

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Austin v. Glass*,  
2023 BCSC 1483

Date: 20230825  
Docket: M193356  
Registry: Vancouver

Between:

**Jack Craig Austin**

Plaintiff

And

**Sandra Jane Glass**

Defendant

Before: The Honourable Justice Basran

## Reasons for Judgment

Counsel for the Plaintiff:

B.A. Hambrook  
D.S. Klein

Counsel for the Defendant:

R.K. Buchanan  
R. Monty

Place and Dates of Trial:

Vancouver, B.C.  
May 1–5, 8–12, 15, 18–19, 2023

Place and Date of Judgment:

Vancouver, B.C.  
August 25, 2023

Table of Contents

**INTRODUCTION ..... 4**

**CREDIBILITY ASSESSMENT..... 4**

    Legal Principles ..... 4

    The Parties’ Positions on Credibility ..... 5

    Credibility Analysis ..... 5

**NON-PECUNIARY DAMAGES ..... 10**

    Legal Principles ..... 10

    The Plaintiff’s Position on Non-Pecuniary Damages ..... 12

    The Defendant’s Position on Non-Pecuniary Damages ..... 12

    Findings of Fact on Non-Pecuniary Damages ..... 13

        Mr. Austin’s Pre-Accident Condition ..... 13

        Circumstances of the Accident ..... 16

        Mr. Austin’s Post-Accident Condition ..... 16

**Medical Expert Evidence ..... 20**

        Dr. Lisa Caillier – Physiatrist ..... 20

        Dr. Gabriel Hirsch – Physiatrist ..... 22

        Dr. Stephen Anderson – Psychiatrist ..... 23

        Dr. David Morgan – Forensic Psychiatrist ..... 24

    Analysis of Non-Pecuniary Damages ..... 26

**LOSS OF INCOME-EARNING CAPACITY ..... 30**

    Factual Findings ..... 30

        Functional Capacity Evaluation and Cost of Future Care Report ..... 33

        Critique of Functional Capacity Evaluation and Cost of Future Care Report .... 34

        Vocational Rehabilitation Report ..... 35

    Past Loss of Income-Earning Capacity ..... 36

        Legal Principles ..... 36

        The Parties’ Positions on Past Loss of Income-Earning Capacity ..... 38

        Analysis of Past Loss of Income-Earning Capacity ..... 38

    Future Loss of Income-Earning Capacity ..... 39

        Legal Principles ..... 39

        The Parties’ Positions on Future Loss of Income-Earning Capacity ..... 40

        Analysis of Future Loss of Income-Earning Capacity ..... 41

---

<b>COST OF FUTURE CARE .....</b>	<b>42</b>
Legal Principles .....	42
The Parties' Positions.....	43
Factual Findings .....	43
Analysis .....	45
<b>SPECIAL DAMAGES .....</b>	<b>46</b>
Relevant Legal Principles .....	46
The Parties' Positions on Special Damages.....	46
Factual Findings and Analysis on Special Damages .....	47
<b>CONCLUSION.....</b>	<b>47</b>
<b>COSTS .....</b>	<b>47</b>

**Introduction**

[1] On December 7, 2018, Jack Craig Austin, the plaintiff, was driving across the Alex Fraser Bridge in Delta, BC when he was rear-ended by a vehicle driven by Sandra Jane Glass, the defendant (the “Accident”). The defendant admits liability for the Accident.

[2] Mr. Austin played hockey semi-professionally in Germany for four years until he suffered a serious hockey injury in 2016 (the “2016 Hockey Accident”). Prior to the Accident, he worked a physically demanding full-time job and played recreational hockey regularly. The Accident exacerbated some of Mr. Austin’s pre-existing pain and concussion symptoms and caused several psychological injuries.

[3] After the Accident, on March 10, 2020, Mr. Austin sustained a serious workplace accident that permanently disabled him from working (the “2020 Workplace Accident”).

[4] Mr. Austin seeks damages for his pain and suffering, past and future loss of income-earning capacity, and cost of future care. He also seeks special damages.

[5] For the reasons that follow, I have concluded that Mr. Austin is entitled to:

a) Non-pecuniary damages:	\$95,000
b) Past loss of income-earning capacity:	\$12,575
c) Future loss of income-earning capacity:	\$291,000
d) Cost of future care:	\$55,000
e) Special damages:	\$5,181
<b>Total:</b>	<b><u>\$458,756</u></b>

**Credibility Assessment**

**Legal Principles**

[6] It is useful to set out the principles governing credibility determinations. In assessing the truthfulness of the testimony of any witness, I am guided by the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

[...] In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. [...]

[7] In assessing credibility, I will apply the factors described by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); [*Faryna v. Chorny*, [1952] 2 D.L.R. [354] (B.C.C.A.)] [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).

### **The Parties' Positions on Credibility**

[8] Mr. Austin submits that the evidence he provided was credible. He suggests that he simply cannot recall details of several past events but he accepted several facts that were not favourable to his case.

[9] The defendant submits that there were approximately 30 instances of Mr. Austin's evidence not being credible during the trial. She submits that this demonstrates a willingness on his part to modify his evidence to suit the result he seeks at trial.

### **Credibility Analysis**

[10] In assessing the credibility of Mr. Austin's evidence, the first step is to assess it on its own. His most common response to questions on cross-examination was "I do not recall." Over the course of this examination, it became apparent that he was not providing forthright and responsive answers. His demeanour was

combative and defensive. Throughout his cross-examination, Mr. Austin repeatedly indicated that he did not remember details of his injuries or the dates when they occurred. However, on re-examination, he specifically recounted details favourable to his position of these types of events. For example, when asked about his condition on March 19, 2019, he specifically recalled the events surrounding his work status as of that date. He seems to remember details that support his position but conveniently cannot remember details that are potentially damaging to his case.

[11] One example of his varying evidence involves Mr. Austin’s concussion history. He told several treatment providers prior to the Accident that he had suffered from concussions caused by his many years of playing competitive hockey. However, at trial, he drew a sharp distinction between the concussion symptoms he experienced and the lack of a specific diagnosis of a concussion by a physician prior to the Accident. This was disingenuous because he reported having a concussion to several treatment providers prior to the Accident, including Dr. Boynton on May 11, 2017. In an exhibit at trial, Mr. Austin wrote that he suffered from “concussion and neck pain”. When asked about this notation, Mr. Austin testified defensively that he did not recall writing this comment but later admitted that the handwriting appeared to be his.

[12] In a September 15, 2018 intake document for chiropractic treatment, completed almost three months before the Accident, Mr. Austin was asked to explain any accidents, falls, personal injuries, and all associated symptoms. He replied, “all related to ice hockey I have had concussions throughout playing hockey for 10 years and 2.5 years ago fell into boards making symptoms worse” (*sic*). When asked about this document at trial, Mr. Austin minimized these incidents by referring to them as “dings” and testified that he did not recall filling out this form.

[13] In the same intake form, Mr. Austin checked boxes indicating that his condition was interfering with work. At trial, he denied that his pre-existing concussion symptoms affected his ability to work aside from occasional issues at the

end of the day. A notation on the bottom of this form indicates that he signed it on September 15, 2018.

[14] Mr. Austin's evidence on why he stopped playing competitive hockey was inconsistent. At trial, he confirmed that the 2016 Hockey Accident ended his semi-professional hockey career. However, on December 12, 2022, he told Dr. Caillier that he stopped playing hockey because he could not reach the upper levels of the sport. Mr. Austin sought to reconcile this inconsistency by saying that a combination of his injury and his inability to move up to the higher levels was the reason why he stopped playing hockey. When pressed, he agreed that the true reason why he stopped playing semi-professional hockey was the injury he sustained in the 2016 Hockey Accident.

[15] Mr. Austin's family physician is Dr. John Phillips. In a medical report form completed by Dr. Phillips on August 6, 2019, he noted that "patient reports a concussion about 3 years prior to his accident. He states he was at baseline and symptom free when accident occurred in December." When confronted with this document at trial, Mr. Austin testified that he did not recall making this statement to Dr. Phillips. I accept that Dr. Phillips made this notation based on Mr. Austin's statement to him.

[16] During his direct examination, Mr. Austin testified that all of his vision problems were caused by the Accident. However, prior to the Accident, he was referred to Dr. Loopeker, an optometrist, for vision issues that stemmed from the 2016 Hockey Accident. Although he attended this appointment after the Accident, the referral to this optometrist was made prior to it.

[17] Dr. Jalili, a chiropractor, wrote a letter dated October 9, 2018 indicating that Mr. Austin required one month off work in January 2019 to attend a program for his post-concussion symptoms. This letter was written and provided to Mr. Austin's employer two months before the Accident.

[18] Mr. Austin denies that he intended to take one month off work to obtain this treatment. He testified that his concussion symptoms were not limiting him. He speculates that the letter was written and sent directly to his employer without his knowledge. It is unlikely that he was unaware of the contents of this letter and I do not accept that he was uninvolved in its transmission to his employer.

[19] At trial, Mr. Austin testified that he had ongoing pain symptoms in his shoulder that fluctuated. However, during his examination for discovery on July 16, 2021, when asked if there were any lingering issues with this shoulder prior to the Accident, Mr. Austin testified that his shoulder was “100 percent” after the surgery and rehabilitation. In attempting to rehabilitate this answer, Mr. Austin meekly explained that on the day of the examination for discovery, he felt that his shoulder was 100 percent.

[20] Similarly, during his direct examination, Mr. Austin denied having upper back pain prior to the Accident. However, on cross-examination, he admitted that a diagram that he completed prior to the Accident described pain symptoms from his neck to mid back.

[21] Notwithstanding clear evidence to the contrary in Mr. Austin’s WorkSafeBC claim file, he insisted that the he did not take time off in January and February 2020 because of a groin injury. Instead, he insisted that he took this time off because of his “MVA related injuries” and that his groin injury “just so happened” to occur at that time. His testimony in this regard is not believable.

[22] Mr. Austin advised Dr. Caillier that he blacked out for a few seconds immediately after the Accident. He maintained this narrative during his examination for discovery and at trial. However, he did not describe this symptom to the doctor at the walk-in clinic he attended a few hours after the Accident. The medical record from that visit indicates that “there was no loss of consciousness”. Puzzlingly, Mr. Austin insists that he told this doctor that he had blacked out but this seems unlikely given the doctor’s notation.

[23] Furthermore, Mr. Austin told several treatment providers that he hit his head on the steering wheel during the Accident, but at trial, he acknowledged that he does not know if this happened. This is confirmed in a medical record dated January 12, 2019 in which there is a notation that the “patient doesn’t know what happened, doesn’t know what part of the body was hit”.

[24] Mr. Austin’s evidence regarding his return to work at McRae’s Environmental Services Ltd. (“McRae’s”) also varied. At one point in his direct examination, he testified that his employer accommodated him by putting him on lighter jobs after the Accident and until he sustained a groin injury in the 2020 Workplace Accident. Later in his direct examination, he denied that his employer provided any accommodations to him. On cross-examination, he confirmed that after the Accident, he completed a four-week graduated return to work program and then returned to his full-time duties at McRae’s, including overtime, without any accommodations or lighter duties. Mike Melenka, Mr. Austin’s supervisor at McRae’s, confirmed that Mr. Austin was not assigned light duties until after the 2020 Workplace Accident.

[25] Mr. Austin incorrectly told Dr. Caillier that he graduated from high school. When confronted with this mistruth, Mr. Austin explained that when he was interviewed by Dr. Caillier he thought he had graduated from high school but later realized that he had not. However, two months prior to seeing Dr. Caillier, Mr. Austin told Dr. Morgan that he did not graduate from high school. Graduating from high school is a notable milestone. I do not accept that Mr. Austin was unaware that he had not completed high school.

[26] Mr. Austin’s evidence was self-serving, inconsistent, argumentative, and it did not accord with the preponderance of possibilities. His evidence was also somewhat unreliable. His testimony was generally vague and scattered. In describing his condition, he often resorted to equivocal language that lacked expected specificity. He frequently stated that his symptoms fluctuate, vary, and change from day to day.

[27] In light of my concerns with both the credibility and reliability of Mr. Austin's evidence, I have relied on documentary and expert evidence in finding the necessary facts that does not depend on Mr. Austin's veracity or reliability.

### **Non-Pecuniary Damages**

#### **Legal Principles**

[28] Mr. Austin must prove that the Accident caused his injuries. He need not establish that the admitted negligence of the defendant was the sole cause of his injuries, but he must demonstrate a substantial connection between the Accident and his physical and psychological injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28–30.

[29] The defendant need not compensate the plaintiff for any loss not caused by her negligence or for the debilitating effects of a condition which the plaintiff would have experienced in any event: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 34–35.

[30] The burden is on the plaintiff to prove causation by establishing that:

- a) the defendant is the "cause in fact" of the damage suffered; and
- b) the defendant is a "proximate cause" of the damage, in other words, that the damage is not too remote from the factual cause.

See: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258.

[31] The remoteness inquiry therefore assumes that but for the defendant's wrongful act, the plaintiff's loss would not have occurred, but places legal limits on the defendant's liability: *Hussack* at para. 54.

[32] If an independent intervening event occurs, the assessment of the plaintiff's position is affected, and the net loss experienced by the plaintiff is reduced. Unrelated intervening events are taken into account in the same manner as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as

great and damages will be reduced proportionately. The defendant need not prove that pre-existing conditions and independent intervening causes would have inevitably led to the plaintiff's current condition. Whether they are latent or manifest, pre-existing and intervening conditions that might realistically cause or contribute to the loss claimed regardless of the tort are relevant to the assessment of damages. They are a contingency that should be accounted for in the award. Such a contingency does not have to be proven to a certainty. It should be given weight according to its relevant likelihood: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 36, 48; *Barnes v. Richardson et al.*, 2008 BCSC 134 at para. 96, aff'd 2010 BCCA 116.

[33] Section 127 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 precludes a plaintiff from recovering all damages from a defendant for a tort-caused injury that is indivisible from an injury in respect of which the plaintiff has a right of claim to workers' compensation benefits. In such cases, the claimant does not recover the full amount of the loss, but only that portion attributable to the tortious act: *Pinch v. Hofstee*, 2015 BCSC 1888 at paras. 60–61.

[34] Some of the relevant factors in assessing non-pecuniary damages include:

- a) the plaintiff's age;
- b) nature of the injury;
- c) severity and duration of the pain;
- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital, and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not penalize the plaintiff)

See *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

### **The Plaintiff's Position on Non-Pecuniary Damages**

[35] Mr. Austin acknowledges that he was suffering from the effects of a possible concussion, or concussion-like injury, in the months leading to the Accident but submits that his pre-existing condition was not significantly interfering with his quality of life. He points out that he continued to play recreational hockey until the Accident and that he quit playing because of the injuries he sustained in it.

[36] Mr. Austin submits that his pre-existing condition, including his concussion symptoms, do not warrant a contingency deduction to his non-pecuniary award. He points out that his concussion symptoms worsened after the Accident.

[37] Mr. Austin also asserts that the 2020 Workplace Accident was causally unrelated to the injuries he sustained in the Accident and that but for the injuries he sustained in the Accident, he would have returned to work by July 31, 2020.

[38] On the quantum of non-pecuniary damages, Mr. Austin relies on the following cases and submits that the Court should award him \$180,000 for his pain and suffering caused by the Accident:

- a) *Baskerville v. Liu*, 2022 BCSC 2164 - \$180,000;
- b) *Sandhu v. Peloquin*, 2019 BCSC 1333 - \$145,000;
- c) *Corness v. Ng*, 2022 BCSC 334, aff'd 2023 BCCA 185 - \$120,000; and
- d) *Suri v. Thomasen*, 2023 BCSC 334 - \$150,000.

### **The Defendant's Position on Non-Pecuniary Damages**

[39] The defendant acknowledges that the Accident aggravated some of Mr. Austin's pre-existing physical and mental health issues and that they were temporarily disabling; however, the defendant submits that Mr. Austin achieved a full and functional return to his original position in respect of most of these complaints by March 10, 2020, the date of the 2020 Workplace Accident. She further submits that the 2020 Workplace Accident totally disabled Mr. Austin from performing physical

labour. She maintains that her negligence is not the proximate cause of Mr. Austin's most serious, ongoing, and debilitating injuries. This is because Mr. Austin had several pre-existing injuries prior to the Accident and the 2020 Workplace Accident caused his total disability from doing physically demanding work. She submits that the 2020 Workplace Accident is an independent intervening event that is only compensable through the workers' compensation system.

[40] The defendant also acknowledges that the Accident caused an aggravation of Mr. Austin's pre-existing neck and upper back pain but asserts that he was not disabled from April 1, 2019 to March 10, 2020 because he returned to work during this period.

[41] The defendant submits that the appropriate range of non-pecuniary damages for Mr. Austin is in between \$80,000 to \$100,000 because Mr. Austin has pre-existing physical and psychological injuries that were exacerbated after the Accident. She asserts that his pre-existing condition merits a 25% deduction in his award. She further submits that the 2020 Workplace Accident was an intervening event that justifies a further 50% reduction in his damages.

[42] Taking these deductions into account and in light of Mr. Austin's credibility problems, the defendant concludes that Mr. Austin is entitled to \$80,000 in non-pecuniary damages. In reaching this conclusion, she relies on the following cases, adjusted for inflation:

- a) *Borecka v. Wilkins*, 2017 BCSC 13 - \$85,000; and
- b) *Hrnic v. Bero Investments Ltd.*, 2018 BCSC 1880 - \$85,000.

### **Findings of Fact on Non-Pecuniary Damages**

#### ***Mr. Austin's Pre-Accident Condition***

[43] Mr. Austin was born in April 1992. He is 31 years old and was 26 when the Accident occurred.

[44] Jean Mary Austin, Mr. Austin's mother, testified that prior to the Accident, Mr. Austin was outgoing and athletic with a particular interest in high-level soccer and hockey. He worked for her and she described him as a great employee. She does not recall him having any concentration or cognitive problems.

[45] Mr. Austin played hockey in Canada until he was 19 years old and then played in Germany from 2012 to 2016. He was not paid to play hockey in Germany but his room and board was funded by a semi-professional team. During the off-season, he returned to White Rock where he worked for a business owned by his mother.

[46] In 2013 or 2014, Mr. Austin had a shoulder surgery in Germany to repair a torn labrum that he sustained while playing hockey there.

[47] The 2016 Hockey Accident occurred during a game in the 2015–2016 season. Mr. Austin stopped playing hockey in Germany after sustaining shoulder and head injuries in that game. Since then and until the Accident, he played non-contact, recreational hockey, approximately four times a week.

[48] Prior to the Accident, Mr. Austin had several pre-existing injuries to his head, shoulder, and groin. He sustained two separate groin injuries, one while playing hockey prior to the Accident. Mr. Austin acknowledges that he also injured his groin at work prior to the Accident.

[49] Mr. Austin sought medical treatment for ongoing groin and men's health issues on October 27, 2018 and November 24, 2018.

[50] Prior to the Accident, Mr. Austin used the benefits he had access to from working at McRae's to treat his ongoing concussion symptoms and other hockey-related injuries. This included treatment for headaches, brain fog, vision problems, fatigue, dizziness, and memory problems.

[51] Mr. Austin reported anxiety and depression symptoms after returning to Canada following the end of his hockey career in Germany.

[52] Mr. Austin obtained treatment over two-and-a-half years for concussion symptoms prior to the Accident. This included five chiropractic treatments provided by Dr. David Edward Beaudoin in May and June 2017 and eight chiropractic treatments from Dr. Jalili from September to November 2018, all for his concussion and neck pain symptoms.

[53] Mr. Austin self-reported a range of concussion related complaints to Dr. Jalili prior to the Accident. As a result, on October 9, 2018, Dr. Jalili prepared a letter for Mr. Austin's employer, McRae's, stating that Mr. Austin required the month of January 2019 off work to attend a month-long neuro-cognitive rehabilitation program. This letter was written and provided to Mr. Austin's employer approximately two months before the Accident.

[54] Mr. Michael Melenka, Mr. Austin's manager at McRae's, recalls receiving the letter written by Dr. Jalili, dated October 9, 2018, requesting that Mr. Austin not work during January 2019. Mr. Melenka understood that Mr. Austin was planning to take this month off because his pre-Accident symptoms were exacerbated by his work at McRae's.

[55] Prior to the Accident, Mr. Austin complained of dizziness, fatigue, and headaches. He underwent hyperbaric chamber treatment for his concussion symptoms prior to the Accident.

[56] Mr. Austin's pre-existing injuries caused pain in his shoulder, neck and back and he also experienced concussion symptoms such as headaches, dizziness, and fatigue. These symptoms caused some limitations prior to the Accident. For example, he was occasionally sore or tired after a day of work. However, he does not recall turning down any opportunities to play hockey because of these symptoms.

[57] Mr. Austin had vision problems prior to the Accident that stemmed from the 2016 Hockey Accident. Prior to the Accident, he was referred to Dr. Loopeker, an optometrist, for treatment of these vision issues.

[58] Mr. Austin’s original position, prior to the Accident, includes some ongoing shoulder symptoms arising from a surgically repaired labrum, neck, upper and lower back pain, at least one concussion with related ongoing headaches, dizziness, visual symptoms, brain fog, forgetfulness, and fatigue.

***Circumstances of the Accident***

[59] On December 7, 2018, Mr. Austin was driving to work, northbound, across the Alex Fraser Bridge in Delta, BC, when he was rear-ended by a vehicle owned and operated by the defendant. He spoke to a police officer and a tow truck driver at the scene of the Accident then drove himself home, which took approximately 30 minutes. On the way, he pulled over and phoned the Insurance Corporation of British Columbia to report the Accident.

[60] Immediately after the Accident, Mr. Austin experienced pain in his neck, head, and upper back as well as a headache, dizziness and shock. After driving himself home, he asked his mother, Jean Mary Austin, to take him to a local walk-in clinic in White Rock. Mrs. Austin recalls that Mr. Austin was confused, dizzy, nauseous, and spoke incoherently on that day.

[61] The doctor who saw him at the walk-in clinic recorded that Mr. Austin did not lose consciousness. Later the same day, Mr. Austin attended an appointment with his family physician, Dr. John Phillips.

***Mr. Austin’s Post-Accident Condition***

[62] In the days after the Accident, Mr. Austin experienced ongoing upper back and neck pain, fatigue, dizziness, and headaches. He also experienced problems with his vision and low mood.

[63] Mr. Austin’s vision symptoms consist of blurriness and eyestrain, influenced largely by the amount of time he spends looking at computer screens when he was doing a business selling hockey equipment online. He does eye movement exercises as prescribed by a physiotherapist but this activity sometimes causes a

flare-up in his vision symptoms. Exercising or getting up quickly also aggravates his vision problems.

[64] Mr. Austin's symptoms recur four to five times per week. This frequency has persisted since the Accident. Lifting heavy objects and stressful or noisy environments aggravate his headache symptoms.

[65] Mr. Austin experienced headaches prior to the Accident but they are now more frequent and severe. They did not previously prevent him from engaging in recreational activities but now they do. For example, Mr. Austin can no longer play recreational hockey or engage in physical activities such as hiking. He is unable to undertake these activities because of the headache pain symptoms he experiences.

[66] Mr. Austin also experiences dizziness. On one occasion, he tried skating but had to stop because he felt dizzy and off-balance. These symptoms occur on a fluctuating basis. Again, Mr. Austin had some dizziness prior to the Accident but it did not prevent him from undertaking his recreational activities such as playing hockey.

[67] On January 12, 2019, Mr. Austin began physiotherapy for his Accident-related complaints. Along with doing physiotherapy, Mr. Austin began working out at a gym. Between December 21, 2018 and April 1, 2019, Mr. Austin reported to both his family physician, Dr. Phillips, and his physiotherapist that he experienced improvement in his post-concussion symptoms, headaches, neck and upper back pain and that he wanted to return to work.

[68] Mr. Austin experiences ongoing fatigue symptoms since the Accident. His energy levels fluctuate and he periodically needs to nap. He experienced some of fatigue prior to the Accident, particularly after a long day of work.

[69] One of Mr. Austin's most significant symptoms is low mood. He describes this as feeling down and depressed. This symptom fluctuates. He ruminates about being unable to work and play hockey. Mr. Austin had what he characterizes as

“light depression” prior to the Accident but it did not impair his vocational or recreational activities.

[70] Mr. Austin has problems with his memory. He forgets day-to-day things such as the location of his car keys and the items he is supposed to pick up at a grocery store. He had some memory problems prior to the Accident but he believes that it made this symptom worse.

[71] Mr. Austin experiences ongoing neck and upper back pain. Massage therapy helps relieve the tension but these symptoms persist. He had some neck and upper back pain prior to the Accident but it was less painful. He experienced more intense pain in his neck and upper back after the Accident with more frequent flare-ups of these symptoms. He has also lost muscle mass because he no longer works out with weights at a gym.

[72] On a typical morning, Mr. Austin feels sluggish, sore, and depressed. Screen time, driving, lifting heavy objects, and busy environments aggravate his symptoms.

[73] On April 1, 2019, Mr. Austin returned to work on a graduated return to work for four weeks, working four days per week, taking Wednesdays off work, but otherwise working his accustomed duties and overtime. On April 29, 2019, although he continued to have mild residual symptoms, Mr. Austin resumed working his regular pre-Accident work schedule, including his accustomed pre-Accident overtime hours.

[74] During the next eight months, Mr. Austin saw his family physician, Dr. Phillips, three times. After an appointment on November 7, 2019, Dr. Phillips noted that he had suggested that Mr. Austin continue physiotherapy and massage therapy for his neck pain and he also advised him that he had arrived at a new baseline for his symptoms and should therefore consider training for other careers. This suggests that the Accident exacerbated and worsened some of Mr. Austin's pain symptoms.

[75] Prior to the 2020 Workplace Accident, Mr. Austin did not do light duties, nor did his supervisor Mr. Melenka hear of him complaining about his work or being unable to do his regular work duties.

[76] Mr. Austin's post-Accident activities include walking, light trail walks, and stretching. He paces himself while trail walking because he occasionally experiences dizziness while doing this activity. He walks 30 to 45 minutes on a weekly basis. This activity sometimes aggravates his pain symptoms but he also occasionally finds this to be helpful for his mood.

[77] Prior to the Accident, Mr. Austin periodically biked on streets and trails. He has not done this activity since the Accident because of dizziness.

[78] The bending, lifting, cognitive demands, noise, and long hours involved in working at McCrae's aggravated some of Mr. Austin's symptoms. He experienced increased neck and back pain, dizziness, brain fog, and low mood. He required assistance from colleagues with some of the heavier strength tasks and in his view, he was not as proficient in doing this work because of his pain symptoms. His supervisor, Mr. Melenka, did not have any concerns with Mr. Austin's work performance after he returned to work at McCrae's.

[79] As noted, the 2020 Workplace Accident occurred on March 10, 2020. Mr. Austin sustained a serious groin injury while lifting a catch basin. This incident further injured his low back and groin, resulting in symptoms into his genitals and causing an exacerbation of his mental health issues.

[80] Mr. Austin feared returning to work and reinjuring his groin and back and he told a urologist that he wanted an MRI examination. Mr. Austin made a claim to WorkSafeBC for compensation for his work-related groin, low back, and men's health issues, which was accepted.

[81] After this injury, Mr. Austin missed approximately one month of work because of his groin injury. He experiences some ongoing numbness in this area.

[82] On June 17, 2020, Mr. Melenka called Mr. Austin to ask him if he was going to return to work. Mr. Austin asked for another week to make his decision. On June 19, 2020, Mr. Austin called Dr. Lasner and asked for a return-to-work note. Then, on June 24, 2020, Mr. Austin called Mr. Melenka and resigned. Four days later, on June 28, 2020, Mr. Austin emailed Mr. Melenka and resigned for “medical reasons” but did not elaborate further.

[83] Mrs. Austin confirmed that since the Accident, Mr. Austin is unable to work, think clearly, or concentrate. He frequently has headaches, becomes confused, and avoids or withdraws from family events because he becomes overwhelmed. He has also become more irritable, sad, frustrated and angry. She did not distinguish between his symptoms after the Accident and the 2020 Workplace Accident.

### **Medical Expert Evidence**

#### ***Dr. Lisa Caillier – Psychiatrist***

[84] Dr. Caillier is a qualified expert in physical medicine and rehabilitation, electrodiagnostic medicine, and chronic pain. She assessed Mr. Austin on December 12, 2022 and produced an expert report on that date.

[85] Dr. Caillier understood that Mr. Austin sustained a concussion in either 2015 or 2016 while playing semi-professional hockey in Europe. Mr. Austin told her that his symptoms from this concussion had resolved prior to the Accident. Her review of the clinical records revealed that he had ongoing headaches, fogginess, fatigue, memory and vision issues, and dizziness that pre-dated the Accident.

[86] The crux of her opinion is that the intensity and frequency of most of Mr. Austin’s pre-existing symptoms increased as a result of the Accident. For example, the frequency of his headaches increased to four to five times per week. In her opinion, Mr. Austin’s history of concussions, which remained symptomatic prior to the Accident, increased his susceptibility and vulnerability to future traumatic brain injuries. She unhesitatingly acknowledges that he had ongoing residual symptoms that would have persisted to some level in the absence of the Accident.

However, she notes that he was at increased risk of a subsequent concussion because of his concussion history.

[87] Dr. Caillier made the following diagnoses:

- a) mild traumatic brain injury;
- b) chronic post-traumatic headaches;
- c) chronic pain in his neck, top of shoulder and lower back;
- d) frustration, depression, and anxiety; and
- e) multifactorial cognitive dysfunction.

[88] Dr. Caillier opined that Mr. Austin likely would not have had his current and ongoing level of injury symptoms but for the Accident. This is based largely on his pre-Accident ability to play hockey, socialize effectively, and work full-time as compared to his post-Accident circumstances in which he is unable to play hockey, socializes less, and periodically experiences fatigue after a day of work.

[89] Dr. Caillier's prognosis for Mr. Austin's likelihood of becoming completely symptom-free is poor.

[90] Vocationally, Dr. Caillier opined that Mr. Austin is capable of working part-time within a sedentary environment and that he is able to manage his activities in his home.

[91] Dr. Caillier understood the nature and extent of Mr. Austin's pre-existing issues and convincingly pointed out that they did not limit his function or require medical treatment provided by a physician. In her view, most of his pre-existing symptoms worsened after the Accident.

[92] Loss of consciousness is not required to make a concussion diagnosis. She relied on the clinical reports of Dr. Phillips that described progressively more symptoms attributable to a concussion. Importantly, she pointed out that Mr. Austin's prior history of concussions made him more susceptible to this injury.

***Dr. Gabriel Hirsch – Physiatrist***

[93] Dr. Hirsch is also a qualified expert in physical medicine and rehabilitation. He examined Mr. Austin on October 12, 2022 and produced an expert report on that day.

[94] Based on Dr. Hirsch's review of records and interview with Mr. Austin, he found that Mr. Austin sustained several concussions prior to the Accident including a significant one attributable to the 2016 Hockey Accident.

[95] Dr. Hirsch observed that the clinical records from the period immediately after the Accident do not document lower back pain. He therefore concluded that Mr. Austin probably did not suffer a lower back injury caused by the Accident. He opined that Mr. Austin could have suffered a neck injury but these symptoms were short lived and more or less resolved within a few months.

[96] Dr. Hirsch does not agree that Mr. Austin suffered a concussion attributable to the Accident. Instead, he concluded that Mr. Austin's concussion like symptoms reflected a pre-existing condition caused by the 2016 Hockey Accident.

[97] Dr. Hirsch opined that Mr. Austin's decision to discontinue working at McRae's was not because of the Accident but instead a result of persistent concussion-like symptoms from the 2016 Hockey Accident. Dr. Hirsch did however note that Mr. Austin suffered a significant concussion caused by the 2016 Hockey Accident, an exacerbation of these symptoms in the Accident, and physically debilitating injuries in the 2020 Workplace Accident.

[98] Based on Mr. Austin's return to work in April 2019, Dr. Hirsch opined that Mr. Austin's neck, lower back, and neurological symptoms were not caused by the Accident.

[99] Dr. Hirsch contends that Mr. Austin has the physical aptitude to perform tasks which are sedentary, light or medium, and his vocational prospects have not been negatively impacted by the Accident.

***Dr. Stephen Anderson – Psychiatrist***

[100] Dr. Anderson is a qualified psychiatrist. He assessed Mr. Austin on January 12, 2023 and produced an expert report dated January 17, 2023.

[101] Dr. Anderson took into account Mr. Austin's pre-Accident concussion history, including the one caused by the 2016 Hockey Accident that ended his semi-professional hockey career in Germany. Importantly, he noted that Mr. Austin continued to play hockey recreationally four to five times per week after the 2016 Hockey Accident. Although he had some lingering symptoms from the concussion sustained in the 2016 Hockey Accident, Mr. Austin was regularly able to play hockey recreationally and work at a physically demanding job.

[102] Dr. Anderson made the following diagnoses caused by the Accident:

- a) persistent somatic symptom disorder with predominant pain;
- b) major depressive disorder of moderate severity; and
- c) generalized anxiety disorder.

[103] Dr. Anderson also opined that Mr. Austin likely had a concussion caused by the Accident because he noted significant cognitive difficulties likely due to a number of Accident-related factors including pain, fatigue, anxiety, and depression.

[104] Dr. Anderson's prognosis is that Mr. Austin will likely not return to his premorbid level of emotional functioning. He opines that Mr. Austin has a permanent disability caused by the Accident and his long term prognosis from a psychiatric point of view is poor, particularly because he has more than one psychiatric disorder.

[105] Dr. Anderson opined that Mr. Austin will likely continue to have permanent cognitive difficulties due to the residual effects of the concussion. He does not think that Mr. Austin is competitively employable and believes that he likely has a permanent disability as a result of the Accident.

[106] Dr. Anderson's opinion is similar to that of Dr. Caillier insofar as both highlight Mr. Austin's inability to play hockey after the Accident as a significant functional difference compared to his pre-Accident condition. Dr. Anderson specifically noted that Mr. Austin did not have diagnosed somatic symptom disorder, anxiety or depression prior to the Accident and he was functioning successfully socially and vocationally. The Accident exacerbated and worsened his pre-existing concussion symptoms and caused these three psychiatric conditions.

[107] Dr. Anderson explained that individuals who suffer a concussion are sometimes able to carry out complex behaviours. He further explained that patients with a history of concussions, such as Mr. Austin, are more susceptible to subsequent concussions and their symptoms worsen with each successive concussion.

[108] Dr. Anderson highlighted that Mr. Austin suffered symptoms he did not have before the Accident, such as light and sound sensitivity, and his ongoing pre-existing concussion symptoms worsened.

***Dr. David Morgan – Forensic Psychiatrist***

[109] Dr. David Morgan is a specialist in psychiatry and a sub-specialist in forensic psychiatry. He interviewed Mr. Austin by video conference on October 18, 2022 and produced an expert report dated November 18, 2022.

[110] Dr. Morgan found that Mr. Austin had a number of pre-existing medical issues prior to the Accident including post-concussive symptoms, urological symptoms, depression, and anxiety. He also opined that Mr. Austin was probably suffering from a somatic disorder of mild severity.

[111] Dr. Morgan did not conclude that Mr. Austin suffered a concussion as a result of the Accident because he did not suffer a loss of consciousness nor did he experience confusion, disorientation, post-traumatic amnesia, or other neurological symptoms. Instead, he opined that Mr. Austin experienced a worsening of his pre-existing post-concussive symptoms and neck pain. He further opines that Mr. Austin

suffered a significant exacerbation of his somatic symptom disorder following the Accident and that this condition became severe for several months after it. Mr. Austin also developed depressive symptoms and may develop a major depressive episode of mild severity so he diagnosed a major depressive disorder.

[112] In short, Dr. Morgan opined that Mr. Austin fulfilled the DSM – 5 diagnostic criteria for somatic symptom disorder with predominant pain moderate to severe, and major depressive disorder, and that these diagnoses were caused by the Accident.

[113] Dr. Morgan observed that Mr. Austin was off work for several months as a result of these diagnoses but his condition improved over time and he was able to return to an maintain his pre-Accident employment but he was not able to resume playing hockey.

[114] In this initial report, he concluded that Mr. Austin’s prognosis from a psychiatric perspective is “probably reasonably good.”

[115] After reviewing Dr. Anderson’s expert report, Dr. Morgan provided an addendum report dated March 1, 2023. He did not interview Mr. Austin again in the course of preparing this subsequent report. From his review of additional collateral information, Dr. Morgan found that Mr. Austin suffered from significant post-concussive symptoms which had persisted for more than two years following a concussion in 2016 and these impacted his occupational functioning. This additional information reinforces his opinion that Mr. Austin probably suffered from a somatic symptom disorder prior to the Accident.

[116] In the subsequent report, Dr. Morgan’s diagnoses remained unchanged. He disagrees with Dr. Anderson’s opinion that Mr. Austin developed a generalized anxiety disorder following the Accident based on his review of the collateral information.

[117] Dr. Morgan changed his prognosis in his second report because Mr. Austin remains troubled by significant pain and associated anxieties about his health. He

therefore concluded that Mr. Austin’s prognosis is probably guarded. Dr. Morgan acknowledge that his initial prognosis was too optimistic.

[118] Dr. Morgan observed that the 2020 Workplace Accident, the groin and lower back injuries sustained by Mr. Austin while lifting a heavy catch basin, skewed his clinical trajectory and these injuries are intervening events that are causally unrelated to the Accident.

**Analysis of Non-Pecuniary Damages**

[119] For the purposes of determining causation, I must consider the effects and contributions of three distinct events:

- a) the 2016 Hockey Accident;
- b) the Accident; and
- c) the 2020 Workplace Accident.

[120] The 2016 Hockey Accident marked the end of Mr. Austin’s semi-professional hockey career. After this incident and before the Accident, he had neck, upper and lower back pain as well as groin pain and some men’s health issues. He sustained at least one concussion prior to the Accident and probably more given his history of headaches, dizziness, vision problems, brain fog, and memory problems.

Mr. Austin’s characterization of blows to his head as “dings” understates the severity and cumulative effect of these head injuries. Each successive concussion made him vulnerable to further concussions with their associated symptoms.

[121] Mr. Austin’s concussion symptoms were ongoing for two and half years prior to the Accident. I am satisfied that prior to the Accident, he had planned to take a month off work in January 2019 to treat these ongoing symptoms in a program administered by Dr. Jalili. I reject Mr. Austin’s assertions to the contrary and his denial of any knowledge that Dr. Jalili had sent a letter to McRae’s regarding the need for Mr. Austin to undertake this treatment program.

[122] I am not convinced that Mr. Austin suffered from any emotional vulnerability by virtue of the loss of his potential hockey career. The evidence does not support this assertion because Mr. Austin had been playing largely unpaid, semi-professional hockey in Germany prior to the 2016 Hockey Accident. While the 2016 Hockey Accident marked a sudden end to his hockey career, I doubt that it caused any significant or ongoing emotional distress.

[123] I similarly reject the defendant's argument that Mr. Austin's physically demanding work at McRae's caused a material risk of aggravation of his concussion symptoms. These symptoms noticeably worsened after the Accident. There is no evidence that Mr. Austin's work contributed to the worsening of these symptoms.

[124] The Accident worsened Mr. Austin's concussion symptoms and this aggravation has persisted. Most notably, Mr. Austin is no longer able to play hockey in any capacity whereas he had been playing approximately four to five times per week in a recreational league prior to the Accident. Given his lifelong affinity for this sport, his abrupt inability to continue playing hockey is a notable loss for him.

[125] Between April 1, 2019 and March 10, 2020, Mr. Austin was not disabled from his work by any Accident-related physical, emotional, or cognitive complaints. During this period, his concussion symptoms persisted. He continued to report some headaches, neck and upper back pain, these were a continuation of similar issues he complained of prior to the Accident but I accept that the Accident aggravated these symptoms.

[126] Beginning March 10, 2020, the date of the 2020 Workplace Accident, Mr. Austin began to:

- a) display more disproportionate or persistent thoughts about his low back, groin and men's health symptoms; and
- b) display persistently high levels of anxiety about his low back, groin and men's health symptoms by eschewing all physical labour and seeking treatment from different physicians, including another urologist, and undergoing further medical investigation through diagnostic imaging.

[127] In my view, the 2020 Workplace Accident permanently disabled Mr. Austin from working. Mr. Austin's fear of further reinjury to his groin and low back ultimately lead to his decision to quit his job with McRae's and avoid all physical work to the present date.

[128] I accept Dr. Caillier's opinion that the intensity and frequency of many of Mr. Austin's pre-existing symptoms increased as a result of the Accident and that he is unlikely to have his current and ongoing level of injury symptoms but for the Accident. The most obvious example of the loss of capacity is his post-Accident inability to play hockey.

[129] I accept the diagnoses of Dr. Caillier and Dr. Anderson that Mr. Austin probably suffered a further concussion as a result of the Accident. This is supported by Dr. Anderson's observation that Mr. Austin suffered symptoms he did not previously before the Accident such as light and sound sensitivity. He also observed that the Accident caused the worsening of Mr. Austin's ongoing pre-existing concussion symptoms. Although Dr. Morgan did not conclude that Mr. Austin suffered a concussion as a result of the Accident, he also noted that Mr. Austin experienced a worsening of his pre-existing post-concussive symptoms and neck pain.

[130] Whether Mr. Austin suffered a new concussion or an exacerbation of his existing concussion symptoms is largely immaterial. The important consideration is that the experts agree, as do I, that Mr. Austin's concussion symptoms noticeably worsened and persisted due to the Accident.

[131] While I agree with Dr. Hirsch's opinion that Mr. Austin's neck, lower back and neurological symptoms were not caused by the Accident, I prefer Dr. Caillier's conclusion that these symptoms noticeably worsened due to the Accident.

[132] I reject Dr. Hirsch's contention that Mr. Austin has the physical aptitude to perform tasks which are sedentary, light, or medium and his vocational prospects have not been negatively impacted by the Accident. This is an alarmingly

unreasonable opinion in the face of the evidence of Mr. Austin's worsened concussion symptoms and inability to perform many of the physical tasks he could previously do. I prefer Dr. Anderson's conclusion that Mr. Austin is not competitively employable and likely has a permanent disability. However, in my view, this was precipitated by the 2020 Workplace Accident, not the subject Accident.

[133] I accept Dr. Anderson's findings that Mr. Austin suffers from somatic symptom disorder, depression, and anxiety. He did not have these diagnosed disorders prior to the Accident.

[134] It is notable that Dr. Quee Newell could not prepare an opinion on Mr. Austin's vocational capacity because Mr. Austin failed her vocational assessment validity tests. Even factoring in his academic issues, he scored below the first percentile, comparable with adults with developmental disabilities. She was unable to reconcile this result with his presentation, his work history, and his obvious capabilities.

[135] Jeff Padvaiskas provided a rebuttal opinion on the methodology employed by Russell McNeil in preparing his functional capacity evaluation. As Mr. Padvaiskas noted, Mr. Austin failed a key objective validity measure of effort, namely heart rate. Mr. McNeil noted that Mr. Austin stopped testing for fear of injuring his low back pain on multiple occasions, but he would not agree that Mr. Austin gave less than optimal effort. In cross-examination, Mr. McNeil would not concede that his testing could not account for will—that is an examinee's willingness to perform at full capacity. His stubbornness on this point made little sense when he was taken through the sections of his report where he documented that Mr. Austin had been unwilling to perform certain lift tests out of apprehension of further low back injury.

[136] The Accident caused a worsening of Mr. Austin's concussion symptoms and an aggravation of his neck and back pain. I do not accept that it contributed to any worsening of his pre-existing groin and men's health issues. The 2020 Workplace Accident precipitated the end of Mr. Austin's career as physical labourer. In my view, it was the most serious and damaging event in his history of physical injuries.

[137] The 2016 Hockey Accident caused a series of pre-existing injuries as previously described. The Accident worsened Mr. Austin's concussion symptoms as well as his neck and back pain. The 2020 Workplace Accident substantially aggravated his pre-existing groin and men's health issues along with his anxiety and depression symptoms.

[138] Mr. Austin's injuries are indivisible given the pre-existing, inter-related and sequentially aggravating nature of them. I attribute a deduction of 20 percent to his pre-existing injuries and 50 percent to the 2020 Workplace Accident as an independent intervening event.

[139] Taking into account the cases referred to by the parties, I am satisfied that Mr. Austin is entitled to \$95,000 in respect of the pain and suffering he endured that is attributable to the Accident.

### **Loss of Income-Earning Capacity**

#### **Factual Findings**

[140] Mr. Austin struggled academically in school. He began failing classes in eighth grade. In ninth grade, he repeated Math 8 but failed it again. He also failed social studies in ninth and eleventh grade.

[141] Mr. Austin did not graduate from high school and he has not tried to complete this qualification since then. He has completed several courses and certifications related to his work as a Hydrovac labourer with McRae's but he has not completed any other training programs.

[142] Prior to starting at McRae's, Mr. Austin worked for his mother's landscaping company, and for brief periods at a dry storage company, a blind installation business, and an excavating company. He also coached hockey as a volunteer. The landscaping work consisted of grass cutting, trimming, raking, and planting. It also involved lifting heavy equipment and bags of debris. He usually did this work eight hours a day.

[143] Mr. Austin began working at McRae's on June 5, 2017 and initially left his employment there on January 4, 2019 in the wake of the Accident. Mr. Austin missed 82 days of work from the date of the Accident to April 1, 2019.

[144] On April 1, 2019, Mr. Austin returned to work at McRae's on a graduated return to work, four days a week. Mr. Austin did not ask for nor did he receive any accommodations when he returned to McRae's on a graduated return to work in April 2019. In May 2019, he resumed working full-time, five days a week with periodic overtime. This schedule is similar to the one he worked prior to the Accident.

[145] According to Mr. Melenka, Mr. Austin's manager at McRae's, Mr. Austin was a good employee with a respectable attendance record, from June 5, 2017, when Mr. Austin commenced working at McRae's, to the date of the Accident.

[146] Mr. Austin worked as a unionized Hydrovac labourer, assisting the operator/driver of a Hydrovac truck. This work involved excavating and cleaning catch basins. It is physically demanding and requires strength, balance, and concentration because it involves moving large rocks and lifting heavy catch basins. He typically worked eight hour shifts and occasionally worked overtime as required.

[147] As noted, during the 2020 Workplace Accident, Mr. Austin suffered a serious groin injury when he lifted a catch basin while working for McCrae's. This was the last day he ever performed manual labour work.

[148] Mr. Austin filed a workers' compensation claim with WorkSafeBC after this injury and it was accepted. On March 16, 2020, Mr. Melenka, Mr. Austin, and Dr. Phillips signed a modified duties agreement that provided Mr. Austin with an opportunity to do light duties and take courses while continuing to work at McRae's. Mr. Austin did these duties until March 27, 2020 when he asked to be laid off because he was worried about contracting COVID-19.

[149] An email dated April 9, 2020 written by the employer to Mr. Austin and copied to WorkSafeBC, indicates that McRae's offered Mr. Austin light administrative duties but Mr. Austin wanted to be laid off:

We had a meeting in my office where you asked to be laid off and requested a Record of Employment from our Administrative Department. You indicated that you were worried about COVID-19 as well as a possible shortage of work. I informed you the we could lay you off, but made it very clear to you that if we did, it had nothing to do with the injury. I further reiterated the we had no shortage of Modified Duties available to you, that would last for as many months as necessary until you were able to return to Regular Duties. I even instructed you to go home and think about it for a night before making a final decision. You came back the next day and informed us that you still wanted to be issued a ROE (Record of Employment) as you did not want to participate in Modified Duties. As such, we issued a ROE with the reason set up as "Lay-Off – Shortage of work" and not medical reasons.

Once again, I want to make very clear that we have Modified Duties available, and our program is very accommodating and flexible. Please contact me should you change your mind and wish to participate in this program. Otherwise, we will assume you wish to remain in a "lay off" status and have no interest in Modified Duties.

[150] In the same email, McRae's strongly encouraged Mr. Austin to continue working by doing modified duties with the objective of returning to his regular duties "[...] [W]e have had numerous employees successfully participate in these programs for many months, if necessary, until they can return to Regular Duties. And many of these injuries, with all due respect to your injury, were far more significant".

[151] Mr. Austin testified that he did not read this email.

[152] Dr. Phillips advised Mr. Austin that he could do light duties. Mr. Austin agreed that he refused to do light duties because of concerns over COVID-19 and that this decision had nothing to do with the Accident.

[153] Jack Austin, Mr. Austin's father, testified that his son sustained a groin injury in March 2020 and this was the reason he stopped working at McRae's.

[154] In an email dated July 28, 2020, Mr. Austin resigned from his position at McRae's due to "medical reasons". He had not worked at McCrae's since the 2020 Workplace Accident.

[155] Mr. Austin enjoyed his work at McCrae's but he could not do it physically, cognitively, or mentally after the 2020 Workplace Accident. He intended to remain there until he retired and aspired to become a full-time driver with the opportunity to work extensive overtime. This would have required a class 5/6 Driver's License. Mr. Austin did not take any steps towards obtaining this class of license.

[156] After leaving his position at McCrae's, Mr. Austin decided to start his own business buying and selling hockey equipment online. His mother assists him with this work including lifting heavier items. He estimates that he earned annual profits of \$1000 by doing this work for 12 to 16 hours per week. He is unable to work more than this amount of time because of eyestrain caused by the time he spends working online on a computer.

[157] Mr. Austin's symptoms continue to fluctuate so he does not think he can undertake any other type of work. In particular, he believes that he is unable to do less physically demanding work because of his ongoing headaches and cognitive problems.

[158] Mr. Austin's earnings from employment from 2016 to 2020 are as follows:

- a) 2016 - \$8,634;
- b) 2017 - \$29,531;
- c) 2018 - \$40,420;
- d) 2019 - \$32,436; and
- e) 2020 - \$15,372.

***Functional Capacity Evaluation and Cost of Future Care Report***

[159] Russell McNeil is a qualified occupational therapist. He assessed Mr. Austin on January 13, 2022 and produced a Functional Capacity Evaluation and Cost of Future Care Report dated January 16, 2023.

[160] Mr. Austin was apprehensive during the testing conducted by Mr. McNeil and he was fearful of exacerbating the lower back pain he experienced during this testing.

[161] Overall, Mr. Austin's reports of pain and ongoing physical restrictions were generally consistent with his measured and observed abilities. Mr. McNeil opined that Mr. Austin "put forth his best and a consistent effort in order to obtain a reliable assessment of his functional capacity." On this basis, he concluded that the test results are an accurate and reliable measure of Mr. Austin's physical capacity.

[162] Mr. Austin's foundational, intermediate, and complex cognitive skills were below average as were his sensory and physical skills. He demonstrated range of motion restrictions but sufficient functional mobility in his cervical and lumbar spine. He demonstrated moderate to severe weakness in upper and lower extremity strength. Overall, his reports of pain and restrictions were consistent with physical findings.

[163] Mr. McNeil concluded that Mr. Austin's functional cognitive restrictions combined with the measured physical restrictions suggest that he does not have the capacity to be competitively employable. He is able to perform short periods of sedentary activity. However, he does not have the capacity to obtain and sustain a productive work pace. He does not demonstrate the capacity to perform the strength demands of light work. Furthermore, given his functional restrictions, it is unlikely that he would have the capacity to retrain for a new occupation.

[164] Specifically, Mr. Austin does not have the demonstrated capacity to be competitively employable on either a full or part-time basis as a hydro-excavator operator/labourer.

***Critique of Functional Capacity Evaluation and Cost of Future Care Report***

[165] Jeff Padvaiskas is a qualified occupational therapist. He prepared a rebuttal report based on a review of Mr. McNeil's expert report dated March 10, 2023.

[166] One of the tests administered by Mr. McNeil evaluated Mr. Austin's ability to reach between eye level and waist level. This test was administered twice, early in the testing day and near the conclusion of that day. Mr. Austin completed the second administration of this test 30% faster than the first. Accordingly, Mr. Padvaiskas concluded that the initial administration of this test may not have represented a high level of effort.

[167] Mr. Padvaiskas also observed that Mr. Austin appeared to demonstrate significant variability in his physical capacity during testing. He therefore views the test results as a baseline of his overall capacity and it is probable that Mr. Austin's optimal physical performance capacity may be greater than indicated by these results.

[168] Mr. Padvaiskas noted that Mr. McNeil did not appear to be aware of the injuries sustained by Mr. Austin in the 2020 Workplace Accident. He noted that Mr. Austin's current demonstrated capacity is well below what would have been minimally required to work full-time as a general labourer with McRae's prior to the 2020 Workplace Accident.

[169] Mr. Padvaiskas also noted that there are several factors that contribute to Mr. Austin's functional cognitive limitations. These include academic limitations, learning difficulties, and concussions prior to the Accident, and distractions caused by pain and fatigue.

### ***Vocational Rehabilitation Report***

[170] Dr. Quee Newell is a qualified clinical counsellor and vocational rehabilitation consultant. She assessed Mr. Austin on December 13, 2022 and produced an expert report dated January 6, 2023.

[171] Mr. Austin's low scores on measures of test effort suggest that his vocational test results may not be valid and are unreliable indicators of his cognitive ability, occupational aptitudes, and academic achievement. For this reason, Dr. Quee

Newell is not confident that Mr. Austin’s vocational test results are a valid representation of his cognitive abilities.

[172] Dr. Quee Newell observed that it is difficult to predict the absent-Accident career trajectory of young people with limited work experience, such as Mr. Austin. Before the Accident, Mr. Austin’s work history consisted of unskilled, direct-entry jobs. She opined that prior to the Accident, he would have been limited to direct-entry employment based largely on his lack of education, training, and work history.

[173] In light of the paucity of information available regarding Mr. Austin’s current self-employment, Dr. Quee Newell was unable to offer an opinion on its future financial viability. She explained that she tried to obtain additional information from Mr. Austin regarding details of this business but he responded vaguely and failed to provide details of this work.

[174] Dr. Quee Newell opined that Mr. Austin is likely to be most successful in direct-entry occupations such as dietary aide, landscape/grounds maintenance labourer, material handler, school custodian, and truck driver.

[175] From a vocational rehabilitation perspective, Mr. Austin’s demonstrated behaviour of working full-time for almost a year after the Accident suggests that he left his position at McRae’s because of the injuries he sustained in the 2020 Workplace Accident, not the Accident.

[176] In testing undertaken as part of Dr. Newell’s assessment, she found that Mr. Austin was in the 17th percentile for non-verbal intelligence which is in the low average range. She explained that a concussion does not result in a loss of intelligence.

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

#### ***Legal Principles***

[177] The principles applicable to the assessment for past loss of income-earning capacity are:

- a) An assessment of a loss of income involves a consideration of hypothetical events.
- b) The plaintiff need not prove these hypothetical events on a balance of probabilities.
- c) A hypothetical possibility will be taken into account provided that the plaintiff establishes that it is a real and substantial possibility, and not mere speculation.
- d) Once a hypothetical possibility is established, the court must consider the likelihood of the event occurring in determining the measure of damages.
- e) A causal connection must be established, on a balance of probabilities, between the Accident and the pecuniary loss claimed.
- f) It is up to the trial judge to determine what approach to use to quantify the loss (i.e., an earnings approach or a capital asset approach).

See: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (Goepel J.A. in dissent, but not on this point); *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36–37; *Laxdal v. Robbins*, 2010 BCCA 565 at paras. 19–20.

[178] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the Court set out a three-step process to assess damages for the loss of future earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the Court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[179] This three-step process applies to both past and future income earning capacity claims: *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162–163.

[180] A contingency deduction to a past loss of income-earning capacity may be appropriate where the material risk impairs the plaintiff's ability to maintain employment regardless of the Accident: *Dorman v. Silva*, 2021 BCCA 228 at

paras. 81–84; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 100–102.

***The Parties' Positions on Past Loss of Income-Earning Capacity***

[181] Mr. Austin seeks damages of \$158,815 for past loss of income-earning capacity for 52 months less the period of approximately five months from March 10, 2022 to July 31, 2020. This is based on an admission that Mr. Austin's inability to work during this period was unrelated to the Accident because it was due to the 2020 Workplace Accident. Accordingly, Mr. Austin asserts that but for the Accident, he would have been able to work full-time at McRae's from August 1, 2020 onward.

[182] The defendant accepts that due to the Accident, Mr. Austin missed 82 days of work, plus overtime, from December 7, 2018 to April 29, 2019. This includes four days of work missed while doing a graduated return to work in April 2019. She asserts that he did not miss any subsequent time from work due to the Accident. Specifically, she asserts that the Accident is not the proximate cause of any loss of income earning capacity after January 2020. Taking into account a daily rate of pay of \$180.70 and an average tax rate of 15.13%, she submits that Mr. Austin is entitled to \$12,575 in damages for past loss of income-earning capacity.

***Analysis of Past Loss of Income-Earning Capacity***

[183] After the Accident, as of April 29, 2019, Mr. Austin returned to full-time regular duties at McRae's, including periodic overtime. With the exception of a period of time in early 2020 that he took off work for reasons unrelated to the Accident, he worked full-time for approximately eight months after the Accident until the 2020 Workplace Accident occurred on March 10, 2020. The significant injury he sustained in this latter accident precipitated the end of his working career as physical labourer.

[184] I do not accept that but for the Accident, Mr. Austin would have returned to work full-time at McRae's on August 1, 2020. McRae's provided Mr. Austin with ample opportunity and encouragement to continue working there after the 2020

Workplace Accident. They offered modified duties that would have ensured that Mr. Austin remained employed while recovering from the 2020 Workplace Accident. McRae's seemingly had experience with workers recovering from workplace injuries and were confident that Mr. Austin could continue his career there. However, Mr. Austin chose to leave this unionized and seemingly secure position. This decision may have been because of concerns over COVID-19 and/or his physical limitations caused by the 2020 Workplace Accident, but it was not related to the Accident.

[185] The Accident caused Mr. Austin to miss approximately 82 days of work. I accept the defendant's calculations that this amounts to a net loss of past income-earning capacity of \$12,575.

### **Future Loss of Income-Earning Capacity**

#### ***Legal Principles***

[186] The Court's assessment of a plaintiff's future loss of income-earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise. The Court engages in an assessment that depends on the type and severity of a plaintiff's injuries, and the nature of the anticipated employment at issue. Economic and statistical evidence provides a useful tool to assist in determining what is fair and reasonable in the circumstances: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[187] As noted earlier in these Reasons, in *Rab* at para. 47, the Court set out a three-step process to assess damages for the future loss of income-earning capacity:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the Court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[188] The third step may involve either the “earnings approach” or the “capital asset approach”. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial. The capital asset approach is appropriate where the plaintiff suffered a loss of a capital asset rather than a loss of earning capacity. It is also helpful when a plaintiff has yet to establish a settled career path as it creates a more holistic picture of a plaintiff’s potential future: *Ploskon-Ciesla* at paras. 16–17.

[189] In *Dornan*, Justice Grauer stated that in undertaking the analysis of positive and negative contingencies, courts are required to assess what happened to the plaintiff in the past, proven on a balance of probabilities. Then, they are required to assess what might happen to a plaintiff in the future. Courts can only consider future possibilities to the extent that they are real and substantial possibilities: *Dornan* at para. 94.

#### ***The Parties’ Positions on Future Loss of Income-Earning Capacity***

[190] Mr. Austin asserts that he would have earned approximately \$67,500 per year had he continued working at McRae’s. Mr. Austin seeks damages for future loss of income-earning capacity of \$1,273,911. This is based on the assumption that he would have worked to age 70 and it takes into account a 4.17% contingency deduction in respect of possible future groin injuries that may affect his ability to work. This contingency is based on an estimate that he would miss one month of work due to groin injuries every two years. The amount sought also takes into account both actuarial and economic contingencies for risk and choice.

[191] The defendant’s primary position is that Mr. Austin is not entitled to damages for future loss of income-earning capacity because he failed to prove that the Accident is the proximate cause of a permanent injury that could lead him to suffer a future income loss. Alternatively, she submits that Mr. Austin did not have a clear career trajectory so the capital asset approach ought to apply such that he receive \$100,000 based on four years salary at \$50,000 per year discounted by 50% to account for negative contingencies.

[192] By further alternative, assuming the earnings approach is adopted, the defendant submits that Mr. Austin is entitled to \$151,085 taking into account several contingencies including his pre-existing injuries, the 2020 Workplace Accident and a future potential workplace groin injury.

***Analysis of Future Loss of Income-Earning Capacity***

[193] Mr. McNeil concluded that Mr. Austin is not competitively employable and it is unlikely that he has the capacity to retrain for a new occupation. While I agree with this conclusion, these circumstances were not solely caused by the Accident. Mr. McNeil did not refer to the 2020 Workplace Accident in his report. I agree with Mr. Padvaiskas' observation that Mr. Austin's current demonstrated capacity is well below what would have been minimally required to work full-time as a general labourer with McRae's.

[194] I am satisfied that the Accident exacerbated Mr. Austin's neck and upper back issues and caused his mental health problems including somatic symptom disorder, anxiety, and depression. These symptoms improved sufficiently by April 2019 such that Mr. Austin returned to his full-time position at McRae's but they did not completely resolve. The 2020 Workplace Accident significantly aggravated Mr. Austin's groin, back, and psychological injuries.

[195] I am satisfied that that the Accident was an event that could cause a future lack of earning capacity and that there is a real and substantial possibility that this could cause a pecuniary loss. The injuries Mr. Austin sustained in the Accident exacerbated some of his pre-existing pain symptoms, caused his psychological injuries and made him more vulnerable to future concussions.

[196] In valuing the future loss of income-earning capacity, I must consider Mr. Austin's pre-existing injuries caused in part, but not solely, by the 2016 Hockey Accident as well as the impact of the 2020 Workplace Accident as an independent intervening event. I ascribe a 20% deduction in respect of Mr. Austin's pre-existing injuries and a 50% deduction based on the 2020 Workplace Accident. In my view,

Mr. Austin's current lack of capacity to work is significantly the result of the injuries he sustained in the 2020 Workplace Accident.

[197] Mr. Austin had worked at McRae's for almost three years prior to the 2020 Workplace Accident. He had an established earnings history from doing this work. Accordingly, I am satisfied that the earnings approach is applicable.

[198] I accept the multiplier used by Mark Szekely, an expert economist whose calculations were relied on by both parties, of \$19,208 to age 65 for a male in British Columbia with a high school diploma, taking into account actuarial and economic contingencies, as a reasonable basis for assessing Mr. Austin's future loss of income-earning capacity. I also accept that \$50,488 is a reasonable estimate of Mr. Austin's annual income taking into account the overtime he had worked at McRae's and assuming that he would continue to work at this rate in the future.

[199] Applying a 70% contingency reduction in respect of Mr. Austin's pre-existing injuries (20 percent) and the impact of the 2020 Workplace Accident (50 percent), I assess Mr. Austin's damages for loss of income earning capacity to be \$291,000.

### **Cost of Future Care**

#### **Legal Principles**

[200] The principles applicable to the assessment of cost of future care are:

- a) Providing adequate damages for future care of an injured plaintiff is of paramount importance.
- b) The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident.
- c) The test for determining an appropriate award is an objective one based on medical evidence.
- d) The focus should be on the plaintiff, with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable.
- e) The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable.

- f) “Medical justification” is broader than “medically necessary”.
- g) Medical experts need not expressly approve specific items of future care; it is sufficient if the totality of the evidence supports the award for specific items.
- h) Common sense should be employed in this assessment.
- i) No award should be included for items that would be incurred in the absence of the accident.

See: *Thompson* at para. 149.

### **The Parties’ Positions**

[201] Based on Mr. McNeil’s cost of future care report and his addendum that considered Dr. Cailler’s Botox treatment recommendation, Mr. Austin seeks \$209,589 in damages for the cost of his future care.

[202] The defendant submits that Mr. Austin likely would have injured his low back and groin so he would have required most of the suggested treatments regardless of the Accident. Alternatively, she suggests that \$10,000 is an appropriate award for counselling and medications.

### **Factual Findings**

[203] Mr. Austin undertook all of the treatments prescribed to him. This includes physiotherapy, massage therapy, chiropractic treatments, stretching his neck and back, as well as memory and vision exercises. He also undertook counselling that he continues to receive on a weekly or biweekly basis. A neurosurgeon provided him with a prescription for Naproxen as well as a recommendation that he attend a concussion clinic.

[204] Mr. McNeil’s initial cost of care recommendations total \$126,095 and consist of the following items:

- a) a heat pad and portable transcutaneous electrical nerve stimulation unit for pain management;

- b) an electric ergonomic sit or stand height adjustable desk unit with related accessories;
- c) assistance with yard work for four hours per month, eight months of the year, assuming that Mr. Austin lives in a home that requires this type of care;
- d) exercise equipment;
- e) a fitness pass;
- f) 24 sessions with a kinesiologist to maintain his strength and mobility;
- g) 24 sessions per year for each of chiropractic, physiotherapy, and massage therapy treatments; and
- h) 12 sessions of counselling with a psychologist.

[205] Regarding Mr. McNeil's cost of future care recommendations, Mr. Padvaiskas noted that the clinical information provided did not justify the recommendations for an adjustable height desk and support for yard work and maintenance is not currently required. He supports the provision of exercise equipment and agrees that the costs of a fitness pass, kinesiology sessions, physiotherapy, massage therapy, chiropractic treatments, and counselling are reasonable subject to medical justification and the number of sessions.

[206] Dr. Quee Newell recommends that Mr. Austin receive 8 to 12 hours of vocational rehabilitation support and career counselling, at an hourly rate of \$110 to \$150, to obtain a job that is compatible with his abilities. She also recommended that he attend a ten-week psychosocial treatment program as well as psychological treatment for somatic symptom disorder and mood issues.

[207] Dr. Caillier recommended that Mr. Austin pace his activities and see a psychiatrist, psychologist, or counsellor, and obtain occupational therapy. She further recommends a lifelong exercise program involving 24 to 26 sessions with a kinesiologist and ongoing access to a fitness facility. She also endorses a trial of medications and Botox treatment. She also suggests that Mr. Austin have long-term

access to physiotherapy and massage therapy at least twice monthly for pain management and an ergonomic assessment.

[208] Dr. Anderson concluded that Mr. Austin will require long-term treatment, psychotropic medication, and counselling. Dr. Anderson recommends a multidisciplinary pain clinic, counselling, psychotropic medications, Botox injections, supervised exercise program, occupational therapy case management, and a vocational assessment. He also recommends that Mr. Austin receive referrals to medical specialists, including a neurologist and an ear nose and throat specialist for treatment recommendations.

[209] Dr. Morgan recommends a trial of antidepressants but he does not believe that Mr. Austin requires further psychiatric treatment. He recommends 12 sessions of cognitive behavioural therapy with a registered psychologist.

### **Analysis**

[210] I am satisfied that Mr. Austin is entitled to damages for the provision of pain management items, exercise equipment, a fitness pass, kinesiologist sessions, medications, and counselling as recommended by Mr. McNeill, Dr. Caillier, Dr. Anderson and Dr. Morgan. I also adopt the recommendation of Dr. Quee Newell that Mr. Austin receive funding for vocational rehabilitation support and career counselling; \$1,500 is a reasonable amount for this assistance.

[211] In my view, Mr. Austin ought to be able to access his choice of chiropractic, physical therapy and/or massage therapy 24 times per year at an estimated cost per session of \$150 for a total annual cost of \$3,600.

[212] Mr. Austin is not entitled to damages in respect of a sit/stand desk, keyboard tray, or yard work because these items are not medically justified and reasonable.

[213] I am similarly unconvinced that Mr. Austin is entitled to an amount in respect of Botox treatments. He sustained injuries in the Accident more than four years ago

and he has not undertaken this form of therapy to date. In these circumstances, the claim for over \$80,000 for this treatment is neither medically justified nor reasonable.

[214] I accept the calculations completed by Curtis Peever, an economist, in respect of the cost of future care. Taking into account the items that are medically justified and necessary, I am satisfied that Mr. Austin is entitled to \$55,000 in damages for the cost of his future care.

### **Special Damages**

#### **Relevant Legal Principles**

[215] The principles applicable to the assessment of special damages are as follows:

- a) Claims for special damages are subject to a consideration of reasonableness, taking into account the nature of the injury sustained, once causation is established.
- b) Medical justification for an expense is a factor as to reasonableness, but is not a prerequisite.
- c) Subjective factors, such as whether the plaintiff believes the treatment is medically necessary, may also be considered.

See: *Hancott v. Barnes*, 2015 BCSC 1308 at para. 164; *Derksen v. Nicholson*, 2015 BCSC 1268 at para. 78; *Devilliers v. McMurchy*, 2013 BCSC 730 at paras. 72, 75.

#### **The Parties' Positions on Special Damages**

[216] Mr. Austin seeks special damages of \$5,685 for expenses he incurred for medications and various treatments including \$504 for a vision examination conducted by Dr. Loopeker, an optometrist.

[217] The defendant denies that this vision examination is related to the Accident because Mr. Austin received the referral to Dr. Loopeker before it occurred. She also seeks other various minor deductions and a global deduction of 25% in respect of special damages treatments incurred after March 10, 2020.

**Factual Findings and Analysis on Special Damages**

[218] Mr. Austin paid \$5,685 for mediations and treatments since the Accident. This includes \$504 for a vision examination conducted by Dr. Loopeker. The referral for this appointment was made before the Accident but the appointment occurred after it. I am satisfied that Mr. Austin would have incurred this expenses irrespective of the Accident so this expense is not attributable to it.

[219] I am satisfied that Mr. Austin is entitled to \$5,181 in respect of special damages that are both reasonable and medically justified. I am not persuaded that this amount should be further reduced.

**Conclusion**

[220] Mr. Austin is entitled to a damages award of \$458,756 consisting of:

a) Non-pecuniary damages:	\$95,000
b) Past loss of income-earning capacity:	\$12,575
c) Future loss of income-earning capacity:	\$291,000
d) Cost of future care:	\$55,000
e) Special damages:	<u>\$5,181</u>
<b>Total:</b>	<b><u>\$458,756</u></b>

**Costs**

[221] If the parties wish to make submissions on costs, they may be filed within 30 days of the date of this judgment. If the parties wish to make oral submissions on costs, or other matters related to the implementation of this judgment, they may make the necessary arrangements with Supreme Court Scheduling within this timeframe. If no submissions are received, the plaintiff will have his costs at Scale B.