

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Demrey v. Gomes*,  
2023 BCSC 1244

Date: 20230719  
Docket: M193025  
Registry: New Westminster

Between:

**Rodney Ian Demrey**

Plaintiff

And

**Ricardo De Oliveira Gomes and Ricardo Daniel Gomes**

Defendants

Before: The Honourable Justice Girn

## Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.  
February 28, 2022  
March 1-4, 7-11, 2022 and  
November 22, 23 and 29, 2022

Place and Date of Judgment:

New Westminster, B.C.  
July 19, 2023

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**INTRODUCTION**

[1] On August 14, 2015, the plaintiff, Rodney Ian Demrey, was involved in a motor vehicle accident in Abbotsford, BC. Mr. Demrey was driving his 2001 Honda CRV (the “Honda”). The other vehicle, a 2002 Ford Winstar (the “Winstar”) was driven by the defendant, Ricardo Daniel Gomes (“Mr. Gomes”). This vehicle is owned by his father, the defendant, Ricardo De Oliveira Gomes. Both vehicles were travelling eastbound on Highway #1 when the Winstar impacted the rear end of the Honda (the “Accident”).

[2] Mr. Demrey suffered injuries from the Accident. Liability has been denied. The Defendants' submit that as Mr. Demrey was at fault for the Accident, he is not entitled to damages arising from his own negligence. Mr. Demrey denies that he is at fault.

[3] Mr. Demrey says that he suffered injuries to his neck, shoulder and back, and migraines and headaches as a result of the Accident. He further submits that the Accident has caused him to suffer psychologically, including driving anxiety, and has resulted in increased alcohol consumption. Finally, he says the Accident was responsible for him losing his job and he has been unable to find similar work since the Accident. Mr. Demrey denies having any pre-existing conditions.

[4] Mr. Demrey seeks non-pecuniary damages, loss of past and future income capacity, cost of future care, and special damages.

[5] The Defendants concede that Mr. Demrey likely sustained injuries as a result of the Accident and is entitled to damages for pain and suffering. However, they dispute the extent to which these injuries have impacted his function, enjoyment of life, and employment. They submit that Mr. Demrey had pre-existing conditions that were aggravated by the Accident but have since been resolved.

[6] The Defendants' submit that Mr. Demrey is only entitled to some past loss of income but is not entitled to damages for loss of future earning capacity.

[7] The Defendants' position with regards to the cost of future care is that Mr. Demrey is entitled to a future care award based on items that are medically necessary, likely to be incurred, and reasonable.

[8] For the most part the parties agree on special damages save and except a few expenses.

**EVIDENCE**

[9] The parties have provided a great deal of evidence and material through various lay and expert witnesses. They also made detailed submissions, both oral and written, on the facts and the law they consider to be relevant. While I have considered all of the evidence, material, and the law, in these reasons I will focus on the facts and law that I consider to be most directly relevant.

[10] In addition to Mr. Demrey and Mr. Gomes, five lay witnesses testified:

- a) Tamalee Lasko – Mr. Demrey’s spouse
- b) Tanya Tapley – Mr. Demrey’s friend
- c) Shanley Rusin – Mr. Demrey’s friend
- d) Kelly Wicks – Mr. Demrey’s former co-worker
- e) Tim Neill – Mr. Demrey’s former manager

[11] Both Mr. Demrey and the Defendants relied upon expert evidence.

[12] At the time of trial, Mr. Demrey was 56 years old. He was born in Winnipeg and moved to BC in the early 1980s. Mr. Demrey is married to Ms. Lasko. They live in a townhouse in Cloverdale and have been married for 15 years.

[13] After graduating from high school in Richmond, Mr. Demrey attended the Pacific Vocational Institute and earned a microcomputer technical certificate. He also completed a number of courses at BCIT including business, accounting, statistics and marketing.

## Circumstances Before the Accident

### *Employment*

[14] Prior to the Accident, Mr. Demrey worked as a salesman with Atlas Alarms (“Atlas”) since 1999 where he sold residential and commercial security systems and alarms. For the four years prior to the Accident, he worked in the Fraser Valley although he has also worked in other regions in the Lower Mainland. Mr. Demrey worked five to six days a week. His job entailed meeting with potential clients and making a lot of cold calls to create his own leads. He also received leads from Atlas. Mr. Demrey testified that he drove extensively to meet with clients.

[15] Mr. Demrey received a salary of \$1,200 every two weeks along with a monthly car allowance of \$475. He also earned a commission of 20% on each sale made.

[16] Mr. Demrey’s reported income for the four years prior to the Accident are as follows:

Year	Income
2011	\$45,182.00
2012	\$50,080.00
2013	\$43,508.00
2014	\$58,501.00

[17] Mr. Demrey’s reported income for 2015 was \$39,846.19 because he did not return to work for the remainder of the year after the Accident.

[18] Mr. Demrey testified that there was always pressure to increase sales, but prior to the Accident, he had never received any verbal or written warnings from his managers at Atlas. He says that at no point did his manager Mr. Neill, ever speak to him about his performance.

[19] Mr. Demrey testified that he enjoyed working at Atlas and planned to work there until his eventual retirement. He does not say at what age he intended to retire. Although Mr. Demrey noted that business was getting better over the years as he made more contacts, from 2011–2014, Mr. Demrey’s income fluctuated save and except in 2014 when he had his best year.

***Recreation and Activities***

[20] Prior to the Accident, Mr. Demrey and his spouse were very socially active together and with their friends. Mr. Demrey testified they had a large circle of friends with whom they would often entertain with dinner parties as he enjoyed cooking.

[21] They frequently went camping to Washington State and throughout British Columbia. In 2014, they purchased a camper van, but prior to that they slept in tents. Mr. Demrey testified that he and Ms. Lasko liked to travel and visited Mexico and Las Vegas on numerous occasions prior to the Accident.

[22] Mr. Demrey and Ms. Lasko frequently went for walks and hikes and Mr. Demrey enjoyed jogging.

[23] Finally, Mr. Demrey was actively involved with his faith congregation and would attend faith meetings two to three times per week.

***Housekeeping***

[24] Mr. Demrey testified that he did most of the housecleaning prior to the accident because Ms. Lasko worked long hours. He would clean the deck and floors and work outside the home including yardwork such as trimming the trees. Some of the outside work was taken care of by the strata at their townhouse complex. While Mr. Demrey did not provide a lot of details, Ms. Lasko testified to more specifics about the tasks Mr. Demrey did prior to the Accident.

***Pre-existing Medical Conditions***

[25] Mr. Demrey had injuries to his left hand, left knee and left ankle in the 1990s. In 2006, he was involved in a motor vehicle accident that caused him to pull some

neck muscles which eventually resolved. In 2014, Mr. Demrey injured his left shoulder while playing soccer but that the injury settled down with home exercises, leading him to return to playing soccer. He also had occasional knots in his right shoulder for which he would receive periodic acupuncture or chiropractic treatments. I find these previous injuries did not interfere with Mr. Demrey's ability to perform his work, do activities with his wife and friends, and perform housework before the Accident.

[26] Mr. Demrey experienced ongoing sleep issues for which he was taking medication. He also testified that he experienced migraines once or twice a month which were often due to stress related to his work.

[27] He also testified he drank more than he should and was advised by his doctor to scale back. Mr. Demrey testified that he had never been treated for psychiatric or psychological issues prior to the Accident. All of this was confirmed by his physician, Dr. Roberts who provided expert medical opinion evidence. I find that the sleep issues, migraines and alcohol consumption did not interfere with his job, his social activities or housework.

[28] The Defendants submit that the evidence reveals Mr. Demrey had the following pre-existing medical issues:

- a) migraines;
- b) sleep disorder;
- c) pain to his neck and mid back;
- d) low back pain;
- e) rotator cuff tendinitis on the left shoulder; and
- f) alcohol use disorder.



[29] The medical evidence does not support each and every one of these medical issues as pre-existing.

[30] I find that Mr. Demrey's only pre-existing medical conditions related to sleep and migraines and that they were aggravated as a result of the Accident.

**The Accident**

[31] There is no dispute that Mr. Demrey's vehicle was rear-ended by the Winstar driven by Mr. Gomes. Liability is in dispute and will be addressed later in these reasons.

[32] On the day of the Accident, Mr. Demrey testified that he was travelling eastbound on Highway #1 in the left hand lane heading to a meeting in Mission. It was shortly after 11:00 am. He continued to stay in his lane as he entered Abbotsford. Mr. Demrey noted that it was not raining and the roadway was dry.

[33] Mr. Demrey testified when he approached the Mount Lehman Road and Clearbrook Road exits, the traffic slowed and it was stop and go. Having his driver's window down, he heard what sounded like squealing tires. He looked in his rear view mirror and the Winstar driven by Mr. Gomes was fast approaching from behind. He noted that the Winstar was pulling a trailer that was skewed a little to the left.

[34] Mr. Demrey says he braced for impact. His foot was on the brake pedal when the Winstar rear ended Mr. Demrey's vehicle. At the time of impact, Mr. Demrey's vehicle was stopped and there were two car lengths of space in front of his vehicle. The impact moved his vehicle about one car length forward.

[35] Mr. Gomes testified that he was heading eastbound from Vancouver to Hope to go camping. He said the weather started off sunny but got cloudier with drizzle and there were a couple of showers. He said the roads were wet and he had to use his windshield wipers.

[36] Mr. Gomes says that as he was approaching the Clearbrook Road exit, the traffic was beginning to get moderately busy. At that point he had been travelling in

the farthest left lane for about 10 kilometres when he noticed Mr. Demrey's vehicle approaching quickly from behind in the left lane. The Honda then proceeded to pass him on the right and merged in front of the Winstar aggressively and cutting very close to his vehicle.

[37] Mr. Gomes testified that he decided to move out of the left lane, did a shoulder check to the right and then looked back in front of him and saw Mr. Demrey's vehicle in a "four wheel slide" with brake lights on and coming to a stop. Mr. Gomes did not have time to do anything but slam on his brakes at which his vehicle also went into a "four wheel slide". However, he was not able to avoid colliding with the rear of Mr. Demrey's vehicle.

[38] Mr. Demrey denies changing lanes and insists that he was in the left lane for quite a while before Mr. Gomes showed up.

[39] Mr. Demrey testified that following the Accident, he exited his vehicle and sat on the ground in the median between the eastbound and westbound lanes of the highway until police arrived who directed them to move their vehicles off the highway to exchange information. Mr. Demrey and Mr. Gomes exited the highway at the Clearbrook exit and exchanged information at a gas station where Mr. Demrey also took photographs of both vehicles, which were tendered into evidence. Mr. Demrey's vehicle was written off.

### **Circumstances After the Accident**

#### ***Injuries***

[40] Shortly after the Accident, Mr. Demrey began feeling pain in his neck and throat and his back was stiff. He went straight to a walk-in clinic and then returned home after being prescribed medication including a muscle relaxant.

[41] Mr. Demrey visited his family physician, Dr. Roberts, four days after the Accident. He reported difficulties in speaking and swallowing due to pain in his throat. He also reported pain in his neck, low back, and knee, and was experiencing headaches and driving anxiety.

[42] He continued to visit Dr. Roberts on a regular basis, every few weeks until Dr. Roberts retired in 2018. Mr. Demrey then saw other physicians at the same medical clinic.

[43] Mr. Demrey testified that he continues to have pain arising from the Accident. He experiences a burning sensation across the back of his neck and base of his skull, and his neck pain is constant. He uses cold, heat, and medication to address the pain.

[44] Mr. Demrey testified that after the Accident, his shoulder pain was severe to the extent that he was not able to sleep on it. In regards to his back, he experiences a burning sensation at the base of his tailbone and the pain can radiate down both legs with the left leg being worse. His mid back pain is aggravated when he bends, twists, stands, or sits for prolonged periods of time.

[45] In regards to his migraines, Mr. Demrey testified that they became stronger and more frequent after the Accident. He recalled one instance when he had five migraines in one week that lasted all day and night. Currently, Mr. Demrey says he gets approximately 15 migraines each month. He uses cold compresses and medication to relieve them.

[46] Mr. Demrey also spoke of the headaches he developed after the Accident which start with neck pain, travel to his skull, and become headaches and are usually triggered by looking up or down for extended periods of time.

[47] Mr. Demrey acknowledged that he had sleep difficulties prior to the Accident, which became worse after the Accident due to the pain.

[48] Driving anxiety also became an issue for him after the Accident. Mr. Demrey says he experienced panic attacks when he would have perceived near misses on the road. Mr. Demrey also testified that the driving anxiety got worse over time especially during rush hour, adverse weather conditions, or at night.

[49] Mr. Demrey testified that he also developed depressive symptoms and found it difficult to get out of bed most days. He acknowledges that the deaths in his family made the depression worse.

[50] Finally, Mr. Demrey testified that his alcohol consumption has increased because he was using it for pain and anxiety management. This led to Mr. Demrey being stopped by the police and failing a breathalyzer test which led to a 90 day roadside prohibition in 2018. Mr. Demrey says he spoke to both his family physician and first disclosed the incident to his psychologist, Dr. Jackson, in December 2019.

***Treatment***

[51] Beginning in the fall of 2015, Mr. Demrey received the following treatments:

- a) Fall 2015: Physiotherapy and Massage therapy at PhysioLife for one year;
- b) 2016-2018: active rehabilitation with Reactive Injury Management (45 sessions)<sup>1</sup>;
- c) 2016-2019: 16-18 sessions of massage therapy at Heart in Hands;
- d) 8 IMS treatments;
- e) since Fall 2015: 40 acupuncture treatments for neck, back, and migraines;
- f) since 2020: chiropractor as needed; and
- g) since 2019: kinesiology sessions with breaks during COVID.

[52] In the spring of 2019, Mr. Demrey underwent an assessment with psychologist Dr. Klassen for depression, anxiety and his increased alcohol consumption after the Accident. He began receiving treatment from Dr. Jackson in the summer of 2019.

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<sup>1</sup> Mr. Demrey testified that he took some breaks from the program because the sessions would aggravate his headaches and lower back and neck pain.

[53] Mr. Demrey takes the following medications: Emtec, Cyclobenzaprine, and Zopiclone as well as Advil, Tylenol Liquid Gels, and topical Voltaren gel.

[54] At the time of trial, Mr. Demrey was continuing to see Dr. Jackson, attending kinesiology sessions and receiving chiropractic and acupuncture treatments as needed. He has received his first set of Botox treatments to address his migraines. Mr. Demrey has also signed up for an eight week course on driving rehabilitation.

[55] In May 2020, he had a mild heart attack for which he was hospitalized for four days in Surrey Memorial Hospital. He gave evidence that he had a stent put in and has made good recovery.

***Post Accident Employment and Activities***

[56] After the Accident, Mr. Demrey was off work until December 2015 because of the Accident-related injuries. He says he followed the advice of his family physician to not drive and was provided with doctor's notes, which were provided to his manager, Mr. Neill.

[57] During this period, Mr. Demrey did not receive his regular salary or car allowance, although he did receive payments for commission earned prior to the Accident. This was supported by Mr. Demrey's Employee Cheque History Report from Atlas for 2015.

[58] Mr. Demrey testified that when he went back to work in December 2015, his sales performance declined. He was having difficulties getting motivated to make sales because sitting caused him pain and he was having frequent migraines and headaches. He also found driving to be challenging due to his driving anxiety.

[59] Mr. Demrey's employment was terminated on April 29, 2016. Mr. Demrey testified that his supervisor at the time, Ms. Wicks, met with him at a coffee shop and presented him with a termination letter, which Mr. Demrey did not accept. Mr. Demrey testified that he had not received any verbal or written warning prior to his termination.

[60] Mr. Demrey filed a complaint with the Employment Standards Branch for monies owing to him for sales he had made prior to his dismissal. This was ultimately resolved with Mr. Demrey receiving a settlement.

[61] Mr. Demrey testified that in January 2019, Mr. Neill offered Mr. Demrey his job back at Atlas. Mr. Demrey did not respond because he felt the relationship with Atlas was tarnished and he was upset in the way he had been terminated and he was working at another position.

[62] Mr. Demrey did not work in 2017. In that summer, he used the services of an employment coach, Yasmin Moulin to assist him with seeking employment.

[63] In April 2018, Mr. Demrey took a part-time position with Styleline Graphics where he assisted with printing and installing graphics on personal and commercial vehicles. Mr. Demrey testified that the work was physically demanding involving standing, crouching, and leaning over graphics tables. The pain in his neck and back got worse resulting in him missing work, once for a month. Ultimately this led him to leave that position.

[64] Mr. Demrey also worked briefly for a company selling windows and doors. He testified that lifting heavy sample bags and driving to appointments was too difficult for him. He experienced panic attacks from the anxiety he felt from driving daily. Ultimately, he left the position after he received the roadside prohibition. He did not advise his manager that he had received the prohibition because he was embarrassed about it. Rather, he advised his supervisor that he was experiencing driving anxiety and needed to take some time away from work. I accept that his reasons for leaving were not strictly related to his driving suspension but rather a combination of that, the pain, and the driving anxiety he was experiencing at the time.

[65] Mr. Demrey testified that he has sought out positions using various websites including Indeed, government websites and has visited the Cloverdale Employment Centre. Mr. Demrey testified that he has applied to a number of jobs with no

success. He testified that he has had difficulties with his job search due to his depression and pain symptoms. Many days he did not feel fit to even apply for work and was in a deep depression where he lacked self-worth and self confidence. I accept this evidence.

[66] Mr. Demrey testified that he would like to work full-time in sales. He does not wish to work in retail selling clothes but has applied to sell other products such as cellphones. He has been searching for inside sales positions where he is not required to drive but that has proved to be challenging thus far.

[67] Mr. Demrey testified that his injuries and symptoms have impacted his participation in social and recreational activities that he enjoyed prior to the Accident.

[68] Their camping trips are much less frequent and are shorter than before. He testified that after the Accident his family physician advised him not to jog due to his lower back pain. He gets quite fatigued when walking.

[69] Mr. Demrey testified that since the Accident, his social interactions became quite non-existent because he does not seem to have the energy or mindset for social occasions anymore. Ms. Lasko and Mr. Demrey do not entertain anymore and he hardly cooks. He testified that he has gone out to social occasions a few times since the Accident but he is usually incapacitated for a few days afterwards. He did not attend a 10 year anniversary party for him and Ms. Lasko that a friend organized.

### **Lay Witnesses**

#### ***Tamalee Lasko***

[70] Ms. Lasko is Mr. Demrey's spouse. She works in Vancouver as an events specialist. Ms. Lasko provided detailed evidence Mr. Demrey's physical limitations after the Accident, as well as the physical and emotional effects of the Accident on Mr. Demrey and their life.

[71] The Defendants submit that Ms. Lasko's evidence should also be treated with caution in part because she exaggerated the impact of the Accident on Mr. Demrey.

[72] Testimony of a spouse can be perceived to be biased, but they also provide valuable insight as they, aside from the plaintiff, are in the best position to provide evidence on a plaintiff's life before and after an accident. While there were some aspects of her evidence I find to be exaggerated, I do not dismiss all of her evidence. Overall, I find Ms. Lasko to be a credible witness. This is partly because some of her evidence was consistent with that of other witnesses.

[73] Prior to the Accident, Ms. Lasko described Mr. Demrey as being full of energy and was "the life of the party". He was always on the go and enjoyed socializing with others. This was confirmed by both Ms. Rusin and Ms. Tapley. She noted that he was healthy and did not think he was depressed or anxious.

[74] In terms of physical complaints, she did not remember anything that would make them cancel their social events. She acknowledged Mr. Demrey did take medication to address sleep issues and while he did have headaches, nothing stood out.

[75] She testified that prior to the Accident, she and Mr. Demrey had a good marriage. They regularly entertained in their home and went camping with their friends. Ms. Lasko described that she and Mr. Demrey enjoyed camping with their friends. During their camping trips, they would walk in the hills and trails.

[76] Prior to the Accident, Ms. Lasko said Mr. Demrey was a confident person and was good at his job. She would hear him speak articulately to his clients and he never complained about driving. She said working at Atlas was a right fit for Mr. Demrey. I note they have been married for nearly as long as Mr. Demrey worked for Atlas.

[77] Ms. Lasko testified they liked to travel before the Accident. During their trips, they walked and hiked a lot.

[78] Ms. Lasko testified that prior to the Accident, Mr. Demrey was the one who primarily cleaned their three level townhouse because of her long hours of work in Vancouver. He would usually do the housecleaning during the weekdays.



Mr. Demrey did the vacuuming, cleaned the floors, cleaned two of the three bathrooms, did most of the grocery shopping, and cooked most of the meals during the week.

[79] Ms. Lasko testified that prior to the Accident, Mr. Demrey was not an anxious driver and drove 90% of the time when they were together. For the first two months after the Accident, Mr. Demrey did not drive and was also nervous as a passenger especially when another car was too close to theirs or if she was driving too fast. Since the Accident, Ms. Lasko drives 80% of the time. In cross-examination, she admitted that when they go camping, she and Mr. Demrey share the driving.

[80] Ms. Lasko testified that all changed with the Accident. She described Mr. Demrey as more grumpy, irritable, impatient, and impulsive. He appeared less motivated and focussed, and depressed.

[81] She testified the change in his personality has affected their marriage and rather than a partnership, she has now taken on the role of a caretaker.

[82] Ms. Lasko testified that they do not invite friends over to their home and do not attend events in the same frequency as they did before the Accident.

[83] She recounted their 10 year wedding anniversary party organized by their friend, Tanya Tapley. Ms. Lasko testified that she attended alone. Mr. Demrey's symptoms from the Accident prevented him from attending.

[84] They travelled to Mexico to celebrate that anniversary but did not do the long walks on the beach or other activities as they previously did prior to the Accident. They only left the resort once to tour the Mayan Ruins and left early when it was apparent Mr. Demrey could not climb the Ruins stairs.

[85] When Mr. Demrey does socialize, he is exhausted afterwards. She provided an example in October 2021 when Mr. Demrey assisted in serving drinks at a reception after a funeral. She testified that after the event, Mr. Demrey was exhausted and laid on the couch for a week recovering.

[86] Ms. Lasko testified that Mr. Demrey began consuming more alcohol after the Accident. She testified he would drink during the day, mix medication with alcohol, and self-medicate. While she did not observe this during the week, she was able to on the weekends. However, Ms. Lasko testified that during the past year, Mr. Demrey is not consuming as much alcohol during the day and is more controlled.

[87] She testified that after the Accident, Mr. Demrey did not do anything and they had to hire someone to clean their house. After Mr. Demrey lost his job at Atlas, they could no longer afford a housekeeper. Ms. Lasko testified that Mr. Demrey attempted to clean their home but the level of cleaning was not the same. He tried to vacuum but after an hour, he was “spent” and could not do anything else. She is now responsible for vacuuming, cleaning floors, and dusting. Ms. Lasko testified that she has to take a vacation day every few months to do a more thorough cleaning.

[88] Ms. Lasko testified that since the Accident, Mr. Demrey has lost interest in cooking even though he used to love it. She is now responsible for cooking meals six or seven days a week. However, in cross examination, Ms. Lasko agreed that Mr. Demrey does do some cooking since the Accident.

[89] They have a small yard that Mr. Demrey would tend to prior to the Accident but it has now fallen on Ms. Lasko. She provided details of their yard project of installing turf and paving stones they had planned prior to the Accident which they intended on completing together. She had to complete the work on her own because Mr. Demrey was not capable of doing any lifting without pain due to his injuries. She pointed out that he did not have difficulties lifting heavy items prior to the Accident. In fact, when they moved into their townhouse two years prior to the Accident, Mr. Demrey carried all of their moving boxes up three sets of stairs.

[90] Ms. Lasko testified to the financial difficulties they have had since the Accident with Mr. Demrey losing his employment at Atlas and the difficulties sustaining employment. They have cut back on cable, eating out, and have not replaced Mr. Demrey’s vehicle. They have also discussed selling their campervan.

[91] Ms. Lasko testified that she has observed Mr. Demrey suffering from migraines and headaches and he often lays on the couch, which he rarely did prior to the Accident.

***Shanley Rusin***

[92] Shanley Rusin has known Mr. Demrey for over 20 years. They became friends during Mr. Demrey's first marriage.

[93] According to Ms. Rusin's testimony, Mr. Demrey was always a lively, upbeat, and fun person to be around. She would frequently seek him out to hang out with.

[94] She testified that she often went to the beach or had dinner at each other's homes with Mr. Demrey and Ms. Lasko. She never noticed Mr. Demrey having any anxiety issues or presenting any signs of pain or suffering.

[95] Ms. Rusin described a day trip to Bellingham, WA in December 2018 during which Mr. Demrey drove both ways. She noticed that he was not as confident in his driving; he had both hands on the wheel while driving and was stressed. This made Ms. Rusin feel anxious as well.

[96] Ms. Rusin testified that she spent three nights with Mr. Demrey and his wife in December 2017. She testified that she saw that Mr. Demrey was not himself. She observed that he would stay in bed in the morning sleeping in the dark, claiming he had a headache, and would lay on the couch instead of going on a walk with her and Ms. Lasko because he did not have much energy.

[97] After the Accident, she would observe Mr. Demrey grimace and complain about his back every time they went to the beach. While he helped bring items to the beach, he would need to make several trips to get even lighter items like lawn chairs and a small cooler.

[98] Prior to the Accident, Ms. Rusin testified that she did not see anything unusual about Mr. Demrey's alcohol consumption compared to other attendees at social gatherings. Ms. Rusin testified that Mr. Demrey appeared to be drinking more

than usual after the Accident. I place no weight on this part of Ms. Rusin's evidence because she herself did not observe this but rather was told by Mr. Demrey through messages.

***Tanya Tapley***

[99] Tanya Tapley has been friends with Mr. Demrey for approximately 25 years and testified that she saw Mr. Demrey monthly in the years prior to the Accident.

[100] Ms. Tapley testified that Mr. Demrey frequently oversaw the planning of numerous events for their close group of friends before the Accident. She confirmed that he was "the life of the party" and had a vibrant personality. Their group of friends would often meet for dinner parties and Mr. Demrey was a social drinker.

[101] She confirmed that she hosted a party for Mr. Demrey and Ms. Lasko's 10 year wedding anniversary, but only Ms. Lasko came because Mr. Demrey stated he was not feeling well.

[102] After the Accident, Mr. Demrey had become more reclusive. She testified that he would frequently accept invitations to social events but then not show up. After a while, he was frequently no longer invited.

[103] Ms. Tapley corroborated Ms. Lasko's evidence that Mr. Demrey regularly went camping with a group of 20 to 30 individuals around three times each year. She claimed that Mr. Demrey consistently helped with setup and breakdown, as well as with food preparation and cleanup.

[104] Since the Accident, she has only gone camping once with Mr. Demrey. On that occasion, Mr. Demrey and Ms. Lasko reserved a campground separate from the main group and only spent one day there.

[105] Since the Accident, Ms. Tapley testified, Mr. Demrey has lost his excitement and seems to be physically uncomfortable. She testified that Mr. Demrey now frequently grimaces and squints his eyes when he has a headache, looks more bent

over, frequently cringes, and exhibits signs of frustration. According to Ms. Tapley's testimony, his use of alcohol has also grown since the Accident.

[106] I note that in cross-examination, Ms. Tapley acknowledged that she saw Mr. Demrey less frequently after the Accident, roughly once every six months because he would often say he was not feeling well and not up to socialising. While I find that Ms. Tapley did see Mr. Demrey less after the Accident, she is able to corroborate Mr. Demrey's evidence of his interactions with friends prior to the Accident and to some extent after the Accident.

***Kelly Wicks (Belrose)***

[107] Ms. Wicks first met Mr. Demrey in 2010 when she joined Atlas as a sales representative. She testified that at the start of 2016 she began supervising two sales representatives, which included Mr. Demrey, but was unable to recall whether this change in duties was ever communicated to Mr. Demrey.

[108] Prior to the Accident, she only saw him one or twice a week during sales meetings. Ms. Wicks testified that sales representatives were expected to make 12–14 sales of monitored accounts per month.

[109] After becoming his supervisor, Ms. Wicks could not recall whether she met with Mr. Demrey for a performance review. However, she recalls that Mr. Demrey advised her that he would not participate in one.

[110] She confirmed that Mr. Neill would send out occasional emails to all sales representatives encouraging them to be more vigilant in following up with leads and communicating with clients to generate new monitored accounts.

[111] Ms. Wicks testified that, while she was supervising Mr. Demrey, he failed to meet the company's sales expectations. As such, she and Mr. Neill made the decision to terminate Mr. Demrey's employment. Ms. Wicks testified that she met with Mr. Demrey in a coffee shop in Langley and presented him with a termination letter which he refused to sign.

[112] It is astonishing that as his supervisor, Ms. Wicks testified that she was unaware that Mr. Demrey was involved in the Accident and was off work when the decision was made to terminate him.

***Tim Neill***

[113] Tim Neill was called by the Defendants. Mr. Neill testified that he was Mr. Demrey's manager at Atlas. He testified that Mr. Demrey was a colourful character who had the gift of the gab and was a reasonably good door knocking salesman. Mr. Neill gave evidence that an average range of income for a salesman at Atlas is anywhere from \$50,000 to \$80,000 a year.

[114] He testified that Atlas' monthly sales goals are 10 to 13 monitored accounts per month per salesperson. Mr. Neill confirmed that, at the time of the Accident, Mr. Demrey was one of his longest serving sales representatives having worked for Atlas for 15 years. Mr. Neill agreed that Mr. Demrey had his best year with Atlas in 2014 and was on track to have a similar year in 2015 up until the Accident, and that he would consider Mr. Demrey's performance in the \$50,000 to \$70,000 range to be satisfactory.

[115] Despite this, Mr. Neill testified that he terminated Mr. Demrey's employment at Atlas due to his lack of sales.

[116] I find much of Mr. Neill's evidence to be unreliable and also have concerns about his credibility. In cross-examination, he agreed that his recollection of events in 2015 and 2016 was not good nor did he have a good recollection of the timeline of events.

[117] More concerning is Mr. Neill's evidence surrounding Mr. Demrey's dismissal. As the general manager, he agreed that he made the decision to terminate Mr. Demrey's employment with Atlas.

[118] Much of his evidence in this regard is not credible and I reject his explanations given that communications written by him contradicted his testimony.

[119] In regards to Mr. Demrey being off work and providing a doctor's note after the Accident, Mr. Neill initially denied he was aware that Mr. Demrey was off work on doctor's orders due to the Accident. Mr. Neill testified, in part:

...We didn't know what he's up to and couldn't find him.  
One way to get his attention is not to pay him.

[120] When Mr. Neill was presented with emails written by him confirming the doctor's note, he conceded that he was aware in October 2015 that Mr. Demrey was off work on his doctor's orders.

[121] He testified that Mr. Demrey's performance declined for a number of months before the decision to terminate him. Mr. Neill confirmed that Ms. Wicks was assigned to be a sales coordinator in January 2016 and that prior to Ms. Wicks' performance review in 2016, there was no formal review process and no formal process for tracking leads and sales. On cross-examination, Mr. Neill agreed that a performance evaluation completed by Ms. Wicks shows that Mr. Demrey was meeting expectations in most areas.

[122] Mr. Neill denied he was aware that Mr. Demrey had applied for Employment Insurance benefits after his termination and could not recall Service Canada contacting him regarding Mr. Demrey's application for benefits. When Mr. Neill was shown the statement attributed to him in response to Service Canada that Mr. Demrey was only dismissed because of performance issues, he agreed it was true.

[123] On cross examination, Mr. Neill agreed that he decided to terminate Mr. Demrey because his sales declined while he was off work due to the Accident and after he returned to work in December. Mr. Neill agreed that four months after Mr. Demrey returned to work the decision was made to terminate him.

[124] Mr. Neill agreed that Mr. Demrey's performance at Atlas was satisfactory enough that he offered Mr. Demrey his job back in January 2019.

[125] In all of the circumstances, I find that Mr. Demrey was dismissed because he was not able to work for a number of months after the Accident and his performance at Atlas declined when he returned to work. This was a result of the injuries he sustained from the Accident. But for the Accident, Mr. Demrey would have likely continued to be employed at Atlas.

**Expert Evidence**

[126] Both parties rely on expert opinion evidence from medical professionals, which I will address below. Evidence from vocational and functional capacity evaluation professionals will be addressed in my assessment of cost of future care and loss of income earning capacity.

***Dr. Roberts, Family Physician***

[127] Dr. Roberts was Mr. Demrey’s family physician before and after the Accident until 2018. Dr. Roberts was tendered as an expert in family medicine.

[128] Dr. Roberts confirmed that Mr. Demrey attended his office on August 18, 2015 and that he continued to see Mr. Demrey for follow ups until Dr. Roberts’ retirement.

[129] Dr. Roberts’ clinical records indicate that from 2006 and 2015, he saw Mr. Demrey numerous times for hyperlipidemia, migraines, and lifestyle assessments. Mr. Demrey’s last complete physical examination before the Accident was in March 2015; he had “no musculoskeletal complaints or abnormalities”.

[130] Dr. Roberts opines that after the Accident Mr. Demrey was experiencing persistent musculoskeletal complaints mostly involving the cervical spine, thoracic spine, and lumbar spine post-Accident. He recommended a number of treatment programs including physiotherapy, kinesiology and medication.

[131] Dr. Roberts prognosis for Mr. Demrey is “after more than three years of treatment, it is unlikely that Mr. Demrey will ever become completely symptom free.”



He further opines that Mr. Demrey will continue to be limited in the amount of work he can do.

[132] The Defendants point out that Dr. Roberts clinical notes indicate that Mr. Demrey reported his symptoms were slowly improving in February 2016, noting that he reported improvement to his neck in December of 2015 and January 5, 2016. In my view, these instances of improvement of symptoms are consistent with Dr. Roberts' opinion that Mr. Demrey will not become symptom free.

[133] The Defendants argue that Mr. Demrey suffered from alcohol use disorder and cross-examined Dr. Roberts on this. Dr. Roberts noted that he conducted annual health reviews of Mr. Demrey. While Mr. Demrey reported drinking more than the recommended guidelines, at no point did Dr. Roberts ever make a diagnosis of alcohol use disorder prior to the Accident because Mr. Demrey did not have ongoing symptoms such as withdrawal or liver damage. As well, Dr. Roberts noted that Mr. Demrey's enzyme levels that test liver function were normal. I accept Dr. Roberts' evidence on this point.

[134] Compared to the other medical experts, Dr. Roberts had the most interactions with Mr. Demrey both pre- and post-Accident, and therefore was more knowledgeable about Mr. Demrey's health overall. Overall, I find that Dr. Roberts gave balanced evidence and I find him to be a credible witness. I accept his evidence without any reservation.

***Dr. Koo, Physiatrist***

[135] I find Dr. Koo to provide the most thorough and helpful expert evidence.

[136] Mr. Demrey called evidence from Dr. Koo who was qualified as an expert in physical medicine and rehabilitation to give opinion evidence regarding diagnosing and treating injuries and diseases of the skeletal system and of the connected soft tissues of the human body.

[137] Dr. Koo conducted two medical assessments of Mr. Demrey and wrote two reports. Dr. Koo’s first assessment of Mr. Demrey was conducted on December 3, 2018. He wrote a report on the same day.

[138] Dr. Koo opines that the Accident “likely resulted in soft tissue injuries to the neck, left shoulder, upper and lower back, and left knee with sequelae including cervicogenic headaches with aggravation of his pre-Accident migraine history, aggravation of his pre-Accident chronic sleep disruption, and an adjustment disorder with anxiety.”

[139] I accept this part of his opinion without reservation. I do not, however, accept his opinion as it relates to the aggravation of Mr. Demrey’s undiagnosed ADHD.

[140] Dr. Koo notes that Mr. Demrey scored between 26 and 28 on the Neck Disability Index and 26 on the Revised Oswestry Low Back Pain Questionnaire<sup>2</sup> designed to identify areas of disability related to neck complaints or low back complaints, respectively. A score of 25 or greater is indicative of severe disability.

[141] In Dr. Koo’s opinion, Mr. Demrey’s prior insomnia and migraines did not appear to significantly impact his employment and but for the effects of the Accident “Mr. Demrey would still be capable of performing at or around that same level of domestic, occupational, and sporting activities with manageable headaches and insomnia”.

[142] Dr. Koo saw Mr. Demrey again on October 1, 2021 and authored an updated report dated October 7, 2021, in which he opines that Mr. Demrey’s Accident-related diagnoses was unchanged.

[143] On p. 15 of his updated report, Dr. Koo opines:

... but for the accident in question, I can see no other reasonable clinical cause for Mr. Demrey’s post-accident complaints of pain and stiffness to the neck, left shoulder, lower back and left knee (now resolved). He had no pre-

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<sup>2</sup> These tests are scored out of 50.

accident concerns with vehicular anxiety, and this too is likely attributable to the accident.

The accident likely increased his pre-accident insomnia and frequency and severity of his migraines, which were pre-accident vulnerabilities.

[144] With respect to Mr. Demrey’s prognosis, Dr. Koo’s opinion is that Mr. Demrey “is approaching maximum medical recovery and he will not experience further significant symptomatic or functional improvement and is likely to have ongoing severe disability for the foreseeable future regarding his chronic neck, upper back, lower back and left shoulder injuries”.

[145] With respect to headaches, Dr. Koo opines that Mr. Demrey’s headaches will likely cause additional disability on the days he experiences them.

[146] Dr. Koo made a number of recommendations:

- a) Participate in a driver rehabilitation program;
- b) Consideration of Botox injections;
- c) Shockwave treatment on the left shoulder;
- d) A rotator cuff strengthening regimen;
- e) Referral to a psychiatrist; and
- f) Assistance with seasonal heavy housekeeping.

[147] In cross examination, Dr. Koo noted that when individuals reach maximum medical improvement, there is still a role for physiotherapy because it is important for symptom management to assist the patient to return to as many pre-injury activities as possible.

***Dr. Laban, Psychiatrist***

[148] Dr. Laban was tendered by Mr. Demrey as an expert in psychiatric medicine qualified to give opinion evidence on the diagnosis, causation, treatment, and prognosis of psychiatric conditions.

[149] Dr. Laban met with Mr. Demrey on September 27, 2019 and on February 3, 2020 and prepared a report dated March 31, 2020.

[150] Dr. Laban diagnosed Mr. Demrey with:

- a) generalized anxiety disorder with panic attacks – moderate severity;
- b) situational anxiety;
- c) specific driving or vehicular anxiety;
- d) persistent depressive disorder – moderate severity;
- e) alcohol use disorder – moderate severity; and
- f) adult attention-deficit disorder (ADHD) by history.

[151] I accept all but one of Dr. Laban’s diagnosis. I am unable to accept her diagnosis of ADHD. Dr. Laban did not do an assessment in regards to this disorder and in my view, there is no medical evidence to support that Mr. Demrey suffers from ADHD. In cross-examination, Dr. Laban agreed that this diagnosis should be removed from the list on her report. Accordingly, I give no weight to any opinions on the effects of Mr. Demrey’s Accident related injuries on undiagnosed ADHD. However, I do not agree with the Defendants that all of her evidence should be given little to no weight – it is not an all or nothing proposition.

[152] With respect to alcohol use disorder, Dr. Laban opines that from a psychiatric perspective, the assessment of alcohol use disorder is based on looking at someone’s normal social life and the impacts of alcohol use on functioning rather than the number of drinks one consumes per day.

[153] Regarding Mr. Demrey’s prognosis, Dr. Laban opines that “it has been more than three years since the accident and Mr. Demrey continues to endorse active symptoms which may be more indicative of a chronic course of illness that could impact future employment opportunities”.

[154] Dr. Laban recommended:

- a) bi-weekly cognitive behavioural therapy for anxiety for up to two years counselling on a regular basis for his alcohol use disorder; and
- b) trials of anti-depressant medications to manage his depression and anxiety.

***Dr. Watt, Specialist in Occupational Medicine***

[155] Dr. Watt was tendered by Mr. Demrey as an expert in occupational medicine to provide opinion evidence regarding the effect that injuries can have on a person’s work capacity.

[156] I find Dr. Watt’s experience in this area to be extensive and diverse. He is currently a member of the Canadian Board of Occupational Medicine and is a permanent functional impairment physician for WorkSafeBC.

[157] Dr. Watt explained that occupational medicine is a specialty that is primarily concerned with function and focuses on the interplay between a person’s medical conditions and their ability to work as well as their ability to participate in home activities and recreational and leisure activities.

[158] Dr. Watt assessed Mr. Demrey on May 19, 2021. At Dr. Watt’s direction, Mr. Demrey also attended for functional testing with a kinesiologist on May 26, 2021. Dr. Watt wrote a report dated August 23, 2021.

[159] Dr. Watt opines that Mr. Demrey’s “neck and back impairments are probably permanent, resulting in a permanent partial disability”.

[160] Dr. Watt further opines that, given the severity of his psychological impairments, Mr. Demrey is not currently fit to return to his pre-Accident job as a sales associate. He opines that “the severity of his psychological impairments are such that he would struggle with the requirements for executive function including focus, concentration, short-term memory, planning, and social interaction”.

[161] Dr. Watt also notes at p. 16 regarding Mr. Demrey’s return to work:

His driving related anxiety is a significant impediment to a successful return to work since his pre-collision job required extensive driving. However, all of these conditions are treatable and at this point it is my opinion they should not pose a long-standing barrier to a successful return to work.

[Emphasis added.]

[162] In terms of Mr. Demrey’s time off work since the Accident, Dr. Watt opines that it was reasonable given the severity of his psychological impairments, particularly his severe mood disorder and driving anxiety.

[163] Dr. Watt also wrote an addendum report dated November 15, 2021 wherein he opines:

Mr. Demrey’s presentation in assessment is misleadingly upbeat; although he presents a gregarious, outgoing demeanor; it is clear from self-report questionnaires that at the time of my assessment he was struggling with very significant depression and anxiety that, in my view, was sufficiently severe to interfere with daily functioning.

[164] When questioned about his disagreement with Dr. Smith’s opinion that Mr. Demrey’s alcohol use disorder was present prior to the Accident, Dr. Watt confirmed that he would not defer to Dr. Smith on this issue because he has been treating individuals with alcohol use disorder for 33 years and has abundant clinical experience with the issue.

[165] He testified that his review of records showed no documentary evidence that Mr. Demrey had been diagnosed nor treated for alcohol use disorder prior to the Accident and that he had merely been counselled to reduce his alcohol use on a few occasions over the past decade. This is consistent with Dr. Roberts’ evidence. In respect of this issue, I prefer the opinion of Dr. Watt over Dr. Smith.

[166] Dr. Watt opines that Mr. Demrey's future employability has been significantly and adversely affected due to his permanent neck and back impairments. This, in my view, is consistent with Dr. Koo's opinion.

[167] It was Dr. Watt's opinion that Mr. Demrey would not be able to safely or competitively perform work that required more than medium strength demands or more than occasional reaching, stooping, crouching or crawling.

[168] With respect to Mr. Demrey's ability to perform essential activities of daily living at home, Dr. Watt opined that Mr. Demrey does not require additional assistance.

[169] Dr. Watt recommended the following for Mr. Demrey:

- a) referral to a fitness trainer for a 4 month progressive exercise program followed by a one year gym pass;
- b) 1–5 treatments of passive modalities that Mr. Demrey finds most effective;
- c) Trial of yoga consisting of 12–16 week course;
- d) Continue with IMS treatments;
- e) Trial of Botox treatment for headaches;
- f) Percussive Muscle massager (\$100-\$200); and
- g) Defensive driving course.

***Dr. Smith, Psychiatrist***

[170] Dr. Smith was tendered by the Defendants as a medical doctor with a specialty in psychiatry capable of opining on psychiatric conditions with specific expertise in the assessment and treatment of mental health disorders and assessment of disability resulting from mental health disorders.

[171] Dr. Smith examined Mr. Demrey on March 31, 2021 and wrote a report dated April 20, 2021.

[172] Dr. Smith opines that Mr. Demrey has pre-existing chronic neck and back pain as evidenced by his occasional treatments pre-Accident. He acknowledged that this was based on Mr. Demrey's three pre-Accident acupuncture treatments.

[173] In cross-examination, Dr. Smith conceded that while assessment of chronic pain is within his expertise, he would defer to other experts on whether Mr. Demrey's back pain was pre-existing.

[174] In regards to this part of his opinion, I prefer the evidence of Dr. Koo, supported by the opinion of Dr. Roberts, and find that Mr. Demrey did not have any pre-existing chronic neck and back pain.

[175] Dr. Smith's diagnosis is similar to that of Dr. Laban in that he also opines that Mr. Demrey suffers from adjustment disorder with mixed anxiety and depression. He agreed that Mr. Demrey's stressors continued to be ongoing.

[176] In cross examination, Dr. Smith agreed that Mr. Demrey is at least partially disabled due to his driving anxiety and agreed that Mr. Demrey is probably disabled from having a job that involves a lot of driving.

[177] Dr. Smith also opines that Mr. Demrey's "diagnoses of Insomnia Disorder, Alcohol Use Disorder, and chronic neck and back pain are pre-existing diagnoses that were likely exacerbated by the accident".

[178] In regard to Dr. Smith's opinion of alcohol use disorder, I prefer the opinion of Dr. Watt, which is also supported by the opinion of Dr. Roberts, that Mr. Demrey did not have a pre-existing alcohol use disorder.

[179] Dr. Smith made a number of recommendations and noted that, if followed, will have significant improvements in Mr. Demrey's physical and mental well-being:



- a) Continue to attend sessions with Dr. Jackson to treat anxiety and depression;
- b) 10 sessions of remedial driving lessons; and
- c) Referral to a kinesiologist.

***Dr. Medvedev, Neurologist***

[180] Dr. Medvedev was tendered by the Defendants as a medical doctor with a specialty in neurology, including headache disorders. Mr. Demrey was assessed by Dr. Medvedev on March 10, 2021 and wrote a report dated March 23, 2021.

[181] In his report, Dr. Medvedev opines that Mr. Demrey has a “pre-Accident history of migraines that were quite severe and frequent prior to the Accident.” He also noted that Mr. Demrey had a history of Workers’ Compensation Board related incidents. I am puzzled by these statements. Firstly, the medical records do not support this nor did any of the medical experts opine that Mr. Demrey’s migraines were severe and frequent. As well, there is no evidence that Mr. Demrey had a history Worker’s Compensation Board related incidents.

[182] Dr. Medvedev opines that the headaches complained of by Mr. Demrey are probably a manifestation of his pre-Accident migraines that were possibly aggravated for a period of time but the current frequency of headaches is consistent with his pre-Accident records. The medical evidence does not support this conclusion. On this area, I prefer the opinions of other medical experts.

[183] He did, however, confirm that Mr. Demrey’s pre-existing migraines were made worse by the Accident. Dr. Medvedev explained the difference between cervicogenic headaches, those that usually start at the back of head and radiate up to his skull.

[184] Dr. Medvedev gave evidence that he frequently prescribes Botox for his patient’s headaches and that Botox is typically administered 3–5 years in post traumatic settings and estimates the cost of the treatment at around \$3,000 to \$4,000 per year.

[185] I find that Dr. Medvedev did not pay careful attention to ensure that he recorded facts correctly. In addition to my concerns expressed above, I am also concerned about his opinion regarding Mr. Demrey's shoulder pain and attribution to a "post accident soccer injury". Mr. Demrey's soccer injury was prior to the Accident. Consequently, I do not give Dr. Medvedev's opinion much weight and I am inclined to accept the opinion of other experts over his.

## **ASSESSMENT AND FINDINGS**

### **Credibility and Reliability**

[186] In making my findings, I must assess the credibility and reliability of Mr. Demrey and the other witnesses.

[187] Credibility and reliability are two different, but related, considerations. Credibility focuses on a witness's veracity, while reliability is concerned with the accuracy of the witness's testimony, with consideration of the witness's ability to accurately observe, recall, and recount events in issue: *R. v. H.C.*, 2009 ONCA 56 at para. 41.

[188] In assessing credibility, factors set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), provide guidance:

[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. 152 (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).

[189] Where a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the Court must be exceedingly careful in assessing credibility: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.); see also *Buttar v. Brennan*, 2012 BCSC 531 at paras. 24–25.

[190] In this regard, the comments of Justice G.C. Weatherill in *Henry v. Fontaine*, 2022 BCSC 930, are most helpful:

[54] As is generally the case in personal injury actions, the most important witness is the plaintiff himself. Once an assessment of the credibility and reliability of the plaintiff's evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts.

[55] A plaintiff who accurately describes his symptoms and circumstances before and after the Accident, without minimizing or embellishing them, can reasonably anticipate that the court will find his evidence to have been credible and reliable.

[191] Credibility and reliability are not all or nothing propositions. A trier of fact may believe all, part, or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, 1996 CanLII 207; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 44, 2005 CanLII 253 (Ont. C.A.).

[192] Pain is always subjective, and the medical experts are well qualified to assess pain reporting by patients. In this case, there is no suggestion by any of the experts that the pain experienced by Mr. Demrey is fabricated, or that Mr. Demrey has been untruthful in his pain reporting.

[193] The Defendants argue that there is reason to doubt Mr. Demrey's testimony because of an inability to accurately recall and recount relevant events. While I agree that Mr. Demrey had problems remembering certain facts and events, I am of the view that they were minor and do not affect the overall reliability of his evidence. In terms of Mr. Demrey's testimony regarding his injuries he sustained as a result of the Accident, I accept Mr. Demrey's testimony as to his pain experience.

[194] Applying these principles, overall, I find Mr. Demrey's evidence was credible. I did not find him to overstate or embellish his evidence. Mr. Demrey was not a sophisticated witness but he presented himself with sincerity and did his best to remember events that occurred over six years ago.

**Liability**

[195] As I have noted above, there is no dispute that Mr. Demrey's vehicle was rear-ended by Mr. Gomes' vehicle. Mr. Gomes asserts that Mr. Demrey bears 100% liability for the Accident due to his failure to ensure it was safe to make a change from the right lane to the left lane in the moments preceding the Accident.

Mr. Demrey submits that he did not make a lane change as he had been in the left lane for quite some time.

[196] Having heard both Mr. Demrey and Mr. Gomes accounts of the events leading up to the Accident and the photographs taken immediately afterwards, I prefer Mr. Demrey's version of the facts over Mr. Gomes. I make this finding based, in part, on inconsistencies in Mr. Gomes' evidence.

[197] Mr. Gomes testified that he was going to move over into the right lane and after he did a mirror and shoulder check, both his and Mr. Demrey's cars were in a "four wheel slide". However, he acknowledged in cross-examination that both his vehicle and Mr. Demrey's vehicles had ABS brakes which would prevent wheels from locking up so that vehicles do not skid.

[198] Mr. Gomes also testified that the road was wet and his vehicle did not have grip and the brakes on his vehicle did not respond to the weather. However, it is clear from the photographs taken after the Accident that neither Mr. Gomes nor Mr. Demrey's vehicles had any water on them. As well, the road was dry. While the photographs were not taken at the scene but rather at a gas station nearby, they nonetheless contradict Mr. Gomes' evidence in this regard.

[199] Mr. Demrey also points out that Mr. Gomes did not raise with either the police officer or Mr. Demrey that Mr. Demrey caused the Accident because he made an unsafe lane change.

[200] Users of a highway have a common law duty to exercise due care for others and themselves in all of the circumstances. The statutory provisions of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [MVA], provide guidelines for assessing fault in a motor vehicle accident, but they are not a complete code: *Salaam v. Abramovic*, 2010 BCCA 212 at paras. 18, 21.

[201] The MVA supplements the common law duty to exercise due care: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 21, citing *Cook v. Teh* (1990), 45 B.C.L.R. (2d) 194 (C.A.). While the relevant provisions of the MVA inform the negligence analysis, a breach of a provision “does not in and of itself give rise to a cause of action”: *D’Amici v. Fahy*, 2020 BCCA 89 at para. 50.

[202] Mr. Demrey relies on *Barrie v. Marshall*, 2010 BCSC 981 at para. 23 and *Wallman v. John Doe*, 2014 BCSC 79, for the proposition that the driver of the rear vehicle in a rear-end Accident bears the onus to show that the Accident was not occasioned by his or her fault. In *Wallman*, Justice G.C. Weatherill states:

[409] When one vehicle rear ends another, the onus is on the rear-ending vehicle to demonstrate the absence of negligence: *Robbie v. King*, 2003 BCSC 1553, at para. 13; *Cannon v. Clouda*, 2002 BCPC 26 at para. 9; *Cue v. Breitzkreuz*, 2010 BCSC 617 at para. 15; *Stanikzai v. Bola*, 2012 BCSC 846 at para. 7.

[410] This is because the following driver owes a duty to drive at a distance from the leading vehicle that allows reasonably for the speed, the traffic and the road conditions: *Barrie v. Marshall*, 2010 BCSC 981, at paras. 23-24; *Rai v. Fowler*, 2007 BCSC 1678, at para. 29. This duty is codified in ss. 144 and 162 of the *Motor Vehicle Act*.

[411] Driving with due care and attention assumes being on the lookout for the unexpected: *Power v. White*, 2010 BCSC 1084 at para. 28, aff’d 2012 BCCA 197.

[203] Sections 144(1)(c) and 162(1) of the MVA expressly sets out the duty of a driver in relation to rear-end collisions, mirroring the common law. Section 144(1) of

the MVA requires drivers to drive with “due care and attention” and to have “reasonable consideration for other persons using the highway”:

- 144 (1) A person must not drive a motor vehicle on a highway
- (a) without due care and attention,
  - (b) without reasonable consideration for other persons using the highway, or
  - (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

[204] Section 162 of the MVA prohibits a driver from following too closely:

- 162 (1) A driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

[205] Mr. Gomes has not demonstrated an absence of negligence. I find that there is *prima facie* evidence of Mr. Gomes failure to keep a safe distance or drive with proper due care and attention. Considering the totality of the evidence, I find the Defendants entirely at fault for the Accident. Had Mr. Gomes been more cautious and slowed down, given that he himself testified that the traffic was getting moderately busy, the Accident would have been avoided.

[206] As I have found that Mr. Demrey did not change lanes, the two cases relied on by the Defendants are distinguishable.

### **Causation**

[207] Mr. Demrey is required to establish on a balance of probabilities that the Defendants’ negligence caused or materially contributed to his injuries. Each case must be determined on its own facts.

[208] In *Jenkins v. Casey*, 2022 BCCA 64 at para. 75, leave to appeal to SCC ref’d, 40203 (9 February 2023), the Court of Appeal noted that the trial judge correctly summarized the general principles of causation:

- a) If the defendant's negligence is one cause of an injury, or if it exacerbates or aggravates an existing condition, then the defendant is liable for causing the resulting injury: at para. 115, citing *Athey* at para. 47.
- b) The primary test for causation asks: "but for the defendant's negligence, would the plaintiff have suffered the injury?": at para. 116, citing *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23.
- c) Tortfeasors must take their victims as they find them, and are liable even if the plaintiff's injuries are more severe than they would be for the average person: at para. 117, citing *Athey* at para. 34.
- d) The general principles of causation in law apply to psychological injury just as they apply to physical injury: at paras. 119–120, citing *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.); *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 74.

[209] The "but for" test must be applied in a robust common sense fashion: *Clements v. Clements*, 2012 SCC 32 at para. 9.

[210] In considering all of the evidence, I conclude on a balance of probabilities that the severity, continuity and persistent nature of Mr. Demrey's injuries have been established and that they were caused by the Accident.

### **Failure to Mitigate**

[211] A plaintiff is required to take reasonable steps to reduce his damages, including by taking recommended treatment. Whether a plaintiff acted reasonably is a question of fact: *Gilbert v. Bottle*, 2011 BCSC 1389 at paras. 201–202.

[212] A reduction is appropriate where the defendant is able to satisfy the two-part test set out in *Chiu v. Chiu*, 2002 BCCA 618:

[57] ... In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[213] It is a subjective/objective test of a reasonable person in the position of the plaintiff: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.

[214] In *Huag v. Funk*, 2023 BCCA 110 at paras. 72–76, the Court of Appeal confirmed that the burden upon the defendant for the second part of the *Chiu* test is a balance of probabilities.

[215] The Defendants submit Mr. Demrey acted unreasonably in failing to take steps to mitigate his losses as it relates to his past loss of income. While I have considered all of the arguments raised in their lengthy submissions, I will not address each and everyone.

[216] The Defendants submit that Mr. Demrey acted unreasonably by failing to ask his employer for leave to address family illness. The evidence does not support this. Mr. Demrey testified that he took one day off work when his mother passed away. I do not accept Mr. Neill’s evidence that Mr. Demrey was taking extended periods of time off to visit his mother in the hospital.

[217] I do not agree that Mr. Demrey acted unreasonably in failing to ask for further time off at Atlas if he was unable to perform his duties after the Accident due to his injuries. I agree with Mr. Demrey that the duty to mitigate would require him to work as much as possible, not to try and take additional time off work.

[218] The Defendants further submit that Mr. Demrey acted unreasonably because he failed to follow the advice of Ms. Moulin in 2017. They submit that if he had found a job in the retail sector it would have changed the course of his employment. Mr. Demrey responds that he did follow Ms. Moulin’s advice. He simply chose not to work in a retail clothing store but did apply for retail positions in kiosks and cellphone stores in the mall. In my view, this was reasonable.

[219] The Defendants argue that Mr. Demrey could have significantly reduced his past wage loss by accepting the offer to go back to Atlas in January 2019. He testified that he was already working at Styleline Graphics at the time. More importantly, I accept that it was reasonable for Mr. Demrey not to go back to Atlas given the circumstances under which he was terminated.



[220] Finally, the Defendants submit that Mr. Demrey cannot be permitted to collect full damages for lost wages after he sat around waiting for the perfect job. He had a duty to go and get a job. They point to Ms. Gallagher's evidence that applying for 33 jobs over several years is inadequate and that he ought to have submitted multiple job applications per day.

[221] In my view, Ms. Gallagher did not take into account Mr. Demrey's ongoing psychological struggles in her assessment. I accept that his depression limited his ability to do the type of job search Ms. Gallagher spoke of. I note that Mr. Nordin opines in his report that Mr. Demrey was not competitively employable due to his psychological issues and that his psychological function would need to improve significantly before even a job at Home Depot would be realistically manageable for him.

[222] Mr. Demrey further submits that he mitigated his losses by attempting to work. This is evidenced by him obtaining four separate jobs after losing his job at Atlas and before the trial.

[223] The Defendants rely on *Binning v. Kandola*, 2021 BCSC 157. I do not find the *Binning* case to be helpful. While Mr. Binning's physical injuries may have been more severe and his pre-accident work was labour intensive, he did not suffer from psychological injuries.

[224] In the case before me, there is medical evidence which I have accepted that Mr. Demrey was not capable of returning to work for sometime after the Accident. Dr. Watt's opinion in his report of August 2021 is that Mr. Demrey was not fit to return to his pre-Accident job as a sales associate and due to the severity of his psychological impairments, particularly his severe mood disorder, "he would struggle with the requirements for executive function including focus, concentration, short-term memory, planning and social interaction".

[225] In his follow up report of November 2021, Dr. Watt noted that Mr. Demrey was struggling with significant depression and anxiety, sufficiently severe to interfere with daily functioning.

[226] The Defendants argue that there was a real and substantial possibility of the following negative contingencies that would have impacted Mr. Demrey's past income absent the Accident:

- Mr. Demrey would have lost his job at Atlas after Ms. Wicks became his supervisor;
- Mr. Demrey's job was already in jeopardy before August 2015;
- Mr. Demrey would have been caught drinking and driving and had his licence suspended; and
- Mr. Demrey would have continued to feel stressed by work and continued to self medicate with alcohol.

[227] It is speculative that Mr. Demrey's employment was in jeopardy and he would have been fired from this job after Ms. Wicks became his supervisor. The evidence simply does not support this.

[228] I also do not accept that Mr. Demrey would have been caught drinking and driving. The evidence supports that Mr. Demrey's alcohol consumption increased after the Accident and there is evidence to support that he was not struggling with alcohol use disorder prior to the Accident.

[229] I am satisfied that the Defendants have not met the burden of establishing Mr. Demrey failed to mitigate his damages.

### **Summary of Findings on Accident-Related Injuries and Impact**

[230] Much of the medical evidence is relatively uniform that Mr. Demrey suffered injuries as a result of the Accident. As noted earlier, the Defendants concede that Mr. Demrey likely sustained injuries and is entitled to damages for pain and suffering. However, they dispute the extent to which these injuries impacted his function, his enjoyment of life and his employment.

[231] The burden is on Mr. Demrey to prove on a balance of probabilities that the Defendants' negligence caused or contributed to his injuries. It must not be forgotten that the Defendants' negligence need not be the sole cause of the injury so long as it is part of the cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17, 1996 CanLII 183.

[232] I am satisfied that Mr. Demrey has proven on a balance of probabilities that his neck, left shoulder, upper and lower back, and left knee injuries with sequelae including cervicogenic headaches were caused by the Defendants' negligence. I accept that he did not have any musculoskeletal complaints or abnormalities prior to the Accident.

[233] It has been more than six years since the Accident and Mr. Demrey's pain continues. The evidence establishes that the pain is chronic and Mr. Demrey will likely have ongoing disability for the foreseeable future.

[234] I am also satisfied that the Accident aggravated his pre-Accident migraines and chronic sleep disruption.

[235] While Mr. Demrey's adjustment disorder with anxiety (in particular driving anxiety) is being addressed with counselling, I find that it has not fully resolved.

[236] I find that Mr. Demrey likely did have some level of depression prior to the Accident. It can hardly be surprising given the passing of the number of individuals close to him prior to the Accident: both parents and his sister-in-law passed away in 2015. As well, Mr. Demrey acknowledged that his job at Atlas was "quite stressful" and he used alcohol as a coping mechanism. However, the evidence supports that these did not impact his ability to work fulltime at Atlas.

[237] I have found that while Mr. Demrey's alcohol consumption may have exceeded guidelines on recommended alcohol consumption, he did not have an alcohol use disorder prior to the Accident.

[238] I am not satisfied that Mr. Demrey has proven on a balance of probabilities that Mr. Demrey suffers from ADHD. Consequently, there can be no causation between any alleged aggravation of ADHD and the Accident.

## **ASSESSMENT OF DAMAGES**

### **Non-Pecuniary Damages**

[239] Factors the Court must consider when assessing non-pecuniary damages have been set out in *Stapley v. Hejset*, 2006 BCCA 34 at para. 46 and subsequent cases. I have taken those factors into consideration.

[240] Mr. Demrey says he was a healthy man who did not have any pre-existing medical conditions. He acknowledges that he had a history of occasional migraines as well as sleep difficulties which were both managed with medication. The evidence supports this position, which I accept.

[241] I find that Mr. Demrey has also suffered psychological injuries. He developed driving anxiety, persistent depressive disorder, and alcohol use disorder as a result of the Accident.

[242] I also accept that Mr. Demrey's injuries have altered his life significantly. Over the last six and a half years, he has had to endure persistent pain and these are unlikely to resolve in the future. However, I do not agree with Mr. Demrey's submissions that the impact of the injuries are debilitating.

[243] I accept the injuries and pain have affected him from being able to participate in recreational and leisure activities in the same manner he did prior the Accident. Mr. Demrey is not able to socialize and entertain with, and cook for, his friends in the same manner and frequency. This played a large part of his life before the Accident. He is no longer the "life of the party".

[244] The Accident has affected his ability to maintain his home. I accept that he performed the majority of the cleaning of their townhouse as well as some outside maintenance. Although Mr. Demrey attempts to do household chores, it comes with

fatigue and increased symptoms afterwards. As a result, Ms. Lasko has had to assume a lot of housekeeping duties that were previously performed by Mr. Demrey.

[245] I accept Mr. Demrey is unable to work in his chosen occupation in outside sales and will likely not be able to work in this same type of employment. While he may not have been the top performer at Atlas, he enjoyed the work that he had been performing for 15 years. This will have long-lasting effects on him.

[246] I find that Mr. Demrey was terminated from his position at Altas because he was not able to perform his duties as a result of injuries he sustained in the Accident. This led to Mr. Demrey and Ms. Lasko experiencing financial difficulties.

[247] Mr. Demrey seeks an award of non-pecuniary damages in the amount of \$130,000. He is not making a claim for a segregated non-pecuniary award for loss of housekeeping capacity. Mr. Demrey cites the following cases in support of his position:

*De La Garza v. Carson*, 2018 BCSC 1858 – the 47-year-old plaintiff was involved in a T-bone type Accident and suffered from headaches, muscle stiffness, neck pain, mid-back pain, and lower back pain. He was no longer able to do yard work or activities that he used to enjoy and was more irritable. The Court accepted that the plaintiff's prognosis for recovery was guarded and that the pain and discomfort had affected his mood and caused him to become irritable and socially isolated. The Court awarded the plaintiff \$115,000.

*Smith v. Hsu*, 2020 BCSC 523 – The 35-year-old plaintiff was found to have moderate whiplash injury which developed into a chronic pain condition and experienced an increase in the number of migraine headaches that she suffered compared to her pre-accident baseline. These headaches were, at first, constant but then became intermittent. The Court found that the plaintiff's chronic pain caused her to develop a major depressive disorder which went into partial remission with treatment. The plaintiff also developed ongoing driving anxiety. The Court awarded the plaintiff \$120,000.

*Crozier v. Insurance Corporation of British Columbia*, 2019 BCSC 160 – The 32-year-old plaintiff was a passenger in a vehicle that was involved in a rear-end accident. The plaintiff sustained soft tissue injuries, with ongoing, chronic mid-back pain as well as psychiatric injuries that had compounded her perception of pain and complicated her recovery. The Court accepted that the plaintiff had ongoing significant chronic pain as well as continuing

psychological symptoms and found that the plaintiff's joyful, outgoing personality had changed. The Court awarded the plaintiff \$125,000.

[248] The Defendants submit that an appropriate award for non-pecuniary damages is between \$50,000 and \$80,000. They cite the following cases:

*Smith v. Evashkevich*, 2016 BCSC 1228 – The 34-year-old plaintiff suffered from soft tissue injuries to his neck, mid and low back, sacroiliac joint injury, cervicogenic headaches as well as anxiety and borderline depression and his symptoms were expected to continue into the future. He took over-the-counter medication to manage his symptoms and reduced his pre-accident activities such as golfing, hiking and snowboarding and became withdrawn in his social relationships. The Court awarded \$50,000.

*Moody v. Hejdanek*, 2018 BCSC 380 – the 36-year-old plaintiff suffered from chronic daily headaches, soft-tissue injuries to his neck and shoulders, intermittent nausea and chronic insomnia. His chronic headaches were expected to remain unchanged indefinitely. The plaintiff was working full time but had become more withdrawn since the accident and reduced his recreational activities. The Court awarded \$55,000.

*Chaudry v. Henville*, 2021 BCSC 2318 – the 43 year old plaintiff suffered injuries to her neck, back, shoulder and hip, feet, chronic pain, headaches and driving anxiety. She suffered from pre-accident headaches, sleep problems and depression. The Court awarded \$80,000.

[249] Although comparison to other awards of non-pecuniary damages is helpful, each award of non-pecuniary damages must be determined on the specific circumstances of each plaintiff. As well, the award must be fair and reasonable to both parties: *Radacina v. Aquino*, 2020 BCSC 1143 at para. 145.

[250] While these cases have some similarities and distinguishing features, I must make an award that is fair and reasonable based on the facts before me. I find that the facts in *De La Garza* are broadly more congruent with Mr. Demrey's case.

[251] A pre-existing condition is a negative contingency that must be considered when assessing damages: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 48.

[252] Defendants must take a plaintiff as they are, even if the injuries are more severe than would otherwise be expected because of a pre-existing condition (the “thin skull” rule). However, defendants are not responsible for the consequences of a pre-existing condition that the plaintiff would have experienced in any event (the “crumbling skull” rule): *Athey* at paras. 34–35; *Dornan v. Silva*, 2021 BCCA 228 at para. 44. If there is a “measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence, then this can be taken into account in reducing the overall award”: *Athey* at para. 35. This situation necessarily concerns a hypothetical event, which will be taken into consideration in the assessment of damages, as long as it is a real and substantial possibility and not mere speculation: *Dornan* at para. 63.

[253] Earlier I found that Mr. Demrey did have some pre-existing injuries which were aggravated as a result of the Accident. I find that, without the Accident, there is a real and substantial possibility that Mr. Demrey would have suffered the effects of the pre-existing conditions relating to sleep and migraines which in turn would have affected Mr. Demrey’s future work capacity. I find that the evidence regarding Mr. Demrey’s pre-Accident low mood and alcohol use do not rise to a real and substantial possibility that they would have detrimentally affected him in the future without the Accident.

[254] In regards to what percentage for negative contingency should be attributed to the pre-existing medical conditions, I agree with the Defendants that even though Mr. Demrey worked full-time prior to the Accident in spite of these conditions, in light of my finding that Mr. Demrey would have been affected by his sleep condition and migraine regardless of the Accident, a discount should be applied. Accordingly, I will apply a 10% negative contingency to Mr. Demrey’s non-pecuniary damages.

[255] Having considered the evidence, the submissions, and authorities advanced by counsel and the relevant factors in *Stapley*, I find that an appropriate award of non-pecuniary damages is \$108,000 (\$120,000 less 10% contingency) is reasonable and fair.

## Loss of Income Earning Capacity

### *Past Loss of Income*

[256] A plaintiff is entitled to loss of the value of work that they would have – not could have – performed but for the injuries sustained as a result of the defendants conduct: *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[257] A plaintiff may only recover damages for her past net income loss: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98.

[258] Projecting what a plaintiff would have earned in the past had they not been injured is a hypothetical exercise. Establishing a real and substantial possibility means that any hypothetical loss must be shown to be realistic considering the plaintiff's likely circumstances without the injury. The plaintiff's claim must have an evidentiary foundation: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 34, 36.

[259] If the plaintiff establishes a real and substantial possibility, the Court must then assess the relative likelihood of the hypothetical event and adjust the damages accordingly: *Gao* at para. 37.

[260] A fair and reasonable award is an assessment rather than a purely mathematical calculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 54.

[261] Mr. Demrey was off work at Atlas from when the Accident occurred until early December 2015. His employment was ultimately terminated in April 2016.

[262] Sergiy Pivnenko testified on behalf of Mr. Demrey as an expert in labour economics qualified to provide calculations and methods that can be used to estimate past income and the present values of future income and costs of care. His report dated November 23, 2021 provides a projection of past absent Accident earning based on an average of Mr. Demrey's annual earnings at Atlas for the years 2011–2014 and for 2015 up until the date of the Accident.



[263] Mr. Pivnenko projects that without the Accident, Mr. Demrey would have earned \$352,062 up to the commencement of the trial. Mr. Pivnenko notes that, to arrive at an estimate of the past wage loss, Mr. Demrey's actual earnings must be subtracted from the absent Accident estimate.

[264] Mr. Demrey submits that his past wage loss following the Accident should be assessed as follows:

	Potential Earnings	Actual Earnings	Loss
2015	\$18,665	\$4,980	\$13,685
2016	\$51,222	\$22,053	\$29,169
2017	\$51,695	\$0	\$51,695
2018	\$52,997	\$10,223	\$42,774
2019	\$54,475	\$4,767	\$49,708
2020	\$56,131	\$360	\$55,771
2021	\$57,610	\$0	\$57,610
2022 (to trial)	\$9,267	\$0	\$9,267
<b>TOTAL</b>	<b>\$352,062</b>	<b>\$42,383</b>	<b>\$309,679</b>

[265] The Defendants submit that Mr. Demrey has understated his income from the date of Accident to trial. I have reviewed Mr. Demrey's Employee Cheque History Report and agree that the 2015 actual earnings is \$10,978.85.

[266] Mr. Demrey submits that employment insurance benefits received should not be considered when determining net past income loss and that they are not properly deductible from a past income loss claim, relying on *Bracchi v. Roberts*, [1990] B.C.J. No. 2429 at 4, (1990) 51 B.C.L.R. (2d) 257 (S.C.).

[267] I have reviewed *Caffrey v Davies*, 2020 BCSC 792 at para. 160 citing *Hayre v. Walz* (1992), 67 B.C.L.R. (2d) 296, 1992 CanLII 1261 (C.A.) and *Luis v. Marchiori*, 2015 BCSC 1 at paras. 185–186, which both hold that employment insurance benefits received by a plaintiff are to not be considered as income in determining net past income loss. The Court in *Luis* relies on the insurance exception as articulated in the leading cases of *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940, 1990 CanLII 97 and *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, 1994 CanLII 120. I agree and do not make a deduction for employment insurance benefits received by Mr. Demrey.

[268] Accordingly, his total actual earnings are \$48,375.85.

[269] I have found that Mr. Demrey's employment at Atlas was terminated due to the decrease in his sales caused by the ongoing physical pain and psychological symptoms that he was experiencing due to the Accident. The medical evidence supports Mr. Demrey's evidence, which I accept, that he was suffering from driving anxiety upon his return to work at Atlas. I also accept that he had difficulty working because of the pain and headaches and migraines he was experiencing from the Accident. He argues that these difficulties led to his decrease in sales performance which ultimately led to his termination.

[270] The Defendants submit that Mr. Demrey is entitled to 4 months of past wage loss for his leave from work after the Accident until he returned in December 2015 and a portion of his post-Accident wage loss. They disagree on how Mr. Demrey's yearly income ought to be calculated.

[271] The Defendants tendered economist Mark Szekely as an expert in economics. He wrote a report dated January 14, 2022 in which he critiques Mr. Pivnenko's report.

[272] The Defendants submit that Mr. Pivnenko's report over estimated Mr. Demrey's income because he failed to deduct out-of-pocket expenses when calculating Mr. Demrey's average Atlas income. In cross-examination, Mr. Szekely acknowledged that the only substantial difference between his estimate of past wage loss and that of Mr. Pivnenko was that Mr. Pivnenko did not deduct out-of-pocket expenses that Mr. Demrey had been incurring in the course of his employment when estimating Mr. Demrey's average annual income at Atlas.

[273] In his calculations, Mr. Szekely deducted all employment expenses claimed on line 229 of Mr. Demrey's income tax returns. However, in cross-examination, when shown Mr. Demrey's Statements of Employment Expenses, Mr. Szekely conceded that all claimed expenses for use of work space in the home were in

essence a tax deduction versus a true employment expense and that they would have been incurred regardless of whether Mr. Demrey worked at Atlas.

[274] Mr. Szekely conceded that all deductions he made for business use of home expenses should not have been made and that those amounts should be added back into his estimate of Mr. Demrey's annual income.

[275] Mr. Demrey also points out that Mr. Szekely included \$14,499 of employment insurance benefits that Mr. Demrey received in 2016 and 2017 as income earned following the Accident when calculating Mr. Demrey's past income loss.

[276] Mr. Demrey submits that Mr. Szekely's projection of Mr. Demrey's gross past loss is low due to the deductions he made for business use of home expenses and his concession that these should not have been made.

[277] However, there are also problems with Mr. Pivnenko's calculations. Mr. Pivnenko testified that he did not make any deductions for employment expenses from his estimate of gross past loss because it is for the trier of fact to determine which employment expenses should be deducted. The Defendants argue that this was only explained when the Defendants raised it in cross-examination and a lay person reading Mr. Pivnenko's calculations may be misled without that explanation.

[278] Consequently, Mr. Demrey acknowledges that his automobile expenses are properly deductible from the estimate of his annual income.

[279] Mr. Demrey submits that, in order to reconcile Mr. Szekely's low estimate of gross past loss and Mr. Pivnenko's high estimate of gross past loss due to not making any deductions for employment expenses, the average between Mr. Szekely's estimate of gross past loss of \$311,516 and Mr. Pivnenko's estimate of gross past loss of \$352,062 should be used to assess Mr. Demrey's gross past income loss.

[280] I am mindful that a fair and reasonable award is an assessment rather than a purely mathematical calculation. With that in mind, given that the calculations by the two economists are not that far apart but neither of the two economists were able to arrive at calculations that were indeed correct, I am prepared to accept Mr. Demrey's submission of making an award for loss of past income based on the average between Mr. Szekely's estimate of gross past loss of \$311,516 and Mr. Pivnenko's estimate of gross past loss of \$352,062.

[281] The average of the two estimates is \$331,789. I will deduct Mr. Demrey's actual earnings of \$48,375.85 to arrive at Mr. Demrey's gross past income loss as \$283,413 (rounded off).

[282] The Defendants submit that there are a number of negative contingencies and his failure to mitigate that would have impacted Mr. Demrey's past income such that there should be a reduction of 50% to past wage loss award. I have found that the Defendants have not proven that Mr. Demrey failed to mitigate his losses. As well, while I do not agree with all of the negative contingencies advanced by the Defendants, I am of the view that there is a real and substantial possibility of the following to have impacted Mr. Demrey's past income absent the Accident:

COVID-19: it is very likely that had Mr. Demrey continued employment with Atlas, his income would have been impacted by the COVID-19 pandemic given his work involved dealing with clients in person.<sup>3</sup>

Heart Attack: Mr. Demrey had a heart attack and spent several days in the hospital. It is likely that he would have been off work recovering for a period of time had he been working at that time.

[283] In my view, a 15% reduction is appropriate taking these two contingencies into account. Accordingly, Mr. Demrey's gross past loss of earning capacity is \$240,901. As well, I am applying the 10% negative contingency for his pre-existing conditions. The total negative contingency will be 25%.

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<sup>3</sup> See *Tritton v. Lai*, 2023 BCSC 956 at paras. 21, 27; *Hastings v. Mathew*, 2020 BCSC 1418 at para. 40; *Warnock v. Weijdemann*, 2021 BCSC 553 at paras 143–144.

[284] Mr. Demrey's gross past income loss must be reduced to net past income loss after taking into account the income tax and employment insurance premiums that would have been payable on the gross past income loss: *Insurance (Vehicle) Act*, ss. 95, 98.

[285] Mr. Demrey submits that, based on Mr. Pivnenko's report, 17% is an appropriate deduction for income taxes and employment insurance contributions. I agree. Accordingly, I am of the view that \$206,538.65 for past loss of earning capacity is fair and reasonable.

### ***Future Loss of Income***

[286] Assessing a parties' loss of future earning capacity involves comparing a plaintiff's likely future, had the accident not happened, to their future post-accident. This assessment will depend on the type and severity of the plaintiff's injuries, and the nature of the anticipated employment in issue but should not be a mathematical exercise: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[287] As stated in *Rab v. Prescott*, 2021 BCCA 345 at para. 47, a tripartite test should be used to assess damages for loss of future earning capacity. I have found Justice Burke's summary in *Choi v. Ottahal*, 2022 BCSC 237 at para. 182, of the three steps most helpful and will reproduce it below:

- a) First, does the evidence disclose a potential future event that could result in a loss of capacity? This step queries whether the plaintiff may hypothetically suffer from long-term health issues which may affect their ability to maintain gainful employment or remuneration.
- b) Second, does the evidence demonstrate that there is a real and substantial possibility that this potential loss of capacity will cause pecuniary loss? Having established that the plaintiff may suffer from long-term health issues which could affect their earning potential at the first stage, the trial judge must assess the likelihood that the plaintiff's loss of capacity will affect their ability to earn income.
- c) Third, having established that there is a real and substantial likelihood that the plaintiff will suffer from ongoing loss of capacity, and that this loss of capacity will result in a loss of income, the trial judge must assess this possible future loss. It is at this stage that the trial judge should consider the basis for compensation (*i.e.*, capital versus earnings approach), contingencies, and the relative likelihood of the loss occurring. The

damages award should be reduced based on the relative likelihood that the potential future would not occur.

[288] The Court must also ensure that the award is fair and reasonable. The assessment is a matter of judgment, not a mathematical calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

[289] Mr. Demrey has met the first step in *Rab*. The medical evidence supports that because of the injuries, both physical and psychological, Mr. Demrey has been rendered less capable of earning income from all types of employment.

[290] Mr. Demrey has also met the second step in *Rab*. Mr. Demrey lost his position at Atlas, which I have found is a result of the injuries he sustained from the Accident. There is a real and substantial possibility that he would have continued working there until retirement. This is supported by the fact that Mr. Demrey testified that he enjoyed working at Atlas as he was there for 15 years prior to the Accident. As well, he was offered the job back in 2019 which supports the real and substantial possibility of Mr. Demrey working at Atlas until retirement.

[291] I am satisfied that although the evidence supports that Mr. Demrey is capable of working in some capacity in a sales position, the injuries he sustained makes him less marketable and attractive as employee to potential employers in all sales including outside sales. He has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured.

[292] I am also satisfied that as a result of his reduced capabilities, Mr. Demrey is less valuable to himself as a person capable of earning an income in a competitive labour marketplace.

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

[294] Given these findings, the final step in assessing Dr. Demrey's claim for damages for future loss of capacity is to assess the value of his loss. This includes

factoring in the relative likelihood of the real and substantial possibilities that affect his post-trial without-accident and with-accident earning capacity: *Rab* at para. 47; *Dornan* at paras. 93–95. Mr. Demrey says that the earning approach ought to be used. Mr. Demrey submits that he should be awarded the sum of \$350,000 for his loss of future earning capacity.

[295] The Defendants have argued that no award should be made. In the alternative they submit that using the capital asset approach, an appropriate award is 6 to 12 months of his Atlas salary in 2022 dollars (\$25,557 to \$51,113). Using the economic approach, they submit that an amount of \$5,000 per year to the age of 65 is an appropriate calculation.

[296] There are two methods for assessing a future loss of capacity: the capital asset approach and the earnings approach. The earnings approach is generally used where the loss is easily measured, while the capital asset approach is generally used when the loss is not easily measured: *Rab* at para. 46. In this case, the earnings approach is best suited because Mr. Demrey had a relatively stable salary prior to the Accident which can be compared with the salary that he could command post-Accident in a suitable position.

[297] Based on all of the evidence, I find that Mr. Demrey is not capable of going back to the type of outside sales job that he had prior to the Accident. Medical experts have opined that Mr. Demrey’s chronic pain will not get better but the driving anxiety will not prevent him from going to work.

[298] Derek Nordin was tendered by Mr. Demrey as an expert in vocational assessment and vocational rehabilitation. His report, dated November 1, 2021, was drafted after interviewing and administering vocational testing to Mr. Demrey on August 24, 2021.

[299] With respect to employability, Mr. Nordin opines that “Mr. Demrey is not competitively employable in a sales capacity and that the primary barrier for him

being competitively employable is his ongoing psychological issues, and in particular his severe (self-reported) anxiety as well as moderate (self-reported) depression”.

[300] Mr. Nordin opines that while Mr. Demrey does have ongoing physical limitations, the primary issues impairing his competitive employability were of a psychological nature.

[301] Dr. Watt opined that Mr. Demrey’s psychological conditions are treatable. I agree with the Defendants that there is no evidence to support that this particular injury gives rise to an ongoing permanent loss of capacity.

[302] Mr. Nordin opines that, given Mr. Demrey’s sales history, he might be able to consider working in a venue such as a Home Hardware or Home Depot store as employees in those settings are generally not required to sit for long periods and their interactions with customers are generally more in a helping capacity as opposed to convincing a customer to buy a particular product. However, Mr. Nordin opines that “Mr. Demrey’s psychological functioning will need to improve significantly before even that type of position would be realistically manageable for him”.

[303] Samantha Gallagher was tendered by the Defendants as a vocational consultant qualified to provide an opinion regarding Mr. Demrey’s present and future employment potential.

[304] In her report of November 8, 2021, Ms. Gallagher opines that Mr. Demrey could have continued with his job at Atlas to retirement absent the Accident given his many years as a salesman and his ability to meet the demands of the job.

[305] She further opines that “the medical information reviewed seems to suggest that Mr. Demrey is likely capable of a return to work but would be best suited to sedentary or light occupations that offer him the opportunity for postural flexibility”.

[306] While I do not disagree with Ms. Gallagher in this regard, I find the recommendations of suitable occupations for Mr. Demrey do not take into account his physical injuries and limitations. Ms. Gallagher recommended that Mr. Demrey



could work as a real estate agent or insurance agent. She conceded in cross examination that these jobs were not suitable for Mr. Demrey given the possibility of frequent driving or prolonged sitting at a desk.

[307] The Defendants submit that Mr. Demrey was likely about to become employed through increased effort and/or assistance from a job placement provider and driving rehabilitation. This is not a case where the plaintiff is permanently disabled from working or working at a known reduced rate. The preponderance of the evidence at trial is that Mr. Demrey will be able to return to work and sustain employment albeit in a different setting.

[308] As such, I find that the most suitable type of work for Mr. Demrey in the future as suggested by Mr. Nordin is in a work setting such as Home Hardware or Home Depot.

***Post-trial without-Accident earning capacity***

[309] But for the Accident, I find that Mr. Demrey would have continued in his role at Atlas until his retirement at age 70.

[310] This assessment of Mr. Demrey's post-trial without-Accident earning capacity assumes that he would have earned an annual salary of \$59,148 as calculated by Mr. Pivnenko. While neither Mr. Pivnenko or Mr. Szekely's calculations were entirely accurate, I find that Mr. Pivnenko's calculations were the best estimate and represented a fair calculation of Mr. Demrey's without-Accident earning capacity. While the defendants argue that this figure is not suitable because it factors in amounts incurred as expenses, I nonetheless find that it is a reasonable and suitable estimate of what Mr. Demrey could have earned going forward. I prefer Mr. Pivnenko's calculation over Mr. Szekely's because Mr. Szekely applied a higher negative contingency on the basis of Mr. Demrey voluntarily choosing to engage in part-time work, which was not borne out on the evidence.

[311] As such, I accept Mr. Pivnenko's calculation of \$449,292 for Mr. Demrey's without-Accident earning capacity. This number reflects the present value to age 70

and labour market contingencies which I find to be appropriate in the circumstances of this case.

[312] As discussed previously, I must apply a 10% negative contingency to this amount to reflect Mr. Demrey's pre-existing conditions. I decline to apply a negative contingency related to his heart attack or the COVID-19 pandemic, as the state of the evidence was that neither would significantly impact his capacity post-trial.

[313] Accordingly, I find that Mr. Demrey's without-Accident earning capacity is \$404,362.

***Post-trial with-Accident earning capacity***

[314] As I have found above, Mr. Demrey is capable of working as a building materials and garden supplies retail salesperson.

[315] To assess Mr. Demrey's future with-Accident earning capacity, I have considered the evidence of Mr. Pivnenko and Mr. Szekely. Again, neither expert was able to produce an entirely accurate calculation of this amount, however I find that Mr. Pivnenko's calculation was the better estimate and represented a fair calculation of Mr. Demrey's with-Accident earning capacity.

[316] I agree with Mr. Demrey that, although I have found him capable of seeking this employment, he will first need to participate in some of the care items dealt with below. As such, I find that Mr. Demrey is most likely to start a new position in 2024, and I do not take into account any salary from post-trial to the end of 2023.

[317] I do not agree with Mr. Demrey's submission that he is only capable of working 20-25% capacity of a full-time salesperson of building materials and garden supplies. The evidence does not disclose this. The evidence disclosed that Mr. Demrey is capable of working in sales, and both Dr. Watt and Mr. Nordin opined that he would first have to deal with his psychological injuries. I have accounted for this time above.

[318] As such, I find that Mr. Demrey's without-Accident salary up to the age of 70 has a present value of \$312,407.

[319] As I have done above, I apply a negative contingency of 10%, resulting in an amount of \$281,166.

### **Conclusion regarding future loss of earning capacity**

[320] Based on my calculations of Mr. Demrey's post-trial without- and with-Accident earning capacities, which is anchored in the evidence of Mr. Pivnenko and Mr. Szekely, my assessment of his future loss of earning capacity is \$123,196.

### **Cost of Future Care**

[321] I adopt the legal principles in the assessment of cost of future care as summarized by Justice Gomery in *Gill v. Borutski*, 2021 BCSC 554:

[107] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 [*Gignac*] at paras. 29–30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[108] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac*, at paras. 31–32. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; *Warick v. Diwell*, 2018 BCCA 53 at para. 55.

[109] At the end of the day, an award for the cost of future care is assessed, not mathematically calculated; *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28–31.

[322] An award of future care costs is not intended to account for the cost of amenities that make the plaintiff's life more bearable or enjoyable, but are not medically justified: *Rattan v. Li*, 2022 BCSC 648 at para. 181 citing *Warick v. Diwell*, 2018 BCCA 53 at para. 24. A common sense approach must be

taken: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13.

[323] Kim Gibson was tendered by Mr. Demrey as an expert in the assessment of, and to provide an opinion on, the cost of future care and assistance required by injured individuals.

[324] Ms. Gibson attended Mr. Demrey's home on November 9, 2021 to conduct her assessment. Based on her review of medical reports, her observations of Mr. Demrey's living arrangements, and an interview with Mr. Demrey, she wrote a report dated November 24, 2021 in which she made a number of recommendations as it relates to the cost of future care:

#### 4. Appendix A – Cost Summary

\*denotes items where tax is charged

	Cost	Provision
<b>Medical Referral</b>	MSP	
<b>Botox Injections</b>	\$3,000	Unknown, could be annually
<b>Exercise:</b>		
- <b>Gym pass</b>	\$539.50	Once
- <b>Kinesiology</b>	\$4,080.00*	Now and replacement every 5 years throughout lifetime
- <b>Pilates</b>	\$225*	Annually throughout lifetime
- <b>Yoga</b>	\$810 - \$1080*	Now and replacement every 5 years
<b>Driving School</b>	\$3,918.40	Once
	\$11,755.20	
<b>Alcohol Treatment</b>	MSP	
<b>Mindfulness Stress Reduction</b>	MSP	
<b>Psychological Counseling</b>	\$11,492	Once
<b>Marital Counseling</b>	\$2,652	At least once
<b>Allied Health</b>		
- <b>Physiotherapy</b>	\$2,100	Once
- <b>Other</b>	\$437.50	Annually throughout lifetime
<b>Massager</b>	\$100 - \$250*	Now and replacement every 10 years
<b>Heavier Homemaking</b>	\$480*	Annually to age 80
<b>Infrared Heating Pad</b>	\$150 - \$230	Now and every 10 years
<b>Medications</b>		
- <b>Current</b>	\$559.04	Annually throughout lifetime
- <b>Future</b>	See body of report	
- <b>Over the Counter</b>	See body of report	Annually throughout lifetime

[325] Mr. Demrey submits these costs are medically reasonable to promote his long-term health and that he is likely to incur them. The Defendants disagree with some but not all of Ms. Gibson's recommendations.

[326] In regards to Botox injections, Dr. Koo and Dr. Watt recommended that he have a trial of Botox injections, as did Dr. Medvedev. Mr. Demrey testified that he

tried one round of Botox treatments in February 2022 and found this caused some reduction in his migraines

[327] In my view, given that Mr. Demrey found that Botox injections helped to reduce his migraines, *albeit* not completely, it is reasonable to continue further treatments.

[328] Dr. Medvedev testified that Botox injections cost \$3,000 to \$4,000 per year and that patients with chronic headaches and migraines can receive Botox treatment between 3-5 years. I am not inclined to award treatment for five years as recommended by Ms. Gibson. However, it is reasonable that Mr. Demrey receive two additional years of Botox injections at \$3,000 per year.

[329] With respect to an annual gym pass, I agree with the Defendants that a gym pass is not medically necessary given that Mr. Demrey has a home gym that he uses regularly.

[330] Mr. Demrey testified that he continues to attend kinesiology sessions and receives benefit from them. There is also medical evidence to support continuation of these sessions including that from Dr. Smith who recommended vigorous exercise for treatment of the insomnia, depression and pain, and a referral to a kinesiologist.

[331] However, I do not agree with Ms. Gibson on her recommendation that this treatment be revisited every five years throughout Mr. Demrey's life as it is not medically justifiable nor was it recommended by any medical expert. Accordingly, I will award one additional set of kinesiology sessions. Ms. Gibson has provided evidence of the cost of the additional set at \$4,080.

[332] Dr. Watt also recommended a trial of yoga. Dr. Watt noted that while it is possible to do programs like yoga at home, individuals are more likely to adhere to a program long enough if there is someone supervising them to ensure they are doing the exercises correctly. I agree with the defendant's alternative position that 10 classes of Mr. Demrey's choice with an amount fixed at \$225 is appropriate.

[333] Dr. Koo recommended 12 physiotherapy sessions and Dr. Watt recommended 1–5 sessions of any modality Mr. Demrey feels effective to manage his back pain. Both doctors also recommended IMS treatments. Ms. Gibson recommends 24 physiotherapy sessions and thereafter 5 sessions annually throughout Mr. Demrey’s lifetime. While I agree that physiotherapy sessions are medically justifiable, I am not satisfied it should be for Mr. Demrey’s lifetime. Accordingly, I am of the view that 16 sessions are reasonable (at \$87 per session).

[334] A percussive muscle massager and Voltaren cream are medically necessary and I accept the Defendants’ alternative position and award \$228 for Voltaren and \$100 for the massager.

[335] I also agree with the Defendants position that an award of \$150 for a replacement heating pad is reasonable.

[336] In regards to medication, the only two medications that Mr. Demrey seeks an award for is Emtec (migraines) and Cyclobenzaprine (pain medication). The Defendants say that the migraine medication is one that he was previously taking and an award should not be made. As I have found that Mr. Demrey’s migraines were aggravated by the Accident, I am of the view that it is reasonable to make an award for this medication.

[337] As well, the Defendants do not oppose an award for the pain medication but say it should be limited to \$569. Mr. Demrey is only claiming 50% of the amount for prescription filling fees since he is not making a claim for Venlafaxine or Zopiclone. I am of the view, that the amounts recommended by Ms. Gibson are medically justifiable and reasonable. The annual medication award is: \$110.76-Emtec; \$83.76-Cyclobenzaprine; \$96- prescription filling fees = \$290.52. It will be awarded for Mr. Demrey’s life.

[338] Regarding driving rehabilitation, Ms. Gibson’s recommendation is based on her consultation with Access Driver Rehab. She recommends 30 driving sessions. The Defendants agree that this should be awarded but do not agree that 30

sessions are appropriate. They submit 10 sessions as recommended by Dr. Smith. As Mr. Demrey's driving anxiety has been a key factor in his ability to do outside sales since the Accident, I am of the view that 20 driving sessions are appropriate in the circumstances. Accordingly I award  $\$140 \times 20$  sessions =  $\$2,800$  plus  $\$251.84$  ( $\$0.54$  per kilometre)  $\times 20$  sessions. This comes to  $\$7,836.80$ .

[339] In regards to counselling, Mr. Demrey continues to see Dr. Jackson for counselling on a bi-weekly basis. Both Drs. Smith and Laban recommended this course of treatment. I am of the view that further counselling is medically justifiable. Ms. Gibson recommended that Mr. Demrey continue to receive counselling sessions for two years. The Defendants' alternative position is that additional one year of counselling is reasonable. Given that Mr. Demrey is receiving counselling for anxiety and depression as well as alcohol use disorder, I am of the view that Ms. Gibson's recommendation is reasonable in the circumstances. Accordingly, I make an award of  $\$11,492$  ( $\$221 \times 26$  sessions  $\times 2$  years).

[340] Ms. Gibson recommended marital counselling. This is not medically necessary and I decline to make an award.

[341] While it is not strictly under the cost of future care, Ms. Gallagher recommended the provision of  $\$2,500$  for a job placement provider. Mr. Demrey testified that he will use the service and given that he has not had a great deal of success finding employment, in my view it is appropriate to make this award. The Defendants agree it is reasonable.

[342] I will now address Ms. Gibson's recommendation for heavy housekeeping services. Mr. Gibson notes the services would be for seasonal housekeeping chores such as deeper cleaning including cleaning under furniture, cleaning of cupboards, window cleaning and cleaning of carpets. This service was also recommended by Dr. Koo given Mr. Demrey's limitations on lifting heavy objects.

[343] Cheryl Black was tendered by the as an expert in the field of functional capacity evaluations. Ms. Black provided a responsive 3-page report dated January

13, 2022 on the opinion of Ms. Gibson. The only substantive area that Ms. Black addressed in her report was Ms. Gibson's recommendation for 16 hours of annual seasonal cleaning.

[344] I found Ms. Black's evidence of little assistance to the Court. In cross-examination, she acknowledged errors in her report and that she did not review all of the medical reports provided to her. I give no weight to her report.

[345] While Dr. Koo did not prescribe the number of hours, I do agree that this service is medically justifiable and reasonable. However, I am of the view that 16 hours annually is not reasonable given that Mr. Demrey resides in a townhouse and some seasonal work is performed by the strata, and the evidence was limited in regards to the type of seasonal cleaning Mr. Demrey did prior to the Accident. Accordingly, I award 8 hours of heavy homemaking services at \$30/hour= \$240 annually. It will only be till age 70, not 80 as recommended by Ms. Gibson.

[346] Mr. Demrey acknowledges that a negative contingency of 20% should be applied to account for the possibility that Mr. Demrey may not use all of the recommended future care and assistance or may not use it for as long as recommended. The Defendants did not make submissions in this regard. Accordingly, I will apply a 20% negative contingency.

[347] I must also calculate the present value of the award for cost of future care, which will cover different durations of several years. In doing so, I will apply the set rate of interest of 2% pursuant to s. 56(2)(b) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 and the *Law and Equity Regulation*, B.C. Reg. 352/81. I have done so with reference to the calculations provided by Mr. Pivnenko and Mr. Szekely, as well as Appendix E of *CIVJI*. Below, a present value is not calculated where the award represents a lump sum.

[348] In summary, I assess Mr. Demrey's entitlement to the following under the cost of future care, calculated as outlined in Mr. Pivnenko's analysis:



Item	Cost	Duration or Replacement Time	Total with Present Value
Botox	\$3,000/year	2 years	\$5,824.80
Kinesiology	\$4,080/4 months	N/A	\$4,080
Yoga	\$225/10 sessions	N/A	\$225
Physiotherapy	\$87/session	16 sessions	\$1,392
Medication and devices			
- Percussive muscle massager	- \$100	- N/A	- \$100
- Voltaren cream	- \$228	- N/A	- \$228
- Heating pad	- \$150	- N/A	- \$150
- Emtec	- \$110.76/year	- Lifetime	- \$2,259
- Cyclobenzaprine	- \$83.76/year	- Lifetime	- \$1,708
- Filling fee	- \$96/year	- Lifetime	- \$1,958
			TOTAL: \$6,403
Driving rehabilitation	\$140 + \$251.84/session	20 sessions	\$7,836.80
Counselling	\$221/session	26 sessions/year for 2 years	\$11,156.44
Job placement provider	\$2,500	N/A	\$2,500
Housekeeping	\$30/hour	8 hours/year for 14 years (age 70)	\$2,905.49

[349] Applying the 20% negative contingency, I award a total of \$33,858.83 for cost of future care.

### Special Damages

[350] Special damages have been agreed to in the amount of \$18,382.82.

[351] Mr. Demrey seeks additional amounts for expenses that he incurred. Mr. Demrey testified that he paid for Botox injections from Dr. D’Alfonso for his headaches and migraines. Given that I have found that Botox treatment are medically justifiable, I will award \$1,250 incurred by Mr. Demrey for these treatments.

[352] With regards to the Ms. Moulin receipt, the Defendants’ position is that it is a special damage if the Court finds that Mr. Demrey was unemployed in 2017 as a result of the Accident. I find that in fact he was unemployed in 2017 as a result of the Accident. Accordingly, I make an award for \$1,134 incurred by Mr. Demrey.

[353] For both of these expenses, Mr. Demrey will provide receipts/invoices to the Defendants.

**CONCLUSION**

[354] I award the following damages:

Non-pecuniary damages	\$108,000
Past Income Loss	\$206,538.65
Loss of Future Earning Capacity	\$123,196
Cost of Future Care and Assistance	\$33,858.83
Special Damages	\$2,384

**TOTAL DAMAGES \$473,977 (rounded)**

[355] Mr. Demrey claims prejudgment court order interest on his past income loss and special damages. Mr. Demrey also claims a tax gross up with respect to any award for cost of future care and assistance. The plaintiff is entitled to interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[356] Unless there are circumstances of which I am unaware, Mr. Demrey is entitled to his costs at Scale B.

“Girn J.”