. It is not necessary for Ms. Broman to have been formally diagnosed with a mental illness in order for her to be compensated for a mental injury; rather, I am to consider the level of harm that Ms. Broman's symptoms represent: *Saadati v. Moorhead*, 2017 SCC 28 at para. 31. I have considered the effect that Ms. Broman's injuries and

limitations have had on her mood and outlook on life. I accept that she has thought of suicide as a means of stopping the pain. I also accept that her demeanour is markedly different than it used to be, as her husband, friends and co-workers testified to. I have also considered that I do not have any expert evidence with respect to the prognosis for Ms. Broman's mental health.

[120] The plaintiff cites the following cases in support of an award for non-pecuniary damages in the amount of \$170,000:

- a) *Marcon v. Lacasse*, 2022 BCSC 1133, where the court assessed non-pecuniary damages in the amount of \$170,000.
- b) *Helgason v. Rondeau*, 2022 BCSC 1330, where the court assessed non-pecuniary damages in the amount of \$160,000.
- c) *Fletcher v. Biu*, 2020 BCSC 1304, where the court assessed non-pecuniary damages in the amount of \$200,000.
- d) *Johnstone v. Rogic*, 2018 BCSC 988, where the court assessed non-pecuniary damages in the amount of \$145,000.
- e) *Nofle v. Bartosch*, 2018 BCSC 766, where the court assessed non-pecuniary damages in the amount of \$170,000.

[121] The defendant submits that an award of \$80,000 to \$115,000 is appropriate and cites the following cases as being comparable to the case at hand:

- a) *Petes v. Peterson*, 2021 BCSC 1838, where the court assessed non-pecuniary damages in the amount of \$75,000.
- b) *Javan Parast v. Curry*, 2020 BCSC 877, where the court assessed non-pecuniary damages in the amount of \$75,000.
- c) *Uppal v. Page*, 2021 BCSC 492, where the court assessed non-pecuniary damages in the amount of \$80,000.

[122] The cases relied upon by the defendant involve plaintiffs with much less severe injuries than I have found to be suffered by Ms. Broman, as well as plaintiffs with pre-existing conditions. While some of the cases cited by the plaintiff are of individuals with more severe injuries than Ms. Broman, they are closer to the circumstances of this case than the defendant's. However, none of the cases are more than a rough guide and I have assessed Ms. Broman's damages on the findings specific to this case.

[123] I find that Ms. Broman's loss of housekeeping capacity is more in keeping with a loss of amenities or increased pain while completing the tasks. In my view, it is more appropriate to include the award for this loss in the award of non-pecuniary damages as opposed to making a separate award. In the circumstances, it is within my discretion to do so and I decline to make an award under a separate head: *Kim v. Lin*, 2018 BCCA 77 at para. 33. Moreover, I do not see how the circumstances of this case are "special" such that a segregated non-pecuniary award is warranted: *Riley v. Ritsco*, 2018 BCCA 366 at para. 102.

[124] Considering the principles and factors set out in *Stapley* and in the authorities provided by counsel, and considering Ms. Broman's particular circumstances and prognosis, I conclude that a fair and reasonable award is \$160,000.

[125] The defendant submits that any award to the plaintiff should consider what she says is the measurable risk that the 2017 Accidents and medical conditions (osteoarthritis) would have detrimentally affected Ms. Broman in the future, regardless of the defendant's negligence. She submits that I should also consider the possibility of Ms. Broman undergoing a successful trochanteric bursectomy in the future. The defendant argues that consideration of these factors should reduce Ms. Broman's damages award by 30%.

[126] The defendant submits that Ms. Broman was diagnosed with arthritis in her right knee by her family doctor, Dr. McLeod, and osteoarthritis in her lower back by way of radiographic imaging done in 2019 and 2020. The defendant further states that Ms. Broman's complaints of right knee locking emerged at some point in 2019

which is five years after the Accident. She points out that both of these conditions appear to have occurred proximate in time to Ms. Broman’s marked decline in function. Thus, as I understand the defendant’s argument, I should conclude that there is a measurable risk that these conditions would have become symptomatic absent the Accident and her damages should be reduced accordingly.

[127] Defendants may argue that a plaintiff’s damages ought to be reduced to account for any “measurable risk” that a pre-existing condition would have detrimentally affected the plaintiff even absent the tortious event: see *Athey* at para. 35. In order for a deduction to be made on this basis, the burden of proof lies with the defence. Measurable risk must be based on the accepted evidence, and must be established as a “real and substantial possibility”, which falls below a balance of probabilities but rises above speculation: *Zacharias v. Leys*, 2005 BCCA 560 at para. 16.

[128] Therefore, to assess “measurable risk”, there ought to be accepted evidence on the following:

- a) What pre-existing condition or subsequent event might give rise to a “measurable risk” of some loss to the plaintiff?
- b) When would it occur?
- c) What would the symptoms be?
- d) How would the symptoms affect function?
- e) How would the function affect damages?

[129] I have concluded that Ms. Broman’s current hip pain was caused by the 2014 Accident. As discussed, the evidence before me does not support a conclusion that the 2017 Accidents aggravated Ms. Broman’s symptoms or are responsible for the deterioration in her condition. Given that lack of evidence, I am unable to determine there is a probability that Ms. Broman would have suffered the hip pain that she currently does absent the 2014 Accident.

[130] However, there is a real and substantial possibility that Ms. Broman may have experienced some low back pain absent the Accident owing to osteoarthritis in her lower back. Dr. Leung opined that Ms. Broman's 2019 X-ray and 2020 CT scan indicate moderate osteoarthritis of her lower back and Ms. Broman's relatively infrequent flare-ups of low back pain are consistent with this diagnosis.

[131] I do not find that the evidence supports a finding that Ms. Broman's right knee pain is attributable to arthritis in that knee or that she has arthritis in that knee. Dr. McLeod's diagnosis of osteoarthritis in Ms. Broman's right knee is not admissible in these proceedings because that diagnosis is contained within clinical records which are not admissible as a diagnosis which is the proper subject of an expert opinion. In fact, Dr. Leung opined that she would not conclude that Ms. Broman has osteoarthritis in her right knee based on the imaging that she has reviewed.

[132] There is a measurable risk that the arthritis in Ms. Broman's lower back would have detrimentally affected the plaintiff absent the Accident. Given the relatively infrequent nature of the flare-ups and the small role that Ms. Broman's back pain plays in the constellation of her injuries, a deduction of 5% from the non-pecuniary damages award is appropriate. Consequently, I find that Ms. Broman is entitled to an award of \$152,000 for non-pecuniary damages.

Loss of Earning Capacity

[133] An assessment of loss 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. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27.

[134] The proper analysis for past and future diminished earning capacity was summarized in *Grewal v. Naumann*, 2017 BCCA 158. Justice Goepel was writing in dissent, however, the majority agreed with the following analysis:

[48] ... 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 either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[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 economic 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 BCCA 211 at para. 21.

[Emphasis added.]

Loss of Past Income Earning Capacity

[135] Compensation for loss of past earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30:

[30] Thus, in my view, a claim for what is often described as “past loss of income” is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[Emphasis added.]

[136] Ms. Broman seeks \$93,301 for loss of past income earning capacity. The amount Ms. Broman seeks is partly based upon the calculations provided by Christiane Clark in her report dated May 3, 2022. Ms. Clark was qualified as an expert economist in these proceedings. She calculated Ms. Broman’s loss of earnings from her employment at 7-Eleven in 2014 and early 2015 as well as her loss of income in 2022 to the date of trial. Ms. Broman submits that her lost wages from 7-Eleven between November 16, 2014, and January 2, 2015, total \$2,850. For 2022, Ms. Clark determined what Ms. Broman would be expected to make as an LPN absent the Accident if she had worked full-time and then added the value of the employer paid benefits to come to a total of \$61,603. She then subtracted the amount that Ms. Broman earned as an LPN in 2022 and from her foot care nursing business in 2022 which totalled \$41,087. Thus Ms. Broman’s past loss of income earning capacity for 2022 is submitted to be \$20,516 (\$61,603 less \$41,087). Adding the loss from 7-Eleven of \$2,850 comes to a total of \$23,366.

[137] Ms. Broman testified that she missed or turned down a number of shifts as a care aide and LPN between 2015 and 2022. However, Ms. Clark did not calculate a loss from Ms. Broman's employment as a care aide or LPN between 2015 and 2022 because of the significant complexity caused by the various premiums provided for in the relevant collective agreement for overtime, days worked, consecutive shifts, holidays etc. Instead, Ms. Broman submits that the gross amount she earned in those years is 20% less than what it would have been but for the Accident. With reference to her actual earnings in those years, the plaintiff submits that she is entitled to a further \$69,935 under this head of damages for a total of \$93,301.

[138] The defendant accepts that Ms. Broman is entitled to an award of \$2,850 in respect of income she would have earned from 7-Eleven but for the Accident. The defendant also submits that Ms. Broman is entitled to a further \$7,956 in respect of time that she missed from work as an LPN following the surgery Dr. McConkey performed in 2019. This amounts to a total of \$11,990.

[139] Other than time missed due to surgery, the defendant takes the position that the plaintiff has not proven that she lost any income earning capacity as a care aide or LPN due to injuries suffered in the 2014 Accident. As I understand her argument, any losses that Ms. Broman did incur for this time period were a result of her failure to seek accommodations and / or that she was not actually limited by her injuries in her ability to earn income as an LPN or care aide.

[140] In respect of the income loss for 2022, the defendant argues that Ms. Broman would not have been required to leave her employment as an LPN at Gillis if she had sought formal accommodations. In the defendant's words, she "ought not to be responsible for the Plaintiff's ill-considered choice to become an entrepreneur rather than ask her employer about accommodations."

[141] I accept that Ms. Broman's injuries arising from the 2014 Accident were such that they impacted her ability to earn income from her employment as a care aide and as an LPN between 2015 and 2022. As described in the summary of evidence section in respect of Ms. Broman's education and employment above, Ms. Broman

suffered significantly and her symptoms were aggravated from working. Given Ms. Broman's upbringing, work ethic, and passion for her profession, there is a real and substantial possibility that she would have worked more shifts and earned more income but for the Accident.

[142] I come to this conclusion even though Ms. Broman's actual earnings during this period exceed the Canadian statistical average for those in her field. I do not accept that this is indicative of Ms. Broman not being as injured as she says. Rather, this anomaly is likely due to the fact that the census data used was based on earnings for 2015 and did not consider significant general wage increases that have occurred in BC since then, as well as the fact that the census is based on full-time earnings of 30 hours per week whereas Ms. Broman's collective agreement provides that full-time hours require 37.5 hours per week.

[143] Ms. Broman kept a log of shifts she missed after the Accident in respect of the injuries she suffered during that Accident. While that log may be incomplete and not entirely accurate, it is some evidence of the shifts that Ms. Broman turned down or missed due to her injuries. Nonetheless, I agree with the plaintiff that a mathematical calculation is not possible given the very complex remuneration structure pursuant to the collective agreement. In any event, the determination of the plaintiff's loss under this head is not a mathematical calculation; rather, it is an assessment made by weighing possibilities and probabilities of hypothetical events: *Grewal* at para. 49.

[144] In my view, it is appropriate to assess Ms. Broman's loss under this head with reference to a reduction in her capacity to earn income compared to the gross income she actually earned. I find that Ms. Broman's actual earning capacity was reduced by approximately 10-15% in 2015 and 2016 and then deteriorated further until the time she left Gillis in spring 2022.

[145] I have already discussed why I have determined that it was reasonable for Ms. Broman to not seek formal accommodations when I considered the defendant's argument on mitigation. To be successful on the mitigation argument, the defendant

needed to prove the required elements on a balance of probabilities, which she was unable to do. However, for the purposes of determining loss of income earning capacity, the requisite standard for past hypothetical events is a real and substantial possibility. In my view, the evidence before me does meet this lower standard and I find that there is a real and substantial possibility that Ms. Broman would have been offered some sort of formal accommodation had she made the request. I have factored this contingency into my assessment of damages under this head.

[146] I have also considered that Ms. Broman was enrolled in the LPN program between September 2018 and February 2020 and she would have been limited in the amount of shifts she would have been able to take during that period even if the Accident had not occurred. I have further factored in the agreed upon loss from her employment at 7-Eleven and have considered the time she missed from work due to the surgery she underwent in 2019.

[147] Taking the approach and considering the contingencies I have described above, I assess Ms. Broman's gross loss of past income earning capacity as being \$60,000. This amount is subject to applicable deductions which I expect that counsel can agree upon.

Loss of Future Income Earning Capacity

[148] The Court must answer two questions to determine a plaintiff's claim for loss of future earning capacity: 1) has the plaintiff's earning capacity been impaired by their injuries; and, if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time: *Pett v. Pett*, 2009 BCCA 232 at para. 8. As with past income loss, while it is somewhat attractive to apply a mathematical calculation, the assessment of the loss is a matter of judgment and must be based on the evidence as a whole: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. The way in which the assessment is carried out will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.).

[149] There are two possible approaches to an assessment of loss of future earning capacity: the “earnings approach” from *Steenblok v. Funk*, [1990] B.C.W.L.D. 1417, 1990 CanLII 3812 (C.A.), and the “capital asset approach” in *Brown*. Both approaches are correct. The earnings approach will generally be more useful when the loss is easily measurable: *Perren* at para. 32. Where the loss “is not measurable in a pecuniary way”, the capital asset approach is more appropriate: *Perren* at para. 12.

[150] Even where the capital asset approach is appropriate, the court should “ground itself as much as possible in factual and mathematical anchors”: *Knapp v. O’Neill*, 2017 YKCA 10 at paras. 17–19.

[151] A plaintiff is not excluded from an award for loss of future earning capacity simply because they are still able to work after the accident and even where their records of employment show that their income has been steady or increased since the accident. In *Willett v. Rose*, 2017 BCSC 627, Justice Smith held:

[69] Even in circumstances where employment data appear to show no reduction or even an increase in income following an injury, where a plaintiff continues to suffer to some degree from the effects of an accident which have an impact on his work, there is an impairment of earning capacity. For example, in *Cheung v. MacDonald et al*, 2004 BCSC 222, it was argued that the plaintiff’s income following the accident was higher than it had ever been. Mr. Justice Ehrcke said at paras. 84 and 85:

[84] As logically rigorous as that approach seems to be, it ignores the reality that Dr. Cheung continues to suffer to some degree from the effects of the accident, and that these effects have an impact on his work. While he may have demonstrated that he can, if he wills himself to, carry on and produce billings as high as before, one must ask whether it is reasonable to expect him to do so in the face of the pain he must endure.

[85] The proper question under this head of damages is not simply whether a plaintiff will suffer an actual wage loss, but rather whether there has been an impairment of his income-earning capacity. This latter approach treats the ability to earn income as a capital asset, and the proper question is then whether that asset has in any way been diminished by reason of the defendant’s negligence.

[152] In the recent decision of *Rab v. Prescott*, 2021 BCCA 345, the Court of Appeal provided guidance in respect of the analysis of damages for loss of future

income earning capacity. Justice Grauer held that once it is proven that there is a real and substantial possibility of a future loss of income, the court must then assess the likelihood of that loss materializing using the test for assessing whether a future hypothetical event will occur. The three-step process is described in *Rab* at para. 47:

[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 (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dorman* at paras 93–95.

[Underline emphasis added; italics in original.]

[153] The approach in *Rab* was recently re-affirmed and further explained in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 8-17.

[154] The Court must then review the overall fairness and reasonableness of the award: *Gregg v. Ralen*, 2018 BCSC 171 at para. 153.

[155] As I understand her submission, Ms. Broman seeks an award for loss of future income earning capacity using the earnings approach. She submits that an appropriate award is \$1,384,958. This amount is based upon a scenario that calculates Ms. Broman's without-Accident earnings to be \$1,976,850 from the date of trial (at age 38) to retirement at age 65. This scenario assumes that, absent the Accident, Ms. Broman would have worked as an LPN until 2027 at which time she would have reduced her hours in order to attend an educational institution for her RN certification and then would have worked as an RN from 2031 until retirement. It also includes 15% as non-wage benefits and assumes that Ms. Broman would earn 10% more than the average RN's earnings. The with-Accident scenario assumes that Ms. Broman is unable to return to employment as an LPN or RN and calculates Ms. Broman's income from the date of trial to retirement at age 65 as being \$591,892. This is based upon Ms. Broman operating her foot care business and

earning \$30,000 net income per year. Thus, Ms. Broman's loss of future income earning capacity is said to be \$1,384,958 (\$1,976,850 less \$591,892).

[156] In the alternative, the plaintiff submits that her loss under this head is \$1,138,696. The alternative position is based upon a without-Accident scenario that assumes Ms. Broman would remain employed as an LPN full-time until retirement. The with-Accident scenario assumes \$30,000 of net annual income from her foot care business until 2030 and then \$40,000 net income from then until retirement.

[157] The defendant argues that the evidence does not disclose a future event that could lead to a loss of capacity and that there is no real and substantial possibility that Ms. Broman will suffer a future loss as a result of her injuries. Thus, she says Ms. Broman is not entitled to any amount for a loss of future income earning capacity. In the alternative, if I am to find that Ms. Broman is entitled to an award under this head, the defendant submits that the award should be assessed using the capital asset approach. Assessed in this manner, the defendant says Ms. Broman's loss could be assessed at between \$146,800 and \$220,300, prior to deductions for other negative contingencies, representing a 10-15% loss of earning income capacity as an LPN from the date of trial to retirement.

[158] Contrary to the defendant's submission, I find that the first and second steps as set out in *Rab* have been met. In my view, Ms. Broman has established that there is a potential future event that could lead to a loss of capacity. That is, she suffers from a chronic pain arising from injury to her right hip. I find that there is a real and substantial possibility that this injury will impair her ability to earn income in the future (as it has in the past).

[159] The considerations discussed in *Brown* at para. 8 are relevant to determining whether there has been an impairment in Ms. Broman's capital asset (i.e. her income earning capacity). Those considerations include whether:

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

2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and
4. the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[160] As discussed earlier, I accept that Ms. Broman has suffered an injury to her right hip as a result of the Accident and that the injury has persisted. Consistent with both expert physicians' opinions, I find that Ms. Broman's condition is unlikely to improve without successful surgical intervention. On the evidence before me, I find that Ms. Broman is not likely able to work full-time as an LPN (or as an RN) without significant accommodations.

[161] Ms. Broman is clearly a very hard worker and is dedicated to her profession as a nurse. In my opinion, her decision to continue working as a nurse with the Interior Health Authority despite the amount of pain she was in is explainable when her upbringing and stoicism is properly considered. I agree with Ms. Wright that Ms. Broman is not physically capable of the job duties of an LPN. Ms. Wright's conclusion is supported not only by Ms. Broman's testimony, but also that of Ms. Stockwell. Ms. Stockwell had the opportunity to observe Ms. Broman on a daily basis for more than one year. Ms. Stockwell has very considerable experience as a nurse both in front-line and management positions over many decades and I accept her testimony in respect of the physical demands of the role of LPN. She testified that she would not hesitate to hire Ms. Broman due to her work ethic, competence, and her personality. However, she testified that Ms. Broman's hip injury would be a significant consideration in a hiring decision and that she would not be able to meet the demands of the LPN role at a facility like Gillis. The evidence supports a finding that Ms. Broman is less capable of earning income and less marketable or attractive as an employee.

[162] The defendant relies on *Fennell v. Mikulasic*, 2021 BCSC 2102, in support of her position that Ms. Broman's chronic pain does not lead to a conclusion that there is no real and substantial possibility that Ms. Broman will suffer a loss of income due to her injuries. However, I do not find this decision to be of assistance to the defendant. The plaintiff in *Fennell* was an office worker and the court held that the plaintiff's injuries would be able to be accommodated in a modern working environment: paras. 127-128, and 132. That is a far different situation than the case before me.

[163] While Ms. Broman's income ultimately increased after the Accident, I find this Court's decision in *Willett* to be directly applicable: Ms. Broman willed herself to work through a very high level of pain which took a toll on her. It is not reasonable to expect her to continue to endure that level of pain; she is not disentitled to an award for future loss of income simply because she is stoic and has a work ethic that drives her to work through the pain. As the Court of Appeal has held, it is a matter of common sense to conclude that the constant pain that Ms. Broman finds herself in will have a detrimental impact on her ability to work in the future: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41. Ms. Broman's injuries and level of pain, which I find to be exacerbated by her duties as an LPN, have resulted in an impairment of the capital asset which is her income earning capacity.

[164] Ms. Broman has derived a significant amount of self worth from her work ethic and ability to help her patients as well as her ability to support her family in the Philippines from her earnings. There is no doubt, in my view, that Ms. Broman views herself as being less valuable as a person capable of earning income in the labour market as a result of her injuries.

[165] The third step is to assess the value of Ms. Broman's possible future loss. As stated in *Rab*, this step must include an assessment of the relative likelihood of the possibility occurring. As has often been said, this analysis will always entail an element of crystal ball gazing.

[166] Ms. Broman's pattern of earnings and likely without-Accident future earnings as an LPN and RN can serve as a mathematical anchor from which I may assess a suitable award under the capital asset approach: *Knapp* at para. 19. Given her passion for health care, her excellent performance at school and on the job as an LPN, her desire to become an RN, and her strong work ethic, I have found that there is a real and substantial possibility that Ms. Broman would have gone on to obtain her certification as an RN if she had not been in the Accident. Ms. Clark's without-Accident calculation accounts for a period of time that Ms. Broman would work part-time in order to obtain her RN certification.

[167] However, in my view, Ms. Broman's calculation of her without-Accident earnings is likely overstated. While I accept that Ms. Broman has worked more hours than the average nurse in Canada, there is a real and substantial possibility that she would not work so much in excess of the average for the rest of her working life, particularly as her income increased and her other financial obligations decreased over time. The annual salary figures used by Ms. Broman in her calculations were not challenged. I find that Ms. Broman's likely without-Accident earnings from the date of trial to retirement at age 65, including the value of her non-wage benefits, would be \$1,797,105.

[168] However, I do not agree that it is appropriate to simply subtract the amount of Ms. Broman's projected with-Accident income from this amount. In my view, the plaintiff's calculation in this respect is speculative. On the evidence before me, I am of the opinion that the amount that Ms. Broman will earn from her foot care business is speculative. She may earn more or less. This Court heard evidence that there may be competition in the field in the near future which, in a market the size of Merritt, could have a significant negative impact on income. On the other hand, Ms. Stockwell gave evidence that the need for foot care nursing services is increasing. Furthermore, Ms. Broman was forthcoming that she would likely continue to pick up some shifts from the Interior Health Authority in order to remain eligible for student loan forgiveness and to maintain seniority. One can only speculate the impact this might have on her future earnings.

[169] I agree with the defendant's alternative position that Ms. Broman's loss should be assessed on the capital asset approach. I come to this conclusion for the reasons discussed in para. 168 and because at the time of the Accident, Ms. Broman's career path was not yet established. That is, Ms. Broman started working in her chosen career path in health care after the Accident and continued to work full-time hours until she returned to school to obtain her LPN certification, at which time she moved to part-time work and then worked full-time as an LPN at NHS and Gillis until early 2022, when she gave up her full-time position and commenced her foot care business. Her income has increased since the Accident which is attributable to her successful completion of the LPN program and obtaining employment in that field. In these circumstances, it is more appropriate, in my view, to assess the loss under the capital asset approach.

[170] In my view, Ms. Broman has suffered a significant reduction in her capacity to earn income in the future as a result of the Accident. I accept that Ms. Broman is not physically suited to jobs that require medium strength such as nursing. A variety of possible career paths, including the one she spent the last approximately eight years training for and practicing in, are not viable for her. It is likely that Ms. Broman will experience functionally limiting pain in her role as a foot care nurse which may mitigate any increased opportunity to earn more income from this business even if the market demand for these services increases.

[171] In determining Ms. Broman's loss of income earning capacity, I must consider the various positive and negative contingencies that may affect her capacity. Relevant contingencies in the present case include that Ms. Broman's condition may get better, particularly if she decides to have surgery and that surgery is successful, although that appears to be unlikely on the evidence I have accepted. I must also consider the real and substantial possibility that Ms. Broman, being a highly-skilled, motivated, intelligent and hard-working employee, may be able to attract alternative employment with suitable accommodations, either within or outside of employment with the Interior Health Authority. I must also factor in negative labour market contingencies, and the fact that Ms. Broman's condition may worsen with time.

[172] Considering these negative and positive contingencies, I find that a fair and reasonable assessment for Ms. Broman's loss of income earning capacity on a capital asset approach is \$650,000.

[173] In considering the fairness and reasonableness of this award, I note that it is roughly equivalent to a loss equal to 35% of her without-Accident lifetime earnings of \$1,797,105 based on her diminished earning capacity. In my view, a diminishment of capacity in this amount is more consistent with the evidence than the alternative position put forward by the defendant of a 10-15% reduction in capacity. This award better reflects Ms. Broman's very high work ethic and the real and substantial possibility that she would have continued to work more than full-time hours for many more years absent the Accident. Finally, the award properly considers the positive and negative contingencies that I have discussed above, particularly the real and substantial possibility that she will find well remunerated employment that she is physically capable of doing.

Cost of Future Care

[174] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore them to their pre-Accident condition, insofar as that is possible. When full restoration cannot be achieved, 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, 1985 CanLII 179 (S.C.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30.

[175] It is not necessary that a physician testify to the medical necessity of each item claimed; however, there must be some basis in the evidence whereupon the trier of fact can draw a link between the professional's assessment of pain and disability with the recommended treatment: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.

[176] In *Sharma v. Chui*, 2019 BCSC 2115, the court said the following about adjustments to be made and contingencies to be applied to the assessment of damages for the cost of future care:

[120] Assessment of damages under this head is complicated by the necessity to predict the future based on the evidence, but also make adjustments for contingencies: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 163, the court stated that the claim for cost of future care must be supported by evidence that demonstrates what a reasonable person of ample means would provide to meet the reasonable needs of the plaintiff. This is assessed on an objective basis that is fair to both parties.

[121] However, the court must have some assurance that the plaintiff will incur the costs. Damages should not be awarded under this head if it is unlikely the plaintiff will avail herself of the services in future: *Maltese v. Pratap*, 2014 BCSC 18 at para. 78. In addition, whether adjustments are necessary to account for contingencies that are either positive (improvement in the plaintiff's condition) or negative (additional care will be required) depends on the specific care needs of each plaintiff: *Langille v. Nguyen*, 2013 BCSC 1460 at para. 234.

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

[178] Ms. Broman seeks \$187,473 for the cost of future care. Her claim is based upon Ms. Clark's calculations which in turn is based upon Ms. Wright's cost of future care report. The defendant submits that the plaintiff is entitled to an award of between \$18,891 and \$35,000 under this head of damages.

Pain Management Program

[179] Ms. Wright and Dr. Leung recommend that Ms. Broman participate in a pain management program. In her responsive report, Ms. Mulgrew disagrees with this recommendation. She notes that Ms. Wright states in her report that a pain management program is recommended for individuals who:

- a) would like to increase their daily functioning;
- b) would like to learn how to self-manage their pain symptoms;

- c) are motivated to return to work, leisure, or homemaking activities but pain is a persistent barrier; and
- d) suffer from anxiety and depression as a result of their pain.

[180] Ms. Mulgrew concluded that Ms. Broman does not fit into any of the above criteria, and therefore, she disagreed with the recommendation. In cross-examination, Ms. Mulgrew testified that she came to this conclusion based upon her understanding of Ms. Broman's life which she derived from her review of Ms. Wright's report. Ms. Mulgrew never interviewed Ms. Broman and in cross-examination, she acknowledged that she does not have any first-hand knowledge of whether or not Ms. Broman meets the criteria set out by Ms. Wright.

[181] Contrary to Ms. Mulgrew's conclusion, the evidence before me supports a finding that Ms. Broman meets each of the criteria listed by Ms. Wright. Moreover, I do not understand how Ms. Mulgrew came to the conclusion she did based upon a review of Ms. Wright's report. I have given no weight to Ms. Mulgrew's opinion in this respect.

[182] I also do not agree with the defendant that Ms. Broman, by virtue of the training she received to become an LPN, has taught herself pain management skills that negate the need for her to attend a pain management program.

[183] In my view, given the interrelated nature of her physical and mental health symptoms, Ms. Broman would benefit from a pain management program and I am satisfied that she would avail herself of one if provided with the funding to do so. I find that \$2,500 is a reasonable amount for such a program.

Occupational Therapy – Homemaking Assessment

[184] Ms. Wright recommends that Ms. Broman receive an occupational therapy homemaking assessment. Ms. Wright explained that such an assessment would provide Ms. Broman with recommendations regarding the adoption of ergonomic body positioning for cleaning tasks and the use of ergonomic cleaning aids.

The assessment would also provide recommendation as to pacing and prioritization of tasks.

[185] I agree that Ms. Broman has had and will continue to have difficulty with cleaning tasks requiring standing and walking, as well as low-level cleaning tasks requiring kneeling, crouching, and severe stooping. In my view, the recommended assessment will assist Ms. Broman in completing these tasks in a manner that aggravates her pain the least. I do not agree with the defendant that Ms. Broman knows how to modify her behaviour in the manner that an occupational therapist would recommend simply because Ms. Broman is an LPN and was previously a care aide. There is nothing in the evidence before me that supports a finding that Ms. Broman's training provided her with the knowledge to make such modifications in respect of her own particular injuries and limitations.

[186] I find that \$1,200 is a reasonable amount for the services of a homemaking assessment provided by an occupational therapist.

Physiotherapy and Massage Therapy

[187] Ms. Wright recommends that Ms. Broman receive physiotherapy and massage therapy to treat flare-ups of her symptoms and as "a means to mitigate further functional decline". On cross-examination, Dr. Sovio testified that he would not recommend these passive therapies but acknowledged that monthly physiotherapy may be beneficial for strengthening muscles. There is no evidence before me that passive therapies would serve to mitigate any further functional decline attributable to Ms. Broman's hip injury.

[188] Ms. Broman testified that she would use these therapies if they were provided to her. However, on the evidence before me, it does not appear that Ms. Broman found such treatments to be beneficial in the past and I am not persuaded that she would avail herself of them in the future. Consequently, I decline to make an award for physiotherapy and massage therapy.

Kinesiology and Gym Membership

[189] In Dr. Sovio’s opinion, Ms. Broman would benefit from active therapies such as kinesiology. Both Ms. Wright and Ms. Mulgrew also recommend this treatment. However, they disagree on the amount of recommended sessions: Ms. Wright recommends 31 sessions and Ms. Mulgrew recommends 11.

[190] Ms. Wright’s recommendation for 31 sessions is said to be based upon her clinical experience as an occupational therapist working with individuals who have chronic hip pain. She recommends six months of weekly sessions followed by six monthly sessions to upgrade her program. Other than stating that Ms. Wright’s recommendation is “excessive”, Ms. Mulgrew provides no basis for her recommendation of 11 sessions.

[191] In my view, Ms. Wright’s recommendation is deserving of more weight than Ms. Mulgrew’s. I am satisfied that Ms. Broman will avail herself of these services and I find that \$2,000 is a reasonable amount for Ms. Broman’s participation in an active rehabilitation program.

[192] Ms. Wright recommends that Ms. Broman be provided with a one-year gym membership to support her kinesiology sessions. Ms. Broman participates in a home-based exercise program, and, on the evidence before me, I am not persuaded that she would use a gym membership. Therefore, I decline to make an award for one.

Psychological Counselling

[193] Ms. Broman seeks between \$750 and \$2,000 for psychological counselling. The defendant agrees that Ms. Broman should receive an amount for counselling but submits that the amount should be limited to \$760 because there are factors other than the Accident that have contributed to Ms. Broman’s need for counselling.

[194] Ms. Wright’s recommendation is to provide her with 8-10 sessions over the next year. Other than Ms. Wright’s recommendation, there is no evidence before me as to the appropriate number of sessions. However, I am of the view that counselling

is reasonably necessary and, in the circumstances, I have decided that \$1,500 is an appropriate amount for psychological counselling. I do not agree with the defendant that Ms. Broman's mental health struggles are more attributable to other factors.

Vocational Training

[195] Based upon Ms. Wright's recommendation, Ms. Broman seeks \$2,494 to provide her with 24-30 hours of vocational training. However, I am not persuaded that Ms. Broman is incapable of continuing with her foot care business and there is no indication in the evidence before me that she is truly considering an entirely different career path. Consequently, I am not satisfied that such training will be used or is reasonably necessary and I decline to make an award in that respect.

Seasonal and Periodic Housekeeping Assistance

[196] As far as I understand her opinion, Ms. Wright recommends periodic housekeeping assistance only if Ms. Broman continues with full-time employment as an LPN. The evidence does not suggest that this is likely and therefore, I decline to make such an award. Moreover, I note that Ms. Wright encourages Ms. Broman to maintain her housekeeping routine, while utilizing modifications learned from her occupational therapy homemaking assessment.

[197] Ms. Wright recommends that Ms. Broman receive seasonal housekeeping assistance. She suggests four to six hours of such assistance twice per year for a total of eight to 12 sessions per year. While I agree that tasks such as washing walls and windows, and cleaning light fixtures and baseboards, involve physical requirements that aggravate Ms. Broman's symptoms, I am not persuaded that the seasonal housekeeping assistance is reasonably necessary. On the evidence before me, I find that Ms. Broman is capable of doing these tasks if she paces herself and if she makes modifications that she will learn as part of the homemaking assessment. While increased pain in performing household tasks, and a decreased pace in completing them are compensable losses, I have already accounted for this loss in my award of non-pecuniary damages.

Assistive Devices

[198] Ms. Broman seeks an award in respect of a body pillow. Ms. Wright recommends the use of one to assist with the quality and quantity of Ms. Broman's sleep. I accept that Ms. Broman has had significant disruptions to her sleep as a result of her hip injury. I am also satisfied that Ms. Broman has a body pillow and uses it and finds it helpful. In my view, replacing such a device every three to four years is reasonable. The present value of such an award is submitted to be \$1,740. I find this amount to be reasonable and award her this amount.

[199] Ms. Wright recommends ergonomic cleaning aids such as a long-handled scrub brush, long-handled toilet brush and long-handled duster to facilitate improved comfort when Ms. Broman is engaged in certain housekeeping tasks. In my view, it is likely that the Bromans own a scrub brush, a toilet brush and a duster; there is no evidence before me of the difference in cost between the items recommended and the ones likely owned by the Bromans. I decline to make an award for these items.

[200] The defendant agrees that Ms. Broman is entitled to \$166 and \$361 for the cost and periodic replacement of an electric heating pad and a handheld massager, respectively. The defendant also agrees that Ms. Broman is entitled to \$1,069 for a clamp-on bath tub bar and shower chair to facilitate safe bathing in light of Ms. Broman's hip injury. I agree that these items are reasonably necessary and that the amounts are reasonable.

[201] I award a total of \$3,336 in respect of assistive devices.

Medications

[202] Ms. Broman claims between \$17,427 and \$36,166 as the present value of the cost of reasonably necessary medications. The defendant agrees that Ms. Broman is entitled to \$16,543 in respect of certain prescription medications for pain but that she is not entitled to an award for over-the-counter pain medications or creams nor is she entitled to an award in respect of medications prescribed for mood and / or depression.

[203] The non-prescription medications claimed are for ibuprofen and acetaminophen as well as a topical rub and a vitamin supplement. Ms. Broman testified that she takes these medications fairly regularly to manage flare-ups and as a preventative measure when she is about to undertake physical activity that may aggravate her hip. In my view the use of these over-the-counter medications is reasonably necessary. I come to the same conclusion with respect to Ms. Broman’s use of a topical rub that provides her with some temporary relief.

[204] However, I do not find that Ms. Broman’s use of magnesium supplements is reasonably necessary and related to her hip injury. While Ms. Broman originally testified that the magnesium supplement was used to mitigate the side effects of certain medications, she later testified that she took it to strengthen her bones. There is no evidence before me that taking magnesium is related to her hip injury, which has not been said to be related to her bone strength.

[205] I accept that Ms. Broman’s use of anti-depressants is reasonably necessary. As discussed earlier, this medication was prescribed by a medical professional prior to Ms. Broman learning that she could not have children. For the same reasons discussed earlier, I am not persuaded that these medications are for conditions that arose from something other than the Accident, and in my view, Ms. Broman is entitled to an award for their use in the future.

[206] In my view, the midpoint of the plaintiff’s present value calculation is a reasonable award for Ms. Broman’s medications, less the claim for magnesium. Consequently, I award \$25,000 for medications.

Summary of Cost of Future Care Award

[207] In sum, I award the following cost of future care items:

Pain Management Program	\$2,500
OT Homemaking Assessment	\$1,200
Kinesiology / Active Rehabilitation	\$2,000
Psychological Counselling	\$1,500

Assistive Devices	\$3,336
Medication	\$25,000
Total	\$35,536

Special Damages

[208] The parties partially agree on the amount of special damages: the plaintiff claims \$13,322 and the defendant agrees to \$12,617; a difference of \$705.

[209] For the reasons given above with respect to the use of magnesium, I also do not find that these are reimbursable. It is not clear to me that Ms. Broman’s use of Levocarb, turmeric, or Epsom salts was related to the Accident. It is also not clear to me that Ms. Broman’s use of a topical spray was medically necessary. Therefore, I decline to make an award for those items and the associated mileage.

[210] Ms. Broman claims the cost of purchasing insoles and running shoes as a special expense. In my view, these have not been shown to be reasonably medically necessary, and in any event, Ms. Broman would likely have purchased high quality footwear as an LPN even if she had not been involved in the Accident. Consequently, I decline to make an award for those items.

[211] For the reasons discussed above in my consideration of the cost of future care items, I find that the use of the topical pain rub and the anti-depressants are reasonably medically necessary and are compensable.

[212] As a result of my findings, Ms. Broman is entitled to \$365 of the \$705 in dispute, and consequently, she is entitled to a total of \$12,982 in special damages.

CONCLUSION

[213] Ms. Broman’s claim for damages is allowed and the defendant is liable for the damages awarded. In summary, I award the following:

Non-Pecuniary Damages	\$152,000
Past Loss of Income	\$60,000
Future Loss of Earning Capacity	\$650,000
Cost of Future Care	\$35,536
Loss of Housekeeping Capacity	Included in Non-Pecuniary Damages Award
Special Damages	\$12,982
Total	\$910,518

COSTS

[214] Subject to circumstances of which I am unaware, the plaintiff is entitled to her costs of the action at Scale B. Should the parties wish to make submissions on costs, they may arrange to do so with Supreme Court Scheduling. Any such arrangements to speak to the matter of costs must be made within 45 days of the date of these Reasons for Judgment.

“Majawa J.”