

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hall v. Lyall*,  
2023 BCSC 260

Date: 20230228  
Docket: M207196  
Registry: New Westminster

Between:

**Andrew Hall**

Plaintiff

And

**Kelsey Ann Lyall and Gabrielle Margaret Lyall**

Defendants

Before: The Honourable Justice Norell

## Reasons for Judgment

Counsel for Plaintiff:

G. Smith

Counsel for Defendants:

J. Montpellier  
R. Kinghorn

Place and Dates of Trial:

New Westminster, B.C.  
September 20-22, 26-28 and  
October 4, 2022

Place and Date of Judgment:

New Westminster, B.C.  
February 28, 2023

**Introduction**

[1] The plaintiff, Andrew Hall, seeks damages for injuries he suffered when the bicycle he was riding and a motor vehicle collided on October 24, 2016. Liability for the accident has been admitted.

[2] Mr. Hall suffered physical injuries which resolved within weeks or months. He also suffered a mild traumatic brain injury (“MTBI”), otherwise known as a concussion. The extent of the effects of the MTBI is the focus of this lawsuit. Mr. Hall claims that the MTBI caused him to lose his planned career as a physiotherapist. He is now self-employed as a kinesiologist. The defendants dispute that he would have become a physiotherapist, and that the remaining symptoms have affected his earning capacity.

**Mr. Hall’s Evidence****Pre-Accident**

[3] Mr. Hall was 25 years old at the time of the accident, and is 31 now.

[4] He participated in triathlons from a young age. At age 16, he began racing in national triathlons for athletes up to age 19. At age 18, he moved to Victoria where the national triathlon program is based, and joined their development program. Mr. Hall stayed in the program for six months, and then joined a private triathlon club which competed at the same level. At age 19, he obtained a licence with the International Triathlon Union which gave him access to certain races. Mr. Hall was not a paid athlete, but raced against international athletes. He also enrolled at the University of Victoria (“UVic”) for part-time studies. He had a significant training schedule. Mr. Hall stopped racing in 2013/14 when he was 23.

[5] After he stopped racing, Mr. Hall continued to attend UVic part-time in the kinesiology program. His plan was to apply for admission to the master of physiotherapy program at the University of British Columbia (“UBC”) once he obtained his degree. After struggling in his first year, he improved his study habits and said that as he progressed, he became one of the best students in the

kinesiology program. He did not graduate in the top 10% of his class, but his transcript shows good marks. He graduated with a B+ average.

[6] In May 2016, after seven years of part-time studies, Mr. Hall graduated from UVic with a bachelor of science with a major in kinesiology. Mr. Hall's parents were very supportive of his fitness and sports goals and had financially supported him throughout university. He was on title with his mother to a mortgage-free home ("Home") in Victoria where he lived, and he received the rental income from the basement suite. Upon graduation he took the summer off to travel and do some hobby tasks. In September 2016, he was hired as a personal trainer by Innovative Fitness ("Innovative") in Victoria. This was his first job. The accident was the following month.

[7] In July 2016, Mr. Hall started the application process for the UBC physiotherapy program with the intent of gaining acceptance for September 2017. He did not apply to any other university. He thought UBC was the best fit as his family lived in the Lower Mainland, and he thought he would be accepted.

[8] Mr. Hall took five steps toward gaining admission. First, he obtained the bachelor degree which had the prerequisite courses. Second, from September to November 2016, he re-took a first-year on-line anatomy course to upgrade one of his poor marks ("Upgrade Course"). The accident took place in the midst of this. Third, he obtained the job at Innovative. This was partly for relevant work experience and partly for money. From September 2016 until he left Innovative in February 2018, he worked about 20 hours per week. Fourth, starting in late October 2016, he volunteered on Fridays at an after-school sports program for children with autism. Fifth, he practiced for the interview process at UBC.

[9] As for other aspects of his life just prior to the accident, Mr. Hall was cycling and weight training about 12 hours a week. He was dating his then girlfriend, now wife, Shannon Costello. He had no problems with fatigue.

**Accident**

[10] The accident happened in the morning while Mr. Hall was cycling to work. He was proceeding through an intersection and an on-coming car turned left in front of him. Mr. Hall's bicycle collided with the passenger side of the car. His knees hit the car and he was "flung almost in a somersault". The next thing he remembers was lying on the pavement. He has a brief gap in memory. Mr. Hall was wearing a helmet. He was taken to hospital and discharged later that day.

**Post-Accident*****Injuries***

[11] Mr. Hall said he suffered three categories of injuries – physical, cognitive, and emotional. Physically, he had bilateral knee, hip, and bilateral shoulder pain, headaches, vertigo and nausea, difficulties with eye tracking, and light sensitivity. Cognitively, he was having problems with memory, "brain fog", and mental fatigue. Emotionally, he was anxious regarding his injuries.

[12] He returned to work at Innovative two weeks after the accident and to his previous hours within a few weeks.

[13] His knees had large bruises and the pain caused him to be "largely immobile" for a week. The knee pain lasted six weeks. His knees felt unstable for two to three months. The hip pain resolved within two to three weeks. The left shoulder pain resolved within a month. The right shoulder symptoms took nine months to a year to resolve. The right shoulder felt unstable and he had pain with certain overhead movements. He had difficulty demonstrating exercises to clients and picking up free weights. He attended a physiotherapist for these injuries for seven months.

[14] Over time, the headaches decreased in frequency and intensity. He now gets headaches about once a week of mild intensity. The vertigo and nausea improved, and by six months, were only triggered by certain situations which he was able to avoid. His physiotherapist gave him eye tracking exercises. This caused nausea. He still gets nauseous from reading while riding in a car. He never had that problem before. For the first few weeks, the sensitivity to light caused him to avoid watching a

screen for long periods. Computer light was piercing and made his headaches worse. The sensitivity improved, but he still finds certain wave lengths troublesome.

[15] In the months after the accident, Mr. Hall had difficulties with staying focused and memory while reading. Sometimes he would read two or three words before he realized he was re-reading a line, or would read a paragraph or page, and have no recollection of what he had just read. In order to retain information, he had to stay very focused and read slowly. When he took the on-line test for the Upgrade Course, he had to try to stay focused. He did not seek a deferral of the exam. He did not become aware of his memory issues until some time after the accident. People would tell him that they had already told him something.

[16] Mr. Hall described the brain fog. He struggles with cognitively-demanding tasks that require him to problem solve on the spot and to multi-task. He became aware of this in the first few weeks after the accident. As the headaches and vertigo were subsiding, he could begin to differentiate between brain fog and headaches. He noticed it when he returned to work. When planning ahead to eliminate pauses in a training session, he would “freeze” and it would take him a minute or two to think what exercise his client should do next. When doing this, he paid less attention to the client’s form, and lost count of how many repetitions the client had done. Mr. Hall found the music and other coaches giving instructions to be distracting. The brain fog has since improved but is still ongoing.

[17] Mr. Hall had fatigue while working at Innovative. After the accident and up until early March 2017, he found it tiring to work in the morning starting at 6 a.m., and then come back to work in the evenings. He asked Innovative to condense his hours to the morning. He returned to work at reduced hours as some clients had been reassigned, and it took a few weeks to return to his regular hours. Mr. Hall’s clients were supplied by Innovative.

[18] Mr. Hall described that his current fatigue “ties more into motivation”, rather than physical tiredness. He could do a workout if he had to following work. When he

is feeling fatigued, he is less motivated to do other things such as housework. When he is fatigued he has greater brain fog, and it amplifies other symptoms.

[19] Initially, he had anxiety about his physical injuries, but as those healed and his cognitive problems did not, he had worry regarding the latter. His emotional strain is centered around the thought that he will no longer improve. He tries to be positive, but he is disappointed. He has not received any psychological treatment.

#### ***UBC Physiotherapy Program***

[20] The admissions process for the UBC physiotherapy program is competitive and includes an interview process (“Interviews”). Mr. Hall was invited to the Interviews and he participated in them in March 2017.

[21] Mr. Hall described that the Interviews involved a series of short, timed scenarios, which took place one after another in different rooms. Written scenarios were posted outside each room. Each interviewee had about two minutes to read the scenario before entering the room. In some rooms the interviewee provided an argument, in others the interviewee role-played with actors, and in others the interviewee had to write. The time in each room was five to six minutes.

[22] To prepare for the Interviews, Mr. Hall gathered information from people who had previously participated in the Interviews, and practiced with others and by himself. Mr. Hall feels that he was not doing as well in the practices as he otherwise would have because of his cognitive symptoms.

[23] Mr. Hall testified that during the Interviews, he had difficulty concentrating and reading, which influenced his ability to comprehend the information within the limited amount of time. He found that reading while also trying to think of a response was difficult. Within the acting scenarios, he found it challenging to respond to the actors and think on his feet. He feels he was slower to come up with solutions to those problems. Mr. Hall agreed that the Interviews were designed to be challenging.

[24] Mr. Hall was not accepted into the UBC physiotherapy program. His understanding is that he cannot ask why. He has not re-applied and does not

anticipate doing so in the “immediate future”. His decision not to reapply has been “highly impacted” because he feels discouraged from some of his “academic limitations”. At his examination for discovery, when asked why he did not reapply he said: “I was discouraged, and I found success in personal training and decided to continue to pursue that for the time being.” In cross-examination, he said that was one of the factors. He felt a sense of loyalty to his now business partner (Mr. Wang) and wanted to see if their business would be successful. He thought he may have to upgrade some courses, and he would have difficulty because of his limitations. He was not accepted in 2017 and did not go into business with Mr. Wang until late 2018. He agreed he has never tried to upgrade any other course, and that having been rejected once, he took no further steps to become a physiotherapist.

***Work at Innovative and Nomadic***

[25] In the spring of 2017, while still working at Innovative, Mr. Hall took an on-line course in “Functional Patterns”. This is a type of physical rehabilitation centered on posture and gait. Mr. Hall started to take in-person Functional Patterns courses.

[26] Innovative paid Mr. Hall \$20 per hour to provide personal training, which Innovative billed to clients at \$70 to \$80 per hour. Innovative agreed to pay Mr. Hall \$50 to \$60 per hour to provide Functional Patterns services, which Innovative billed to clients at \$100 per hour. Mr. Hall’s pay stubs reflect this change starting in late October 2017, after which he provided about six hours per week of Functional Patterns services on top of regular personal training. Mr. Hall said that in February 2018 he left Innovative to provide Functional Patterns services on his own, training people in their homes. This decision had nothing to do with his injuries. Mr. Hall agreed he could have gone to another gym. Initially, he had only a few clients. In cross-examination, he agreed that he was let go with severance. Innovative decided to no longer offer Functional Patterns services. Mr. Hall offering this service created some “drama” with the other trainers. At his examination for discovery, Mr. Hall stated that his injuries did not interfere with his ability to provide Functional Patterns services. He said that statement was true at the time, but qualified it by stating that it

was based on that specific time period, the Functional Patterns courses he had taken up to that time, and the types of clients he then had.

[27] Mr. Hall has since taken a total of four in-person Functional Patterns courses up to February 2022. These were full-time, week-long, and practical, where he learned specific exercise techniques. Comparing himself to his peers, Mr. Hall feels it took him “a bit more repetition to see or understand” the exercises.

[28] In late 2018, Mr. Hall and a friend Eric Wang, started their own business. In February 2019, they incorporated Nomadic Biomechanics Ltd. (“Nomadic”). Mr. Wang is also trained in Functional Patterns, and is the person who introduced Mr. Hall to it. They provide kinesiology and Functional Patterns services in leased space in Victoria. Mr. Hall and Mr. Wang met in 2014 while they were both students at UVic. In early 2017, Mr. Wang became employed at Innovative as well. They left Innovative within about month of each other in early 2018.

[29] In the first two fiscal years, Nomadic did not make a profit. Mr. Hall was supported by rent from the Home, and Ms. Costello. In 2021, Mr. Hall and Mr. Wang were able to pay themselves a small income. Nomadic’s year end is August 31. Although Mr. Hall did not have the financial statements for 2022, he expected to pay himself about \$20,000 for that fiscal year. Mr. Hall intends to continue with Nomadic.

[30] With respect to how his injuries have affected his operation of Nomadic, Mr. Hall tends to defer to Mr. Wang who is the primary person who set up the banking, retained an accountant, obtained permits and insurance, and bought and replaced equipment. Mr. Wang had the initiative to do those things.

[31] Mr. Hall testified that in 2019, the most he saw clients was 16 hours per week, with an average of 10 hours. That has increased over time, and in 2022, the most he saw clients was 34 hours a week, with an average of 24 hours. He finds some aspects of his work fatiguing. Mr. Hall gets referrals from physiotherapists and a chiropractor, and has received good reviews. In November 2021, he began to limit his clients and started a wait list where he is “creating a threshold” of about 25 hours

per week of client-facing time, because when he exceeds that, he gets mental fatigue and headaches more prominently.

[32] Mr. Hall described that clients which require more thought and mental resources are fatiguing. If he is training a complex or difficult client, he has to “come up with different regressions” and ways to demonstrate an exercise. That is when he starts to feel more overwhelmed and tired. Sometimes when he has tried two or three things that are not working, he “kind of freezes up” and is “stumped for a minute or two” and tells the client to go get a drink of water and he uses that time to think of a solution. Or, he will revert to something with which he is more comfortable. As part of an initial client assessment, he takes a video of the client walking and will analyze that video in slow motion to make the biomechanics more visible for the client. If he does this for a “prolonged duration” he gets symptoms similar to when he reads in a vehicle. The fluorescent lighting can be distracting as it is bright and has a flicker. He agreed that he has tinted lenses for this.

[33] Mr. Hall said it was exhausting to work all day and then respond to emails in the evening. He sometimes asks his wife to help him find other words, or change the tone of an email if it sounds a bit sharp. When his wife was in first year university, as a more experienced student, he helped her with English class. Now she helps him. He said this is an example where it took comparing his ability to someone else “to really become more aware of what perhaps my deficits are”.

[34] On days that he has increased his hours and is experiencing fatigue, when he gets home from work, he is not motivated to do household tasks. Sometimes he will order in supper or defer chores to the weekend, or go to bed early. Mr. Hall explained again that it is not a physical fatigue. Mr. Hall agreed that after he left Innovative, he had to find his own clients, do his own marketing, and for the first time, run his own business. He does not have a baseline to which to compare this.

#### ***Statements to Experts***

[35] Mr. Hall was referred to statements he had made to a treating optometrist and experts he had seen for independent assessments. Mr. Hall confirmed that he made

these statements, and understood the importance of telling the truth as those experts would base their opinions on this information.

[36] Mr. Hall testified that when he was in grade six he was bullied because of his small stature. One of his coping strategies was to become very reserved and build up a shell, and not show any weakness. This has stayed with him, and as an adult he portrays that he is stoic and nothing is wrong.

[37] It is most informative to address the assessments and statements in chronological order. They all post-date the Interviews.

[38] In April 2018, Mr. Hall attended Dr. Sass, an optometrist, at the request of his counsel, and underwent various testing which I will describe later.

[39] In July 2018, Mr. Hall attended Dr. McCrodan, a treating optometrist. Mr. Hall completed a “quality of life checklist”. The symptoms that Mr. Hall endorsed as occurring “frequently”, related to reading (falls asleep when reading, skips or repeats lines while reading, and trouble keeping attention centered on reading). He endorsed that he had difficulty concentrating “occasionally”. Mr. Hall agreed all the answers were true except two. The first was that he “never” had fogginess. He said at the time he answered it, he thought it was true, but he has a different opinion now. The second was that he “never” was forgetful or had poor memory.

[40] In September 2018, Mr. Hall underwent neurocognitive testing with Dr. Corney, a neuropsychologist, at the request of his counsel.

[41] Mr. Hall saw Dr. Filbey, a physiatrist, a month later in October 2018 also at the request of his counsel. Mr. Hall’s primary concern was with respect to his right shoulder. Mr. Hall also reported that he had “auditory memory” and “reading and eye tracking” deficits. Mr. Hall told Dr. Filbey that he did not notice these problems but they were picked up by testing. When it was put to Mr. Hall that he had testified at trial that he had these issues when he was taking the Upgrade Course in 2016 and when preparing for the Interviews in 2017, and that they both could not be true, Mr. Hall said that he had noticed the symptoms following the accident and prior to

2018, and through repeated exposure he was able to differentiate them from other symptoms, and the testing confirmed that realization.

[42] Mr. Hall agreed he told Dr. Filbey that he was exercising 15 to 16 hours per week, and this was true. Mr. Hall told Dr. Filbey that he was employed 25 hours per week and he was “choosing this based on his desires and not his limitations”. Mr. Hall said the 25 hours was not correct. He had not looked at his work records, and when he did, he was working less than 10 hours per week. Further, at the time, he was still building his business and that was contributing to his lower work hours.

[43] Mr. Hall told Dr. Filbey that the dizziness and nausea had improved and only occur in “extreme situations”, such as if he were to watch an extremely shaky video, and on a day to day basis they do not bother him; he had no light sensitivity, his headaches were markedly improved, he could get some motion sickness when he surfed, and he was not able to read when in a moving car. Mr. Hall said that was a “relatively accurate” snapshot of his symptoms at the time except for the light sensitivity.

[44] Three years later, in July 2021, Mr. Hall saw Dr. Corney for a second time for neurocognitive assessment, at the request of his counsel. In direct examination, Mr. Hall was taken to this passage in Dr. Corney’s report:

Mr. Hall indicated that his current symptoms rarely have a significant impact on his day-to-day activities or his vocational functioning, which he suggested was due in part to most of his activities and vocational tasks being highly familiar and routinized, and therefore not cognitively demanding. He did, however, note that he occasionally experiences distractibility and/or attentional lapses at work, for example when he is required to communicate complex information to a client.

[45] Mr. Hall testified that since he had met Dr. Corney previously, he felt some connection with him and that Dr. Corney was invested in his progress, and Mr. Hall did not want to disappoint him. Mr. Hall said he had just been married the week before and was off work, so he may have been more positive. However, in June before he got married, he was having brain fog and cognitive difficulties and gave an example of a challenge with a particular client.

[46] Mr. Hall agreed that much of the testing was administered by an assistant, and he had very little to do with Dr. Corney. Mr. Hall disagreed that his evidence in direct examination was an attempt to reconcile the damaging information in Dr. Corney's report. He referred to his earlier evidence that he does not outwardly ask for help or complain. Referring to the above passage, he said that the nature of his character was coming through, and later in the passage he was trying to hint that he was looking for help.

[47] Mr. Hall disagreed with the words "not cognitively demanding". He said the vast majority of his clients have chronic pain and those sessions are more challenging. In contrast, he has a few clients who are athletes who are looking to improve fitness, and for those sessions, he does not have the same difficulty. As he has become more experienced and created more reputation within Victoria, he has received more complex cases. He said that he was "underselling it" when he spoke to Dr. Corney because he does not like to show vulnerability, and he is not a "great advocate" for himself.

[48] Mr. Hall said the words "highly familiar and routinized" are "less correct". Even though some of the strategies he employs at work can be the same, because clients are different, he has to adapt and problem solve on the spot.

[49] Mr. Hall gave examples of him "occasionally experiencing distractibility and lapses at work", similar to when he was at Innovative. He said another element is remembering each client's problem, for example if it is the right or left shoulder. He agreed there are memory aides such as writing something down.

[50] Mr. Hall said there was an "element of truth" to the words that his symptoms "rarely" have a significant impact on his day-to-day activities or his vocational functioning, but that is because he has created strategies to work around his limitations. He does not schedule multiple difficult clients in one day. Mr. Hall agreed that he reported to Dr. Corney that his cognitive difficulties do not appear with any "real frequency", but he does not agree that is accurate. He said when he met with

Dr. Corney he was working 22 hours per week or less. His business continued to build after that and as he has increased his hours, he is seeing more complex cases.

[51] Mr. Hall was taken to another passage of Dr. Corney’s report where he had told Dr. Corney that Nomadic had grown to the extent that he:

... at times feels overwhelmed and experiences a degree of work-related stress and anxiety. Having said that, he continues to enjoy the freedom and flexibility that is associated with being self-employed.

[52] Mr. Hall agreed that he stated the above to Dr. Corney. Mr. Hall was referred to the next sentence in that paragraph which states:

He estimated that, on a weekly basis, he spends, on average, 30 to 35 hours per week working one-on-one with clients, and an additional 10 hours per week performing various administrative tasks associated with his business.

[53] Mr. Hall agreed he said this, but said it was a mistake. He had not gone through his records at the time. When he did so, that number is incorrect.

[54] Mr. Hall was referred to Dr. Corney’s recommendation that in the future should Mr. Hall find that his cognitive symptoms interfere with his function to a greater extent, he could see a rehabilitation psychologist or an occupational therapist to develop strategies to minimize the impact. Mr. Hall has never attended one of those professionals to address cognitive issues.

[55] The next significant event occurred in November 2021, when Mr. Hall said he began creating a wait list and capped his client-facing time to 25 hours per week.

[56] In June 2022, Mr. Hall was interviewed by Mr. Willis, vocational rehabilitation consultant, at the request of his counsel. Mr. Hall described limitations at work which I will return to below. Mr. Hall also provided Mr. Willis with a description of an average day after the accident. His description included working from 10:00 a.m. to 5:00 p.m. (“Some days this will be broken up with 15 min to 1hr gaps between appointments for [C]ovid protocols or due to cancellations/scheduling”), and when he returns home at 5:30 p.m., doing administrative work such as emails and invoicing, and then preparing dinner at 6:30 p.m. Mr. Hall said this was accurate.

**Mr. Eric Wang's Evidence**

[57] The defendants objected to Mr. Hall calling Mr. Wang as a witness. This was the subject of a mid-trial application. I allowed the application, and due to court time constraints said I would give brief reasons here. At a trial management conference, Mr. Hall's counsel had been directed to provide defence counsel with notice and a will say statement, by two weeks before trial, of any further witnesses he would be calling. Mr. Hall's counsel did send this information concerning Mr. Wang, by email prior to the deadline. Defence counsel did not have an email address for delivery, but both sets of counsel had frequently used email to communicate with each other. Unfortunately, unbeknownst to both counsel, some emails to defence counsel's firm were not being received. This was discovered a couple days after the deadline. It took about another week for Mr. Hall's counsel to forward the will-say statement again. However, about a month prior to this, an adjuster for defence counsel had already interviewed Mr. Wang as he had been identified at Mr. Hall's examination for discovery. The applicable principles are set out in *Fu v. Zhu*, 2017 BCSC 749 at para. 50. In my view, these events were explained, unintended, and the defendants were not prejudiced in their ability to defend the case. However, refusing to permit Mr. Wang to testify would prejudice Mr. Hall and prevent relevant evidence on a central issue from being heard. It was in the interests of justice that Mr. Wang be permitted to testify.

[58] Mr. Wang met Mr. Hall in the 2014/15 university year. They had a few classes together and then started doing projects together. Mr. Hall's memory and ability to analyze information was better than his own. Mr. Hall was committed to his studies and fitness. When other students took a break in the common room, Mr. Hall did not. Mr. Hall's energy level was good. Despite training, Mr. Hall could still focus and take notes in evening lectures. Mr. Wang did not know Mr. Hall was a national level athlete until a year after they met.

[59] Mr. Wang knew Mr. Hall had been in the accident, but they did not have much contact at that time. Mr. Wang graduated from the kinesiology program in January 2017. In February 2017, he also started working for Innovative. He did not see

Mr. Hall often at Innovative, but when he first observed him, Mr. Hall was hesitant when moving equipment and when he picked up dumbbells, he would use his left hand only. In January 2018, Mr. Wang stopped working at Innovative.

[60] Mr. Wang took the first Functional Patterns on-line course in April 2017. He and Mr. Hall took the first in-person certification course together in late 2017. In the course, they practiced “cueing” each other doing exercises. Mr. Hall’s endurance and ability to focus was “pretty much the same” as it had been in university, but his ability to recall exercises was not. Mr. Wang had to sometimes prompt Mr. Hall to recall exercises. Since then, he and Mr. Hall have taken other Functional Patterns courses together. By the end of a course, Mr. Wang is “completely exhausted” but Mr. Hall physically “just keeps going”, but after Mr. Wang finds that Mr. Hall does not recall all that they have learned, and has to be reminded about it.

[61] When they went into business together, and based on his experiences with Mr. Hall in university, Mr. Wang expected that he and Mr. Hall would equally share the responsibilities of running a business, but he found that Mr. Hall would rarely take the initiative. Mr. Hall has taken on more responsibilities since then, but not as much as Mr. Wang had hoped he would. It seems that Mr. Hall has less energy in the winter with the fluorescent lighting on. He does not like the fluorescent lighting either and they try to keep it off. He notices Mr. Hall squints more with it on.

[62] In the summer of 2021, Mr. Hall started to get referrals from a physiotherapist and chiropractor. Mr. Wang knows Mr. Hall’s clients and these are tough cases. He can see on the calendar that if Mr. Hall is working from “9 a.m. to 7 p.m. straight with back to back clients”, none of those are difficult clients, but on days Mr. Hall has complex clients, he has fewer and they are not back to back. He notices that with more complicated clients, Mr. Hall is missing “variables”, but with easier clients, Mr. Hall “knocks them out of the park”. Mr. Wang volunteered that he does not know if this reflects his own personal preference of how he trains versus how Mr. Hall trains.

[63] Mr. Wang currently sees clients for about 27 hours per week. He considers this full time. He is fit and healthy. He charges \$90 per hour. Mr. Wang also has a wait list, which he bases on whether clients have committed to taking the Functional Patterns on-line course. Mr. Wang has to work as he does not have another source of income. This past year has been much busier for Nomadic.

[64] Mr. Wang agreed that running a business has challenges and there are a lot of things for which he and Mr. Hall are responsible. He agreed that Mr. Hall is passionate about his own fitness pursuits.

### **Expert Evidence**

#### **Dr. James Filbey**

[65] Dr. Filbey is a physiatrist and was qualified as an expert in that area. He assessed Mr. Hall on one occasion on October 11, 2018.

[66] Dr. Filbey's diagnoses were: MTBI; bilateral knee contusions with residual left iliotibial band pain; and a right shoulder contusion, query a labral injury. He opined these were caused by the accident. Dr. Filbey noted improvements in all of these and opined that the prognosis was good.

[67] Dr. Filbey recommended that for the vertigo and nausea, Mr. Hall gradually challenge himself by graded exposure to activities he wishes to participate in, such as surfing. With time, this would likely improve.

#### **Dr. Darren Sass**

[68] Dr. Sass is an optometrist and was qualified as an expert in that area. He has taken courses, self-study, and operated a clinic in the areas of developmental optometry and neuro-optometry, however, he has not completed a fellowship in neuro-optometry and was not qualified as a neuro-optometrist. He assessed Mr. Hall on one occasion on April 3, 2018.

[69] Dr. Sass diagnosed the following: near sightedness; eye movement dysfunction (e.g. losing place while reading); vertical misalignment of the eyes;

visual processing (visual thinking) dysfunction; light sensitivity by history; and headaches by history.

[70] Dr. Sass opined that with the exception of the nearsightedness, and the vertical misalignment of the eyes, all of these were probably caused or contributed to by the accident. This was because there were no reports of any symptoms related to these prior to the accident, and the symptoms began soon after. He assumed that the near-sightedness was pre-existing. Mr. Hall has misalignment of his eyes because he holds his head in a tilted position. The misalignment resolves if he straightens his head. Dr. Sass does not know if the head tilt is related to the accident. The headaches could be from other causes, although the visual symptoms may have contributed. Inefficient visual skills may cause certain tasks to be more effortful.

[71] Dr. Sass opined that although Mr. Hall's eye movements are "technically intact in that he can move them in full range of motion smoothly and accurately", they require more conscious attention and make him dizzy at times. Mr. Hall's complaint of skipping lines and losing place while reading was due to sluggish saccadic eye control. However, in the appendix to his report, Dr. Sass stated that the results of the eye movement test (which tests saccadic movement) were average and Mr. Hall made no errors. Further, that "saccadic eye movements from one point to another on command were quick and accurate". However, with pursuit eye movements Mr. Hall felt dizzy while tracking a target. Dr. Sass said that he had since realized that the statement in the appendix was in error. This conclusion was not a result of comparing Mr. Hall's test results to the normative data, but based on his conclusion that he personally could do the test more quickly. I note that most of the tests administered have normative data for children, although Dr. Sass indicated that age 14 (often the limit of the normative data) is considered similar to adult scoring.

[72] Dr. Sass opined that the tests administered showed that Mr. Hall's "visual processing seems adequate, for the most part". Mr. Hall scored appropriately on all tests except automaticity of digit naming was below expected on a developmental

eye movement test (this appears to be contrary to the appendix), and he scored below expected on a short-term visual memory test.

[73] Dr. Sass opined that deficits in visual perceptual abilities contribute to lowered efficiency with computer and book work, fatigue and cognitive dysfunction. He did not test Mr. Hall's computer ability and he understood Mr. Hall was not doing a lot of book work. Mr. Hall reported feeling "loopy" after the testing, which Dr. Sass interpreted as feeling overwhelmed.

[74] Dr. Sass recommended vision therapy, which he expected to make "significant improvements".

#### **Dr. Patrick Corney**

[75] Dr. Corney is a neuropsychologist and was qualified as an expert in that area. He assessed Mr. Hall on two occasions: in September 2018; and again, for two days on July 12 and 13, 2021.

[76] Dr. Corney stated that the results of testing in 2018 showed "acquired weaknesses in [Mr. Hall's] working memory, processing speed, and attentional efficiency, and that these cognitive symptoms were consistent with the effects of a symptomatic MTBI".

[77] Dr. Corney reviewed the results of the 2021 testing. Intelligence testing showed that Mr. Hall's overall score was in the high average range. However, his scores were not consistent across the sub-indices. He had high average and superior range abilities in verbal comprehension and perceptual reasoning, but scores in the lower half of the average range for working memory and visual processing speed. These two sub-indices are the most susceptible to the effects of a brain injury. The differences in the sub-indices scores are unusual. Dr. Corney expects the sub-indices scores to be similar, and this is an indication of pre-accident capacity of strong general intelligence. In summary, the testing showed high average intellectual ability, but "personal" weaknesses in working memory and processing speed compared to strong verbal and nonverbal intellectual abilities.

[78] Memory testing showed improvements since 2018, and Mr. Hall's current results fell consistently within or above the average range. However, there were indications that components of his memory remained "weaker than expected" on the basis of his general intellectual ability, and in particular a prominent weakness in visual working memory.

[79] Attention testing showed improvements since 2018. His overall attention index score fell within the average range. Weaknesses in complex attentional abilities (e.g. divided attention) remained. The results suggest that for more complex attentional tasks, Mr. Hall is likely to require greater time in order to perform accurately, and/or that he is likely to be susceptible to committing errors when working under speeded conditions.

[80] Testing for executive function was in the average to superior range.

[81] Results of language ability fell within the average to high average range which was an improvement compared to his low average range in 2018.

[82] Testing of spatial functioning fell within the average range except Mr. Hall's attention to visual detail showed a slight, personal weakness.

[83] Testing of psychological/emotional function did not suggest the presence of clinical psychopathology or any emotional behavioural, thought or somatic/cognitive dysfunction.

[84] Dr. Corney concluded:

At the time of the current re-assessment Mr. Hall was not, in my opinion, exhibiting any major functional impairments or disabilities, as he appears to be functioning well overall across the various domains of his life (e.g. social, vocational, daily activities, stress management). Having said that, the findings of this re-assessment indicated that Mr. Hall continues to exhibit subtle weaknesses in his processing speed, attention, and working memory, and these result in his experiencing some occasional cognitive difficulties at work, particularly when he is engaged in complex and/or novel (for example, keeping track of and/or communicating complex technical information). Fortunately, Mr. Hall described most of his vocational activities as being highly familiar and routinized, and his cognitive weakness do not appear to interfere with his performance of these activities with any real frequency.

[85] There was no need for treatment. It is unlikely that further significant cognitive recovery would be expected, however it is “certainly possible” that further functional improvements could be obtained with enhanced use of compensatory strategies.

**Dr. Steven Dommann**

[86] Dr. Dommann is a neurologist and was qualified as an expert in that area. He assessed Mr. Hall on one occasion on March 30, 2022 at the request of defence counsel.

[87] Dr. Dommann opined that it is likely that Mr. Hall suffered an MTBI. His MTBI symptoms (vertigo and light sensitivity) resolved within the expected time frame. He is left with low-grade headaches (3/10) which had improved from daily to episodic.

[88] Mr. Hall’s complaints of mental fatigue and difficulty multitasking are non-specific and may be related to the headaches or an undiagnosed low mood. Dr. Dommann opined it is unlikely that Mr. Hall sustained long-term cognitive damage following a mild conclusion. In most cases, symptoms of a concussion resolve within several months. It is difficult to draw conclusions from the neuropsychology testing as there is no baseline for comparison. Dr. Dommann agreed that the history he took from Mr. Hall did not indicate any mood disorder or anxiety, and Dr. Corney did not offer an opinion regarding a psychological state. Dr. Dommann said that often mental fatigue is attributable to low mood even if a patient is not aware of it, so he always considers it, as it is treatable.

[89] Dr. Dommann opined that visual symptoms are common after an MTBI but are non-specific and not clearly due to visual dysfunction. There can be some mild saccadic and pursuit dysfunction, but they are likely cognitive rather than ocular-motor and usually asymptomatic. Many patients with normal pursuit and saccades after an MTBI complain of headaches or dizziness with eye movements. There is no convincing evidence to support vision therapy after an MTBI.

[90] Dr. Dommann opined that if the headache disorder is treated and if the possibility of a mood disorder is excluded or treated, Mr. Hall’s symptoms of fatigue

will improve and there is little reason to suspect that he will be impaired in his ability to work and do recreational activities.

**Mr. Clae Willis**

[91] Mr. Willis is a vocational rehabilitation consultant and was qualified as an expert in that area. He assessed Mr. Hall on one occasion by way of virtual interview on June 22, 2022.

[92] Mr. Willis contrasted “impairment” which is a medical opinion, with his expertise, which is determining how those impairments affect vocational ability.

[93] Mr. Willis reviewed the information given to him by Mr. Hall as to how his injuries have affected him. In my view, this either generally reflected Mr. Hall’s testimony in direct examination, or it painted a more negative picture of the effects of his injuries, and did not reflect what Mr. Hall had told Dr. McCrodan, Dr. Filbey and Dr. Corney. For example, in one test administered by Mr. Willis, Mr. Hall reported that his symptoms have “moderately disrupted” his work/school life, and “markedly” disrupted his social life/leisure activities. Mr. Hall reported that in the last week his symptoms had caused him to miss work or leave or be unable to carry out his normal daily responsibilities 50% of the time, and even on those days he went to work, 50% of the time he was so impaired by symptoms that his productivity was reduced. On the other hand, Mr. Hall also provided Mr. Willis with a description of his average post-accident work day (referred to above, being 10:00 a.m. to 5:00 p.m. with administrative work in the evening) which conflicts with this information. Mr. Willis agreed that this information indicated that Mr. Hall was working 40 hours per week, but said this was not necessarily billing work and was just one piece of information. He had to take all information into account.

[94] Mr. Willis reviewed the medical opinions of Drs. Sass, Filbey and Corney. Mr. Willis concluded that the “unabated and unresolved cluster of physical, cognitive and psychological barriers” makes Mr. Hall “not competitively employable” to work as a physiotherapist, and that Mr. Hall “is not fully capable/truly competitive of working” in his current job as a kinesiologist or “alternative reasonable occupations”.

[95] With respect to the unabated barriers, Mr. Willis agreed that Dr. Filbey did not identify any physical impairments other than related to Mr. Hall's shoulder injury. Mr. Willis was not aware if Mr. Hall's shoulder injury had improved since Dr. Filbey's 2018 report. With respect to cognitive impairments, Mr. Willis said that Dr. Corney's opinion that Mr. Hall appeared to be functioning well, was an assessment of impairment and Mr. Willis was assessing vocational ability. Mr. Willis agreed that Dr. Corney opined that testing of psychological and emotional functioning did not suggest any dysfunction. Mr. Willis emphasized this referred to "clinical" psychopathology. Mr. Willis was referred to Dr. Dommann's opinion. In Mr. Willis' view, except for the period of time immediately following the accident, Dr. Dommann was opining on impairment, not vocational ability.

[96] Mr. Willis opined that he was unclear regarding Mr. Hall's ability to "academically upgrade" to alternative occupations "given his academic restrictions". He did not specify what those were.

[97] Mr. Willis's report states that:

... Mr. Hall describes his working scenario as one of a repetitive, non-challenging scenarios. Distinctly different than that of a novel practitioner applying and utilizing current evidence-based approach to benefit their clients.

[Emphasis added.]

[98] Mr. Willis said that the word "physical" was missing in the above paragraph and it should read "non-challenging physical scenarios". He agreed that the above paragraph is what was reported to him by Mr. Hall, but it was his understanding "on reflecting on this and reading again", that the word "physical" should be there.

[99] Mr. Willis opined that pre-accident "there did not appear to be restrictions" to Mr. Hall's entry into a Canadian or American physiotherapy program. He agreed that his report did not provide any substantive analysis of whether Mr. Hall would have been accepted into the UBC physiotherapy program.

[100] Mr. Willis opined that presently Mr. Hall "is unable to complete the essential duties" of a kinesiologist on a "fulltime, dependable basis", and that he "will likely

need suitable and generous accommodations to access the competitive labour market”. The accommodations required would create “undue hardship” on most employers. He noted that Mr. Hall has been able to work in his pre-accident occupation, but “with restrictions in a manner which the job tasks are performed”, and his current self-employed situation allows for “tremendous flexibility” and “tolerance of inability”.

[101] Mr. Willis stated that Mr. Hall reported an inability to work more than 24 hours per week. These reduced hours are an accommodation, and show an inability to sustain full-time employment. He opined that Mr. Hall “cannot consistently show up for work and work a full day”, and that Mr. Hall’s situation “suggests that he is not dependable”. He opined that Mr. Hall may need to find “alternative units or work assignments that are less demanding to secure a durable role”. Mr. Willis did not explain how he reconciled the 24 hours per week with: Mr. Hall’s statement to Dr. Corney that he was working 30 to 35 hours with clients and another 10 hours per week performing administrative tasks; or with Mr. Hall’s own report to Mr. Willis that he was working 10:00 a.m. to 5:00 p.m. with administrative tasks each evening.

[102] Mr. Willis referred to Mr. Hall being briefly off work at Innovative following the accident, that during that time many of Mr. Hall’s clients had transferred to another trainer, and that “he never regained the level of ability”. It was not his understanding that Mr. Hall’s hours at Innovative quickly returned to their pre-accident level, but when brought to the weekly hours Mr. Hall worked at Innovative, agreed that after the initial weeks when Mr. Hall was off work, there were a number of weeks where Mr. Hall exceeded his pre-accident hours. I note that the work hours provided to Mr. Willis by Mr. Hall’s counsel and replicated in Mr. Willis’ report, do not include the Functional Patterns hours.

[103] Mr. Willis reported that he has considered alternative occupations for Mr. Hall, but the “barriers and restrictions” have likely reduced the number of jobs available. He opined that Mr. Hall “cannot compete against other non-challenged workers”. He agreed that Mr. Hall worked side by side with other trainers for 1.5 years at Innovative.

**Ms. Diana Cameron**

[104] Ms. Cameron is a vocational rehabilitation consultant and was qualified as an expert in that area. She did not assess Mr. Hall, but provided a critique of and response to Mr. Willis' assumptions, methodology and conclusions, at the request of defence counsel, in a report dated August 3, 2022.

[105] Ms. Cameron opined that Mr. Willis had an insufficient basis for the conclusions in his report regarding Mr. Hall's pre-accident level of commitment and achievement, his competitiveness for admission to further education, and his pre- and post-accident abilities and vocational trajectories. In her opinion, Mr. Willis did not adequately account for information that conflicted with his conclusions.

[106] Ms. Cameron opined Mr. Willis had insufficient information to suggest Mr. Hall was likely to have gained admission to the UBC physiotherapy program. She provided information on the admission criteria and statistics from the UBC website. I replicate that portion of her report here, but note that this was the subject of admissibility arguments at the end of trial, which I will discuss later:

The admission requirements for this program include an undergraduate degree, a minimum B+ GPA, the completion of a number of prerequisite courses, and a minimum of 70 hours of experience working with people with disabilities. It is unclear from the report of Mr. Willis where Mr. Hall gained experience working with people with disabilities; it is therefore more difficult to provide a definitive opinion regarding his competitiveness for this program. According to the program website, "*the MPT program is highly competitive and only qualified applicants will be invited for interview*". Meeting the minimum admission requirements does not guarantee admission. Since 2014, this program has received 304 to 411 applications per year, and 144 to 240 students are offered interviews per year. Each year, 120 students are admitted to this program; 80 seats are based in Vancouver, 20 are in the Surrey, and 20 are in Prince George. Based on the competitiveness of this program, and Mr. Hall's academic achievement during his undergraduate studies, I expect it was possible but not probable that he would have been admitted to this program in the absence of his involvement in the 2016 MVC.

[Emphasis added.]

[107] In testimony, Ms. Cameron qualified the above underlined opinion and said she cannot state whether it is probable that Mr. Hall would have been admitted. It was put to Ms. Cameron that because Mr. Hall was offered the Interviews, based on

the above data, he had a greater than 50% chance of being accepted. Ms. Cameron stated that if the assumption was that every person being interviewed was identical, that would be a reasonable conclusion, but she cannot make that conclusion because nothing is known of the other applicants. Competitiveness depends on the cohort who applied. Ms. Cameron is not privy to the UBC admissions process. It is fair to conclude from the fact that Mr. Hall was granted the Interviews, that UBC considered him to be an eligible applicant, but there is a distinction between eligibility and competitiveness.

[108] She agreed the Interviews required Mr. Hall to read and quickly process information. She deferred to the medical experts as to how a reduction in working memory and processing speed relative to pre-accident levels, or slow saccadic eye movement, may impact Mr. Hall in the Interviews. The Interviews took place less than one year after the accident.

[109] Ms. Cameron referred to information published in a 2020 report from Industry Canada stating that for small businesses providing kinesiology services in B.C., approximately 95% are profitable. The average annual profits were \$87,300. No details of the businesses are provided in Ms. Cameron's report. Ms. Cameron was cross-examined on whether the profit included salaries of owners. She did not think it did, but I note that owners do not necessarily take profits as salary. In my view, this hearsay information is so general that no conclusions can be drawn from it.

**Mr. Peter Sheldon**

[110] Mr. Sheldon is a labour economist and was qualified as an expert in that area. He provided a report dated June 29, 2022 at the request of Mr. Hall's counsel.

[111] Mr. Sheldon provided the multipliers for future earnings discounted at the prescribed discount rate. He also provided tables that used data of full-time full-year earnings of male physiotherapists (average \$85,200 to age 70), and male "other professional occupations in therapy and assessment" which includes those working as a kinesiologist (average \$53,500 to age 70) to provide the present value of those income streams.

[112] The tables included “risk only” and “risk and choice” labour market contingencies. Risk only contingencies reflect that some people are forced by factors outside their control, to not work full-time or at all, whereas risk and choice contingencies reflect that some people voluntarily choose not to work full-time, or at all. These are statistical averages.

### **Mr. Mark Gosling**

[113] Mr. Gosling is an economist and provided a report dated June 28, 2022 at the request of defence counsel. Mr. Gosling’s report was admitted by consent without the need to call him for cross-examination.

[114] Mr. Gosling provided a table of the actuarial multipliers for discounting future income at the prescribed discount rate. He also provided tables of economic multipliers (roughly equivalent to Mr. Sheldon’s “risk and choice”) multipliers for B.C. males with a bachelor degree (except law) and for B.C. males with a master degree.

### **Causation and Assessment of Damages Principles**

[115] A plaintiff must establish causation on a balance of probabilities. That is, the tortious act caused or contributed to the injuries the plaintiff suffered; and that the injuries caused or contributed to the loss for which the damages are claimed: *Smith v. Knudsen*, 2004 BCCA 613 at para. 26; *Grewal v. Naumann*, 2017 BCCA 158 at para. 45. The basic test for causation is the “but for” test: *Clements v. Clements*, 2012 SCC 32. A plaintiff must establish that but for the defendant’s tortious act, the injury would not have occurred. A plaintiff is not required to establish that the defendant’s tortious act was the sole cause of the injuries so long as it is part of the cause beyond *de minimus*: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17, 1996 CanLII 183.

[116] Once causation is established, the basic principle of assessment of damages is that a plaintiff is entitled to be put in the position he or she would have been in had the tortious act not taken place: *Athey* at para. 32. In *Blackwater v. Plint*, 2005 SCC 58, the Court discussed the difference between causation and the assessment of damages in tort:

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

### **Credibility and Reliability**

[117] The main credibility issue is the extent to which Mr. Hall’s MTBI symptoms have in the past and currently impact him.

[118] In assessing the credibility and reliability of evidence, I am guided by the factors and approach in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff’d 2012 BCCA 296, leave to appeal to the SCC ref’d, 35006 (7 March 2013). This includes: the ability and opportunity of a witness to observe events; whether the witness’ evidence is consistent or inconsistent with other independent evidence; whether the witness changes his or her evidence or has said something different on a previous occasion; whether the evidence seems reasonable or unlikely; any motive to shade evidence or lie; and demeanor. Ultimately, the Court considers whether the “evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time”.

[119] I find that Mr. Hall was generally a credible witness. However, his evidence with respect to the extent the remaining MTBI symptoms are affecting his ability to work, was not always reliable. The following are my reasons.

[120] First, there were several significant contradictions between Mr. Hall’s evidence on the effect of his MTBI symptoms, and what he told Dr. McCrodan and the experts over the past four years. For example, the assessment by Dr. Filbey was seven months after the Interviews, and a month after Dr. Corney’s first testing. At trial, Mr. Hall described in detail his challenges in preparing for and participating in the Interviews, to the extent Mr. Hall now alleges that he did not gain admission to

UBC because of this. Yet, he told Dr. Filbey that he “did not notice these problems but they were picked up by testing”. Some explanations are difficult to fully accept. For example, Mr. Hall said he may have had a better outlook when he saw Dr. Corney in 2021 because he had just been married, and had been off work, and that he “undersold” his injuries. Mr. Hall knew it was important to accurately report his symptoms.

[121] Second, Mr. Hall is clearly intelligent and capable. Neither Mr. Hall’s presentation nor Dr. Corney’s opinion leads me to conclude that Mr. Hall would have significant difficulties in carrying out his work. In the two and a half days Mr. Hall was in the witness stand, he responded quickly and appropriately to questions. Dr. Corney’s testing confirms Mr. Hall is intelligent and overall testing shows above average abilities but subtle personal weaknesses in three areas. Mr. Hall improved from 2018 to 2021. While I accept that Mr. Hall is now receiving more complex clients as his reputation grows (which is an indication he is doing good work and can do the job), I am not persuaded that the Functional Patterns services he is providing are that much more complex, that someone of his abilities cannot not perform this work without significant challenges. Mr. Hall successfully completed the Functional Patterns courses. Mr. Hall made statements to Dr. Corney in 2021 and Mr. Willis in 2022 (after getting more complex clients) that his work was largely routine. Further, not all of the problems Mr. Hall described are difficult to solve. For example, Mr. Hall said sometimes he did not recall if a client had a right or left sided injury. The solution would be to take notes. Nor is this necessarily indicative of a brain injury. It is also telling that Mr. Hall has never sought assistance from a psychologist or occupational therapist to devise compensatory strategies.

[122] Third, Mr. Hall made contrary statements to experts of how many hours he was working. He said he started limiting his client-facing time to 24 hours per week in November 2021, however owning and operating a business is more than just revenue work. Mr. Wang stated that he was averaging 27 hours per week of client-facing time, and he considered himself full time. In September 2021, Mr. Hall told Dr. Corney that he was working 30 to 35 hours per week with clients and another 10

hours per week doing administrative work. In June 2022, he told Mr. Willis he was working from 10:00 a.m. to 5:00 p.m. and doing administrative work in the evenings. Mr. Wang's evidence was that he sometimes sees Mr. Hall's calendar "back to back from 9 a.m. to 7 p.m."

[123] When the prior statements and expert opinions are viewed in order, they show Mr. Hall initially had more significant MTBI symptoms, those symptoms improved over months, and then continued to improve further but to a lesser extent over the next few years. Mr. Hall is understandably concerned regarding the MTBI. However, I conclude that he has attributed any pause for thought or forgetfulness (for example, not recalling whether a client had a right or left shoulder injury), or any request for assistance (for example, him asking his wife to review an email, where he said that comparing his ability to someone else made him "more aware of what perhaps my deficits are"), or any fatigue at the end of a work day (which is not an unusual experience for healthy people), to the MTBI. Having said all this, I accept that Mr. Hall has and does in the situations described by Dr. Corney, experience mild symptoms of an MTBI at work, and this has caused him to limit his hours.

[124] Turning to other witnesses, Mr. Wang was a fair witness, and I generally accept his evidence. It was clear he is an advocate for Functional Patterns. For example, he stated that he wished Mr. Hall would have better posture to better represent what they were teaching. I accept that he thinks that Mr. Hall sometimes does not recall all that he should of some of the Functional Patterns training and misses "variables". However, Mr. Wang, also fairly volunteered that he may have a different approach to Functional Patterns training than Mr. Hall. I further accept that he has observed that the fluorescent lights appear to bother Mr. Hall. He observed that Mr. Hall spaces out his bookings of more difficult clients. That is a good compensatory strategy. He notices Mr. Hall seems more tired in the winter, but that is not evidence of causation, nor is Mr. Wang qualified to express a medical opinion. I accept his evidence that Mr. Hall did not have the initiative he had hoped he would, but that has improved. Nomadic is Mr. Wang's only source of income. He needs it to be successful.

[125] I found Dr. Filbey and Dr. Corney to be objective and fair witnesses. I accept their evidence. I also found Dr. Dommann to be a fair witness. He provided an opinion that Mr. Hall's fatigue may be caused by low mood or headaches. There was no evidence from a psychologist or psychiatrist to suggest that Mr. Hall may have undiagnosed depression. I do not find that Dr. Dommann was being impartial in suggesting this. My impression was that Dr. Dommann was considering the potential causes of the fatigue out of a genuine desire to assist Mr. Hall.

[126] I accept Dr. Sass's opinion on visual acuity and alignment, but put little weight on his opinions outside that. His use of development eye tests for children and teenagers, his contrary opinion on whether Mr. Hall had poor saccadic eye movements and his explanation for that inconsistent opinion, and the general nature of his statements on visual dysfunction, left me with little confidence in those particular opinions.

[127] I put little weight on Mr. Willis' opinions because he appears to have formed an interpretation of the expert medical reports that is not supported by a reading of those reports, and made assumptions regarding Mr. Hall's condition that are not supported by the evidence at trial.

[128] Mr. Willis made conclusory statements, for example that Mr. Hall had "unabated and unresolved physical, cognitive and psychological" injuries, that were not fully, or in some cases not supported at all, by the evidence. He stated that Mr. Hall could not fully carry out the duties of a kinesiologist, yet Mr. Hall has done so for the past four years, and was successful as a personal trainer for 1.5 years at Innovative immediately after the accident when his injuries were at their worst. Mr. Hall took two Functional Patterns courses in 2017, and persuaded Innovative to pay him more than double his regular wage for those services. One inference is that Mr. Hall was, in fact, very competitive. Currently, Mr. Hall has apparently impressed those who refer him clients and he now has a wait list with more complex clients. There was no evidence of any significant accommodation that Innovative was required to provide to Mr. Hall. The only evidence was that after the accident, Mr. Hall asked Innovative to condense his work hours to the morning. There was no

evidence to support a conclusion of “undue hardship” for an employer, or what that would be. There was no evidence other than Mr. Hall’s subjective reports to Mr. Willis, that Mr. Hall had “academic restrictions”. Mr. Hall completed a university course (albeit first year) immediately after the accident when his symptoms were at their worst. I do not accept Mr. Willis’s explanation that the word “physical” was missing from his paragraph describing what Mr. Hall told him because he did not identify what on reflection caused him to determine that he had incorrectly interpreted what Mr. Hall had told him. That is, that Mr. Hall’s work was primarily “repetitive, non-challenging scenarios”. I note that this information was provided by Mr. Hall in the summer of 2022, seven months after Mr. Hall said he had started a wait list and was getting more complex cases.

[129] I accept most of Ms. Cameron’s critique of Mr. Willis’ report but only to the extent it is proper rebuttal opinion and points out the lack of analysis in Mr. Willis’ opinion.

[130] There are no credibility issues with respect to the evidence of Mr. Sheldon or Mr. Gosling. I accept their multipliers, labour market contingencies, and sample calculations as being accurate based on the parameters they have outlined.

[131] Finally, I address the defendants’ argument that Mr. Hall did not call witnesses who could have testified to his condition before and after the accident, and that this is another reason to doubt his evidence. The defendants argue that Mr. Hall did not call his wife or close friends, or co-workers or employer at Innovative, or his regular health care professionals. I reject this argument. These are all witnesses the defendants could have called as part of their case if they thought they would be helpful. Further, the central issue in this case was the extent to which Mr. Hall’s continuing MTBI symptoms are affecting his ability to work. On that point, Mr. Hall called Mr. Wang, the person who would be knowledgeable. Calling Mr. Hall’s family or friends would not be informative. The defendants agree that other than

physiotherapy, Mr. Hall has undergone little treatment for physical injuries which are not in dispute. A current health care provider cannot give other than inadmissible hearsay evidence regarding Mr. Hall's work. There was no functional capacity evaluation, but the issue is not Mr. Hall's physical capacity to carry out work – it is his cognitive ability, and Mr. Hall was assessed by and called an appropriate expert, Dr. Corney, on that issue.

### **Non-Pecuniary Damages**

[132] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The amount does not depend solely upon the seriousness of the injury, but upon the Court's assessment of loss and its ability to provide solace and ameliorate the condition of the plaintiff in his or her particular circumstances. While awards in other cases provide guidance, each case must be determined on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. A list of factors to consider in determining awards is set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. Those include the: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. A plaintiff's stoicism should generally not penalize the plaintiff: *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at paras. 54–55.

[133] I find that as a result of the accident, Mr. Hall suffered physical injuries and an MTBI. There was no evidence supporting a psychiatric injury, although I accept Mr. Hall found his injuries initially emotionally distressing and he is disappointed and concerned that he did not recover 100%. Physically, Mr. Hall suffered bilateral knee bruises, pain and instability, hip pain, and bilateral shoulder pain and right shoulder instability, all of which resolved within weeks or months. These injuries caused him pain, but it eventually resolved. He attended physical therapy for months.

[134] I find that Mr. Hall suffered an MTBI and initially had greater symptoms but that they improved in the months after the accident. He had difficulty with

concentration and memory while reading. He had headaches which have improved but which he still gets weekly, of mild intensity. He had vertigo and nausea which almost completely resolved by six months. He has lingering inability to read in a car, and cannot watch a shaky video for a prolonged period. He had light sensitivity worse for the first months, which has improved but persists to some degree.

[135] With respect to the remaining MTBI symptoms and how they impact Mr. Hall now, I accept Dr. Corney’s opinion that Mr. Hall has “subtle weaknesses in his processing speed, attention, and working memory, and these result in his experiencing some occasional cognitive difficulties at work, particularly when he is engaged in complex and/or novel tasks (for example, keeping track of and/or communicating complex technical information)”. For more complex attentional tasks, “Mr. Hall is likely to require greater time in order to perform accurately, and/or that he is likely to be susceptible to committing errors when working under speeded conditions.” While Mr. Hall’s overall abilities are above average, they are not to the level of his previous abilities in those areas. I find that these remaining MTBI symptoms are likely permanent. Mr. Hall is young and those injuries will be with him for the rest of his life.

[136] Finally, I also find that Mr. Hall’s MTBI symptoms or possibly his headaches cause him to have some increased fatigue on occasion. However, there is a lack of credible expert evidence establishing a causal link between Mr. Hall’s claims of extensive fatigue and his MTBI. Dr. Sass’s generic statement that people with visual perceptual difficulties may spend more effort and become fatigued was not specific to Mr. Hall. Dr. Corney does not opine that Mr. Hall’s subtle impairments would cause fatigue to the extent claimed by Mr. Hall. Dr. Corney does not mention fatigue at all other than one reference in his report that Mr. Hall reported “severe” fatigue when he administered a Post-Concussion Symptom Scale. Dr. Corney stated that in the two days of assessment, Mr. Hall did not report or exhibit any signs of fatigue. Dr. Dommann thought the fatigue may be related to other treatable conditions, but I did not understand him to be ruling out that some fatigue can be caused by MTBI symptoms. Mr. Hall and Mr. Wang are owners of a small business and are

responsible for much, and I find that Mr. Hall was truthful when he said to Dr. Corney that their business had grown and that he at “times feels overwhelmed and experiences a degree of work-related stress and anxiety”. It is significant that Mr. Hall has described his fatigue as “tying more into motivation”. In the result, while I accept that complex clients may task Mr. Hall more and may cause some fatigue, and that the combination of these has caused him to limit his work hours, I find that he has not proven that all of his fatigue is causally related to the remaining MTBI symptoms.

[137] There was no evidence that Mr. Hall’s relationships with his family and friends were affected to any significant degree. His lifestyle has returned to his pre-accident activities although he does not surf as much as previously.

[138] Mr. Hall argues that he lost a career as a physiotherapist as a result of the accident and this factors into non-pecuniary damages. A loss of a desired career can be a factor, but as I discuss below, the evidence that Mr. Hall would have been accepted to UBC absent his injuries, or that Mr. Hall’s performance at the Interviews was why he was not offered a position, is speculative.

[139] Mr. Hall seeks general damages in the amount of \$150,000. Defence counsel argues that general damages should be \$75,000 to \$85,000.

[140] Counsel cited a number of cases. I have considered: *Conroy v. Rodin*, 2021 BCSC 861 (\$150,000); *Blackburn v. Lattimore*, 2021 BCSC 1417 (\$180,000); *Sharp v. Song*, 2021 BCSC 1422 (\$200,000); *Aylen v. Mellin*, 2022 BCSC 223 (\$125,000); *Bolduc v. Stratton*, 2022 BCSC 1168 (\$120,000); *Choy v. Stimpson*, 2021 BCSC 1020 (\$75,000); *Siu v. Clapper*, 2020 BCSC 944 (\$80,000); *McGavin v. Talbot*, 2017 BCSC 2194 (\$65,000); and *Palmer v. Ansari-Hamedani*, 2019 BCSC 114 (\$85,000). All of these involved either a diagnosed MTBI, or in some cases, symptoms of an MTBI although no diagnosis was made, along with other injuries of varying severity.

[141] *Conroy*, *Blackburn*, and *Sharp* are cases in which there were significant psychological injuries in addition to the MTBI, and where the functional limitations were much greater than here. *Aylen* and *Bolduc* involved additional physical injuries.

*Choy*, *Siu*, and *McGavin* involved less functionally disabling injuries. The MTBI symptoms in *Choy* had resolved. *Siu* involved complaints of lack of concentration and memory which were the result of pain. *McGavin* was an agreed amount for soft-tissue injuries and a resolved MTBI. *Palmer* involved a mild concussion where the symptoms resolved.

[142] Considering all of the above, I assess non-pecuniary damages to be \$100,000.

### **Loss of Earning Capacity**

[143] In assessing damages, past events must be proven on a balance of probabilities: *Athey* at para. 28. However, the test to be applied for assessing damages for both past and future hypothetical events is whether there is a real and substantial possibility, not speculation, of an event leading to a loss. The plaintiff is not required to establish these hypothetical events on a balance of probabilities: *Grewal* at para. 48. The events are given weight according to their relative likelihood: *Athey* at para. 27; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 13–17.

[144] A loss of earning capacity may be quantified either on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach may be more useful when the loss is more easily measurable; the capital asset approach will be more useful when the loss is not easily measurable, for example where the plaintiff has returned to his or her former employment, but has still established a loss of capacity, or where the plaintiff is young and does not have an established career path.

[145] While the assessment is not a mathematical exercise, economic or statistical evidence if available, may be a useful tool as a starting point, and in assessing what is fair and reasonable: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[146] At the end of the analysis, the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[147] In keeping with the principle that the plaintiff is to be put in the position he or she would have been in absent the tortious conduct, damages for loss of earning capacity are to be based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 28–30.

[148] In *Rab v. Prescott*, 2021 BCCA 345, the Court set out the three-step process for assessing loss of earning capacity:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (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.

### Mr. Hall's Position

[149] Mr. Hall claims past loss of earning capacity of \$155,00 to \$200,000 (to be adjusted for income taxes). He seeks future loss of earning capacity of between \$2.0 million to \$3.2 million, or in the alternative \$1.0 million.

[150] The above claims are based on the following hypothetical scenarios:

(1) absent the accident, Mr. Hall would have been accepted into the physiotherapy program at UBC in 2017 and completed it, and he would now be in his third year of full-time employment as a physiotherapist; (2) his earnings would have been either: (a) the average income of a physiotherapist, in addition to profit he would have earned from owning a physiotherapy business (relying on Ms. Cameron's mention of the Industry Canada report); or (b) the average income of a physiotherapist; (3) he would have continued this career full-time until age 70; and (4) his post-accident earning capacity is now restricted to \$20,000 per year, based on his projection of what he will earn for Nomadic's fiscal year ending in August 2022. In the alternative, if the Court finds that there is no real and substantial possibility that Mr. Hall would have become a physiotherapist, Mr. Hall advances a claim based on without-

accident income of the average kinesiologist, with all other parameters being the same. This results in the alternative position of about \$1.0 million.

[151] Mr. Hall argues that factors which support positive contingencies, and risk only negative contingencies, as well as retirement at age 70 are: pre-accident Mr. Hall was someone who was driven to succeed as evidenced by him competing at national and international levels; his commitment to his studies; his efforts to prepare for admission to UBC and the Interviews; following the accident, his return to work even when he had symptoms; his pursuit of Functional Patterns; his above average intelligence; and his worth ethic. Mr. Hall argues that at least risk and choice should apply to with-accident scenarios because Mr. Hall is already injured and unlike many workers, will have that impairment throughout his career.

#### **Defendants' Position**

[152] The defendants submit that past loss of earning capacity should be assessed at \$10,000, and that no future loss of earning capacity has been established. In the alternative, future loss should be assessed at between \$46,000 and \$86,000.

[153] For past earning capacity at Innovative, the defendants calculate the loss based on the difference in hours Mr. Hall worked in the six weeks following the accident compared to his hours in the month prior to the accident. This is \$1,102. However, the defendants submit that the total award should be \$10,000 to account for any other loss of work capacity up to trial.

[154] For future loss of earning capacity, the defendants argue that the evidence does not establish a real and substantial possibility that absent the accident, Mr. Hall would have been accepted to UBC physiotherapy. If there is a real and substantial possibility that Mr. Hall would have been admitted to UBC, Mr. Hall could earn as much as a physiotherapist. Mr. Hall negotiated with Innovative to provide Functional Patterns services at \$50 to \$60 per hour, which correlates with the high end of average physiotherapists' incomes. An award based on the capital asset approach is appropriate given Mr. Hall's limited work experience, and an award of \$42,400 is appropriate, being one year of an average kinesiologist's income, discounted 20%

as Mr. Hall did not seem motivated to work full-time prior to the accident. In the alternative, if an earnings approach is appropriate, the award should be between \$43,216 and \$86,432, calculated by taking the present value of without-accident earning capacity of a kinesiologist, again reduced by 20%, and applying an estimated percentage of incapacity of five to 10%.

[155] As for residual earning capacity, the defendants submit that Mr. Hall's evidence was unreliable. The meagreness of his earnings after leaving Innovative is due to his decision to take a risk running a small business. Mr. Hall's comments to experts shows he enjoys freedom, and his desire to restrict his work week. His low earnings are caused by his choices and the market and not his injuries.

[156] Finally, while acknowledging Mr. Hall's accomplishments and motivation, the defendants submit that a minimum of "risk and choice" contingencies should be applied throughout. Prior to the accident, Mr. Hall had comfortable financial circumstances and did not demonstrate a commitment to full-time work. His first job was at age 25. The same factors support a retirement age of 65 rather than 70.

### **Analysis**

[157] I turn first to Mr. Hall's without-accident earning capacity.

[158] Much of the parties' arguments are tied to whether Mr. Hall would have been admitted to UBC and had a career as a physiotherapist. This raises the issue of the admissibility of the hearsay information in Ms. Cameron's report regarding the minimum admission criteria and statistics (collectively, the "Website Information") for the UBC physiotherapy program. Although I refer to Ms. Cameron's report, the same comments apply to the appendix to Mr. Willis's report with similar but not identical information regarding admission criteria.

[159] There was no evidence from a witness who is knowledgeable regarding the admissions decision process for the UBC physiotherapy program. There are minimum requirements to apply, but that says little of how UBC decides which applicants are offered Interviews, and from there, which interviewees are offered

seats in the program. There was no evidence of how UBC weighs various factors, or even what all the factors are. There was no evidence that Mr. Willis had personal knowledge of the admissions process. Ms. Cameron agreed she did not have any. In my view, neither expert could provide admissible opinion on the likelihood of Mr. Hall being admitted as neither had any knowledge beyond the limited Website Information, and any opinion that could be based on that information is limited.

[160] The issue between the parties became for what purpose the Website Information was admissible. Mr. Hall submitted that although the Website Information is hearsay, it is admissible for the truth because it is of the sort regularly relied upon by vocational experts, and there are strong circumstantial guarantees of its trustworthiness. Here, neither party is the source of the hearsay information, and where the defendants introduced the evidence through Ms. Cameron's report, and the plaintiff takes no objection to the evidence, it is convenient to admit the evidence for the truth without requiring the attendance at trial of the individual reporting the Website Information. Ms. Cameron testified that the Website Information is a type she relies upon in her practice. Mr. Hall's counsel refers to *Mazur v. Lucas*, 2010 BCCA 473, as supporting the admission of the Website Information for the truth.

[161] In my view, *Mazur* does not do so. *Mazur* confirms the established principles in *R. v. Lavallee*, [1990] 1.S.C.R. 852, 1990 CanLII 95, that an expert may rely on hearsay as the basis of his or her opinion, but the hearsay is not admissible for the truth. The hearsay is only admissible for the limited purpose of showing the information upon which the expert opinion is based and evaluating the opinion. To the extent the hearsay is not proven by otherwise admissible evidence, the weight of the opinion may be affected: *Mazur* at para. 37. *Mazur* discusses that the type of hearsay relied upon by the expert, that is not otherwise proven or accepted by the trier of fact, must be considered in determining how that affects the weight of the opinion. In *Mazur* at paras. 31–40, the Court discussed that there are two types of hearsay evidence relied upon by experts: that which has circumstantial indications of trustworthiness because it is routinely acted upon by experts within sound professional practice; and that which is from the mouth of a party or suspect. Not

proving the truth of the former may have little effect on the weight of the opinion, compared to not proving the latter.

[162] The defendants submitted that the Website Information was not admissible for the truth and referred to *Sen-Laurenz v. Napoli*, 2019 BCSC 1379. In *Sen-Laurenz*, the defendants sought to introduce website data of admissions statistics for the UBC medical school without calling a knowledgeable person regarding the admissions process. At para. 170, Justice Walker rejected that evidence. The same reasoning applies here. Neither party would have been able to tender the website pages containing the Website Information for the purpose of proving the truth of the information without calling someone knowledgeable regarding that information. Having that same information repeated in an expert report does not make it admissible for the truth. Neither party suggested that the Website Information met the requirements of business records and was admissible under that exception to the hearsay rule.

[163] I accept that the Website Information has some circumstantial indications of reliability because it is published by UBC. I conclude that the weight of Ms. Cameron's opinion is only slightly affected. However, this does not assist Mr. Hall, because Ms. Cameron's admissible opinion is no more than her conclusion that admission to UBC physiotherapy is highly competitive and it is possible that Mr. Hall could have been offered a position. She could not properly express an opinion beyond that. Even if the Website Information were admissible for its truth, the inferences that could be drawn from it are limited. It is not probative for Ms. Cameron to state that if all applicants were identical to Mr. Hall he would have a greater than 50% chance of being admitted, because all applicants will never be identical. When Mr. Hall was granted the Interviews, he could have been near the top or bottom selection of those who were interviewed. The Website Information does not discuss what factors UBC considers and how they are weighed. This is not a situation such as in *Bolduc*, where there was evidence from knowledgeable persons of the admission decision process.

[164] The evidence also does not establish a strong commitment by Mr. Hall to this plan. I contrast the evidence here, with the evidence in *Bolduc* where there was evidence of: current and alternative plans of the plaintiff as to how she would attempt to gain admission to a Canadian or foreign medical school; significant relevant work and volunteer experience to further her plans; and plans for successive applications were she not initially successful. In contrast, I do not find the steps Mr. Hall took to gain admission to be exceptional. His only work and volunteer experience were gained at about the time he applied. Four of the five steps he took, were what was necessary to meet the minimum requirements for eligibility. The fifth step was gathering information and practicing for the Interviews. Once rejected, he did not make any attempts to improve his chances with further relevant volunteer or other paid work, or upgrade course marks, or apply again to UBC, or to other universities. Rather, it appears he was discouraged after one rejection and abandoned that plan when he “found success in personal training and decided to continue to pursue that for the time being”.

[165] In summary, I find that Mr. Hall has not established a real and substantial possibility that he would have been admitted to the UBC physiotherapy program absent the injuries. It follows that he has also not proven that his performance in the Interviews was why he was not accepted.

[166] What then are the real and substantial possibilities of Mr. Hall’s career absent the accident? Considering all of the evidence, in particular that Mr. Hall had a bachelor degree with a major in kinesiology, his work as a personal trainer, his passion for fitness and high level sport, and his interest in Functional Patterns, I find the very likely real and substantial possibility is that absent the accident, Mr. Hall would have taken the Functional Patterns training, and he would have worked as a kinesiologist offering Functional Patterns services, similar to what he is doing now. Neither the evidence, nor the parties’ arguments raised any other possible career, or significant potential event (positive or negative) that would affect the assessment of without-accident earning capacity on that basis, other than what labour market contingencies should apply.

[167] In my view, average risk and choice multipliers are appropriate, as is age 65 for retirement. I do not accept the defendants' arguments that Mr. Hall's fortunate financial circumstances and limited work experience up to the accident means there should be an additional discount to the assessment of work capacity. Until Mr. Hall stopped racing, his limited work experience was fully explained by the training and high level of commitment required by his sport. Since he stopped racing, Mr. Hall has still been committed to personal fitness which is appropriate for his career. He did not show a strong commitment to the work force after he stopped racing, but in my view, this does not indicate that for the remainder of his work life he will not be committed to the work force. He was then young, and he is smart and has drive, for example by doing well at university, undertaking training in Functional Patterns, and by starting Nomadic with Mr. Wang. Starting a business takes initiative.

[168] What is the value of Mr. Hall's without-accident earning capacity as a kinesiologist offering Functional Patterns services? I find that an income approach is appropriate. Although Mr. Hall did not have a lengthy earning history, he did have a bachelor of science degree with a major in kinesiology, where a likely career path was laid out.

[169] There is no statistical data on the average earnings of a kinesiologist providing Functional Patterns services which could be used as a starting point in the analysis, but there is other evidence which provides useful information and parameters for the assessment of potential value.

[170] I start with the low end of potential value. Using Mr. Sheldon's tables, the average annual earnings of "other professional occupations in therapy and assessment", which includes kinesiologists, is \$53,400 to age 65. The present value of this stream of income, and using risk and choice contingencies, is \$1,081,580. I consider this to be the lowest possible, and least likely of the real and substantial possibilities for assessment of value because Functional Patterns services are billed at a greater rate than, for example, personal trainers, and because of Mr. Hall's intelligence, abilities and drive.

[171] At the high end of potential value, there is evidence of the increased rate that Mr. Hall and Mr. Wang have both commanded as Functional Patterns kinesiologists. Mr. Hall persuaded Innovative to pay him \$50 to \$60 per hour to provide Functional Patterns services. At the time, Mr. Hall had just started on this certification and service, and was working few hours doing this work. However, for illustration, \$50 per hour, 35 hours per week, 48 weeks per year, is \$84,000 per year, comparable to that of an average physiotherapist. Using Mr. Sheldon's tables, the average annual earnings of physiotherapists, is \$85,500 to age 65, and the present value of this income stream using risk and choice contingencies, is \$1,802,900.

[172] Mr. Hall testified that when he and Mr. Wang formed Nomadic, they initially discounted their rate to attract clients. Mr. Hall said he had increased his rate and it was now competitive but he did not give that rate in direct examination. Mr. Wang said his current rate is \$90 per hour and it is a reasonable inference that Mr. Hall's rate is the same since they have equal credentials and experience, and now bill roughly equal revenue (Mr. Wang slightly greater) but there is some inconsistent evidence which I will address further below.

[173] Looking at the fiscal 2020 and 2021 financial statements, overhead not including their own salaries was an average of \$21,000 per year, and was mostly rent and amortization of equipment that Nomadic purchased. Mr. Hall did not expect the overhead to increase significantly. Using Mr. Wang as an example of full-time work which includes 27 hours per week of client-facing time at \$90 per hour, 48 weeks per year, and assuming a modest increase in expenses which would be divided between the two owners, his potential income should be about \$100,000, greater than that of an average physiotherapist. If Mr. Hall's 24 hours per week is used at \$90 per hour, his resulting income should be about \$90,000, also greater than the average physiotherapist. This is assuming that all clients would use Functional Patterns services at this rate. This may not always be possible, but my impression from Mr. Wang's evidence is that all of his services were Functional Patterns because he said his wait list was based on whether clients had committed to that program, and he did not suggest he was billing other clients at a lower rate.

My impression from Mr. Hall's evidence is that he was providing this service, at varying levels of complexity, to all of his clients. I acknowledge, some personal training may be at a lower rate.

[174] However, as noted above, there is conflicting information which has to be considered. First, in cross-examination Mr. Hall stated his average rate worked out to be about \$40 per hour. I find that surprising given that Mr. Wang stated his rate was \$90 per hour, and the other factors I noted above in concluding that there rate was likely close to equal. I conclude that either Mr. Hall was in error, or he was referring to his discounted rate from previous years. That rate is less than what he was paid as an employee at Nomadic providing Functional Patterns services, let alone as an owner of a business that has to pay overhead.

[175] Second, although this is a post-accident fact, the financial statements of Nomadic up to the fiscal year ending in August 2021, do not show revenue or income close to the above figures. One likely explanation is that the business has grown since then. Both Mr. Wang and Mr. Hall indicated that since the summer of 2021 and particularly in the last year, Nomadic has become much busier. However, although the financial statements for the year ending August 2022 were not completed, Mr. Hall estimated that the revenue for Nomadic for that year would be about \$69,000. That figure is not consistent with \$90 per hour, or even \$40 per hour and the number of billing hours each Mr. Hall and Mr. Wang stated they were working.

[176] It is difficult to reconcile this information, but ultimately the question is that of capacity and not actual earnings; that is, what Mr. Hall would have had the capacity to earn without-accident. The evidence establishes that Functional Patterns services are billed at \$90 to \$100 per hour as a business owner, and \$50-\$60 per hour as an employee. I find that the past financial performance of Nomadic is not indicative of the capacity of Mr. Hall, on either a without-accident, or with-accident basis. Nomadic was commenced with few clients, at discounted rates, a year before the pandemic which prevented in-person services for a while, and Mr. Wang's and Mr. Hall's evidence indicated that it is only in the last year that their business has

become much busier. They now both have wait lists. As would be expected, it has taken them some time to build their business.

[177] Considering all of the above, and weighing all of the possibilities, including that there may not always be all Functional Patterns clients that can be billed at an increased rate, or that expenses could increase, I find that the most likely real and substantial possibility is that Mr. Hall's without-accident earning capacity as a kinesiologist with Functional Patterns training, would have been close to that of a physiotherapist, being in the range of \$85,000 per year, with a present value of about \$1.8 million.

[178] I turn now to Mr. Hall's with-accident earning capacity.

[179] I first address together the time periods after Mr. Hall left Innovative and up to the trial (a past loss), and the time period into the future. Mr. Hall argues that his lack of financial success to date is evidence of his incapacity. I disagree. He equates the lack of financial success of Nomadic with incapacity, and they are not the same. I reject Mr. Hall's argument that his residual earning capacity for the future is \$20,000. The Court is assessing capacity. Mr. Hall has made choices that have nothing to do with his injuries that have resulted in him earning much less income than what he could have earned, at least up until recently. After Mr. Hall left Innovative, he chose to not go to another gym, but to take the risk of starting out on his own offering Functional Patterns services. If he and Mr. Wang continue on their trajectory, it appears that will turn out to be a wise choice in the long run.

[180] Mr. Hall could have chosen to continue to work as an employee at a gym and earn much more than he has for the past four years. For example, in 2018, just prior to leaving Innovative, Mr. Hall earned \$7,381 until February 16, 2018. This included some hours of Functional Patterns training at \$50 to \$60 per hour in addition to mostly personal training paid at \$20 per hour. Extrapolated, this is the equivalent of \$54,380 per year, and that was part-time work. Even if one were to assume Mr. Hall could only do full-time personal training at \$20 per hour, the annual earnings would be \$41,600. I find that Mr. Hall could have chosen, and still could choose, less

demanding work that does not cause him any difficulties and earn substantially more than he has, at least up to last year, at Nomadic. Mr. Hall values being self-employed and what I conclude must be an expectation of ultimate financial benefit in continuing to build Nomadic into a successful business.

[181] I conclude that subject to any real and substantial positive and negative events which I will discuss below, Mr. Hall has the capacity to earn much more in the future than he is currently earning, and the fact that he has earned less up until trial, is not the result of his injuries suffered in the accident, but largely due to the choices he made, unrelated to the accident, to start his own business with Mr. Wang.

[182] Mr. Hall argues that his continuing MTBI symptoms are an event which could cause a pecuniary loss because he has had to restrict his hours because of his symptoms. Other than labour market contingencies, this is the only hypothetical event raised by the evidence or identified by the parties other than labour market contingencies. I have accepted Dr. Corney's opinion as to Mr. Hall's limitations, and that Mr. Hall does have some limitations at work. In my view, Mr. Hall has established a small but real and substantial possibility that his MTBI symptoms have and will continue to cause him some reduction in his ability to work as a Functional Patterns trainer.

[183] In estimating the effect of the MTBI symptoms, it is informative to consider Mr. Wang's position. He is an ideal comparator since they are equal partners in Nomadic with equal credentials. Mr. Wang sees clients 27 hours per week. He is healthy and considers that he is working full time. Running a business involves more than just revenue generating work. Mr. Hall works about 89% of Mr. Wang's revenue producing hours. That is evidence of the practical effect on Mr. Hall of his symptoms. It is consistent with Dr. Corney's opinion that Mr. Hall is capable of generally functionally well, but with some mild limitations. I have also considered that on both Mr. Wang's and Mr. Hall's evidence, Mr. Hall has in the past not contributed as much to the administrative work of running Nomadic, although that has improved. No expert has assigned a percentage impairment, but considering all of the evidence, I estimate that the loss is between 11% and 15% of without-accident capacity.

[184] Having made those findings of without-accident and with-accident earning capacity, I turn now to the final assessment of the losses.

[185] For past loss, there are two distinct time periods: when Mr. Hall was working for Innovative, and after he left Innovative and decided to become self-employed. Mr. Hall lost two weeks of work immediately after the accident, and then returned to work as a personal trainer at reduced hours. I find Mr. Hall's loss at Innovative is confined to the eight weeks immediately after the accident. As of the last two weeks of December 2016, Mr. Hall had returned to more than his pre-accident hours. I calculate the average of all hours worked after that date, including Functional Patterns hours, to be 23.5 hours per week. Comparing that to the eight weeks, I find the loss of earning capacity at Innovative was \$2,030. As for the time period after he left Innovative and up to trial, it is only in the last year that Mr. Hall has had to limit his hours, but I accept that Mr. Hall has also in the past not contributed as much as he otherwise would have to the administrative work of operating Nomadic. I estimate the loss at about 11% to 15% of one year of potential without-accident capacity. Combining this with the loss at Innovative, I assess past loss to be a total of \$13,000. Counsel can make the adjustment for income taxes.

[186] For future loss, applying the 11% to 15% reduction in capacity to the \$1.8 million assessment of without-accident earnings, I assess future loss of earning capacity to be \$235,000.

### **Special damages**

[187] The parties have reached an agreement that special damages are \$440.

### **Orders**

[188] Mr. Hall will have judgment against the defendants as follows:

<b>Head of Damage</b>	<b>Award</b>
a) Non-pecuniary damages	\$100,000
b) Past Loss of Earning Capacity	\$13,000 (less any adjustment for tax)
c) Loss of Future Earning Capacity	\$235,000
d) Special Damages	\$440
<b>TOTAL</b>	<b>\$348,440</b>

[189] Unless there are settlement offers or other matters of which I am unaware, Mr. Hall will have his costs of this action at Scale B. If the parties need to address costs, they may make arrangements through Supreme Court Scheduling to speak to the matter in the next 60 days.

“Norell J.”