

CITATION: Graul v. Kansal, 2022 ONSC 1958  
COURT FILE NO.: CV-18-201  
DATE: 2022 04 08

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Jonathan A. Graul	)	
	)	Gary Will, Brennan Kahler, Lane
Plaintiff	)	Foster, Counsel for the Plaintiff
	)	
- and -	)	
	)	
Dev Raj Kansal	)	Kathleen Polczer, Julie Settimi, Anne-
	)	Louise Cole, Counsel for the
- and -	)	Defendants
	)	
Rakesh Kansal	)	
	)	
Defendants	)	
	)	
	)	
	)	HEARD: November
	)	15,16,17,18,19,23,24,25,26,29,30,
	)	2021 and December 1,2,3,6,7, 9,10,
	)	14, & 15, 2021 by Zoom Video
	)	Conference

JUSTICE G.D. LEMON

REASONS FOR JUDGMENT

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## **Introduction**

[1] On December 18, 2017, Mr. Gaul was involved in a car crash when the defendant, Dev Raj Kansal, drove head on into Mr. Gaul's car. The defendant, Rakesh Kansal, was the owner of the car driven by Dev Raj. Mr. Gaul submits that, as a result of the accident, he suffered a traumatic brain injury, post concussive syndrome, chronic pain disorder, post traumatic headaches, phonophobia, and tinnitus along with physical injuries to his ears, neck, back, shoulders, and knees. He says that he has disabling psychiatric impairments because of the trauma of the accident including persistent mood disorder, an adjustment disorder with anxiety and depression, driving anxiety, and features of post-traumatic stress disorder.

[2] Despite treatment since the time of the accident, Mr. Gaul says that he has not improved and he cannot return to work, now or in the future.

[3] In brief, the defendants submit that Mr. Gaul's difficulties are exaggerated and, to the extent that he has any injuries, his choice of treatment has made them

worse. With the correct treatment and some accommodation, the defence submits that Mr. Graul can return to work.

[4] These reasons explain why Mr. Graul is correct in what he says, and the defence is entirely wrong.

[5] As a result of his injuries, Mr. Graul seeks general damages, past income losses and expenses, along with future income losses and future care costs. For the reasons set out below, those matters are determined as follows.

### **Liability of the Defendants**

#### **The Accident**

##### ***Evidence of Mr. Graul***

[6] On December 18, 2017, Mr. Graul was on his way to work in Guelph from where he lives in Fergus. At 7:45 a.m., he was driving his Volvo sedan south on Highway 6 in a typical single line of commuter traffic from Fergus to Guelph. It was not snowing but there was snow on the ground.

[7] Without warning, the car in front of Mr. Graul veered to the right and left the road. Mr. Graul then saw a car coming towards him; he only had time to prepare for impact to the front of his car.

[8] Mr. Graul next recalled being stopped in a ditch against the fence line. The airbags had been deployed from the steering wheel, the windshield pillar, and the side of the motor vehicle. He got out of the car because he could smell smoke.

[9] Mr. Graul suspects that he was unconscious for a time. The damage to the vehicle suggests an impact to the front and side of his car, but he does not remember a side impact. He does not remember talking to the police or his son at the scene, but he was advised later that he had.

[10] Mr. Graul had burns on his hands and face and was bleeding from his nose and mouth. He had abrasions on his arms. He was taken by ambulance to Guelph General Hospital and released later that day.

[11] The accident report and photographs filed in evidence are consistent with Mr. Graul's description of the accident. The accident report shows that Mr. Dev Raj Kansal was the driver of the vehicle that hit Mr. Graul, and that car was owned by Mr. Rakesh Kansal.

### **Analysis**

[12] The defence called no evidence contrary to the evidence in the accident report. The defence does not admit liability, but also does not contest liability. The defence written submission says: "Given that in his Statement of Claim the plaintiff

has sought damages in the amount of \$5.5 million, the defendants are not in a position to admit liability."

[13] On this evidence, I am content that the defendants were negligent and are liable for Mr. Grail's damages.

### **Damages**

[14] The defence acknowledges that Mr. Gaul was injured by the collision. The issues relate to what injuries were caused by the accident and the extent of those injuries.

[15] In order to determine Mr. Gaul's damages, it is important to consider who he was before the accident and how he is after the accident.

### **Mr. Gaul's Circumstances Before the Accident**

#### ***Evidence of Jon Gaul***

#### ***Background***

[16] Mr. Gaul is 57 years of age and lives with his wife in Fergus, Ontario. They have been married 34 years and have three sons, aged 32, 29, and 22, who now live independently.

[17] Mr. Gaul was born and raised on a farm outside of Stratford. His parents carried on a dairy, beef, and cash crop farm. He has four siblings. When he grew

up on the farm, he had a variety of chores to do and he learned practical skills related to machinery, electrical, and plumbing services, as well as carpentry.

[18] Mr. Gaul graduated from high school in 1982 and eventually earned a George Brown College degree in instrument engineering. He started to work in 1985 and then took an electrician's apprenticeship in 1988. He then went to Humber College to be a construction maintenance electrician. He was certified as an electrician in 1994.

### ***Employment***

[19] Mr. Gaul started work with the City of Guelph in November 1998 as an industrial electrician. In 2002, he became an instrumentation technician/electrician. In 2008, he was promoted to Lead Hand with the city and was employed in that field at the time of the accident. In 2017, he had been employed at the city for 19 years and was 53 years of age.

[20] In December 2017, Mr. Gaul was employed at the Guelph wastewater treatment plant. He looked after plant automation, computer programming, equipment installations, in-house design, and engineering, as well as his Lead Hand supervisory role. Reporting to him were five millwrights, two electricians, and one gas fitter. Although he was a supervisor, he also worked with his coworkers to carry his share of the physical work, such as replacing motors and pulling conductors. About 50 percent of his work was at his desk, while 50 percent was



hands-on and more physical work. His work involved climbing ladders. He enjoyed his job because the work was varied and allowed him to be creative.

[21] Mr. Graul agreed that his work could be stressful and political at times. He denied any difficulties with his manager at work.

[22] Mr. Graul also worked overtime of 10 to 20 hours per week, and more during power outages or ice storms. He had been working this amount of overtime on a continuous basis since 2008. Overtime had been consistent from year-to-year but also changed from week-to-week.

### ***Activities***

[23] Mr. Graul filed a pre-accident photo brief which disclosed that his hobbies included boating, fishing, golf, and cycling. He had played soccer since his mid-thirties. He was part of a league and played all year in both indoor and outdoor soccer. He played every year except in 2009, when he ruptured his ACL playing soccer. He had surgery and rehabilitation in 2010 and returned to soccer and basketball in 2011. He was playing both sports at the time of the accident.

[24] Before the accident, Mr. Graul socialized once to twice a week with his soccer mates. He had a "guys' weekend" once a year to go golfing and fishing.

[25] Prior to the accident, Mr. Graul did the gardening and lawn work, as well as the snow shovelling, at the family residence. He carried out handyman projects

around the house, such as replacing a patio and deck and putting in a front walkway. He replaced the roof, doors, and windows. He installed gates on the property. He replaced a hardwood floor, heated floors, and finished the basement.

[26] Mr. Graul generally did all the driving when he and his wife were together. He enjoyed driving and generally drove 15,000 to 20,000 km per year. He maintained the family cars including brakes, oil changes, wheel bearings, etc.

### ***Health***

[27] Before the accident, Mr. Graul was in good to excellent health. He agreed that he had back pain in 2016 and sought treatment with his family doctor. The doctor prescribed Advil and Mr. Graul attended physiotherapy from June to July 2016 but had no lasting pain.

[28] In 2017, he went to his family doctor about a headache on a pain scale of nine or ten along with blurred vision. Mr. Graul thought that this headache was because of his allergies. Mr. Graul's doctor recommended Tylenol.

[29] Mr. Graul testified that he had a history of medical difficulties but nothing that affected his ability to work or carry on his recreation. He denied having any concussion symptoms before the accident.

[30] Mr. Graul testified at length, in chief and in cross, about a handwritten document of his head injuries in the past. He provided this list of head traumas at

the request of Dr. Jones, his temporomandibular joint (TMJ) specialist. It was referred to as a "list of all of the head trauma incidents leading up to the MVA [motor vehicle accident]". As the credibility analysis and some of the medical evidence relates to this list, I will return to it when I review those issues.

[31] Mr. Gaul testified that this history of head injuries did not generate any concussions, injuries, or claims because of prior car accidents. He did not lose time from work because of any of these events. While he agreed that these events involved head trauma, he described them as "minor". He did not go to hospital for any of the incidents, even though on one occasion he was unconscious for four to five minutes.

[32] Mr. Gaul agreed that, at his examination for discovery in January 2019, he testified that he had no previous head injuries. However, that discrepancy was clarified in a letter from his lawyer which said he had "no diagnosed concussions or brain injuries." But, he admitted, "I have hit my head before including the time I required two-stitches in my head." He agreed that this last incident was not in the handwritten list, nor was the list included in his answer to his examination.

[33] Mr. Gaul agreed that he did not provide this list to any of his experts or treating physicians, except perhaps one. He denied that he intentionally did this to have them focus only on the accident.

***Other Evidence of Pre-Accident Circumstances***

***Evidence of Lydia Gaul***

[34] Ms. Gaul met Mr. Gaul at George Brown College. She has known him for 37 years and has been married to him for 34 years.

[35] Ms. Gaul testified that, before the accident, Mr. Gaul was easygoing, easy to talk to, kind, and had a good sense of humour. Their marriage was successful with no separations or talk of divorce. They overcame the challenges of raising their children and the deaths of their respective fathers. They were supporting their respective mothers.

[36] Ms. Gaul said that Mr. Gaul was a good and thoughtful husband. Although they had argued in the past, those arguments were not significant. Before the accident, he did most of the driving.

[37] Mr. Gaul was a good father and gave advice and guidance to his sons. He worked with them on their cars and coached them in baseball and golf. The family had only one income, but they agreed that Ms. Gaul should stay home with the children.

[38] Their extended family, on both sides, were close to Mr. Gaul. In the past, Mr. and Ms. Gaul's social life consisted of going to a friend's home once a month, out for dinner once every two months, and a movie once every six months. Mr.

Graul used to socialize with friends by golfing, hanging out in the garage, or visiting after soccer games.

[39] The family vacationed together by going to a cottage, going on day trips, or having family celebrations. In February 2017, the couple went to the Dominican Republic. They enjoyed their time there golfing, going on excursions, walking, and swimming. They also went to restaurants with two other couples.

[40] Ms. Graul confirmed in detail Mr. Graul's evidence with respect to his employment, hobbies, and contributions around the house. Because she had a bad back, he did most of the physical maintenance work.

[41] Before the accident, Mr. Graul was healthy. With respect to the head injury list, she was aware that it had been requested by Dr. Jones. She helped put the list together, as did Mr. Graul's mother, sisters, and brother. It took a few hours to put it together. Mr. Graul had told her about his past injuries, and she knew of some of the motor vehicle accidents because they were living together at the time. She was aware that Mr. Graul was not hurt after these accidents and carried on with his normal activities. A 2006 motor vehicle accident occurred with their son in the car; afterwards, both were fine and carried on with their work, sports, and school.

[42] Ms. Graul testified that, before the accident, Mr. Graul's memory was excellent, and he had no problems with concentration or focus. He was able to

organize and multitask. He was not depressed or anxious and had no problems with his balance, hearing, or tinnitus.

[43] Just prior to the accident, they had planned to renovate their kitchen and had even prepared drawings and plans. They still needed an engineer to consider taking out a wall and costing that expense.

***Evidence of Daniel Graul***

[44] Daniel Graul is Mr. Graul's son. Daniel is a manager at an accounting firm.

[45] Daniel testified that, before the accident, Mr. Graul was kind, outgoing, quick witted, and hardworking. He enjoyed soccer, basketball, and golf. He went for bike rides and swam at the beach. He was a handyman who worked around the house doing jobs such as roofing, decking, interlocking brick, and replacing the master bathroom. He also worked on the family cars which included everything short of replacing the transmission.

[46] Daniel agreed that Mr. Graul enjoyed his work because it presented him with challenges and a variety of tasks every day. Daniel could tell that his father was proud of his work. He was aware that his father worked overtime throughout the year on an on-call basis, including on weekends and holidays.

***Evidence of Pamela Ciccarelli***

[47] Ms. Ciccarelli is Mr. Graul's older sister. She is presently 67 years of age and lives in Toronto.

[48] In the five years before the accident, the family annually got together for Christmas, Thanksgiving, a week at the cottage, and sporadic other events. When they were at the cottage, they spent time at the beach, shopping, and playing other games.

[49] Before the accident, Mr. Graul was easygoing, curious, and inquisitive. He got along well with his family. He helped Ms. Ciccarelli out at her home by doing wiring and plumbing. He also helped at their mother's home with plumbing, wiring, and replacing a floor.

***Evidence of Philip Koechl***

[50] Mr. Koechl worked for the City of Guelph during the time Mr. Graul was employed there. Mr. Koechl apprenticed with Mr. Graul as an instrument technician; they worked together every day. Mr. Graul helped him obtain his qualifications. As they had a work relationship, Mr. Koechl had only been to Mr. Graul's house once in 2006. The two have not seen each other since the collision.

[51] Mr. Koechl testified that Mr. Graul was well-liked and respected at his work. For a time, Mr. Graul was Acting Supervisor and all the other employees hoped he would be able to keep that job.

[52] Mr. Koechl described how Mr. Graul's type of work required focus, concentration, and a good memory. One needed fine motor skills because of the fine wiring involved in the job. Some of the locations at the job are very loud.

***Evidence of Jerry Atkinson***

[53] Mr. Atkinson is the Wastewater Operations Manager for Niagara Region. Before that, he was employed with the City of Guelph, where he worked with Mr. Graul. For a time, Mr. Graul was Acting Supervisor of maintenance. They had a good working relationship.

[54] Both men were Lead Hands until 2016, when Mr. Atkinson became a supervisor. He has not seen Mr. Graul since the motor vehicle accident.

[55] As Lead Hand, Mr. Graul was responsible for handing out work to staff and supervising that work. He was also involved with contractors. Overall, he was to make sure that the plant operated well. Mr. Graul also had duties as an electrician and as a programmer of the Supervisory Control and Data Acquisition (SCADA) computer program. Mr. Graul created SCADA and modified it as necessary. He worked regular overtime to maintain SCADA because no one else could fix it.



[56] While Acting Supervisor, Mr. Graul continued as Lead Hand. Mr. Graul was very good as Acting Supervisor and understood the plant. He was also excellent as the "go to" guy. In Mr. Atkinson's view, it was a natural progression for Mr. Graul to become a supervisor of the maintenance operation. He was a team leader and helped troubleshoot problems. He was very dedicated and loyal to "his guys". If there were things that he did not know, he learned quickly from others. He was an expert related to electrical and instrumentation issues. According to Mr. Atkinson, Mr. Graul appeared to enjoy his job and was a valued team member.

[57] The job included physical work and climbing ladders. It required focus and concentration, or else other staff could be put in danger. Mr. Atkinson said Mr. Graul needed to be able to concentrate on diagrams and know what electrical wires were involved. A mistake "could get someone killed." Mr. Atkinson testified that Mr. Graul also needed a good memory to remember how equipment had been taken apart, so that it could be reassembled.

[58] Mr. Atkinson also testified that Mr. Graul needed fine motor skills for operation instrumentation and to strip and label wires. Small screws needed to be tightened and there was only a small area between wires to work.

### ***Evidence of John Mogk***

[59] Mr. Mogk has been an electrician for 40 years. He knew Mr. Graul as a co-worker at the City of Guelph for 10 to 15 years. They did not socialize together,

although they did golf together at a work event. He and Mr. Graul worked together on electrical instruments. He knew that Mr. Graul was a Lead Hand and temporary supervisor.

[60] Mr. Mogk found Mr. Graul knowledgeable and personable. He got along with others. Mr. Mogk knew others went to Mr. Graul for information. Mr. Graul was conscientious and worked a lot of overtime. He came back early from knee surgery. Mr. Mogk testified that Mr. Graul's overtime included an hour or so each night and working on weekends. He appeared to love his job and his employer. In Mr. Mogk's opinion, Mr. Graul would have been a good supervisor.

[61] Mr. Mogk recalled that about one third of Mr. Graul's work was electrical, one third was programming, and one third was supervising. The physical work included climbing ladders and carrying items. Mr. Mogk felt Mr. Graul needed focus and concentration for programming and electrical troubleshooting, otherwise, it would be dangerous. Mr. Mogk agreed the workplace could be loud.

[62] Mr. Graul needed a good memory for his computer work. He needed good eyesight as the wires in an electrical panel were coloured and labeled. He needed fine motor control to deal with electrical wiring and keyboarding. To Mr. Mogk's knowledge, after the motor vehicle collision, Mr. Graul's injuries could not be accommodated in the job.

***Evidence of Raymond Masse***

[63] Mr. Masse is an industrial millwright and mechanic at the City of Guelph's wastewater treatment plant. Mr. Masse was first hired in April 2013 and worked with Mr. Gaul. He knew Mr. Gaul as the Lead Hand. He had a working, not social, relationship with him.

[64] Mr. Masse saw Mr. Gaul as a hard worker who carried out many functions. He was an electrician, programmer, Lead Hand, and temporary supervisor. Mr. Gaul's experience made him very knowledgeable. As such, he was contacted by other employees and departments for information.

[65] Mr. Gaul had a passion for his job and spent a lot of time and effort making things work right. Mr. Gaul worked a lot of overtime. He could be called at 2:00 a.m. and, if he could not fix a problem from his home computer, he came to the plant to fix it. He also regularly came in on Sundays. He did more than he had to do to make things work. Mr. Gaul got along with people at the plant. He was a humble person and did not look for praise.

[66] Mr. Masse also testified the work could be physical, with climbing ladders and carrying heavy loads. Before the motor vehicle collision, Mr. Gaul had no problems with the physical part of the job.

[67] According to Mr. Masse, the engine room and blower room are very loud. Other areas are noisy as well. The job requires concentration, along with eye and motor coordination, to deal with electrical measuring devices. The job would be dangerous without these skills. Mistakes could cause significant environmental problems.

[68] Mr. Gaul needed to have good memory skills to remember program changes. He needed good vision to deal with electrical wiring.

### **Aviva Conduct Motion**

[69] During the trial, Mr. Gaul alleged that the defence had tampered with his witnesses. He therefore brought a motion for an order allowing a statement of witness, Kiran Suresh, to be entered into evidence without requiring Mr. Gaul to produce Ms. Suresh for cross-examination. He also requested an order for production of the complete files of all investigators hired by the defendant for this case. That request included communications between the insurance company, its lawyers, private investigators, and witnesses.

[70] I dismissed Mr. Gaul's motion for reasons to follow. These are those reasons.

[71] In support of the motion, Mr. Gaul relied upon the affidavit of one of his lawyers. It included a great deal of hearsay about the conduct of the private investigators retained by the defence. In response, the defence provided affidavit evidence from those investigators. No one requested cross-examination on any of the affidavits. On that basis, it was difficult, if not impossible, for me to determine exactly what occurred between the witnesses and the private investigators. The motion could have been dismissed on that basis alone.

[72] Further, the defence agreed that the statement of witness, Ms. Suresh, could be filed in evidence. Indeed, it was made an exhibit on the day before this motion was argued.

[73] Mr. Gaul submitted that the defence failed to provide all the information they should have. He submitted that the trial should proceed while he reviewed the requested productions. He argued that if, after a review, he believed there was evidence in the possession of the defence that supported his case, he should be allowed to reopen his case.

[74] However, Mr. Gaul could not point to any area of evidence that he did not already control. He had produced evidence from his treatment providers, coworkers, friends, and family. Counsel for Mr. Gaul, when pressed, could not point to any area of evidence that might be hidden by the defence. I did not see it

as reasonable to hold up a trial to go fishing for what, if anything, the defence might have in their file.

[75] The allegations made by Mr. Graul with respect to both the insurance company's private investigators and their lawyers are serious. If true, there could be significant consequences for all those involved. However, that was not the determination I had to make in this trial. I had to keep my eye on what I was asked to decide and not get sidetracked into other, albeit interesting, areas.

[76] Mr. Graul alleged the defence lawyers failed to produce witness statements for many months, contrary to their obligations. In response, the defence submitted that it provided those witness statements within an earlier affidavit of documents. I did not have that affidavit of documents. On that record, I could not decide whether counsel complied with their obligations or not.

[77] I agree with Mr. Graul that it seems odd that the defence would immediately request the private investigators to cease their investigations if nothing inappropriate had occurred. It also seemed odd that the defence conceded the witness statement if it had done nothing wrong. However odd it may have seemed, I did not have the tools to determine that conduct one way or the other. On all the evidence, it was quite possible that there was a substantial misunderstanding as to what occurred and what was understood by the witnesses involved.

[78] Mr. Gaul's lawyers brought their concerns raised by the witnesses to the defence lawyers on three occasions. Defence counsel acknowledged that all three of them failed to respond to the letters from plaintiff's counsel. Obviously, that was a breach of professional conduct. That conduct only heightened the concerns of Mr. Gaul's lawyers. An immediate clarification of the circumstances by defence counsel would likely have put this matter to rest. Their failure to do so was inexcusable. But that conduct was unrelated to whether the allegations against the investigators were borne out by Mr. Gaul. More importantly, it was unrelated to the real issues in this case.

[79] Mr. Gaul submitted that filing the letter of the witness was not a satisfactory result because he was entitled to present a live witness. If this were a jury trial, there would have been merit to that argument. However, on a judge alone trial, the effect of the written statement was to present the evidence unchallenged by the defence. It effectively became an agreed statement of fact. That reality was a significant penalty to the defence for their conduct.

[80] Mr. Gaul submitted that, if he had further time to meet with the witness ahead of trial, further helpful evidence may have come forward. Given the significance of the evidence in the statement (set out below), that seemed unlikely. Further, the last interview with the witness was on November 12, 2021. The trial

started on November 15, 2021. It seemed doubtful further evidence of significance would be obtained.

[81] Although it was true the witness declined to testify, her email in the materials did not lay all the reason for that turn of mind at the feet of the defence. I agree with the defence that the email suggested the witness misunderstood her role in this proceeding.

[82] The defence provided some of the correspondence related to the private investigators. Some was excised. The defence submitted that it was excised because of settlement discussions. I agree with Mr. Gaul that, read in context, the excision for that reason seemed unlikely. But I did not have sufficient evidence to find one way or the other. Mr. Gaul conceded the files he requested could be excised for matters related to settlement discussions or associated information. However, given the apparent lack of trust between counsel, I did not know how Mr. Gaul would be satisfied with any excisions required by the defence. That issue alone would have led into a quagmire more prejudicial than probative.

[83] Ultimately, as is often said, there is no property in a witness. The defence had a right and, in some cases an obligation, to seek out further information. I did not hear Mr. Gaul say otherwise. The issue was how that investigation could be carried out. I could not make that determination on the provided materials in the



midst of the trial. The determination of the issue was not relevant to the findings that I had to make.

[84] Accordingly, the motion failed.

***Agreed Evidence***

[85] As explained above, Kiran Suresh's evidence was filed as an exhibit on consent. Her admissible evidence from that statement on this topic is that she met Mr. Gaul when she joined the City of Guelph in 2006. They worked in the same department from 2006 to 2016.

[86] Before the accident, Mr. Gaul was extremely respectful and professional. He was very knowledgeable and thorough in his work. He was bright, quick, and had a great memory.

[87] Within his employment, Mr. Gaul had a very good reputation and was a hard worker. The place of employment was highly regulated and there were many compliance requirements that had to be followed. As such, it was imperative to have very capable and knowledgeable staff in all positions. Mr. Gaul was the lead of maintenance. It was a very physical job and he was on his feet all day. He was always "up and running" to make sure nothing fell apart. She defined him as a "Champion" on the team.

[88] Mr. Gaul always made himself available for maintenance related work. He was depended on for his opinions, even for construction projects. He worked on every piece of equipment at the water treatment plant and with people on various teams.

[89] Mr. Gaul drove a lot for work and was frequently on call.

### **Analysis of Lay Witnesses**

[90] There was no significant attack on the credibility of the collateral witnesses. Despite the defence arguments contrary to Ms. Suresh's evidence, it must be remembered that her evidence was entered on consent without the need for cross-examination. I accept the collateral witnesses' evidence of Mr. Gaul's life and work experience prior to the accident for my ongoing analysis.

[91] Mr. Gaul's co-workers were consistent in their evidence. All were fellow employees and not close friends. There was no apparent reason for them to fabricate their evidence.

[92] I appreciate that Ms. Gaul, Daniel, and Ms. Ciccarelli are family, and I should be cautious about their evidence. However, their evidence is substantially corroborated by the other lay witnesses. Just because a witness is family does not mean they have lied to support Mr. Gaul; more is required to reject their evidence.

[93] The defence raises arguments about the credibility and reliability of Mr. Gaul's evidence on some discrete topics. I will deal with those items below. However, those defence arguments do not relate to the evidence of how Mr. Gaul carried on his life immediately before the accident. This pre-accident evidence is not challenged by any contrary defence evidence. To the extent that there is any concern about Mr. Gaul's post-accident evidence, those concerns must be placed in the context of how Mr. Gaul carried on his life before the accident.

[94] I accept this pre-accident evidence and find that, before the accident, Mr. Gaul was healthy and exceptionally physically fit. A man in his fifties who not only plays soccer all year round but comes back from a significant injury to continue playing cannot be described otherwise.

[95] I find that Mr. Gaul was working long hours in a job he liked. He was respected and relied upon in that job. He was a valuable employee to the City of Guelph. He enjoyed rising to the challenges in his job. Mr. Gaul had a strong work ethic instilled in him from an early age.

[96] Mr. Gaul's job required physical stamina, concentration, and good eyesight and hearing. Mr. Gaul's employment needed him to deal with multiple tasks at once and to be able to remember complex steps.

[97] On top of that, I find that Mr. Gaul was doing the bulk, if not all, of the physical and "handy man" jobs around the house. As set out above, he did those jobs well and in a timely fashion. At home, he was loved, respected, and relied upon.

### **Mr. Gaul's Circumstances After the Accident**

#### ***The Day of the Accident***

##### ***Evidence of Jon Gaul***

[98] Mr. Gaul was taken from the scene of the accident by ambulance to Guelph General Hospital and released after two to three hours. He called his wife from the hospital, but she was too upset to drive. Her manager drove her to pick up and take Mr. Gaul home.

[99] At the time, Mr. Gaul had a headache, spasms in his back and neck, and was confused. He was, as he said: "Out of it." His wife was concerned about him, so she took him to the Fergus Hospital because she wanted him to have a CT scan. He was examined and diagnosed with a concussion. He was given muscle relaxants, told to see his family doctor, and sent home.

[100] The ambulance call record from the accident was in evidence. It says that Mr. Gaul said he had no loss of consciousness. This account is also confirmed in the hospital triage record and notes from Emergency Medical Services (EMS). X-

rays were normal. There was no indication of a head injury. A CT scan on January 12, 2018, showed no abnormalities.

***Evidence of Lydia Gaul***

[101] On the day of the accident, December 18, 2017, Ms. Gaul was working 7:00 a.m. to noon. Mr. Gaul called her from the highway. To her, he sounded "awful", like he was in shock. Her manager drove her to the Guelph hospital. When she got to the hospital, Mr. Gaul seemed dazed, confused, disoriented, and vacant. He was a "shell" and very quiet.

[102] Ms. Gaul's manager drove her back to work to get her car and Ms. Gaul then drove Mr. Gaul home, arriving at 11 or 11:30 a.m. When they arrived at home, Mr. Gaul was still not well and, to her, seemed worse. He was more vacant and tilted his head in an odd way. She was worried and called their family doctor. She was able to make an appointment for December 21, 2017, but the doctor told her to take Mr. Gaul to the hospital.

[103] They arrived at the Fergus hospital between 2:00 and 2:30 p.m. and, again, he seemed to be declining. He was "falling apart". She knew that he had hit his head and needed to be assessed. The hospital staff did not carry out a CT scan because a scanner was not available. She would have been happier if a scan had been completed.

[104] The hospital doctor gave her instructions on how to look for signs of concussion and told her to keep Mr. Graul awake. They referred her to a physiotherapist. His first treatment was on December 20, 2017, and his second was on December 22, 2017.

### ***Injuries after the Accident***

#### ***Evidence of Jon Graul***

[105] It is important to know that, for reasons set out below, I find Mr. Graul entirely credible in the description of his circumstances since the accident. His evidence is internally and externally consistent with other evidence. While the defence raises issues with respect to some of Mr. Graul's evidence, his testimony is confirmed by other credible witnesses, objective medical evidence from his case, and even some of the defence medical evidence. I will analyze the credibility issues once that evidence is appropriately summarized here.

[106] The defence suggests that Mr. Graul is not motivated to return to work. For now, I note that this argument is damaged by the reality of the evidence set out above: Mr. Graul was a hardworking, committed member of his workplace and his home. As set out below, there is no explanation, other than his injuries from the motor vehicle accident, as to why he would not have returned to work as soon as he could.

[107] On December 21, 2017, Mr. Gaul saw his family doctor, Dr. Carlson. He was feeling "terrible". His muscles were sore, and he had headaches, blurred vision, dizziness, and poor balance.

[108] As a result of the accident, his injuries over time included headaches, low mood, forgetfulness, anxiety, depression, a "slowed down feeling", general fatigue, poor libido, vision issues, tinnitus, neck pain, shoulder pain, low back pain, and pain in his elbow with numb hands. He sometimes had sciatic pain down his leg or swollen feet and ankles. He has TMJ problems and other dental issues.

[109] Mr. Gaul continues to have headaches, which are either at the base of the skull or behind his eyes and ears. Presently, they are about twice per week but sometimes more depending on weather changes. They were more frequent in the past, occurring daily for hours or a half day at a time. They get worse due to stress or fatigue. Unlike his headaches before the accident, his headaches now are more debilitating. He cannot work through them and needs to lie down in a quiet place.

[110] Mr. Gaul's vision is blurred, and he often sees a "halo" around images. This is particularly so in a busy environment. If he tries to read, the words seem "to come off the page" and he sees double. Presently, his vision problems are worse in the morning or when he is tired.

[111] With respect to his tinnitus, he understands this symptom to result from damage to his inner ear. Since the accident, he always has the sound of a cicada in his ear. Stress makes it louder but there are times when the sound will increase for no reason to the point that it is painful.

[112] He had neck pain immediately after the accident and now has it daily. The pain depends on the day and what he is trying to do. If he looks down too much, he has to move and adjust his position to reduce the pain.

[113] He has shoulder pain on both sides which radiates down from his neck. This shoulder pain occurs a couple of times per week.

[114] His lower back pain develops into sciatic pain if he does too much; however, he has controlled this pain by stopping activity before it causes the pain. It still happens about once a month. His lower back pain has spasms a couple of times per week.

[115] His feet can swell up such that he is unable to put on his shoes.

[116] Following the accident, he had facial pain from the airbags deploying. He had to have his dental appliances filed down because they no longer fit his jaw. His TMJ is being managed by using appliances at night.

[117] He has fatigue from not sleeping well due to his pain and tinnitus.



[118] His low mood developed in the months after the accident because of his pain and inability to do much. He is still unable to drive, work, or participate in family events as he would like. As a result, he is irritable, on edge, emotional, and loses his temper. His moods have affected his relationship with his wife because he takes things out on her.

[119] He has memory problems, confusion, and difficulties concentrating.

[120] He has difficulty getting out of bed and often forgets to eat. His wife leaves him post-it notes and messages or reminders on his phone. Even so, he ignores those reminders.

[121] He gets confused trying to understand his mail. When he tries to read a book, he cannot concentrate long enough to remember what he has just read. He does not read the newspaper. He can manage a cell phone screen, but virtual Zoom events are hard for him.

[122] Mr. Gaul loses his balance and suffers dizziness daily. He sometimes falls or "bounces off the walls." This is worse in the morning but continues throughout the day.

[123] As a result of his injuries, Mr. Gaul has exercised poor judgment on occasion. In May 2018, he walked home from his physiotherapy appointment. This was nine or ten kilometres in sandals and 30-degree weather; without a water

bottle or cell phone. He also leaves the gas stove or barbeque on about once per week. He has left the garage door open overnight and leaves his keys in the front door on a regular basis.

[124] The accident has affected his relationship with his wife. As a result of the accident, he sees the stress aging her, for which he feels responsible. They are frequently angry with each other about her driving and their finances. He has lost libido and is on hormone replacement therapy to assist.

[125] He has temper control problems that he never had before the crash. These difficulties also affect his relationship with his sons. He has been angry with strangers and friends because of his frustrations.

[126] Mr. Graul feels stuck at home and does not go out to see people. He no longer plays soccer. Last summer he attended a game, but he did not go see his former teammates because it was too depressing. He has socialized with those teammates only once in four years. He misses his annual "guys' weekend" to go golfing and fishing.

[127] He is also unable to continue his hobbies of boating, fishing, golfing, bike riding, and reading.

[128] He cannot return to work because he is unable to drive there. He has problems with his vision and hearing and cannot think or organize. He cannot use a computer to assist with that organizing.

[129] After the accident, he thought he would go back to work in less than six months. He was hopeful and worked towards that goal. Work meant a lot to him, and he misses it. Without it, he is angry, worried about money, anxious, and has sleepless nights. He still wishes to return to work because he finds no joy in sitting at home in this "ridiculous form of retirement."

[130] The motor vehicle accident impacts his family finances because he was the principal income-earner. His wife works as a cashier at a grocery store earning approximately \$17 per hour and working 28 hours per week. She now tries to work more shifts. She used to make \$21,000 per year, while he used to make \$100,000.

[131] Because of the change in their finances, the couple has not been able to replace vehicles or renovate their house. Any renovations will cost more because he will not be able to do them as he had in the past. They had hoped to move to a larger home in the future for their children to visit with grandchildren. They had hoped to help finance down payments for their children's homes but will now not have the money.

[132] Mr. Graul normally did all the driving, but now Ms. Graul does it all. He has moved a vehicle around the driveway but nothing more than that. He must pay for car maintenance because he can no longer do it himself. He broke a windshield trying to repair the dashboard of his son's car. He still has the car he got to replace the one damaged in the accident. He has maintained his driver's license and renewed it in November 2018.

[133] He cannot drive because of his visual difficulties. He has problems with his peripheral vision, particularly when there is traffic. If it snows, he must look down to avoid that stimulus. His license has not been medically suspended and one of his doctors said he could drive for short distances. His family physician, Dr. Carlson, has not suspended his license because Mr. Graul told her several times that he is not driving. She has written a letter to confirm that he requires transportation.

[134] As a passenger, he is anxious and hyper-alert, gripping the dashboard and sidebar. He argues with his wife while she is driving. He has not taken a driver desensitizing course because the cost was denied by his insurer, and in any event, he still cannot drive with his vision problems.

[135] Since the crash, he has done little around the house. He has been able to do some painting without success. He does some outside maintenance, but it takes much longer to cut the grass or shovel the walk. In the past, shovelling the

walk took about twenty minutes and now it takes two to three hours. His lack of judgment is such that, when he was removing snow from a vehicle, he damaged its roof.

[136] This accident has been a life-altering event for him. The overall effect of his injuries is that he has lost his sense of self-worth. He has troubles with hearing, double-vision, confusion, and depression. He has lost his independence and finds that to be emasculating. He continues to have extreme fatigue because he does not sleep well and there is "so much to deal with." His depression has become worse, particularly in the winter months.

[137] He agrees that there are some days when he does not use his pain medications, because they are to be used only as needed. He recently started antidepressants but is not sure how long ago. He agreed that he has not been treated by a psychologist or psychiatrist, but rather has only spoken with a social worker.

[138] After the accident, the couple went back to the Dominican Republic for a one-week holiday. Mr. Gaul's care providers thought it was a good idea. This vacation had been arranged before the accident to celebrate their 30th anniversary. They were going to renew their vows because it was the same place as their honeymoon. Mr. Gaul found the flight painful, but he was okay when he landed. Over the week, he spent approximately 75 percent of his time sleeping in

his room or on the beach. The couple pursued no other activities like they had when they were there the year before.

[139] In cross-examination in advance of seeing some surveillance recordings, Mr. Graul agreed that he walked 40 minutes to the post office in March 2018 and did some snow-shovelling in April 2018. He did yard work in 2018, such as cutting grass and using a pole to trim branches. When he used the pole to trim branches, it did not go well, and his shoulder was injured for months.

[140] He helped his son change the oil and a signal light on his car. In October 2018, he was trimming trees and shovelling snow.

[141] In May 2019, he continued doing yard work, and in August 2019, he went on a holiday at a cottage with his family. In September 2019, he constructed a back-step. He shovelled snow in November and December 2019.

[142] In February 2021, he refinished a table and used a stationary bike. In March and April 2021, he was still doing small jobs around the house.

[143] While testifying, Mr. Graul was shown several "Discomfort Scale" documents that he completed for his TMJ specialist, Dr. Jones. Each sheet required him to rate his average discomfort over the previous seven days on a scale of 0 to 10, with 0 representing no pain. Each sheet listed 12 symptoms to be rated: TM joint pain, TM joint sounds, bite issues, neck pain, headache, facial pain,

eye symptoms, ear pain, stuffy ear or ringing sounds, arm/hand/finger numbness, tingling or pain, upper back pain, and lower back pain.

[144] The average overall pain scores on each sheet ranged from 1 to 2. In evidence, Mr. Gaul confirmed the scores were accurate. The sheets were completed between November 28, 2018, and March 4, 2020. As set out below, this overall pain score contrasts significantly with pain scores he gave to other treating practitioners.

[145] Mr. Gaul has made no attempt to return to work or re-train. He has not requested modified work or reduced hours. He has made no efforts to obtain other work. He is presently on income replacement benefits and long-term disability. He has not applied for Ontario Disability Support Program (ODSP) or any other government benefits.

[146] He carries out housekeeping around the house, but it is at a much slower pace. He has not needed to hire anyone to do the gardening or snow shovelling. He continues some of his handyman projects but at a slower pace. He completed the back step in 2019, but the step had been started before the accident.

[147] When Mr. Gaul was taken through the surveillance videos, he agreed they were accurate. One shows that in July 2019 he went to a community center for a celebration of life. He was there from 1:44 p.m. to 4:08 p.m. Mr. Gaul said he took

no joy in attending that event but went because it was a former colleague, and he had an obligation to go. He is still not able to go to other social events because he is overloaded by noise and visual cues. Mr. Graul then went with his wife to Lee Valley and the Beer Store. The video confirms that Ms. Graul drove.

[148] Another video, from September 11, 2019, shows Mr. Graul walking slowly without difficulty. He is shovelling and moving slowly.

[149] A video from July 30, 2020, shows him carrying a gas can, trimming hedges, and pulling vines from the side of his house. He helps a neighbour put a motorcycle into the back of a van. He is seen bending over and, on his knees, gardening and watering the grass. It does not show him having any balance problems.

[150] On July 31, 2020, Mr. Graul is seen taking things to the car from the house, which may be him preparing to go to the cottage in Grand Bend. He is walking between closely parked cars. The recordings confirm that Ms. Graul is still driving, although Mr. Graul helps her take groceries into the house. He does not appear to have problems with balance.

[151] On January 2, 2021, Mr. Graul is recorded shovelling his driveway from 11:38 a.m. until 1:29 p.m. He is working slowly but does not appear to have any balance problems. Mr. Graul described the snow as very light. He cannot shovel



heavy snow; when that is necessary, it is done with the assistance of his neighbours.

[152] In the videos, Mr. Gaul does not appear to be in pain. He speaks with his neighbours on two occasions but does not appear particularly tired. After the shovelling, he went shopping with his wife.

***Evidence of Lydia Gaul***

[153] Ms. Gaul testified that, after the accident, Mr. Gaul was not able to focus or concentrate. He forgot to eat or take his medications. He could not organize anything. She needed to remind him to eat lunch and take his medications by leaving post-it notes or cell phone messages. The notes helped but he might still forget. She phoned or texted him at breaks from her work to check on him and remind him.

[154] She testified Mr. Gaul's judgment has been damaged. On one occasion, he walked home for miles from his physiotherapist rather than wait for a cab. She confirmed that it was a hot day, he had inappropriate footwear, and no water. He told no one that he was walking, and she needed to call the police to find him.

[155] Mr. Gaul leaves the gas stove on in the kitchen about twice a week and has left the barbecue on. This has resulted in him accidentally burning towels and a rug

and melting a plastic pot. He almost always leaves his keys in the door. She checks every night to make sure that he has not left the garage door open.

[156] Ms. Gaul is worried that he will stumble or fall when he is home alone. He has balance difficulties because he still struggles with his hearing and visual issues. In the first year after the accident, he had troubles with his balance every day. With vision therapy he has slightly improved, but the balance problems continue. His balance is worse when his tinnitus is worse or when he is tired. She has seen him fall a few times since December 2017 and he has told her about other falls.

[157] Ms. Gaul testified that Mr. Gaul's thinking ability has slowed down, particularly with respect to calculations and decision making. She does all the family finances. He leaves piles of paperwork around rather than filing it as he did in the past and loses documents because of that disorganization.

[158] He often gets distracted by the TV or the birdfeeder. He cannot multitask and can only focus on one thing at a time. He cannot follow a recipe because he gets distracted.

[159] He tries to do work around the house, but it takes him much longer. He can shovel light snow but does not do it logically and often gets distracted. The neighbours help with heavier snow or the icy snow at the end of the driveway.

[160] He does some cooking, cleaning, and tasks inside the house, but it takes "a little longer." He does some of these tasks to occupy himself, but it took him many months to refinish the kitchen table and he has not yet completed that job.

[161] He is now angry, irritable, anxious, frustrated, sad, and depressed. He will snap at her. He is irritable when his depression is worse, when he sleeps badly, or when focussing on their financial problems. He seems to have no filter for any outbursts. He will eventually apologize, and she tries to be patient with him. He shows his anger only to her.

[162] Mr. Graul finds it hard to fall asleep because of the tinnitus. He will get to sleep about 1:00 a.m. but wakes up through the night. He wakes up fatigued in the morning and finds it hard to wake and orient himself.

[163] Mr. Graul has difficulty socializing with their large family. The noise from loud conversations forces him to leave the room because he gets overwhelmed. He will leave and go to a bedroom for 30 minutes to "quiet his mind" and eventually comes back. The couple does not socialize with friends because Mr. Graul does better visiting with only one to four people. They do not have friends over, nor do they go out. They cannot go to restaurants or movie theatres because of Mr. Graul's sight and hearing issues. He visited with his soccer friends once, but it was too loud, and he could not participate. He does socialize with neighbours if they are outside.

[164] Mr. Gaul has not driven since 2017 because he worries about his lack of peripheral vision. He is also easily distracted and is not alert. Ms. Gaul was emphatic that it would be dangerous for him to drive, even though he has been cleared by his doctor to drive short distances. Falling snow on the windshield will break his concentration. He is also a difficult passenger and second-guesses her driving. He physically braces himself and his anxiety increases. The driver desensitizing course was denied to him by his insurance company.

[165] Ms. Gaul's account of their 2018 trip to the Dominican Republic was similar to Mr. Gaul's version. Although they went on his doctor's advice, both flights were "horrible" and, essentially, Mr. Gaul rested in bed or on the beach other than his meals. There was no golf or other excursions, and she walked the beach by herself. She has gone on her own for weeklong holidays in 2019 and 2020. She left Mr. Gaul home alone during these trips.

[166] She can tell when he is in pain because of the look on his face and his body language. He does less when in pain and takes Advil. He uses a heating pad and rubs the area that hurts.

[167] Mr. Gaul's ongoing injuries have had an impact on the family. Ms. Gaul said the two of them are concerned about their future because they cannot afford his treatment and they had hoped to help their children and grandchildren financially in the future. They had hoped to buy a slightly larger home, renovate,

and sell their present house to pay for it, and host family events in a larger home. That is no longer possible.

### ***Other Evidence of Post-Accident Circumstances***

#### ***Evidence of Daniel Graul***

[168] Since his father cannot drive and his mother does not like to drive, Daniel's parents do not come to visit him anymore. He also cannot visit as often as he would like. He calls his father once a week, which is more than he did before the accident.

[169] Presently, his father is quieter, irritable, lacks sleep, and has a shorter memory. Daniel sees a little bit of tension between his mother and father. Daniel has seen the notes that she leaves for Mr. Graul, and he knows his parents have little arguments about the notes.

[170] Daniel is certain that his father takes longer to do things because he has less concentration. His father has problems with balance and coordination. He has seen his father stumble and appear to lose balance for no apparent reason. His father cannot work on the cars anymore. Daniel changed the tires on his parents' cars because his father could not. While Daniel was away, his father attempted to fix Daniel's car but ended up breaking the windshield.

[171] His father is less involved with projects around the house and is very slow to finish those projects. It has taken him ten months to refinish a table.

[172] Daniel knows his father was optimistic about getting better, but there has been no progress.

***Evidence of Pamela Ciccarelli***

[173] As previously mentioned, Ms. Ciccarelli is Mr. Gaul's older sister.

[174] Shortly after the collision, Ms. Ciccarelli spoke with Mr. Gaul, and he appeared to be "like a zombie." She then continued to speak with him once a week, but he talked little. He was eventually able to converse better.

[175] To Ms. Ciccarelli, Mr. Gaul appears to be frustrated and angry because he cannot do the things he used to do. He has lost independence and must rely on others. He does not read and, if he does, he cannot remember what he has read. He has not done any handiwork for her or their mother since the accident. He appears to have taken up birdwatching because he cannot play golf or soccer.

***Evidence of Jerry Atkinson***

[176] Mr. Atkinson is the Wastewater Operations Manager for Niagara Region. Before that, he worked with Mr. Gaul while employed with the City of Guelph.

[177] While in Guelph, Mr. Atkinson was involved with accommodating employees. He testified that, to receive an accommodation, the employee would still need to be able to do the job. He did not see how Mr. Gaul's job could be accommodated for Mr. Gaul's deficiencies.

***Evidence of Raymond Masse***

[178] Mr. Masse is an industrial millwright and mechanic for the City of Guelph at the wastewater treatment plant.

[179] After the accident, Mr. Masse saw Mr. Gaul at a party before COVID-19 started. The new supervisor wanted to meet Mr. Gaul and organized a department get together at the Elora Casino. They all ate dinner together and socialized, but Mr. Gaul was not the same as before. After dinner, some of the participants went into the casino; however, the lights and sounds forced Mr. Gaul out of the casino within 15 minutes. He needed to look at the ground and hung onto a machine to stay upright.

***Evidence of John Mogk***

[180] Mr. Mogk worked with Mr. Gaul at the City of Guelph for 10 to 15 years.

[181] Since the accident, he has seen Mr. Gaul twice. Once, at a meeting with the new maintenance supervisor, and once at Christmas a year or so after the accident. Mr. Gaul was not able to remain in the casino because of the noise of the machines. On another occasion, they ate in a restaurant, but it was clear Mr. Gaul could not understand the menu and ordered what someone else had.

### ***Agreed Evidence***

[182] Kiran Suresh's evidence was filed as an exhibit on consent. She was Mr. Gaul's co-worker.

[183] Before Mr. Gaul's accident, Ms. Suresh had moved to Barrie and so only spoke with him over the phone. After the accident, Mr. Gaul was much slower in recalling things and sounded very unhappy and depressed. He sounded upset that it was taking so long for him to recover.

### ***History of Medical Treatment***

#### ***Evidence of Jon Gaul***

[184] The details of Mr. Gaul's treatments are set out below. Mr. Gaul testified that he first took treatment from the emergency department and his family doctor, Dr. Carlson. He has taken physiotherapy from two different clinics. He has taken occupational therapy, speech therapy, and met with a social worker for counselling at a rehabilitation clinic. That therapy has continued from 2018 to now, with some interruptions because of financing and COVID-19.

[185] From 2018 to January 2020, physiotherapy was at least once a week and sometimes twice. His various care providers have assisted his recovery or at least maintained his level of impairment. He still cannot walk on a treadmill because of his sight problems.



[186] He attended vision therapy and further treatment with his optometrist, Dr. Quaid.

[187] He attends the Berge Hearing Clinic for his tinnitus. He wears hearing aids that help with his tinnitus, but they do not help him sleep. If he tries to sleep with his hearing aids, they reduce the sound of the tinnitus but increase the sounds of his pillow to sound like crinkling potato chips. If he takes them out, the tinnitus returns. He wears his hearing aids sporadically. He believes he must revisit the clinic to have the settings adjusted. Even when they are successfully tuned, the sound is still there, but manageable.

[188] Some of his physiotherapy is financed by the account being protected by his lawyers in this litigation and some paid out of his own pocket. He does not know the amount that he presently owes, but he thinks it could be \$20,000 or \$30,000. His own insurance benefits ran out in early 2019, which brought some of his therapy to an end.

[189] He is now less concerned about COVID-19 and would go to his health providers if he had funding. He found them all to be helpful and is now backsliding without those resources. The interruption was detrimental to his recovery and his tinnitus has increased.

[190] As he said: "I had been working - it's been - it's become my - a career to get better. Like I was - that's how I was treating all my appointments all along."

### ***Evidence of Lydia Graul***

[191] Ms. Graul testified that Mr. Graul has made efforts to get better. He has gone to his physiotherapy and doctor's appointments as requested. It is "his full-time job to get better." She listed all the various doctors and service providers that he has attended and detailed the time that it takes to go to all of them. As she has often been the driver to and from Mr. Graul's various appointments, the time commitment for them both has been substantial.

[192] Mr. Graul's treatment has been interrupted because of the pandemic and their inability to pay the providers. Ms. Graul testified that stopping treatments has caused Mr. Graul to regress. When he is not receiving regular treatment, he has greater mobility issues, greater pain, and his tinnitus is worse. She sees him taking more pain medication and he appears to be feeling unwell.

### **Medical Witnesses**

[193] The medical witnesses fall into three groups: Mr. Graul's treating medical practitioners, the medical experts who assessed him on behalf of his own insurer, and the experts hired by both parties for this litigation.

[194] The parties agreed in advance that the medical witnesses could provide expert opinion evidence and they agreed on the areas in which the doctors could testify. I have summarized their expertise with their evidence. Before those experts gave evidence, I was provided with the doctors' reports, curriculum vitae, and agreed expertise. I reviewed those materials in advance of the witnesses being called. In each case, I relied upon the recent case of *Parliament v. Conley*, 2021 ONCA 261, 155 O.R. (3d) 161, at paras. 43-48, and its helpful summary of the legal principles related to expert witnesses. I satisfied myself that counsel were correct in their agreements on expertise.

[195] While some of the experts were more often retained by plaintiffs or defendants, that fact did not rise to the level of rejecting their evidence in total.

[196] This evidence should also be reviewed in light of the defence submission that Mr. Gaul has not done enough to mitigate his damages and that I should be hesitant to accept his evidence of his present concerns. The defence also faults him for failing to obtain what the defence submits is the proper psychiatric care.

[197] I start with Mr. Gaul's treating practitioners' evidence: Dr. Carlson, Dr. Quaid, and Dr. Berge. There is no defence evidence contrary to their testimony.

***Evidence of Dr. Pamela Carlson***

[198] The parties agreed that Dr. Carlson is a medical doctor practicing family medicine and qualified to testify on the diagnosis, prognosis, and treatment of medical conditions arising out of motor vehicle collisions and other trauma. Generally, however, she gave her evidence as Mr. Gaul's family physician.

[199] Dr. Carlson has been a family doctor since 2015 and took over a practice from Mr. Gaul's previous doctor. Her work is equally involved with family practice and emergency medicine at the Fergus Hospital. As such, she is familiar with the diagnosis, treatment, and recovery of concussions. She regularly diagnoses and treats mild to severe concussions and states that each patient differs in their management.

[200] She first met Mr. Gaul in July 2015, but she understood his medical history from his past doctor's notes. Mr. Gaul had been in the hospital the year before for diverticulitis but had no other acute problems or concerns. He had a colonoscopy in October 2015 and no issues in follow up.

[201] Her own notes showed that Mr. Gaul had attended in May 2016 suffering from three weeks of back pain because of a soccer injury. He had been medicating himself at home. On examination, he was normal, although tests were ordered. There were no other visits relating to his back.

[202] In May 2017, he attended with respect to headaches, blurred vision, and problems with his sinus, which he attributed to allergies. The headaches were "stabbing" with a pain of 9 or 10 out of 10. She could not provide a diagnosis but made notes as to possible causes. She then referred him for allergy treatments but not for his headaches. She suggested he use ibuprofen. She told him to follow up if there was no improvement. She did not see him again until after the collision.

[203] She next saw Mr. Gaul on December 21, 2017, three days after the accident. He described the collision and complained of pain in his knee and shoulder. His back was having spasms and he suffered from headaches and dizziness. He was dazed and drowsy but had difficulty sleeping. Although he could fall asleep, he could not stay asleep and required a nap during the day. He was confused and his vision was blurry for near or moving objects. He could not focus on moving objects.

[204] Mr. Gaul gave her a history of prior car crashes he had been in, but explained that he had no injuries, nor head injuries, from those incidents. She had not seen the handwritten list of head trauma incidents referred to above. She was aware of some of the incidents on the list, and generally about his car accidents, but not the specifics. Although he did not tell her about all his prior history, she testified there was no indication of any earlier impairments, and he was otherwise forthcoming with respect to information.

[205] The events set out in the handwritten list do not affect her opinion because they are too remote from the accident and there were no ongoing symptoms. Mr. Graul was functioning well; however, that history could make him more prone to concussion.

[206] After the accident, Dr. Carlson examined Mr. Graul. He was alert but emotional with respect to the accident. His affect was otherwise flat. On physical examination, she diagnosed whiplash and moderate to severe concussion. She recommended that he take two weeks off work and provided him with concussion counselling, including brain rest and no overstimulation. She advised that he could take over-the-counter medications for pain. She also recommended counselling relating to the accident, Tylenol, naproxen, Flexeril, and physiotherapy.

[207] She next saw Mr. Graul on January 3, 2018. He was still in pain in his neck and back muscles and his concussion symptoms were ongoing. He described dizziness, loss of balance, "fogginess", memory problems, fatigue, and restless sleep. He said he had started physical therapy twice per week. On observation, he seemed to have a flat affect, but he had normal gait and balance. Her physical tests raised no concerns.

[208] On January 15, 2018, he complained of tinnitus for the first time. His symptoms were otherwise the same. He was now having headaches which woke him. He had difficulties with visual patterns and saw halos around things. He had

low stamina and was not able to help with household chores. She recommended amitriptyline for his headaches, sleep, and concussion symptoms. She recommended that he go to an optometrist and obtain vision therapy.

[209] In January 2018, they discussed his depression and anxiety and she urged him to speak with a counsellor. However, he had a lot of appointments and difficulties that were of higher priority. She was not aware if he has since taken any counselling but was aware that he was seeing a social worker.

[210] On February 21, 2018, Mr. Gaul still complained of problems with movement and patterns in his vision. He had tingling in his legs if he stood too long, and he continued to have headaches and sleep problems. He was now having difficulty getting to sleep. He also complained of short-term memory problems.

[211] On February 26, 2018, Mr. Gaul reported tinnitus, muscle issues, back spasms, fatigue, and difficulties with dizziness and concentration. His sleep was better, but he was now on medications. His reporting of symptoms showed that his concussion was still severe.

[212] Mr. Gaul still had problems with his vision, but he had seen Dr. Quaid, his optometrist, for an assessment. He complained of problems with his peripheral

vision. At Dr. Carlson's recommendation, he was now seeing an occupational therapist and Dr. Berge for his hearing problems. His physiotherapy was helping.

[213] Dr. Carlson increased his amitriptyline to help with his sleep. While amitriptyline is an antidepressant; it is not generally used for depression. Here, she prescribed it for his insomnia, and to some extent, for his concussion. They started with a low dose and increased it. When it proved unhelpful, she told him to stop, and he did.

[214] Dr. Carlson met with Mr. Gaul on March 24, 2018, and he was still the same. He was not able to walk very long in the snow and was still suffering from tinnitus, sleep deprivation, and some new dental pain. She put him on different sleep medication. Trazodone is an antidepressant, but, again, was used for his sleep issues. He had not been taking counselling as recommended.

[215] On April 30, 2018, Dr. Carlson changed Mr. Gaul's sleep medications again. Mr. Gaul was not driving, and she provided a note so that he could get transportation benefits.

[216] On May 28, 2018, Mr. Gaul's condition had not changed much. His sleep was still a problem, and she changed his medication again. He was having difficulty with walking and memory. He was attending vision and speech therapy.



[217] Dr. Carlson met with Mr. Gaul on July 5, 2018, and he complained that he was worse after having various medical assessments. Some of those assessments had occurred in Mississauga and the long drive on the highway had been difficult for him.

[218] Her diagnosis was that he had a severe concussion.

[219] In September 2018, Mr. Gaul came to her office regarding an injury to his left shoulder incurred when he was attempting to trim a tree. An ultrasound later in October 2018 was normal.

[220] She met with him on November 19, 2018, and he complained of double vision even though he was wearing glasses and taking therapy. He was still not driving. He had fallen or stumbled recently and had difficulties walking in the snow.

[221] In January 2020, Mr. Gaul was still not taking counselling because he was "not sure where to start" and was concerned about paying for it. He was not sharing his concerns with his wife because he did not wish to burden her, and he described that he "keeps things bottled up." Dr. Carlson was focusing on his largest issues being tinnitus, balance, and problems with his vision.

[222] Dr. Carlson had a phone interview with Mr. Gaul on July 30, 2020. He still was suffering from tinnitus and low stamina. His headaches were made worse by the various medical assessments carried out. He had fallen that morning and two

or three times over the last six months. He had recurring pain to his back and neck. He had not had any physiotherapy because of COVID-19. He was complaining of a loss of libido, and she referred him for assessment in that regard. He was supportive of the plan.

[223] In her opinion, Mr. Gaul's various symptoms were caused by the car accident. The soft tissue injuries were related as well. Her objective evidence was her own exams, his demeanor while at her office, and the audiology, physiotherapy, and optometry reports.

[224] Dr. Carlson did not believe that Mr. Gaul would be able to return to work because of his problems with focusing, hearing, vision, and neck and back pain. As a result, he would not be able to bend and twist, operate a vehicle, or travel on public transportation. His judgment and ability to respond to changes would not allow for it. Although he could take care of himself, he would not be able to do the larger duties of daily living such as shopping, household tasks, managing medications, and driving.

[225] With respect to treatment, Dr. Carlson was satisfied that Mr. Gaul had participated and followed her recommendations. She recommended he continue with physiotherapy, corrective lenses, hearing aids, occupational therapy, meditation, driving rehabilitation, exercise, and others. In total, she had seen Mr.

Graul 31 times: 17 of those in person between the collision and December 2019, and the remaining 14 since 2019 either by telephone or in person.

[226] Her current diagnosis is that Mr. Graul is suffering from post concussion syndrome and traumatic brain injury. Her opinion has not changed since December 2019. He is still unable to return to work and cannot engage in all aspects of usual daily living. She has not changed her recommended treatment.

[227] She has not seen the reports from the various defence doctors, but she believes she has the necessary information from Mr. Graul and has made no note of any deficiencies in his reporting.

[228] Dr. Carlson was not aware that the defence doctors had recommended that Mr. Graul could return to work, but this did not change her opinion that he cannot work. She explained that, although she relied somewhat on subjective reports from Mr. Graul, she also relied on assessment reports and her own observations. She has not seen him at home but does have reports from other assessors who have.

[229] In May 2021, Dr. Carlson prescribed antidepressants for the first time for Mr. Graul's mental health symptoms. His mood changes had not been of concern to her till that point. However, Mr. Graul had increased difficulties because of the pandemic, no access to therapy, and a personal tragedy to a friend. Accordingly,

she thought it would be a good idea to try an antidepressant. He is still on it and she has increased his dose. She will continue to monitor dosage in the future.

[230] She agreed that psychological and psychiatric problems can cause symptoms including blurred vision, panic attacks, memory loss, cognitive problems, attention problems, and difficulties with decision making and judgment. Although mental and psychological reasons can cause his various symptoms, in her opinion, his difficulties were caused by the motor vehicle accident and the head injury which occurred at that time.

[231] She is aware that Mr. Gaul has not driven since the accident. She does not see that he is a high risk to make him unfit to drive.

***Evidence of Dr. Patrick Quaid***

[232] The parties agreed that Dr. Quaid was qualified to provide expert opinion evidence in the field of optometry and optometrical impairments. Mr. Gaul was referred to Dr. Quaid by Dr. Carlson.

[233] Mr. Gaul was referred with the following symptoms, all of which began after the motor vehicle accident: near double vision, hypersensitivity, peripheral vision issues, and blurred vision.

[234] Dr. Quaid tested Mr. Gaul and found that he had "convergence insufficiency", meaning his eyes will not turn close enough to his nose to read. He

also had "vergence insufficiency and saccadic dysfunction", causing his eyes to not properly track movement. Finally, Dr. Quaid diagnosed Mr. Gaul with defective depth perception.

[235] These difficulties affect Mr. Gaul's ability to drive, read, and look at a computer screen or cell phone. In Dr. Quaid's opinion, Mr. Gaul would have difficulty working with wires or exercising proper depth perception. Mr. Gaul would need to touch an item to be sure that he was seeing it properly. It was Dr. Quaid's opinion that, on a balance of probabilities, Mr. Gaul's difficulties were caused by the car accident. He does not believe these difficulties were caused by aging.

[236] Dr. Quaid explained that, in time, the brain will be able to suppress the double vision; however, for now, Mr. Gaul's double vision remains. As of September 2018, Mr. Gaul had significant impairments with visual convergence, vergence amplitude, visual motor search and speed, visual memory, vertical and horizontal tracking, and reading efficiency.

[237] Dr. Quaid's prognosis is "guarded". With therapy, Mr. Gaul has made some gains. His therapy will teach his brain how to control his eyes to remove the double vision. This will also occur using specialized glasses. His glasses prescription may have to be altered for a year or two more, but he should also continue with treatments.

[238] Dr. Quaid explained that Mr. Gaul has been compliant with his training, but because Mr. Gaul's insurer has denied payments and the pandemic intervened, there have been no further treatments.

[239] Dr. Quaid observed Mr. Gaul improving over time, particularly with respect to his depth perception, but he still has double vision which becomes worse as he gets tired. With therapy, some of Mr. Gaul's metrics have improved but his symptoms remain, particularly with respect to tracking. While tracking is the most important, Dr. Quaid explained he must look at all the metrics. Regardless of improvement, Mr. Gaul has poor reaction time and poor hand eye control. Dr. Quaid expects that Mr. Gaul will also have problems with peripheral perception and will continue to second guess what he is seeing in his peripheral view. Rain and snow will still cause problems for his eyesight, as will windshield wipers.

[240] Dr. Quaid agrees with Mr. Gaul that he should not drive, though he also agrees that Mr. Gaul could drive 10 to 15 minutes at a time on backroads and not on the highway. Fatigue for any reason would reduce that driving time. Although Mr. Gaul has been cleared to drive in a limited fashion, driving ability is not likely to improve over time. Ultimately, it is safer for others if Mr. Gaul does not drive.

[241] With respect to treatment, Dr. Quaid recommends that Mr. Gaul should have ongoing checks every six months.

***Evidence of Dr. Brenda Berge***

[242] Dr. Berge was qualified on consent to give expert evidence in the field of audiology, audiological impairments, and the diagnosis and prognosis of audiological impairments. Dr. Berge carries on her practice at the Berge Hearing Clinic in Guelph.

[243] She met with Mr. Graul on March 29, 2018, after he was referred to her by Dr. Quaid and Dr. Carlson.

[244] Mr. Graul's principal complaints were tinnitus and sound sensitivity. She took a history from him and carried out an examination. She observed Mr. Graul's lack of balance. She carried out a hearing test which showed that Mr. Graul's hearing was normal except for one pitch where there was a significant "notch" at the four kHz line. To her, this was objective and clear evidence that Mr. Graul's difficulties were "a noise induced hearing loss." That notch represented the part of his ear that was "smashed". In her opinion, that injury took place when his airbag deployed in the accident.

[245] At her last examination with Mr. Graul, she carried out a "baby hearing test". The results again were consistent with his complaints of tinnitus and his "misophonia" or emotional aversion to sound. This too was objective and diagnostic of Mr. Graul's problems with his hearing.

[246] With respect to the list of head traumas, since those events were non-symptomatic prior to the collision, that history was not important to her. The list did not change her opinion that these symptoms were caused by the motor vehicle accident, particularly the airbag noise, whiplash, and concussion.

[247] Dr. Berge's clinical diagnosis was "blast induced tinnitus, misophonia and noise induced hearing loss with dizziness." In her view, all his complaints of dizziness, jaw pain, and head and neck injury are indicative of noise induced hearing loss. In her opinion, this hearing loss is permanent; there are no treatments to cure or to relieve his present condition.

[248] She described that tinnitus causes "fight or flight" anxiety which will increase with stress or non-restorative sleep.

[249] She described misophonia as an emotional aversion to sound. Sound will be so chaotic to an individual that it will have a "striking force". All the sounds in the listener's location will appear to be together and positioned immediately in front of that individual's face. Accordingly, that individual will avoid being out with others. Mr. Graul would likely tolerate 20 minutes or so, before the fight or flight response would then kick in.

[250] She recommended hearing aids to assist with the pain in his ears and reduce his misophonia and anxiety. The hearing aids should mitigate his physical and



psychiatric injuries as well. Upon testifying, she found out Mr. Graul was not wearing the hearing aids because changes were needed as they were not working. She left it to him to follow up. She said the prescription for these hearing aids will need to change from time to time, perhaps once a year.

[251] From Dr. Berge's observations of Mr. Graul, he cannot coordinate his arms and gait while walking on soft or inconsistent ground. This too is diagnostic of Mr. Graul's condition. If he is on unstable ground, or walking unevenly, that will be distracting to him and lead to higher heart rate and imbalance.

### ***Evidence of Caterina Minaudo***

[252] Mr. Graul was assessed and treated by four professionals at Rehab First, a multidisciplinary practice in London, Ontario. Rehab First primarily gets its referrals from plaintiff's lawyers. Mr. Graul was seen by Caterina Minaudo, Joanne Brotman, Debra Mair, and Karol Nega.

[253] Ms. Minaudo is a speech language pathologist who worked with Mr. Graul in 2018. She met with Mr. Graul three times and received handwritten notes and questionnaires from Ms. Graul, though Ms. Minaudo has not met her. Ms. Minaudo completed a cognitive communication assessment of Mr. Graul and provided speech language therapy to him. She used a semi-structured interview method and two standardized assessment measures.

[254] She trusted the information she received from Mr. Gaul. Her standardized testing also showed there was validity to his observations. His reading and writing skills were tested informally through other tests. He was able to do many of the tasks, but required more time, support, structure, and repetition to complete them. Such structuring required, for instance, multiple choice questions rather than free memory.

[255] His responses suggested mild difficulties responding to questions with complex units of information. He could sustain his attention to tasks if there were minimal distractions or disruptions.

[256] Based on her findings, she believed that Mr. Gaul was "experiencing difficulties with cognitive skills integral for auditory comprehension and processing." She recommended that Mr. Gaul receive speech language pathology treatments to address his concerns. Those sessions provide Mr. Gaul with education, exercises, and strategies to strengthen his cognitive communications skills and to promote improved functioning in daily activities. She recommended six treatment sessions within the home or the community as appropriate.

### ***Evidence of Joanne Brotman***

[257] Ms. Brotman is a speech language pathologist with Rehab First. Mr. Gaul's care was transferred from Ms. Minaudo to Ms. Brotman. Her reports of March 21, 2019 and January 22, 2020 were filed in evidence.

[258] She reported that Mr. Graul was experiencing ongoing pain symptoms, tinnitus, visual disturbances, headaches, fatigue, and emotional and cognitive difficulties. He reported cognitive difficulties such as memory, oral expression, reading and auditory comprehension, and executive functioning.

[259] She provided "pacing strategies" to Mr. Graul, but Mr. Graul had difficulty understanding the importance of those strategies. He had difficulty focussing on her assistance and required repetition and reinforcement of what she was teaching.

[260] In her January 22, 2020, report, Ms. Brotman reported that Mr. Graul continued to have the same difficulties. His treatment had been interrupted by the pandemic and the end of his insurance benefits in March 2019.

[261] When Mr. Graul's benefits ended in March 2019, his therapy, therefore, also went on hold. Ms. Brotman then arranged with Mr. Graul and his lawyer to protect their accounts in this litigation for any future work. She does not know the terms of those protected accounts. His treatment commenced again in September 2019.

[262] Her overall observations were that Mr. Graul had difficulty with his memory, maintaining attention, and attempting to focus. He had difficulties understanding what was required of him. He also had difficulty with his executive functioning skills,

in that he had difficulties with decision making, such as scheduling or preparing lists.

[263] From Ms. Brotman's observations, Mr. Gaul continued to lose focus over time and needed repetition and reinforcement. He presented with communication difficulties, including problems with memory, attention deficits, oral expression, social communication, information processing, and executive functioning.

***Evidence of Debra Mair***

[264] Ms. Mair is a social worker at Rehab First. She provides personal counselling, vocational rehabilitation, and case management services. She spoke with Mr. Gaul on seven occasions between March 2019 and August 2019. She reviewed some of the available medical reports relating to Mr. Gaul.

[265] Ms. Mair was primarily involved with Mr. Gaul in the role of a personal counsellor. From her observations, she noted that Mr. Gaul was hesitant to participate at first, but became more open to discussing his feelings, concerns, and stresses. In return, Ms. Mair provided Mr. Gaul with strategies to address his emotional status and functioning, such as meditation, breathing techniques, visualization, and reframing. In Ms. Mair's opinion, Mr. Gaul was experiencing significant adjustment issues because of the collision and his injuries.

[266] Ms. Mair had Mr. Graul complete standardized tests. Those tests indicated that he had severe levels of depression and mild levels of anxiety.

[267] Ms. Mair's plan was that Mr. Graul would benefit from further social work services and counselling to support his rehabilitation and emotional wellbeing. Such counselling would include driver rehabilitation therapy. He should also have occupational therapy, speech language therapy, physiotherapy, and massage therapy.

[268] She recommended that he have psychological assistance. By that point, he had not had any cognitive therapy, psychotherapy, concussion support groups, or family counselling. He had not been part of any brain injury groups nor prescribed any medications for his psychological problems.

[269] Despite his insurance benefits being exhausted, Mr. Graul continued treatment on a protected basis.

### ***Evidence of Karol Nega***

[270] Mr. Nega is an occupational therapist with Rehab First. Mr. Nega interviewed Mr. Graul and reviewed relevant medical literature. He had Mr. Graul carry out various standardized tests.

[271] Mr. Nega formed the opinion that Mr. Graul "has ongoing functional implications due to persisting post-concussive symptomatology" following the

collision. Mr. Graul continues to experience cognitive difficulties and has reduced concentration attention, memory, decision making and problem solving, judgment, organization, and planning.

[272] In Mr. Nega's view, Mr. Graul's "overall rating" was that he had a "lower severe disability."

[273] In his assessment, Mr. Nega recommended that Mr. Graul continue with occupational therapy, physiotherapy, speech therapy, social work, vision therapy, and follow ups with his TMJ specialist and audiologist. In his opinion, Mr. Graul would not be able to continue to work at the City of Guelph.

### **Insurer's Assessors**

[274] Mr. Graul was assessed by his own insurer with respect to his accident benefit entitlements. These assessors filed their reports and were cross-examined by the defence. This group is made up of Zinnia Lee, Johan Reis, and Dr. Sujay Patel.

### ***Evidence of Zinnia Lee***

[275] Ms. Lee is a registered physiotherapist and functional capacity evaluator. She was asked to assess Mr. Graul's functional abilities and to determine if he had

a substantial inability to perform the essential tasks of his employment as a maintenance Lead Hand.

[276] Ms. Lee carried out a functional assessment of Mr. Gaul on July 4, 2018, seven months after the accident. She found that Mr. Gaul gave a reliable effort and she had no concerns about malingering or feigning illness. From her review of the reports, Mr. Gaul's history, and her own functional testing of Mr. Gaul, she came to the opinion that he could not perform the essential tasks of his employment. She did not rule out that Mr. Gaul might return to work in the future but left that to other physicians and what the future might hold.

### ***Evidence of Johan Reis***

[277] Mr. Reis is a clinical psychologist. He was asked to conduct a psychological assessment of Mr. Gaul. As part of his practice, he deals with patients with brain injuries.

[278] He assessed Mr. Gaul in April 2019. Mr. Reis read the relevant documents that were provided to him, interviewed Mr. Gaul, and had him carry out standardized tests. He found Mr. Gaul's test results reliable, given that they were relatively high in the areas of neurologic impairment and amnesic disorders. This is consistent with Mr. Gaul's cognitive difficulties.

[279] Ultimately, Mr. Reis diagnosed Mr. Gaul with "Major depressive disorder, Mild with anxious distress" along with a "Specific Phobia, Situational (vehicular)." In his view, from a purely psychological perspective, Mr. Gaul suffered a substantial inability to perform the essential tasks of his employment because of the motor vehicle accident.

[280] In Mr. Reis' opinion, Mr. Gaul would benefit from psychological treatment to improve his functioning. A typical initial course of treatment would include 12 to 16 weekly or biweekly sessions, each 30 minutes in length.

[281] Although Mr. Gaul had not received psychological treatment, he had met with a social worker and said he would go if recommended.

[282] Depending on the success of the psychological services, Mr. Reis felt there was a possibility that Mr. Gaul would recover, but that would have to be assessed after the first round of treatment.

[283] Although Mr. Gaul could return to work with treatment, that was strictly from a psychological perspective.

***Evidence of Dr. Sujay Patel***

[284] Dr. Patel is a certified independent medical examiner. He was asked to provide an independent psychiatric evaluation of Mr. Gaul. He assessed Mr. Gaul on December 3, 2019.



[285] To complete his assessment, Dr. Patel reviewed the extensive list of related medical reports prepared to that point. He interviewed Mr. Gaul and had him complete several standardized tests. Those tests disclosed no signs of malingering.

[286] Dr. Patel expected to have an accurate medical history from Mr. Gaul, but at the time of testifying was not aware of the handwritten history of head trauma, including the existence of five collisions, nor that Mr. Gaul may have lost consciousness or hit a telephone pole. However, this was not relevant to him for psychiatric purposes.

[287] In Dr. Patel's opinion, Mr. Gaul was "clinically mildly to moderately depressed." Further Mr. Gaul was, from a mental health perspective, "mildly to moderately ill."

[288] In the end, Dr. Patel opined that Mr. Gaul had a "Specific Phobia, Situational Type (Vehicular). Adjustment Disorder, with Mixed Anxiety and Depressed Mood." These impairments resulted from accident-related factors.

[289] With respect to employment, Mr. Gaul "would likely lack the mental function to show-up/remain, participate and produce in most work roles in a sustained way."

[290] Of significance to my analysis in this trial, Dr. Patel pointed out the obvious:

When considering the severity of his collective accident related psychiatric and physical disorders (and related impairments) Mr. Graul likely does currently suffer a complete inability to engage in any suitable employment.

### **Credibility of Mr. Graul**

[291] The defence asks me to consider the credibility of Mr. Graul through the lens of *Bradshaw v. Stenner*, 2010 BCSC 1398, at paras. 186-87, aff'd 2012 BCCA 296:

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. 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. 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.

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

[292] For the following reasons, I accept Mr. Gaul's evidence with respect to his injuries and ongoing circumstances.

[293] Other than the expert opinions about diagnosis, there is no evidence contrary to that of Mr. Gaul and his witnesses. I found nothing in Mr. Gaul's evidence that was inherently unbelievable.

[294] None of Mr. Gaul's treating physicians found him to be inconsistent or to exaggerate his circumstances. As set out below, no expert opined that Mr. Gaul's injuries could not result from the accident impact.

[295] Dr. Berge relied on objective testing to diagnose Mr. Gaul. She found Mr. Gaul's symptoms consistent with that diagnosis. This confirms Mr. Gaul's evidence of tinnitus, difficulties with his balance, and anxiety.

[296] Dr. Quaid also relied on objective testing to diagnose Mr. Gaul and found Mr. Gaul's symptoms consistent with that diagnosis. This confirms Mr. Gaul's evidence of difficulties with seeing and driving.

[297] The assessors employed by Mr. Gaul's insurer found Mr. Gaul to be injured and his complaints consistent with those injuries. No one could suggest that they were biased toward Mr. Gaul; I can assume that they were, at least, objective in their findings.

[298] In his testimony, Mr. Gaul did not exaggerate his difficulties and appeared to downplay them to some extent. Ms. Gaul was able to fill in the descriptions of injuries that he discounted or overlooked.

[299] As set out above and below, the various experts carried out objective standardized testing of Mr. Gaul. Those tests included metrics to test for reliability of his responses. None of the experts found Mr. Gaul to be exaggerating his symptoms or malingering. All but two found his responses to be completely reliable and those two did not find any indication to reject his information.

[300] The defence raises several arguments with respect to Mr. Gaul's credibility. The defence does not submit that Mr. Gaul's evidence should be rejected but that his credibility is "suspect". As a result, the defence submit that "the plaintiff's evidence at this trial ought to be viewed with skepticism." I do not agree.

### **Head Injury History**

[301] The defence submits that Mr. Gaul was not forthcoming to his various assessors about his pre-accident health history. He failed to provide the handwritten list of head injuries to his healthcare providers. The list included three head trauma incidents in Mr. Gaul's childhood which required stitches, and five previous motor vehicle accidents. One of the five accidents caused Mr. Gaul to lose consciousness for four to five minutes.

[302] To explain why he did not provide the handwritten list to other healthcare professionals, Mr. Gaul characterized these previous incidents as insignificant. Thus, says the defence, he has tried to minimize the importance of providing a complete pre-accident medical history to the various healthcare professionals.

[303] I agree that Mr. Gaul's failure to properly answer his undertaking is noteworthy; however, in the end, this list was of little significance. Some of the injuries occurred when Mr. and Ms. Gaul were in their relationship. She noted no ongoing concerns following these injuries.

[304] None of Mr. Gaul's treating or assessing physicians found the list to be of significance because he did not report any ongoing symptoms after these injuries. None thought it important to their determinations.

[305] To the extent that this list is significant, for reasons set out below, it suggests that Mr. Gaul was more susceptible to head injury. Providing that information would have improved his legal case, not hampered it. It would not have helped his case to keep these events from his healthcare providers.

[306] The list of head injuries, or Mr. Gaul's failure to disclose it, does not affect Mr. Gaul's credibility.

### **Pain Charts**

[307] The defence next focusses on Mr. Graul's inconsistency in his description of the level of pain he has been experiencing since the accident.

[308] In evidence is a series of Discomfort Scale charts Mr. Graul provided for his TMJ specialist, Dr. Jones. Each sheet required Mr. Graul to rate his average discomfort over the previous seven days on a scale of 0 to 10. Each sheet lists 12 symptoms which are to be rated. The symptoms were TM joint pain, TM joint sounds, bite issues, neck pain, headache, facial pain, eye symptoms, ear pain, stuffy ear or ringing sounds, arm/ hand/ finger numbness, tingling or pain, upper back pain, and lower back pain.

[309] The Discomfort Scale sheets are each signed by Mr. Graul, and he agreed in evidence that the scores were accurate. The sheets cover the time from November 28, 2018 to March 4, 2020, or about 1 year and 3 months. The average overall pain scores on each sheet range from 1 to 2 out of 10.

[310] The defence points out that this overall pain score contrasts significantly with pain scores that Mr. Graul provided to other practitioners. For example, on July 24, 2019, he advised Dr. Friedlander that his headaches, neck, and shoulder pain were all 5 out of 10. Likewise, on August 26, 2019, Mr. Graul advised Dr. Lang that his neck and back pain were both 4 out of 10. Two days later, on August 28, 2019, he advised Dr. Basile that his headaches were 8 out of 10. Thus, according to the

defence, Mr. Graul has displayed an inconsistency in reporting his pain complaints and, as such, his evidence on this issue must be viewed with caution.

[311] The defence does acknowledge that some of the expert witnesses opined that this fluctuation is due to the nature of pain (i.e., it ebbs and flows). However, it is only when Mr. Graul is asked by proposed experts to rate his pain that it is consistently higher. While one would expect an ebb and flow of pain, one would not expect that ebb and flow to consistently coincide with the dates that Mr. Graul happened to be assessed by a proposed expert.

[312] I agree with the defence that there is a significant inconsistency here. However, that does not lead to significant evidence. Even if Mr. Graul's pain is a steady one to two, he is still suffering real harm years after the accident.

[313] Further, when asked about this inconsistency, many of the witnesses thought that the answer might depend on the wording of the question. As set out below, Mr. Graul has significant cognitive deficits; I am hesitant to find that he has intentionally misled his healthcare providers without knowing the specific question to be answered.

[314] Mr. Graul's evidence was consistent that his pain increased with long drives. The experts were in the Greater Toronto Area and Mr. Graul resides in Fergus.

While the impact of long drives was not explored, it is as likely to be a cause of the difference as exaggeration.

[315] Finally, this discrepancy is the only aspect of his description that suggests exaggeration. Only one doctor made note of this discrepancy and did not discard the rest of the information provided by Mr. Gaul. All other doctors either did not rely on this information or only added it into a multi-factor analysis. It did not affect their opinion of Mr. Gaul's difficulties when looking at all the evidence available to them. I shall do the same.

[316] The pain charts do not affect Mr. Gaul's overall reliability and credibility.

### **Surveillance**

[317] The defence placed Mr. Gaul under surveillance and some of the recordings of his activities were put to him in cross-examination.

[318] The defence submits that Mr. Gaul tried to minimize the importance of the activities depicted in the surveillance videos. He had several explanations for his activities. For example, when pulling weeds on July 27, 2019, he stated that he was distracted. When he admitted to spending more than two hours at a celebration of life gathering at a community centre, he tried to explain this away by stating that he felt obligated to go. Nevertheless, he admitted that he went there voluntarily.



[319] It is therefore submitted that Mr. Gaul has tried to minimize the impact of this evidence by stating that he felt obligated to go. The defence counters, however, that most people go to funerals and celebrations of life out of a sense of duty and obligation, and not because they really want to be there. The defence submits that the key here is that Mr. Gaul's accident-related issues did not prevent him from attending this event. The footage shows Mr. Gaul socializing outside before the event for several minutes. While Mr. Gaul may have felt an obligation to attend, he was not obligated to socialize beforehand.

[320] The defence also outlines Mr. Gaul's other justifications and explanations for his activities depicted in the surveillance videos. For example, on December 11, 2019, Mr. Gaul explained his roughly 20 minutes of snow clearing by stating that, on that particular day, he shoveled snow because his social worker was coming, and he did not want her to slip or fall. Again, the importance of this video is that Mr. Gaul can do winter maintenance at his home.

[321] On January 2, 2021, Mr. Gaul is again shown shovelling snow. He agreed that he had been shovelling for about half an hour, non-stop. He qualified his answer by stating, "If you call that shovelling," and indicated that it represented "minimal efforts." These comments underscore what appears to be Mr. Gaul's efforts to minimize the impact of the surveillance. The video clearly depicts Mr. Gaul engaged in an activity that would indeed be called "shovelling" by most

people. Snow shovelling in winter is not an easy task, and Mr. Graul appeared to have little difficulty with this activity on this occasion.

[322] In his re-examination, Mr. Graul tried to characterize the snow as being "light" on January 2, 2021, but the video indicates the snow had some weight to it, with perhaps a layer of ice underneath. Mr. Graul admitted in his cross-examination that he was likely trying to break up ice when using his hand to hit the hood of the car.

[323] The defence submits that the surveillance video also shows Mr. Graul assisting his next-door neighbour with the neighbour's motorcycle on July 30, 2020. Mr. Graul may have been helping his neighbour lift a motorcycle into the back of a van, as he was trying to assist his neighbour in any way he could. He may also have been stabilizing the motorcycle.

[324] On the same date, July 30, 2020, the surveillance video also shows Mr. Graul trimming shrubs, pulling weeds, watering plants, and cutting grass. He was active for a total of about two hours that day.

[325] The next day, July 31, 2020, surveillance video shows Mr. Graul being very active. On that date, he watered some plants, socialized with a neighbour, and did some grocery shopping with his wife. After arriving home, he placed several items into the back of the family vehicle in preparation for a drive later that day to Grand

Bend. Mr. Graul made multiple trips between the house and the vehicle to load various items. His activities on this day began at around 8:55 a.m. and ended with Mr. Graul's arrival in Grand Bend at around 4:30 p.m. The drive took approximately two hours.

[326] The surveillance video also shows Mr. Graul shopping with his wife on multiple occasions. He went shopping on July 27, 2019, July 31, 2020, and January 2, 2021. He is seen shovelling snow on two separate occasions.

[327] Finally, the defence refers to surveillance that shows Mr. Graul socializing with neighbours on four separate occasions on July 30, 2020, July 31, 2020, January 2, 2021, and September 8, 2021.

[328] I do not find the surveillance videos to be of much use to me or the defence.

[329] Mr. Graul did not deny these activities and they are not inconsistent with his evidence in chief. Mr. Graul does not say that he is bedridden. He tries to do what he can but cannot do much. That is what the video recordings amply show.

[330] The videos show that Ms. Graul does the driving. Mr. Graul attempts to keep busy in his "ridiculous form of retirement." When one compares the pre-accident description of Mr. Graul with the slow-moving individual in the videos, we are shown a significantly damaged man. It appears from the surveillance that Mr. Graul is essentially trying to fill his day.

[331] The surveillance does not affect Mr. Gaul's credibility.

**Mr. Gaul's Conduct at Trial**

[332] The defence points out that Mr. Gaul did not seem to have much difficulty giving his evidence at trial. He did not appear to stutter or be at a loss for words. He had a good vocabulary and was well spoken. He showed no noticeable signs of fatigue and engaged appropriately. He understood questions and seemed to have a good recall of events. His memories did not appear to be erratic or disjointed. He did not seem to have difficulty recalling dates, names, and other details. In short, while in the witness box, he did not display the extensive list of cognitive and memory issues he claims to have sustained because of the accident.

[333] The defence asks that I consider that Mr. Gaul testified over a period of two days. Over these two days his alleged symptoms were not apparent before the court. As set out below, Dr. Basile testified that Mr. Gaul starts to stutter later in the day when he gets tired. Mr. Gaul testified later in the day without stuttering. Testifying in court can be a trying and tiring process, especially when it is one's own case being tried. The defence submits that it is questionable as to why Mr. Gaul's symptoms were not apparent over the course of those two days of testimony.

[334] I do not find this evidence questionable.

[335] First, as set out below, the defence experts agree that Mr. Gaul has cognitive deficits. There is no dispute about that even if those deficits did not show during trial.

[336] Second, Mr. Gaul was not dealing with a loud workplace or diverse tasks. He was sitting at home answering questions virtually for which he was prepared. We took breaks as the court normally does. This was not a test of Mr. Gaul's ability to endure such that I should be concerned about his credibility or reliability.

[337] The way Mr. Gaul gave evidence does not affect his credibility.

### **Loss of Consciousness**

[338] Mr. Gaul testified that he must have lost consciousness at the scene. The defence disputes this evidence. The experts' opinions below consider whether it is important that Mr. Gaul lost consciousness at the scene and whether he had amnesia with respect to the accident. For reasons set out below, nothing turns on that determination since Mr. Gaul's possible loss of consciousness or memory is but one factor in the multi-factor assessment of his condition. However, out of respect to the parties' arguments, I shall make the necessary findings.

[339] The defence submits that, although Mr. Gaul claims that he may have lost consciousness in the accident, the balance of the evidence does not support that position.

[340] When Mr. Gaul was asked to explain why he thinks he lost consciousness, he indicated that he was convinced that the defendant car hit him from the front, until he saw the damaged vehicle and "the driver's side was caved in." The defence points out that photos of the damaged vehicle simply do not support that the driver's side was "caved in". In fact, most of the damage to the vehicle was on the front end. Thus, Mr. Gaul's explanation for why he thinks he lost consciousness simply does not make sense to the defence.

[341] Additionally, Mr. Gaul testified that he was certain that he "hit the driver's window" and "the dash with my knees." Thus, Mr. Gaul has an actual memory of hitting the window and the dash. These are events that happened after his vehicle came into contact with the Kansal vehicle and before the vehicle came to stop in the ditch. These recollections support the assertion that Mr. Gaul did not lose consciousness in the accident.

[342] Further, the defence points out that the medical records in evidence confirm that Mr. Gaul told the ambulance attendants at the accident site, the staff at Guelph General Hospital on the accident date, his family doctor on December 21, 2017, and the staff at Eramosa Physiotherapy on January 18, 2018, that he did not lose consciousness. On that basis, the defence submits that the evidence demonstrates that Mr. Gaul did not lose consciousness as a result of the accident.

[343] And yet, I note that the evidence also discloses that Mr. Graul has no recollection of speaking with an officer at the scene, although advised by the officer later that he did. I did not hear evidence from that officer, but the hearsay evidence did not seem to be in dispute. I did hear from Mr. Graul's son that he spoke with his father by telephone from the scene, but Mr. Graul did not remember that conversation.

[344] The defence expert, Dr. Freedman, agreed that a patient's report on whether they lost consciousness may not be reliable because they may not be the best historian of their own consciousness. He agreed that one can lose consciousness and not know it.

[345] That expert opinion and common sense tell me that I cannot rely on Mr. Graul's recollection of losing consciousness. The rest of the evidence shows that he did. I find that Mr. Graul either lost consciousness or his memory fails him in respect to what happened at the immediate accident scene.

### **Credibility of Other Plaintiff Witnesses**

[346] The cross-examination of Mr. Graul's lay witnesses was not an attack on their credibility. Rather, it was limited to obtaining what additional evidence might assist the defence. There is no reason to reject the lay witnesses.

[347] As set out above, there is no reason to reject the evidence of family members simply because they are family. The defence submits that Ms. Graul was "bitter" in her evidence. I did not find that to be the case. Rather, she appeared to be concentrating on giving answers to the questions and was rather taken aback by the nature of the questions rather than the evidence that she was providing. While there was nothing untoward in that cross-examination from a legal point of view, I could well understand her offence at some of the questions and their tone.

[348] Since the lay witnesses gave credible and consistent evidence to that of Mr. Graul, they add to Mr. Graul's credibility and reliability.

[349] The defence submits that I should be hesitant to accept the evidence of the Rehab First witnesses since it is in the best interests of their employer to recommend continuing treatment. I reject that submission. I cannot make that presumption about healthcare providers any more than I should be hesitant to accept the submissions of legal professionals that are in the best interests of their employer. The defence makes no other submissions against the reliability or credibility of these witnesses.

[350] In short, I accept Mr. Graul's evidence of his circumstances since the accident.



### **Expert Medical Evidence**

[351] To this point, I have made findings on Mr. Gaul's condition before and after the accident. Both parties presented expert medical evidence but, given my findings above, little turns on that evidence. That is to say, on the evidence, and using lay language, Mr. Gaul had a head injury at the time of the accident. It damaged his seeing and hearing. He has trouble with his balance and memory. He cannot see well enough to drive. He is depressed. He is in lot of pain which is long standing and not likely to end. On that basis he cannot return to work and cannot continue his usual daily activities.

[352] Instead, the experts seemed to be more concerned about what to call Mr. Gaul's condition rather than dispute his symptoms and what he was living through. To the extent that they relied on hypothetical facts, I have the advantage of having made findings of fact in this decision. To those facts, I will apply the opinions of the expert medical evidence that I accept and provide reasons why I have rejected other evidence.

[353] All the expert witnesses were recognized to be qualified to give opinion evidence in their respective fields. I have agreed that their evidence is admissible. Most of the medical witnesses had some failings in their evidence from their

apparent bias, ability to answer questions, or degree of expertise. However, not much turns on that given Mr. Graul's proven injuries from the collision.

**Does Mr. Graul have a Mild Traumatic Brain Injury?**

***Evidence of Dr. Vincenzo Basile***

[354] Dr. Basile gave evidence for Mr. Graul as an expert in the field of "neurology with specialties in traumatic brain injury management and post concussive syndrome." He was qualified to opine on the diagnosis and prognosis of traumatic brain injury and post concussive syndrome, prognosis of neurological impairments, restrictions arising from neurological impairment, the need for treatment and housekeeping assistance due to neurological impairments, and the effect of neurological impairments on the ability to work.

[355] In brief, Dr. Basile is a neurologist. He has trained with leading experts in the field of traumatic brain injury. He works with neurosurgeons in both the United States and in Canada.

[356] Dr. Basile was asked to carry out a diagnosis, prognosis, and assessment of causation with respect to Mr. Graul. In coming to his opinion, Dr. Basile applied all the information available from Mr. Graul, family members, and other treating professionals; however, each piece of information "has its own weight." In Dr.

Basile's view, one looks at all the evidence to see if it makes logical sense in the total picture.

[357] It was Dr. Basile's opinion that Mr. Gaul had post concussive syndrome and moderate traumatic brain injury. These conditions will affect the quality of his life and ability to function. Even mild traumatic brain injury can significantly compromise one's activities of daily living.

[358] Dr. Basile first met Mr. Gaul in August 2019 and followed up in November 2021. From Mr. Gaul's description of the accident, there was sufficient force to have jolted Mr. Gaul's brain. A loss of consciousness is not required for a diagnosis of traumatic brain injury. The fact that there was no abnormality on Mr. Gaul's MRI is also unremarkable. Although the MRI was normal, with no blood, bleeding, or structural damage, that did not discount traumatic brain injury.

[359] The fact that Mr. Gaul could not remember some things after the accident is consistent with a concussion or hitting his head in some fashion. Mr. Gaul's wife described him as having blank staring spells, which is also indicative of traumatic brain injury and concussion.

[360] Dr. Basile reviewed the records of Mr. Gaul's family physician, Dr. Carlson. The symptoms set out in those records, such as headaches, sound sensitivity, dizziness, feeling "loopy" or dazed, repeating questions, drowsiness, and

increased sleep, are consistent with concussion. He agreed with Dr. Carlson's diagnosis of moderate to severe concussion and whiplash.

[361] From Dr. Basile's own observations, Mr. Gaul was slurring or stuttering or searching for words when he was tired towards the end of the day. That too is typical of traumatic brain injury. Mr. Gaul's dizziness, failure to concentrate, poor sleep, pain, anxiety, and blurred vision meet the clinical criteria for post concussive syndrome.

[362] In reviewing Mr. Gaul's activities of daily living, Dr. Basile could see that Mr. Gaul had a functional injury as well. Although he was independent in his activities, he was slow and needed the help of his wife for such things as driving and finances. He had greater difficulty when he got tired. The fact that these symptoms lasted six to seven months after the accident, and that Mr. Gaul had difficulties with memory and concentration, judgment and decision making, tinnitus, double vision, lack of sleep, depression, and slowness in his activities, pointed to typical traumatic brain injury. So too did the fact that he angered, was hyper critical, and did not appear "to have a filter."

[363] In his physical examination of Mr. Gaul, Dr. Basile observed the indications of traumatic brain injury in Mr. Gaul's eye movements and when he had trouble finding words. This was supported by the reports of Dr. Quaid and Dr. Berge. Their

observations were the same. In Dr. Basile's view, the cause of the tinnitus was traumatic brain injury.

[364] In Dr. Basile's opinion, Mr. Gaul suffers from "moderate" traumatic brain injury, which affects his day-to-day conduct. It started with the motor vehicle accident and has persisted. Dr. Basile has the same diagnosis now as he had in 2019. Although Mr. Gaul has improved somewhat, his problems with tinnitus and balance have not. Dr. Basile believes that Mr. Gaul will not be able to return to work because of his cognitive and behavioral deficiencies along with some physical limitations.

[365] Dr. Basile recommended treating symptoms with Omega-3, mindfulness training, and other methods, including a sleep study. Treatment will not be a cure for the concussion; there is some hope for change but that is unlikely at this stage. Although Dr. Basile recommended treatment, his prognosis for Mr. Gaul is "guarded". However, without treatment, Mr. Gaul's condition will worsen; particularly if he pushes himself too hard.

[366] Defence expert, Dr. Mitchell, says that the traumatic brain injury has resolved, but Dr. Basile disagrees. There have been some subtle improvements, but Mr. Gaul still has problems with his daily activities of life. There were delayed symptoms but objective evidence from all the treating doctors shows that Mr. Gaul is still disabled and is not malingering.

[367] Dr. Basile denies that the persisting problems are because of Mr. Graul's depression. Depression would not cause his eye or hearing problems, nor would it explain some of his behavioral difficulties. On a balance of probabilities, the cause of the symptoms is the head injury.

[368] Dr. Basile agreed that he was not told of Mr. Graul's head trauma history. However, this history did not affect his opinion because Mr. Graul said that he had recovered completely. Further, this history may have predisposed Mr. Graul to concussion and his ongoing persistent symptoms. More frequent concussions mean a greater risk of having another.

[369] Dr. Basile agreed a Glasgow Coma Scale (GCS) of 15 at the time of the accident suggests there was no sign of brain injury, but he opined that there can still be a brain injury. In Dr. Basile's view, the GCS is antiquated. The speed of the accident is a factor but not determinative if one is already prone to concussions.

[370] Dr. Basile was not concerned about the difference in how Mr. Graul described the discomfort in his headaches. Symptoms will fluctuate daily. That difference had no bearing on his opinion. All symptoms need to be considered as part of a constellation in coming to a medical opinion.

[371] Dr. Basile does not believe that Mr. Graul can return to work because of such barriers as driving. That said, he did not know about Mr. Graul's work

requirements. Dr. Basile presumed that, given his persisting symptoms, Mr. Graul would be quite slow at what he does, as he was not the same person he was before.

[372] Dr. Basile denied that Mr. Graul's difficulties are "iatrogenic" or caused by psychological factors or the nature of his treatment to date.

***Evidence of Dr. Sarah Mitchell***

[373] Dr. Mitchell gave evidence for the defence. It was agreed that she is an expert in the field of "neurology with specialties in traumatic brain injury management and post concussive syndrome." She is qualified to opine on the diagnosis and prognosis of traumatic brain injury and post concussive syndrome, prognosis of neurological impairments, restrictions arising from neurological impairment, the need for treatment and housekeeping assistance due to neurological impairments, and the effect of neurological impairments on the ability to work. That is to say, the same qualifications as the plaintiff's expert, Dr. Basile.

[374] Dr. Mitchell's curriculum vitae is quite impressive; she has significant teaching and training in the area along with clinical experience with psychiatric and complex brain disorders. She is an assistant professor in both psychiatry and medicine at the University of Toronto. She attempts to split her medical-legal assessment practice between both plaintiff and defence.

[375] For Mr. Gaul's assessment, she was with him for approximately fifty minutes. Before that, Mr. Gaul was with her intake assistant to obtain standard information for the assessment. Dr. Mitchell then reviewed that information with Mr. Gaul for 30 to 35 minutes. This is the same process she uses in her clinical practice.

[376] After meeting with Mr. Gaul, Dr. Mitchell reviewed his medical brief in detail. She left this step to the end so that it did not bias her examination of Mr. Gaul. Based on the objective and subjective information of Mr. Gaul's ongoing complaints, she diagnosed Mr. Gaul with a mild traumatic brain injury that is now resolved. He also had a resolved concussion, but unresolved chronic tension headaches.

[377] The various symptoms described by Mr. Gaul's family physician could indicate a mild traumatic injury, which is partly why Dr. Mitchell formed her diagnosis. The various symptoms noted by the family physician, such as sensitivity to noise, balance, and "slowed down", are all classic symptoms of traumatic brain injury.

[378] Dr. Mitchell agreed that traumatic brain injury does not require a blow to the head; acceleration/deceleration can cause a traumatic brain injury. Such an injury can occur without showing on an MRI or CT scan. It is unusual, but symptoms can increase over time.



[379] In examination-in-chief, Dr. Mitchell testified that a traumatic brain injury should resolve within three months. If it takes longer, then other causes are more likely. Mr. Gaul's depression, sleep disturbance, and ongoing pain needed further assessment. In her opinion, there was no ongoing neurological impairment from the concussion and traumatic brain injury. Rather, those impairments were caused by other factors.

[380] In cross-examination, she acknowledged that, although Mr. Gaul's acute symptoms have resolved, she could not say when that occurred. After three months, 80 to 95 percent of mild traumatic brain injury patients recover, but 5 to 20 percent will continue to complain of subjective symptoms.

[381] Later in cross-examination, she was confronted with PowerPoint slides from a presentation on this topic that she gave to Aviva Insurance. One of her slides shows that 15 percent of patients continue to suffer symptoms. They are described by her as the "miserable minority". She could not explain why Mr. Gaul did not fall into this group.

[382] Dr. Mitchell's PowerPoint slides were filed as an exhibit. They confirm that any period of loss of consciousness, post-traumatic amnesia, or confusion is consistent with traumatic brain injury. Those slides also confirm that most of Mr. Gaul's symptoms are consistent with mild traumatic brain injury.

[383] In Dr. Mitchell's opinion, Mr. Graul received inappropriate treatment for depression. He needs an assessment and treatment by a psychiatrist. He also needs a sleep study. He needs to reduce his reliance on analgesics and change his lifestyle.

[384] Dr. Mitchell agreed that Mr. Graul continues to have ongoing symptoms. The symptoms have waxed and waned, and been described differently, but he continues to have problems with balance, headaches, focus and concentration, memory, sleep problems, and fatigue. Dr. Mitchell agreed that Mr. Graul needs to pace himself. He can do duties around the house, but still must pace himself.

[385] The symptoms in January 2018 of tinnitus, affected sleep, headaches, vision and balance problems, difficulty with patterns, halos, no stamina, fatigue, and difficulty waking, are unusual one month after a traumatic brain injury. Some, however, are related to traumatic injury. The tinnitus and sight problems are not associated with traumatic brain injury and should be improving. There is no clear cause for the tinnitus, but Dr. Mitchell deferred to Dr. Berge's opinion.

[386] The list of head trauma plays into the value of Dr. Mitchell's evidence. Dr. Mitchell agreed that she reviewed the handwritten list of head trauma in her report of November 22, 2021. She said:

Given these previous head injuries, a more detailed account of Mr. Graul post accident symptoms is required. These previous

injuries may have predisposed Mr. Graul to the concussions sustained in the index injury, and potentially to ongoing persistent symptoms.

[387] As a result of the handwritten list, Dr. Mitchell had a heightened concern about the possibility of multiple head injuries. That history could have a dramatic effect on Mr. Graul's recovery, even if the old trauma had apparently recovered or was of lesser degree. Although Dr. Mitchell wanted more information about the head injuries, no one contacted her to provide that information.

[388] In her evidence, Dr. Mitchell confirmed that she provided her draft reports to AssessMed, the facility that hired her to give her opinion. She signed her latest report on November 22, 2021, even though it was a draft. She said that AssessMed only made simple edits to her report. She did not know who did the review, but it was simply administrative assistance.

[389] And yet, this last report had a further paragraph added by AssessMed after her comment about previous head injuries. She approved:

My opinion has not changed as stated in my report dated July 11, 2019.

[390] Dr. Mitchell testified that she would not be concerned about a patient having a "vacant stare" but agreed that it should be investigated. Ms. Graul was prudent to take Mr. Graul to the hospital, but a vacant stare is not a "red flag" to Dr. Mitchell.

When it was pointed out that she said the opposite in a CBC programme, she laughed.

[391] Given the description of Mr. Gaul at the casino, Dr. Mitchell agreed his reaction could be from a brain injury, but that it would be unusual.

[392] Dr. Mitchell testified that she refers to herself as a cognitive neurologist and not a neuropsychologist. In her view, she would be better able to diagnose a mild traumatic brain injury than a neuropsychologist. This will be of significance when considering the defence evidence from neuropsychologist, Dr. Freedman, below.

[393] Dr. Mitchell agreed that, with a mild traumatic brain injury, going to a grocery store could feel overwhelming, but Mr. Gaul should still be able to integrate into normal life. He should do activities "as tolerated". He should not be reclusive.

[394] She agreed with the suggestion that there is unlikely to be recovery after three years if diagnosed with post-concussion syndrome.

[395] To summarize her examination and cross-examination, Dr. Mitchell's evidence relating to my determinations is as follows. She agreed that Mr. Gaul had a mild traumatic brain injury. While she thought his symptoms were from another cause, some victims of such an injury do continue to have symptoms like Mr. Gaul. She agreed that he continues to have related and consistent symptoms. She thought there should be further investigation into his history of head trauma.

***Evidence of Dr. Lawrence Freedman***

[396] Dr. Freedman gave evidence for the defence. On consent, he was qualified as an expert in the field of neuropsychology, neuropsychological impairments, and qualified to opine on the diagnosis and prognosis of neuropsychological impairments, and neuropsychological treatment. Since 2006, 75 percent of his practice has been medical-legal and almost exclusively for defendants. Of that 75 percent, 15 percent was for Aviva Insurance. Since 2006, Dr. Freedman has not treated anyone for traumatic brain injury; his clinical practice is assessments and advice but not treatment. Of those clinical referrals, none relate to mild traumatic brain injury.

[397] Dr. Freedman was retained by the defence to determine if Mr. Gaul had sustained a traumatic brain injury, to assess the severity of any injury, and to consider any cognitive impairments because of that brain damage. He was also to consider treatment and whether Mr. Gaul was able to return to work.

[398] As was his practice, the assessment commenced at about 9:30 a.m. when Dr. Freedman's technician carried out a number of cognitive tests of Mr. Gaul. This testing continued into the afternoon with appropriate breaks and time for lunch. After the tests were completed, Dr. Freedman completed a clinical interview of Mr. Gaul. The whole process ended at approximately 2:30 or 3:00 p.m.

[399] During his clinical interview, Mr. Graul's behavior was normal, he was alert, cooperative, and oriented. He showed no retrograde amnesia in describing the accident. He showed no physical neurological deficits.

[400] From Dr. Freedman's review of the test results, Mr. Graul had deficits relating to verbal memory functioning, sample processing speed, and semantic fluency. The deficits were in the domains of language, problem solving, speed, verbal and spatial cognition skills, and intelligence. Dr. Freedman testified that Mr. Graul had difficulties with problem solving. Mr. Graul's validity testing showed that there were no validity concerns.

[401] In cross-examination, Dr. Freedman agreed that Mr. Graul's visual scanning was in the first percentile of the population; 99 percent of the population would be better at those tasks than he was. Dr. Freedman agreed that visual scanning was very important when working with "machinery and processes" and was "absolutely" necessary for driving. In other areas, his scoring was so low that it impacted Mr. Graul's ability to read. Significantly, Dr. Freedman agreed that such a low score in that area was a "significant marker for traumatic brain injury." It could also have a significant impact on Mr. Graul's type of work.

[402] After the clinical interview, Dr. Freeman reviewed the various medical records of Mr. Graul's treatment. From that review, he saw that Mr. Graul had no loss of consciousness, no amnesia, no confusion or disorientation, and no

repetitive speech. Since he had no amnesia about the accident, that was indicative of no traumatic brain injury.

[403] He did not think that Mr. Gaul had post traumatic amnesia because Mr. Gaul could remember the start of the accident, even though he could not remember the impact to the side of the car or arriving in the ditch. Since he could remember the start of the accident, this imperfect recall was not significant.

[404] From a review of all the information, Dr. Freedman did not believe that Mr. Gaul had experienced a traumatic brain injury. Rather, the test scores themselves do not show a traumatic brain injury, only a cognitive deficit.

[405] In Dr. Freedman's opinion, Mr. Gaul does not need any therapy for traumatic brain injury.

[406] In short, Dr. Freedman looks for five indications of traumatic brain injury. First, loss of consciousness. Second, post traumatic amnesia. Third, an unusual GCS score. Fourth, physical neurological deficit. And fifth, evidence from imaging. He did not find any of those in his review of the medical records.

[407] In Dr. Freedman's opinion, the acute accident history is the most important factor. Based on the information that he reviewed from the medical records from the day of the accident, he felt one could not diagnose concussion and he was not convinced that there was concussion. In Dr. Freedman's view, one cannot rely on

subjective reporting when it does not match the objective tests for traumatic brain injury.

[408] In examination-in-chief, Dr. Freedman said that Mr. Graul's CT scan was normal. Therefore, he said there could be no diagnosis of traumatic brain injury. He found no objective evidence of any shock or disorientation. However, in cross-examination, he agreed that one can have a traumatic brain injury without coma, findings on an MRI or CT scan, fractured skull, or a brain bleed.

[409] In his view, there was moderate cognitive impairment; however, he could not connect that to a traumatic brain injury. Accordingly, there must be other factors or other disorders causing the symptoms. He agreed that Mr. Graul's depressed mood is an impairment from the accident, but stated it was not caused by a head injury.

[410] He agrees that there was a decline in Mr. Graul's verbal function domain between July of 2018 and 2020. If there had been a traumatic brain injury, one would not expect there to be that decline because the injury should have stabilized by that point. When one has a minor traumatic brain injury, the patient usually recovers within three months unless there is a new neurological cause. Therefore, there must be other factors related to Mr. Graul's pain and depression.



[411] Dr. Freedman does agree that Mr. Graul has cognitive deficits as shown in the testing carried out by both he and Mr. Graul's expert, Dr. Valentin. However, Dr. Freedman believes that the deficits are from Mr. Graul's depression and not a traumatic brain injury. In his view, Mr. Graul would benefit from psychotherapy and medication.

[412] Dr. Freedman agreed that most patients recover from mild traumatic brain injury. He did not agree that 10 to 15 percent do not recover; that was a "myth". In his opinion, it is more likely 1 percent do not recover. He acknowledged that studies show 10 to 15 percent do not recover but said that, in his opinion, those studies are flawed, and the results misinterpreted.

[413] Dr. Freedman agreed that traumatic brain injury can be diagnosed clinically and without a CT scan from such symptoms as double vision, blurry vision, confusion, dizziness, "feeling hazy, foggy and groggy", lethargy and drowsiness, headaches, sleep disturbances, inability to focus or concentrate, and sensitivity to light or sound.

[414] Other signs or observations include behavioral or personality changes, blank stares or dazed looks on an acute basis, difficulties with balance or coordination, delayed or slow speech, memory loss, slurred or unclear speech, and trouble controlling speech.

[415] Only in cross-examination did Dr. Freedman acknowledge that, while he did not refer to percentiles in his report, some of Mr. Graul's results were significantly below average and many domains showed significant impairment. One of the tests was in the 9th percentile. Another that tested Mr. Graul's problem solving was zero - meaning 100 percent of people perform better on that test. Mr. Graul also had deficits in verbal memory and language fluency.

[416] While the tests showed that Mr. Graul's reasoning was intact, his processing speed was significantly below average and much lower than one would expect given Mr. Graul's background, education, and employment. Dr. Freedman agreed that this impairment of speed was a significant marker for mild traumatic brain injury.

[417] Dr. Freedman agreed that some of Mr. Graul's executive functioning was in the 16th percentile and that he would have difficulty planning and multitasking. He agreed that Mr. Graul's semantic fluency was in the 4th percentile.

[418] Dr. Freedman was referred to the writings of Dr. Ronald Ruff. Dr. Freedman agreed that Dr. Ruff was one of the leaders in the area of traumatic brain injury. Dr. Freedman agreed that Dr. Ruff's writings were important, and he agreed with much of his work. He agreed that traumatic brain injury is manifested by at least one of loss of consciousness, amnesia, alteration of mental state, or focal cognitive deficits. He agreed that some practitioners follow this definition, and he agreed

with some of it but not all of it. With respect to Dr. Ruff's article, he did not agree with the use of the nonspecific term "befuddlement". Otherwise, he agreed with it.

[419] He agreed that concussion is difficult to diagnose even weeks or months afterwards. Patients cannot accurately self-report a loss of consciousness because they would not necessarily know of their loss of consciousness. In any event, one can have traumatic brain injury without loss of consciousness.

[420] He agreed that Mr. Graul's symptoms at his December 21, 2017 visit with his family physician were consistent with symptoms of concussion.

[421] He did not dispute Dr. Quaid's opinion and expertise. He also agreed that he was not an audiologist and Dr. Berge has expertise in that field.

[422] Dr. Freedman did not receive any information from friends or family about Mr. Graul's symptoms but agreed that such information could be important to his diagnosis.

[423] In answer to my question, Dr. Freedman agreed that, if I were to find that there was a loss of consciousness, post traumatic amnesia, and a physical neurological deficit, it could be that Mr. Graul had a mild traumatic brain injury.

[424] In summary, Dr. Freedman was the only medical opinion that rejected a diagnosis of traumatic brain injury. However, he relied only on his view of the

medical reports and the objective evidence. It appears that even Dr. Ruff would have made a diagnosis of traumatic brain injury. Based on my finding of fact above, Dr. Freedman's evidence confirms a mild traumatic brain injury.

[425] In any event, Dr. Freedman provided ample opinion and objective evidence that Mr. Gaul has been significantly compromised by this car accident. Those areas of compromise relate directly to his ability to resume his pre-accident employment. Although Dr. Freedman was to consider whether Mr. Gaul was able to return to work, he was not asked that question in evidence.

### **Analysis**

[426] Trial judges will always need expert evidence in some areas. Those exceptional individuals who assist the courts need to be paid. But they also need to understand their role is to assist the court, not the party who pays them. I encourage Dr. Freedman and Dr. Mitchell to focus their exceptional medical knowledge and experience on the patients that need them and to forgo this well-paid role. If they intend to carry on this line of work, I recommend that they familiarize themselves with the principles of expert evidence set out in *R. v. France*, 2017 ONSC 2040, 36 C.R. (7th) 293. Where their evidence conflicts with other expert evidence, I reject their evidence.

[427] Dr. Mitchell testified that she prepares the best report she can "within the restrictions of my time." The time she had available was apparently not enough to do the work required to assist the court in this case.

[428] Dr. Freedman gave one opinion in chief and another in cross-examination. I obtained all of Dr. Freedman's considerable expertise only after rather routine cross-examination. While that is the role of cross-examination for most witnesses, the court should not need to rely on cross-examination to obtain unbiased and complete evidence.

[429] If an expert wants more information to render an opinion, that expert should decline to give the opinion or qualify the opinion to point out that necessary or helpful information is missing.

[430] I can accept some of what a witness says, all of what a witness says, or none of what a witness says. I accept Dr. Basile's and Dr. Mitchell's evidence and find that Mr. Gaul has a mild traumatic brain injury. I accept Dr. Basile's and Dr. Freedman's evidence and find that Mr. Gaul continues to deal with those impairments.

[431] Dr. Basile's approach of looking at all factors and assigning weight is a better way to proceed than Dr. Freedman's approach of ignoring or not asking for information that did not match his opinion. Dr. Mitchell's opinion in chief was that,

while Mr. Graul has deficits, since they have lasted more than three months, they must not be from a traumatic brain injury. In cross-examination, she agreed that 15 percent of traumatic brain injured patients can continue to have symptoms. I find that Mr. Graul is in that group.

[432] Dr. Basile often failed to answer questions and went on his own lectures even when instructed not to do so. However, that conduct did not damage his overall evidence.

[433] For the following reasons, I reject Dr. Freedman's opinion that Mr. Graul did not suffer a traumatic brain injury.

[434] In examination-in-chief, Dr. Freedman was adamant that factors indicating brain injury were non-existent. By the end of cross-examination and my questions, he agreed that they might well exist. There was no such hesitation in his initial opinion.

[435] Only in cross-examination did Dr. Freedman agree that one can have a mild traumatic brain injury without coma, or findings on an MRI or CT scan. Only in cross-examination did he agree that almost all of Mr. Graul's symptoms were consistent with traumatic brain injury.

[436] Despite having given expert evidence in the past, Dr. Freedman had difficulty understanding what of his "complete file" he needed to provide to Mr.

Graul's counsel for cross-examination. He is either less experienced than he professes or tried to avoid disclosing the necessary records. Either way, his evidence is tainted.

[437] Throughout the cross-examination, Dr. Freedman was defensive. He often did not answer the question, even though he was often reminded by me. He was entirely different in cross-examination than he was in examination-in-chief. Although he could answer examination-in-chief questions very easily, he parried with Mr. Graul's counsel over word choice and semantics.

[438] By the end of cross-examination, Dr. Freedman agreed that no other treating doctor nor noted authorities agreed with his diagnosis and findings. Despite that, he doggedly held on to his opinion that Mr. Graul did not have a traumatic brain injury.

[439] While Dr. Freedman's report is not in evidence, the cross-examination disclosed that he failed to clarify Mr. Graul's many deficits in his report. His explanation was that there were no requirements for him to be so clear and he left it to other neuropsychologists who might have access to his raw data to understand his report. That manner of reporting is of no use to the court from an independent expert whose role is to assist the court. It is more the role of a biased, paid expert trying to hide real and significant evidence from the court.

[440] Although Dr. Freedman agreed that information from other readily available sources would have been of assistance to him, he did not ask for that information before rendering his opinion.

[441] I do accept Dr. Freedman's evidence that Mr. Gaul has significant deficits, whatever Dr. Freedman thinks may be the cause. But I reject the balance of Dr. Freedman's evidence.

[442] For the following reasons, I reject Dr. Mitchell's opinion that Mr. Gaul is no longer suffering the effects of a traumatic brain injury.

[443] Dr. Mitchell's process of report writing leaves much to be desired, but I am to consider her court room evidence, not her report writing.

[444] However, her attention to detail is alarming. I cannot see how Dr. Mitchell can, within one page, say that based on new information "a more detailed account of Mr. Gaul's post accident symptoms is required", while still confirming her earlier diagnosis without that new information. And that confirmation was added by her AssessMed editors, not drafted by Dr. Mitchell herself, though she approved the addition.

[445] I do not expect an expert to laugh when caught in a significant contradiction in her evidence as Dr. Mitchell did. That demonstrates a lack of awareness of the significance of the expert witness's role.



[446] Ultimately, Dr. Mitchell's evidence assists Mr. Graul. He had a mild traumatic brain injury. He continues to have deficits. Just like 15 percent of similar head injury patients. It is not clear to me why, if Dr. Mitchell was an unbiased, helpful expert witness, she could not have told me all of that in her first report. I do not know if that was because she was too busy or not clear on her role. Either way, she did not assist as she should have.

### **Does Mr. Graul have Psychiatric Injuries?**

#### ***Evidence of Dr. Neal Westreich***

[447] Dr. Westreich gave evidence for Mr. Graul and was agreed to be an expert in the field of psychiatry and psychiatric impairments, and qualified to opine on the diagnosis, prognosis, and treatment of psychiatric impairments.

[448] Dr. Westreich has an extensive curriculum vitae. In short, he is the Head of the Sunnybrook Health Sciences Centre Adolescent Traumatic Brain Injury Clinic and a staff psychiatrist. He is an assistant professor at the University of Toronto Medical School in the Department of Psychiatry.

[449] Dr. Westreich's reports were entered into evidence. Based on his reading of the relevant records, interview with Ms. Graul, and his meetings with Mr. Graul on July 30, 2019, and November 2, 2021, Dr. Westreich diagnosed Mr. Graul with a mild neurocognitive disorder due to mild traumatic brain injury, along with an

adjustment disorder with mixed anxiety and persistent depressive mood. He added that Mr. Gaul has residual vehicle anxiety. He diagnosed that Mr. Gaul "clearly presents with a post-concussive syndrome with ongoing symptomatology."

[450] Dr. Westreich described Mr. Gaul's prognosis as poor and recommended ongoing psychiatric care and continued work with an occupational therapist. He did not believe that Mr. Gaul could continue with employment. He was of the view that these difficulties were caused by the motor vehicle accident.

[451] Mr. Gaul described his symptoms to Dr. Westreich consistently with what is set out above. Dr. Westreich had Mr. Gaul complete a number of standard tests. Based on those tests, Dr. Westreich was satisfied that Mr. Gaul was forthright and honest throughout the assessment. Dr. Westreich opined that there was no evidence to suggest that Mr. Gaul was "intentionally malingering or exaggerating his symptoms."

[452] Dr. Westreich agreed that Mr. Gaul did not give him the handwritten list of head trauma. But the list did not change Dr. Westreich's opinion. Such a history of head injury supported his opinion and diagnosis of why the symptoms have continued.

[453] Although he recommended that Mr. Gaul should have ongoing psychiatric care, he was aware that there had been none to date. Seeking care is the patient's choice.

***Evidence of Dr. Irina Valentin***

[454] Dr. Valentin gave evidence for Mr. Gaul and was agreed to be qualified to provide opinion evidence in the fields of neuropsychology and neuropsychological impairments, and on the diagnosis, treatment, and prognosis of neuropsychological impairments.

[455] In her work, Dr. Valentin carries out assessments for both plaintiffs and defendants on an equal basis. She also treats patients with traumatic brain injury.

[456] When she met with Mr. Gaul in 2018 and 2021, she reviewed reports from other assessors. As part of her opinion, she relied on those previous reports, as well as her own observations and interview of the client. She also used standardized tests. Based on that information, she made a diagnosis of mild traumatic brain injury with major depressive disorder and provided recommendations.

[457] When she met with Mr. Gaul in July 2018, she observed that his walk was slow and marked by a moderate limp. He walked up stairs slowly and cautiously. He was able to provide a description of the accident and appeared to have a good

memory of the accident other than his loss of consciousness. The level of his cognitive functioning and impairment of his daily activities was common in her traumatic brain injury patients.

[458] She had Mr. Gaul complete several standardized tests, which were the same or similar to those conducted by Dr. Freedman. Comparing to what was elicited in Dr. Freedman's cross-examination, the results of the two batteries of tests were similar in outcome.

[459] Those tests that Dr. Valentin administered that related to validity, raised no concerns, and she was satisfied that Mr. Gaul made a good effort.

[460] She chose the tests to see how he functioned in several areas on a day-to-day basis. She relied on his description of his employment to say that he had average or high-average intelligence prior to the accident. She said that his reasoning and language skills were in the 37th percentile. His visual scanning abilities were lower than one percent. He is now mildly impaired in his ability to scan for information. His visual motor skills are good, but time-sensitive skills are a problem. This is a significant marker for traumatic brain injury where speed is often decreased.

[461] Dr. Valentin opined that Mr. Gaul was, at that time, not able to return to work. She thought that he would not be able to deal with stress, noises, making

quick judgments, or anything that required processing speed. He would be unable to do the work at all or would make mistakes. His visual memory ranked as low-average. Accordingly, he would not be able to perform tasks that required visual memory, or process complex visual information. His reasoning functioning was impaired and, therefore, he would not be able to multitask.

[462] All of this was consistent with a mild traumatic brain injury and post-concussion symptoms. In her opinion, it would affect his daily living.

[463] Because Mr. Gaul had none of these symptoms prior to the accident, and there is no indication of any other cause, Dr. Valentin's opinion was that his difficulties arose from the accident.

[464] She then assessed Mr. Gaul in March 2021. Overall, he had improved "a little bit" but was still impaired with respect to his processing speed. His employment would still be impacted. His condition was consistent with his condition in 2018. He had reduced attention and would be incapable of paying attention for an extended period. After less than 10 minutes, he would get lost at work.

[465] His executive functioning was impaired with respect to his efficiency. At work, he would be distracted with noises or multitasking. As he tired, his executive function would decline, and he would not be able to function.

[466] Since 2018, his psychiatric condition had worsened, and his depression had increased to significant or severe. His anxiety difficulties were "profound". This is not common if treatment were provided, but Dr. Valentin classified this case as "complex". There is more than one diagnosis and overlapping impairments. Therefore, there is less chance of recovery. This is particularly so if Mr. Graul receives no treatment, or if treatment is not provided consistently. His hopelessness affects his psychological functioning, which would affect his ability to work.

[467] Dr. Valentin's present diagnosis is that Mr. Graul still has mild traumatic brain injury plus a major depressive disorder. He has a specific phobia relating to driving and a neurocognitive disorder "not otherwise specified" in the mild range. This last diagnosis affects his cognitive abilities. In her view, the neurocognitive disorder was still caused by the car accident.

[468] At this time, she believes improvement is unlikely, but there is always a possibility that he could return to work in some capacity.

### ***Evidence of Dr. Zohar Waisman***

[469] Dr. Waisman testified for the defence. He was qualified on consent to give opinion evidence in the field of psychiatry, and the diagnosis, treatment, and prognosis of psychiatric impairments. That is to say, the same as Mr. Graul's expert, Dr. Westreich. Dr. Waisman carries on a private practice in psychotherapy.

[470] Dr. Waisman, like the other medical witnesses, was provided with Mr. Graul's medical brief and took a history from Mr. Graul. It does not appear that the information provided was significantly different than set out above.

[471] In July 2020, Dr. Waisman asked Mr. Graul whether he would go for psychological care. Mr. Graul answered that it would depend, because "I feel like it means I am weak. Can figure it out on my own. It is also confusing because of all the different opinions that have been made about me."

[472] Dr. Waisman testified that it was a "very challenging task" to diagnose Mr. Graul, though he eventually diagnosed Mr. Graul as suffering from an adjustment disorder with anxiety and depression as a result of the collision. He saw no evidence of any deficits in memory, concentration, or focus. He did not believe that Mr. Graul's condition was permanent but thought he would benefit from further psychotherapy as well as optimization of his medications.

[473] Dr. Waisman left the diagnosis of a brain injury to the neuropsychological or neurological assessors. He said that he was not qualified to diagnose brain injury.

[474] Dr. Waisman's diagnosis was that Mr. Graul's emotional and behavioral problems arise from the accident. He had significant impairment in various areas of his functioning. Dr. Waisman had "absolutely no doubt that he suffers from chronic pain."

[475] Mr. Graul had some features of post traumatic stress disorder, but not all the criteria. Dr. Waisman agreed that Mr. Graul could be disabled without meeting all the features of a definition of post traumatic stress disorder.

[476] Dr. Waisman was clear that Mr. Graul had an adjustment disorder because of the car accident. From his review of the family physicians' records, he could not say when the adjustment disorder started. Dr. Waisman agreed that the adjustment disorder could impact Mr. Graul's ability to socialize, interact with others, relate to others, and enjoy life. Accordingly, he made a recommendation for treatment.

[477] As I understand Dr. Waisman's opinion, he believes that Mr. Graul's condition is not permanent and, with further psychotherapy and proper use of medications, he will improve. He believes that there is no psychiatric restriction to Mr. Graul carrying on his normal activities of daily life. He provides no opinion on other areas of Mr. Graul's condition.

[478] In Dr. Waisman's view, Mr. Graul has not received optimal management from healthcare providers. He reviewed the treatment that Mr. Graul had received from his family physician. As a psychiatrist, Dr. Waisman was not happy with the medications given as antidepressants. He was concerned that Mr. Graul had bad side effects from the medications and, therefore, the medications should not have been prescribed. On the other hand, he said the medications should have been



kept on longer. In short, Mr. Gaul should have been referred to a psychiatrist. Dr. Waisman had no criticism of the family physician, Dr. Carlson, and was content with her present antidepressant medication for Mr. Gaul; he simply would have chosen a different series of medications and treatments in the past.

[479] He believes that Mr. Gaul will worsen without treatment but, with proper treatment, he could improve.

[480] Dr. Waisman believes Mr. Gaul's circumstances are too complex for treatment by a social worker. Mr. Gaul needs a psychiatrist for therapy and medications. Given Mr. Gaul's head pain, depression, tinnitus, fatigue, and cognitive deficits, psychotherapy may not be successful. Such therapy would need to be structured around Mr. Gaul's needs and would require a highly trained psychiatrist.

[481] On the other hand, such therapy will not assist with Mr. Gaul's visual problems, auditory impairment, or his vestibular impairment. Dr. Waisman had no opinion on how to treat the auditory, visual, or vestibular problems. The psychotherapy will not be a "cure all" and the treatment will need to be multidisciplinary.

[482] He agreed that Dr. Westreich would be better placed to assess Mr. Gaul's current level of functioning.

[483] In summary, Dr. Waisman does not disagree with Dr. Westreich other than to believe that Mr. Gaul can recover if he receives proper psychiatric treatment. He is simply more optimistic of Mr. Gaul's prognosis.

### **Analysis**

[484] From all this evidence, it is obvious that Mr. Gaul has psychiatric injuries arising from the accident.

[485] The only issues appear to be whether he can recover from his circumstances or whether he should have had other treatment.

[486] I do not have Dr. Waisman's optimism of Mr. Gaul's condition. Mr. Gaul has overlapping difficulties. His visual problems, auditory impairment, vestibular impairment, and cognitive deficiencies will not be treated by psychiatry and will impinge on his ability to follow instruction despite his best efforts. Dr. Waisman agreed that he was only looking at the psychiatric aspects of Mr. Gaul's condition and not all the overlapping conditions in play. When I look at all of them, I cannot find that Mr. Gaul will return to work or his pre-accident life.

### **Does Mr. Gaul have Chronic Pain?**

[487] I note that defence Dr. Waisman has already diagnosed chronic pain.

***Evidence of Dr. Mark Friedlander***

[488] Dr. Friedlander gave evidence for Mr. Graul and was qualified on consent as an expert in the field of chronic pain and anesthesiology and qualified to opine on the diagnosis and prognosis of impairments arising from chronic pain, and treatment for chronic pain.

[489] Like others involved with Mr. Graul, Dr. Friedlander relied on Mr. Graul's history as well as the various records with which he was provided. That history was consistent with the evidence set out above. Dr. Friedlander assessed Mr. Graul in July and August of 2019. Dr. Friedlander did not do a physical capacity test but, instead, relied on the reports of others. He did carry out a physical examination of Mr. Graul.

[490] Dr. Friedlander's opinion was that Mr. Graul had chronic pain headaches and a traumatic brain injury. Further, Mr. Graul had cervical and lumbar vertebral column sprain/strain causing chronic post traumatic musculoskeletal neck and shoulder blade pain and nerve root irritation symptoms. Mr. Graul also has a psychological impairment and a sleep disorder alongside his chronic pain.

[491] Dr. Friedlander opined that these injuries resulted from the car accident and prevent Mr. Graul from returning to work. He recommended a functional abilities evaluation if Mr. Graul were ever to return to work. However, as of the time Dr. Friedlander assessed him, Mr. Graul would not be able to return to work based on

the other reports that Dr. Friedlander reviewed. In Dr. Friedlander's view, one must look at the full picture and cannot ignore the other reports.

[492] Dr. Friedlander thought that Mr. Gaul's prognosis was poor. Further treatment should occur, but complete healing or cure was unlikely.

[493] Dr. Friedlander was not concerned that some reports suggested that Mr. Gaul had pain of 2 or 5 out of 10, because his responses may depend on the questions asked. He was not concerned that Mr. Gaul had described pain but had no limited range of motion. Even if Mr. Gaul could move, he would still feel the pain. In his opinion, the cause of the injury was head trauma and injury to Mr. Gaul's spine even though not visible on an x-ray.

[494] Although Mr. Gaul was trying to perform some activities, he was not doing as much as he had before the accident. In Dr. Friedlander's view, Mr. Gaul was trying to do more at home, despite the recurring pain.

### **Analysis**

[495] On this evidence, I find that Mr. Gaul has chronic pain. There is no evidence to reject that opinion and Dr. Friedlander's evidence is quite persuasive. There was no damage to his credibility in cross-examination.

[496] Of greater significance to my analysis, I accept Dr. Friedlander's opinion that one must look at all Mr. Gaul's circumstances to determine his injuries from the accident.

### **Can Mr. Gaul Return to Work?**

#### ***Evidence of Alan Walton***

[497] Mr. Walton gave evidence for Mr. Gaul and was qualified on consent as a registered physiotherapist with experience in the treatment of chronic pain, mild to moderate brain injury, and emotional responses following trauma. It was agreed that he was an expert in the field of vocational rehabilitation and assessment and qualified to opine on the impact of impairments on an individual's employability and earning capacity. He normally works for plaintiffs in motor vehicle litigation.

[498] Like the other experts in this trial, Mr. Walton was provided with a medical brief. He interviewed Mr. Gaul in August 2019 and learned Mr. Gaul's history similar to what is set out above. Mr. Walton also administered a number of standardized tests. Like other experts set out above, Mr. Walton found Mr. Gaul to have moderate depression and mild anxiety.

[499] Mr. Walton testified that treatment effectiveness depends on the client. In this case, treatment is more difficult because of the multiple diagnoses and Mr.

Graul's cognitive difficulties. His chronic pain and sleep depression are complications that make it more difficult to treat.

[500] Throughout the reports, Mr. Walton found that the diagnosis of concussion was a constant, and such a diagnosis also seemed obvious to him. He noted that Mr. Graul had vision problems consistent with concussion.

[501] Mr. Walton expected that Mr. Graul would have ongoing multidisciplinary treatment. He noted the family physician had suggested treatment, but that Mr. Graul ran out of money to support those treatments.

[502] Mr. Graul's physical complaints were like other motor vehicle accident clients of Mr. Walton. Mr. Graul's reporting was consistent throughout his interview and consistent with what would be expected from concussion.

[503] Mr. Graul expressed a desire to go back to work. Mr. Walton was satisfied that Mr. Graul did what he could, but he worked very slowly and methodically. He needed to take breaks and struggled towards the end of the test.

[504] The results of the tests showed Mr. Graul had cognitive deficits, such that he could not concentrate or focus, and was easily distracted. Accordingly, he would not be predictable in his work. These deficits are consistent with concussion. For Mr. Graul to continue to work, he would need breaks and would not be able to work

quickly. Driver desensitization courses are available, but not likely to be successful for Mr. Gaul given his cognitive difficulties.

[505] In Mr. Walton's opinion, Mr. Gaul would not be able to meet the demands of his job or any other job. Returning to work would be quite unsafe. He does not have adequate fine motor coordination, particularly for complex tasks. Mr. Gaul would also not be employable in other occupations because his cognitive difficulties would make it difficult for him to retrain. Given Mr. Gaul's age, he would not likely be able to find other employment.

[506] Mr. Gaul is intelligent but cannot test well in a real-world scenario. Although he can read, and spell particular words, he cannot focus long enough to keep track of the task or factor out distractions. He is also not able to remember what he reads a short time later.

[507] Mr. Walton was aware that Mr. Gaul had short-term disability benefits and income replacement benefits. In his view, Mr. Gaul is not financially motivated to fake his illness and would have preferred to work. In his view, Mr. Gaul should continue to push himself as he has.

[508] He did not think that psychological treatment would assist because Mr. Gaul is "not psychologically minded." In any event, in Mr. Walton's opinion, Mr. Gaul

would need to get control of his pain and solve his cognitive impairments before pursuing psychological treatment.

***Evidence of Dr. Michael Lang***

[509] Dr. Lang gave evidence for the defence and was found on consent to be an expert in the field of physical medicine and rehabilitation. He was qualified to give evidence with respect to the diagnosis, treatment, and prognosis of physical and musculoskeletal impairments.

[510] As a physiatrist, Dr. Lang treats chronic conditions relating to muscular skeletal impairments. He treats patients in the hospital and in outpatient clinics. He gives expert evidence in a ratio of about 75 percent for the defence and 25 percent for plaintiffs.

[511] Dr. Lang assessed Mr. Graul in June 2019 and has not seen him since.

[512] Dr. Lang's intake assistant spent about an hour and a half obtaining historical data from Mr. Graul. Dr. Lang reviewed that information with the assistant, then later with Mr. Graul to clarify any questions and review Mr. Graul's symptoms with him. Dr. Lang carried out a neuromuscular examination of Mr. Graul. The entire assessment took just over two hours. Finally, Dr. Lang reviewed his notes and the medical file to prepare his report.



[513] While Dr. Lang did not receive any information from other lay witnesses, he did think that information would be useful for his psychosocial assessment of the impacts upon Mr. Graul. It would help determine if Mr. Graul could actually return to work. For instance, Mr. Graul's family physician would have more information with respect to his abilities.

[514] Dr. Lang found Mr. Graul to be straightforward, cooperative, did not exaggerate his symptoms, and made a good effort. The description of his pain was consistent with his injuries. He did not appear to be "the kind of guy" to complain.

[515] Dr. Lang's examination of Mr. Graul was "unremarkable" except for some tension in Mr. Graul's neck muscles. Based on that examination, Dr. Lang diagnosed Mr. Graul as having chronic myofascial neck pain. He also found that Mr. Graul had mechanical back pain in his lower back. His other injuries, such as his right flank pain and elbow pain, were not related to the motor vehicle accident.

[516] In Dr. Lang's opinion, Mr. Graul suffered a whiplash injury from the motor vehicle accident as well as an injury to his lower back. Although Mr. Graul was not overly limited on clinical examination, Dr. Lang opined that he would fatigue more quickly. He would also not be able to look in one direction for a lengthy period of time or stand in one location; instead, he would have to take breaks. Mr. Graul would not be able to carry heavy objects or lean back for a long period of time, like

a painter might. He would not be able to participate in high impact athletics like running or jogging.

[517] Dr. Lang opined that Mr. Gaul should regularly exercise to keep up his range of motion. He should not be too sedentary and should continue with an exercise program. Mr. Gaul could also undergo surgery for his back pain; however, that might need to occur every six months or yearly.

[518] To return to work, Mr. Gaul will need to exercise pacing and his employer will need to accommodate his limitations. For example, lifting would need to be accommodated.

[519] Dr. Lang agreed that Mr. Gaul's injury was permanent, but he did not think it was serious, so long as Mr. Gaul received accommodations in the workplace. Dr. Lang could not give an opinion as to what work Mr. Gaul could return to, but Mr. Gaul would need modification in order to do so. He agreed that all spheres of injury need to be considered to determine if Mr. Gaul could return to work.

[520] In answering a question from me, he agreed that it would be considered a serious injury if Mr. Gaul could not get back to work. In his view, Mr. Gaul's physical impairments are permanent.

### **Analysis**

[521] I accept the evidence of Mr. Walton. It accords with the evidence of the lay witnesses above. I find that Mr. Gaul cannot return to work.

[522] Dr. Lang is of the view that, from a physical point of view, Mr. Gaul can return to work if he can be accommodated; however, Dr. Lang has nothing to base that hope for accommodation. He agreed that third party information would be of assistance. It is unfortunate that all the evidence before me has not been shared with the defence experts. From the evidence of Mr. Gaul's co-workers, I find that Mr. Gaul cannot be accommodated. Mr. Gaul cannot climb ladders or carry weights. He cannot read to any significant extent. He cannot multitask. He cannot do tasks requiring fine visual or motor coordination skills. He cannot work in noisy locations. He cannot drive any significant distance. All of these are required for his work.

[523] Even if Mr. Gaul could be accommodated for his physical weaknesses, such accommodation fails to consider his auditory, balance, visual, and cognitive failings. Although Mr. Gaul's witnesses point out the obvious that one must look at all of Mr. Gaul's circumstances, the defence position appears to look only at one factor at a time while ignoring all others. That is not a useful analysis.

### **Failure to Mitigate**

[524] The defence says that Mr. Graul has failed to take the necessary steps to mitigate his losses from the car accident. I have taken the defence issues from its written submissions.

[525] The defence submits that, while Mr. Graul has received varied and extensive treatments for the possible concussion or traumatic brain injury, his treatment for his psychological issues has been limited.

[526] However, the defence ignores the fact that Mr. Graul's funding for such treatment ran out in 2019. He has not been able to afford the regular care of a treating psychologist or psychiatrist.

[527] The defence points out that Mr. Graul did not receive long-term antidepressant treatment until 2021.

[528] However, the defence ignores the fact that Mr. Graul did not receive any advice to do so until Dr. Carlson turned to that issue when more serious issues were stabilized. Mr. Graul did not receive any different advice until then. Although Dr. Waisman thought that different medication was warranted, he did not fault Dr. Carlson's management. In any event, there is no requirement for a plaintiff to change their medical treatment at the instance of a defence expert.

[529] The defence then complains that Mr. Graul claims the accident has had a detrimental impact on his ability to work but has taken no action to return to work.

He claims to have loved his job; however, since the accident, he has made no attempts to inquire about whether modified duties or hours might be available for him at his workplace.

[530] However, the defence has led no evidence to suggest that such modification was available to Mr. Gaul with his admitted chronic pain and cognitive deficiencies. The only evidence I have is that no such accommodation is available. With Mr. Gaul's permanent auditory, visual, and cognitive deficiencies he cannot return to the work described by Mr. Gaul and his co-workers. He would not be able to work in that work environment.

[531] The defence says Mr. Gaul has made no attempts to return to work, retrain, or find alternative employment.

[532] However, when one considers Mr. Gaul's full-time career trying to make himself well, there is little time for other employment. To submit that retraining is possible, the defence submission ignores its own evidence of Mr. Gaul's cognitive difficulties.

[533] Further, there is no evidence - even from the defence - that counters all the medical evidence that Mr. Gaul cannot do the tasks required to return to work. He cannot be faulted for failing to attempt that which his treaters say he cannot do.

[534] The defence then refers to the evidence that Mr. Graul has not taken any driver desensitization treatment. Nor has he made any attempt to return to driving, "notwithstanding the fact that his treating optometrist has cleared him to drive short distances."

[535] However, the defence simply ignores the evidence that Mr. Graul cannot afford those courses. Even if Mr. Graul found the time and money for the course, there is no reason to think it would be helpful with his cognitive issues. Further, driving short distance for 20 minutes when he is rested will not get him to work; it will be even less likely to get him home from work when tired. Mr Graul will not be able to drive into work to deal with any emergencies. The evidence of Dr. Quaid is not contested. Mr. Graul's visual problems are still significant and ongoing. That evidence confirms Mr. Graul's inability to read or have good depth perception. And those failings are inconsistent with work and consistent with all else Mr. Graul describes.

[536] The defence objects to Mr. Graul's claims that the accident has affected his ability to do household tasks; he admits that he can do many household tasks, albeit at a slower pace.

[537] However, the phrase "slower pace" is a loaded one in this case. Mr. Graul's attempts to keep himself busy should not be compared to the multitasking, highly

competent man he once was. The evidence of Ms. Graul and their son is not contradicted on how Mr. Graul functions at home.

[538] As set out above, the defence surveillance reports do not challenge the evidence of Mr. Graul's present circumstances. Rather, it shows that Mr. Graul has little else to do and is trying to fill his day. While surveillance evidence has shown that he is capable of cutting grass, shovelling snow, trimming shrubs, and watering plants, he is doing so slowly and consistently with his evidence. He has been shown to engage in these activities for hours at a time on jobs that should take much less time. Surveillance has also shown Mr. Graul socializing with neighbours, engaging with others at a celebration of life, and travelling to Grand Bend for a family weekend at a cottage. However, we know from other evidence that this is unlike Mr. Graul before the accident when he socialized more often and with more people.

[539] The defence submits that Mr. Graul has failed to follow the treatment recommended to him by his audiologist. He was prescribed hearing aids for his tinnitus but failed to return to his treatment provider for over three years to have the hearing aids readjusted. As soon as he returned in November 2021 to have his hearing aids readjusted, he experienced immediate relief to his tinnitus symptoms and his balance.

[540] However, the defence fails to consider the rest of the story. Again, Mr. Graul did not have funding to carry on his treatments. More importantly, the hearing aids are not treatment for the permanent damage he has suffered to his hearing; they are only to improve his symptoms. He has explained that the hearing aids have their own failings and, regardless, he continues to have the steady drone of a cicada in his head.

[541] Further, even if Mr. Graul failed to follow that one piece of advice, the evidence shows that every one of the doctors who assessed or treated him found him to be co-operative and responsive. He followed the advice of all his doctors. I agree with Mr. and Ms. Graul that he has made a career of trying to get better. He has done all he has been asked, except when he could no longer afford it.

[542] The defence summarizes that, had Mr. Graul followed medical advice and obtained appropriate treatment for his mental health issues, his driving anxiety, and his tinnitus, he would be much further down the road to recovery.

[543] However, no medical expert says that. Rather, all say Mr. Graul's prognosis is guarded. At best, Dr. Waisman believes his proposed plan is better, but still, that does not support what the defence submits.



[544] On all the evidence, I find that Mr. Gaul has done all he can to mitigate his losses. On this evidence, I have no reason to think he will change those efforts. I find that Mr. Gaul is doing the best that he can given his proven injuries.

## **General Damages**

### **The Evidence**

[545] To consider Mr. Gaul's general damages, I have considered all that I have set out above with respect to how Mr. Gaul was before and after the accident. Very briefly and without reducing the significance of all the evidence:

1. Before the accident, Mr. Gaul was healthy and exceptionally physically fit.
2. Mr. Gaul worked long hours in a job he liked. He was respected and relied upon in that job. He was a valuable employee to the City of Guelph. He enjoyed rising to the challenges in his job.
3. Mr. Gaul had a strong work ethic instilled in him from an early age.
4. Mr. Gaul's job required physical stamina, concentration, and good eyesight and hearing. Mr. Gaul's employment needed him to deal with multiple tasks at once and to be able to remember complex steps.
5. Mr. Gaul was doing the bulk, if not all, of the physical and "handy man" jobs around the house. He did those jobs well and in a timely fashion. At home, he was loved, respected, and relied upon.

6. As a result of the motor vehicle collision, Mr. Graul has damage to his hearing, sight, memory, and balance. He is in chronic pain. He has cognitive deficiencies. He is easily confused and cannot multitask.
7. Mr. Graul cannot return to the social, athletic, and personal tasks that he enjoyed in the past. He cannot return to the work that he valued and enjoyed. He has lost all the collegiality of those activities.
8. Mr. Graul's relationships within his family have been harmed.
9. At present, at best, he cannot drive more than 20 minutes if it is not raining or snowing. He cannot read except on a cell phone. He is in pain and does not sleep properly.
10. Without his income, Mr. Graul's plans for his and his family's future have been destroyed.

[546] However, I agree with the defence that I must also keep in mind that Mr. Graul is not bedridden or house-bound. He was able to go on one holiday in 2019, however reduced that holiday may have been.

[547] There have been improvements in some of Mr. Graul 's symptoms. His neck pain has improved. It is dependent on activity and certain positions like looking down. Mr. Graul 's shoulder pain is now "in the background more often" and flares up a "couple times in a week." Mr. Graul experiences low back pain a couple times a week. Mr. Graul no longer has issues with chewing.

[548] I do not accept the defence argument that examples of what Mr. and Ms. Graul considered to be "poor judgment" since the accident can be seen as "not really evidence of extreme or unusual behaviour."

[549] The defence submission on this point is emblematic of its position throughout the trial. The defence regularly picks and chooses evidence to support its position while ignoring evidence that defeats its argument. In this instance, the defence submits that:

Taking a long walk is something that many people do for exercise. Since Mr. Graul was not working when this incident occurred, he certainly had the time to take a one-hour walk. Likewise, most people have left stoves on, burnt plastic items or tea towels, left keys in doors or left garage doors open. These occurrences are not all that unusual and have limited significance in this case.

[550] To revisit the evidence on this point, Mr. Graul's "one-hour walk" was in the heat of the day, without water, without proper shoes, without a phone, and without notice to his caregivers. That is a significant error in judgment and not something that people regularly do. The evidence is that Mr. Graul left a stove on as he left the house and leaves his key in the door most days. Those are significant events.

[551] I do agree with the defence that I must keep in mind that, even though Ms. Graul raises several serious concerns about Mr. Graul's judgment, she has left him alone for two one-week holidays. She is most certainly entitled to her own time and

has earned some time to herself, but that evidence is contradictory to her evidence that she worries extensively about Mr. Gaul.

[552] Mr. Gaul has continued to engage in household and handyperson tasks since the accident. He has carried out an oil change on a family vehicle. He has changed a signal light on a family vehicle. He has been refinishing a table. He has installed outdoor stairs over several months.

[553] Mr. Gaul is also able to do external gardening and lawncare activities including cutting grass, trimming shrubs, weeding, and watering plants. He is able to shovel light snow. Mr. Gaul admits to going on a weeklong holiday to a cottage with his family in 2019.

[554] However, there is no doubt that he will not be able to do the more expensive and, for Mr. Gaul, enjoyable work around the house, such as renovations, wiring, plumbing, and significant work on the family vehicles.

[555] I agree with the defence that Mr. Gaul's financial plans may have been unrealistic, but the collision has brought those hopes to an immediate end.

[556] While there are no submissions that Mr. Gaul fails to meet the threshold for general damages, on all the above evidence, I find that he has a permanent serious impairment of important physical, mental, and psychological functions.

## **Analysis**

[557] The principles related to fixing personal injury damages are well known. I am to assess an amount to restore Mr. Gaul to the position he would have enjoyed but for the accident, to the extent that money can do so. No such amount can be perfect compensation but must be reasonable and fair to both parties. The award must be consistent with other decisions involving similar injuries. It cannot be based on sympathy for the plaintiff nor retribution to the defendants. There can be no dispute that such an award will have to be arbitrary and be decided on the circumstances of each individual, both in terms of physical and psychological suffering: *Andrews v. Grand and Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 261.

[558] In order to determine this issue, I have considered: *Legree v. Origlieri*, 2021 ONSC 7650; *Rizzi v. Marvos*, 2008 ONCA 172, 236 O.A.C. 4, leave to appeal refused [2008] S.C.C.A. No. 200; *Akeelah v. Clow*, 2018 ONSC 3410; *Doxtater v. Farrish*, 2014 ONSC 4224; *Rolley v. MacDonnell*, 2018 ONSC 6517, affirmed 2020 ONCA 642; *Higashi v. Chiarot*, 2021 ONSC 8201; *Watts v. Donovan*, 2009 CanLII 26931 (Ont. S.C.); *Foniciello v. Bendall*, 2016 ONSC 1119; *Kwok v. Abecassis*, 2017 ONSC 164; *James v. Harper*, 2010 ONSC 4785; and *Gray v. Macklin*, [2000] O.T.C. 866, 7 M.V.R. (4th) 264 (Ont. S.C.).

[559] I do not intend to compare and contrast these cases in this judgment. In some of these cases, the plaintiff was less injured than Mr. Graul; in others, the plaintiff was more injured. When considering and distinguishing these cases (and the ones referenced in them), I place weight on the certainty that Mr. Graul will not return to work of any kind and will not likely be able to drive again, and that he has significant cognitive injuries along with permanent hearing and visual impairments.

[560] In Foniciello, at para. 78, Henderson, J. summarized:

Based on the principles set out above and the caselaw, I find that the range for general damages for cases in which a plaintiff has suffered a significant brain injury but has moderate functionability is \$200,000.00 to \$300,000.00.

[561] There is a lot of play in the terms "significant" and "moderate", but based on the case law available to me, I see that range of damages to be accurate albeit a bit high.

[562] In considering all of that, I fix general damages in the amount of \$225,000.

### **Special Damages**

[563] The defence does not dispute Mr. Graul's special damage claim of \$38,177.40.

### **Lost Income**

[564] The parties dispute what income should be attributed to Mr. Gaul for the time he has been away from employment. Mr. Gaul submits that his income should be based on an average of his last two years of income, while the defence submits that it should be based on an average of his last five years.

[565] Once that income is determined, Mr. Gaul says that he would have retired at age 70 if not injured in the accident. The defence submits that he would have retired earlier if he had not returned to work by April 2020. The date of any return to work or retirement will, of course, be a significant factor in determining what the future lost income will be for Mr. Gaul.

### **Past Lost Income**

#### ***Evidence of Ian Wollach***

[566] Mr. Wollach gave evidence for Mr. Gaul. It was agreed that Mr. Wollach was qualified to give expert opinion evidence in the field of forensic accounting and provide an opinion on income losses and calculations with respect to the present value of cost of future care.

[567] In order to prepare his report, Mr. Wollach reviewed Mr. Gaul's income tax returns for 2013 to 2018, his short-term and long-term benefits, a neuropsychologist's report, and a vocational report. He also considered Statistics Canada's life tables including statistics relating to average retirement date. He

noted Mr. Graul's income replacement benefits and the provisions of the *Insurance Act*, R.S.O. 1990, c. I.8.

[568] Based on Ontario law, he calculated the income loss commencing seven days after the accident, at 70 percent of Mr. Graul's gross income, to the date of trial. That amount is then to be reduced by the benefits Mr. Graul received from long-term and short-term disability and income replacement benefits. There was no dispute between the parties on that methodology.

[569] As one of his initial assumptions, Mr. Wollach based Mr. Graul's pre-accident income on an average of his 2015 and 2016 incomes, his best two years prior to the accident. That figure was \$108,016 earned annually.

[570] In cross-examination, Mr. Wollach agreed that he could have averaged the income over five years but, given that Mr. Graul had a collective agreement, two years would be a better estimate for the future. He agreed that five years would have reduced the loss.

[571] He also confirmed that the correct way to estimate Mr. Graul's past losses was to average it over two years, rather than five, because the increased rate of pay reflects what the future holds.

[572] I agree with Mr. Wollach's analysis. Averaging the income over five years would not reflect the reality of Mr. Graul's real income at the time of the accident



and going forward, given his employment contract. That would not be a fair estimate of Mr. Gaul's income. There is no evidence that an approach of averaging over two years is contrary to accounting of income losses.

[573] Mr. Wollach prepared two reports: one in 2019 and one in 2021. He agreed that he failed to update the latest report with updated income replacement benefits. As a result, he recalculated the losses as a result of the income replacement benefits to November 2021. The effect of that reduced the lost income from \$102,311 to \$75,308.

[574] I find that the past lost income is \$75,308.

### **Future Lost Income**

[575] While Mr. Gaul must prove past facts on a balance of probabilities, future loss or damage must only be shown to have a reasonable chance of occurring. Once it is shown that there is a reasonable chance of suffering a loss or damage in the future, the court must then assess the value of that chance, and future contingencies are regarded as factors to increase or decrease the award: *Schrump et al. v. Koot et al.* (1977), 18 O.R. (2d) 337 (C.A.), at pp. 339-340.

[576] The degree of possibility of such future loss must be reflected in the award. Compensation for future loss is not an all or nothing proposition, but rather

depends on the degree of risk established: *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (C.A.), at p. 634.

[577] The defence submits that Mr. Graul could have returned to work by April 2020. I can reject that submission in brief. As set out above, there is no evidence to support that submission. Given my findings above, it has no fact finding to support it.

### **When would Mr. Graul have retired?**

#### ***Evidence of Mr. Graul***

[578] In 2017, Mr. Graul had been employed at the City of Guelph for 19 years and was 53 years of age. His plans were to keep working to age 70 and even to obtain his Master's Electrician license so that he would be able to do independent electrical work. As long as his health was good, he had not thought of early retirement. The City of Guelph has no mandatory retirement, and he knows others who have worked past 65.

[579] Between 2001 and 2006, he had his own business doing consulting with respect to instrumentation and electrical work. He stopped that work when his then employer was bought out.

[580] Mr. Graul's Ontario Municipal Employees' Retirement System (OMERS) pension report as of January 31, 2019, shows that he would have an income of

\$23,860.03 if he retired as of June 30, 2026 (at age 62). OMERS continues to contribute to his pension and, therefore, his actual income would be somewhat higher than this statement. However, this low pension amount is another reason to remain working. Even if he earned more pension income, he would have continued to work. Mr. Gaul said that he liked his work and so "Why not?"

[581] In 2012, he tried a management position but, after three months, he gave it up. He preferred to work with his hands, though he did not close the door to that kind of opportunity. He thought he might consider a management position for the years 65 to 70.

[582] If Mr. Gaul received his Master's Electrician license, he could do consulting work on the side at about \$150 to \$185 per hour depending on the service. This would be a back up plan if he lost his job with Guelph. He cannot get that license now since he cannot do the necessary studying and reading.

[583] All his sons have had post-secondary education and he and his wife have helped them out with their education in the hopes of them having little or no debt at their graduation. This included Michael's nine years of schooling to become an osteopath.

[584] In the long term, Mr. Graul wanted to assist his children with down payments for homes, and to buy a new home for himself and Ms. Graul of perhaps 2500 square feet on a larger lot to entertain their growing family.

***Evidence of Ms. Graul***

[585] Ms. Graul testified that Mr. Graul's intention was to work to age 70. He had no reason to slow down, and he enjoyed his computer work. He knew that he was entitled to retire at 65 but they only recently found out that he was eligible for an unreduced pension. Even so, he was intending to work past 65.

[586] If he was no longer able to work at the City of Guelph, Mr. Graul had planned to have a consulting job when he obtained his Master's Electrician license. He had had a similar business between 1999 and 2005 or 2006. He did this consulting work after-hours and on weekends from his work with the city. He consulted about 15 hours a week.

[587] Ms. Graul said that she likes her job, and her intention was to work until she was 69 so the two would retire together. Neither of them was afraid of work and their first priority was family.

[588] She was not aware that Mr. Graul might join management at Guelph. She agreed that he had not got around to getting his Master's Electrician paper. His father died at age 62 from a heart attack. Mr. Graul enjoyed his activities around

the house, but she did not believe that he would change his plans from working longer. He would have had time to do all his activities and still go to work.

[589] Ms. Graul testified that they helped their three sons with tuition and university to allow them to graduate without debt. They paid for a total of 18 years of post-secondary education. They wished to provide down payments for their sons' houses and help with their weddings. They hoped to contribute to their grandchildren's Registered Education Savings Plans. They also wished to buy a larger house to entertain the family. With those financial hopes, Mr. Graul would have continued to work till 70.

***Evidence of Daniel Graul***

[590] Daniel Graul had no knowledge of his father's retirement plans.

***Evidence of Pamela Ciccarelli***

[591] Ms. Ciccarelli is Mr. Graul's older sister. She has worked for the provincial government for 42 years. She could have retired in 2015 on a non-reduced pension but did not. She is presently 67 years of age and lives in Toronto. She does not have plans to retire. As she said, "We just work."

[592] Mr. Graul has never spoken to her of any plans for retirement.

[593] She agreed that her father died at 62 and yet they both had planned to work past that age.

***Evidence of Co-Workers***

***Evidence of Philip Koechl***

[594] Mr. Koechl worked with Mr. Graul from 2006 to 2017, up until the time Mr. Graul was injured.

[595] Mr. Graul was Acting Supervisor for six months and all of the other men hoped that he would keep that job. Mr. Koechl does not know why Mr. Graul did not get the job.

[596] He did not speak with Mr. Graul about his retirement plans and did not know about them.

***Evidence of Jerry Atkinson***

[597] Mr. Atkinson is the Wastewater Operations Manager for Niagara region.

[598] He testified that it is not unusual to retire and go into consulting with the city. He knows others who have done so and others who want to. From his knowledge of Mr. Graul, he could have done that as well. He believes it was realistic for Mr. Graul to be a supervisor past age 70.

[599] In his job as Manager, Mr. Atkinson has a set of approved contractors. He would have hired Mr. Graul as a contractor if he was healthy and able to do the job.

***Evidence of John Mogk***

[600] Mr. Mogk worked with Mr. Graul at the City of Guelph for 10 to 15 years.

[601] Mr. Mogk retired at age 62. He retired due to COVID-19 when he became aware of all the illnesses that went through the plant. He did not have any knowledge of Mr. Graul's retirement plans.

***Evidence of Raymond Masse***

[602] Mr. Masse is an industrial millwright and mechanic for the City of Guelph at the wastewater treatment plant.

[603] Presently, there is one employee he knows who is 70 and another one who is turning 70. He knows other workers who have been hired back to work three or five days a week after they retire.

***Agreed Evidence***

[604] Kiran Suresh's evidence was filed as an exhibit on consent. From her statement, her admissible evidence was that she met Mr. Graul when she joined the City of Guelph in 2006. They worked in the same department from 2006 to 2016.

[605] Ms. Suresh confirmed that she was aware of Mr. Graul's desire to expand his career and work towards becoming a Master Electrician. It was her opinion that Mr. Graul would have wanted to work beyond 65 as he was very work-oriented,

focused, and hard-working. She stated she certainly would have hired him (in compliance with all the rules and regulations) to work for the city as a contractor if that was what he wanted. She was aware that people who work for the City of Guelph can work beyond the age of 65.

### ***Analysis***

[606] I have no difficulty in finding that Mr. Graul would have remained employed with the City of Guelph until age 70.

[607] The evidence shows that he has been steadily employed since a young age. He was a hard worker who was respected at his place of employment. All the witnesses confirm his evidence that he enjoyed his work and was good at it. They also said that he did well in his short time in management. I find that his aptitude and experience would have made him a valuable asset for the city to keep employed.

[608] Mr. Graul was Acting Supervisor for a time but gave it up to be more hands on. This supports the view that he would have been able to "slow down" to a desk job as he got older. I find that he would have continued to remain employed with the City of Guelph.



[609] I do not make this finding based on what others have done beyond 65 or what the statistical averages might show. Rather, I have considered the evidence as it relates to Mr. Gaul alone.

[610] I agree with the defence that the Gauls' generous plans for the children and their accommodation are unrealistic, but I find that those plans were honestly held. For those plans to have any hope of success, Mr. Gaul would have had to remain employed. His pension would not have allowed him to maintain what the family already had.

[611] I do not factor in Mr. Gaul's potential income from consulting. He did not have a Master's license yet and the evidence of potential income is simply hope and conjecture. There is insufficient evidence to make a finding to support that submission.

[612] Mr. Gaul had a variety of other interests to draw him away from employment. In my view, it is unrealistic to think he would have remained working past 70.

### ***Evidence of Ian Wollach***

[613] Mr. Wollach calculated the future loss to age 70. For his calculations, he made no changes for either positive or negative contingencies. In his view, the positive contingencies, such as a new employment contract, balanced out the

negative contingencies related to health and accident. He did not factor in any increases in income for promotion or pay raises.

[614] Mr. Wollach applied a net discount rate of 0 percent for 15 years and 2.5 percent thereafter. He used an inflation rate to increase Mr. Graul's income from the time of the accident to the time of the report. There was no objection raised with respect to Mr. Wollach's methodology.

[615] On that basis, he calculated Mr. Graul's future lost income based on two scenarios, both of which relied on self-employed income after retirement. Those calculations are of no use to me given my findings above. However, Mr. Wollach provided me with the tools to carry out my own calculations of future lost income based on Mr. Graul's continued employment to age 70 at the City of Guelph.

### ***Analysis***

[616] Based on Mr. Wollach's calculations and my findings above, I find that Mr. Graul's total lost income to age 70 is \$1,282,074.

[617] Mr. Wollach's evidence is persuasive and not contradicted by any other evidence. All his calculations are in evidence and I do not think it will be useful to attempt to summarize those well-known calculations.

[618] I do not rule out arithmetical errors based upon my factual findings. If I have made arithmetical errors, counsel may advise within their costs submissions set out below.

### **Pension Production Issue**

[619] During the trial, the defence moved for an order for production of Mr. Gaul's "complete OMERS file" in advance of the defence calling a representative from OMERS as part of the defence case. In particular, the defence asked that Mr. Gaul sign a requisition to obtain "the complete OMERS file" or an order that OMERS provide "the entire file" to Mr. Gaul. That motion was dismissed for reasons to follow. These are those reasons.

[620] The motion was first raised as an issue prior to the commencement of the trial, but not served until November 14, 2021 (one day before the trial).

[621] Prior to the trial, Mr. Gaul had produced his December 31, 2019, pension statement in support of his claim for lost future income. His pension statement confirmed his income on retirement as of age 65. It also set out the terms of his pension to calculate other amounts for early retirement. He also produced his income tax returns to 2020.

[622] Prior to trial, the defence subpoenaed a representative of OMERS to come to trial to obtain further information. This subpoena requested, "Your complete pension records regarding the plaintiff."

[623] In response, counsel for OMERS requested a clarification of what was required because he felt the summons was overly broad. Further, OMERS required an express consent from Mr. Graul or a court order to produce the file. OMERS counsel also pointed out that any general information relating to the plan, such as its terms and information about retirement eligibility dates, was publicly available, and he provided the relevant website. Finally, he made several suggestions on how the request might be narrowed.

[624] In response, the defence requested "a general list of documents" within the file in order to narrow the request. In reply, OMERS advised that it did not have a general list of documents that may be contained in a member file.

[625] The defence responded with a list of matters that it wished to investigate:

1. When Mr. Graul is eligible to obtain an unreduced pension.
2. The amounts that he will receive if he receives an unreduced pension.
3. The amounts that he would receive if he received a reduced pension.
4. Records of inquiries Mr. Graul made regarding his pension.
5. How the pension is calculated.

[626] However, the defence still wanted the complete file from OMERS and requested it in the Notice of Motion.

[627] Mr. Graul's counsel echoes the submissions of OMERS and points out that the file may contain private information that is irrelevant to the issues at trial. Further, if the information is of such importance, the defence has not explained why it did not request this information in advance of trial. However, Mr. Graul consented to the release of any information related to his inquiries about retirement as well as his contributions to his pension in 2020 and 2021.

[628] It is important to remember that at no time did OMERS refuse to attend pursuant to the subpoena or refuse to produce the information; it only sought a more specific request. I dismissed the motion without affecting those steps.

[629] Further, the defence defined its request during argument to specific items and Mr. Graul agreed to those requests. As such, I did not need to make any order about those items.

[630] The defence submitted that "the OMERS file contains documents pertaining to the plaintiff's anticipated retirement and the amount he will receive." The existence, terms, and contents of the OMERS file would serve a role in how the trial would proceed. Further, the production of the file in advance of the OMERS representative testifying would shorten the trial.

[631] There is no doubt that the documents related to Mr. Graul's pension income might be relevant to the issues at trial; however, other than any requests about retirement from Mr. Graul, the defence could not articulate what information it was missing or what information had not been produced by Mr. Graul. Nor could the defence describe any prejudice to it for any missing information. Mr. Graul had already provided a pension report with all the necessary calculation factors as set out in items 1 to 3 and 5 above. Without knowing what the defence actually needed from the file, the request was simply a fishing expedition.

[632] The defence gave no reason why this request was not made sooner than the outset of trial. Mr. Graul's expert report relating to this issue was provided in December 2019. The defence has filed no responding expert report.

[633] In the result, this motion was simply a late request for an unspecified fishing expedition into Mr. Graul's pension file. On that basis, it was dismissed.

[634] While I made no order in advance of the OMERS witness, it was still open to the defence to call that witness. In the end, the defence did not call any witness from OMERS.

### **Future Care Costs**

[635] Given Mr. Graul's injuries, the medical evidence confirms that he will need a lot of assistance to carry on his life. Some of those expenses are agreed upon but most are in dispute. The defence submits that a round figure of \$75,000 will cover any future treatments Mr. Graul may need.

[636] As set out below, Mr. Graul has provided evidence of those needs and their costs. Expert witness for Mr. Graul, Ms. Marla Tennen, has given her opinion of the costs of those needs. Mr. Wollach has then provided his opinion of what lump sum will be necessary to fund those expenses to ages 65, 75, or for life depending on the need.

[637] As before, I rely on *Schrump v. Koot*, at pp. 339-340, to show that, while Mr. Graul must prove past facts on a balance of probabilities, future loss or damage must only be shown to have a reasonable chance of occurring. Once it is shown that there is a reasonable chance of suffering a loss or damage in the future, I must then assess the value of that loss.

[638] The award must be fair to both parties but the ability of the defendant to pay is not a relevant consideration. The focus must be on the injuries of the innocent party. Fairness to the defendants is achieved by assuring that the claims raised against them are legitimate and justifiable: *Andrews v. Grand and Toy Alberta Ltd.*, at pp. 243-244.

[639] As said in *Higashi v. Chiarot*, at para. 246:

The standard of real and substantial risk applies to future care expenses. The test for determining the appropriate award for future care costs is an objective one, based on medical evidence. To prove a claim for future care costs, the following conditions apply: (a) there must be medical justification for the claims; (b) the award must be fair and moderate; and (c) the claims must be reasonably necessary, having in mind personal circumstances. [Citation removed.]

[640] Mr. Graul may only claim once and my concern is to ensure that he will have adequate future care: *Andrews v. Grand and Toy Alberta Ltd.*, at p. 261.

### ***Evidence of Marla Tennen***

[641] Ms. Tennen was qualified on consent to give opinion evidence with respect to "life care planning". She has been a "professional rehabilitation consultant" for 30 years. Her report set out what she saw as Mr. Graul's requirements for the future and the cost of those items. Her report was filed as her examination-in-chief and she was then cross-examined on that report. The cross-examination successfully reduced her report to an accounting exercise. To be fair to this evidence, the report is entitled "Future Cost of Care Report". For the following reasons, I have only relied on Ms. Tennen's evidence for what various services cost. The defence made no submissions contrary to that evidence. I will rely on the medical evidence to decide what Mr. Graul needs.



[642] Ms. Tennen's work is referred to her primarily by plaintiffs' lawyers. Typically, she is not retained by defendants. Her evidence shows that bias and advocacy for Mr. Graul.

[643] Ms. Tennen did not make any home observations. She did not think it necessary to meet with Mr. Graul other than by phone. She did not assess the presence of any family support system. She did not carry out any tests other than to rely upon the examinations done by others. She did not get any information from the defence to prepare her report. She did not take into consideration that Mr. Graul might have age-related health issues in any event.

[644] Ms. Tennen said that she relied upon her nursing training and years of expertise to make her recommendations. She saw her present job as nursing; however, she has not done any clinical nursing work in a doctor's office or hospital since 1992.

[645] Ms. Tennen agreed that Dr. Valentin did not recommend a rehabilitation support worker as she had. She relied on her own experience for that recommendation. A rehabilitation support worker would support and add to the work of the occupational therapist. She agreed that Mr. Graul has not had a rehabilitation support worker to date, and no one has recommended such a worker except her.

[646] Throughout her evidence, Ms. Tennen was defensive and arrogant. Often, she did not answer the question but simply added her own defensive editorial. Ms. Tennen's opinion was weakened by her defensiveness. She was more an advocate for her own position than for Mr. Gaul or in assistance to the court.

[647] Although Ms. Tennen recommended a "multidisciplinary approach", she was quite vague in what those disciplines might be. In her view, there was no overlap in her recommendations, when there clearly was.

[648] Ms. Tennen recommended case management services for two years even though Mr. Gaul has not used, or apparently needed, such services in the four years since the accident.

[649] Ms. Tennen did not consider that medication is covered at age 65 or that Mr. Gaul may have health benefits from his employer. She was aware the government might fund some of these services but did not include it in her findings.

[650] Ms. Tennen's opinion with respect to attendant care was based solely on her opinion and she agreed that, depending on the day, Mr. Gaul might not need assistance.

[651] She agreed that no doctors have recommended Mr. Gaul have assistance for gardening and snow shovelling.

[652] I am prepared to accept that Ms. Tennen's report is helpful to me for the cost of various items in dispute. The report is dated 2019 and I am sure that the costs will have increased to the benefit of the defence. Other than those values, I reject the rest of Ms. Tennen's evidence.

[653] After her evidence was given, it appeared that Mr. Graul amended his requests. I will, therefore, analyze these issues following Mr. Graul's written submissions.

***Evidence of Ian Wollach***

[654] Mr. Wollach prepared a schedule which set out the present value of each item recommended by Ms. Tennen and added HST where applicable if she had not included that in her report.

[655] In order to calculate the future cost of most items, he used 0 percent for the first 15 years and 2.5 percent thereafter for the correct multiplier. He also provided me with different ways to calculate the future cost of different values than Ms. Tennen provided.

[656] Mr. Wollach fairly gave no evidence on the need for any of the expenses; his evidence was essentially mathematical. I did not hear any objection to his methodology.

***Psychological/Social Work/Relationship Counselling***

[657] Mr. Graul submits that he suffers from psychological and psycho-social disabilities because of his injuries suffered in the 2017 collision. These impairments affect his psychological functioning, his ability to function in social relationships with his family and friends and have negatively affected his overall quality of life.

[658] Mr. Graul testified that he participates in social work counselling to help him deal with memory limitations and concentration issues in coping with daily things. He testified that, if he had funding, he would continue with his social worker. He felt the treatment was helpful. Mr. Graul testified that the social work counselling helped him feel better about himself and gain control over his emotions and depression.

[659] As set out above, Mr. Graul also testified that, since the injury, his relationship with Ms. Graul has suffered. Dr. Friedlander discussed the need for counselling in his reports which were filed as exhibits. Dr. Westreich believed Mr. Graul can benefit from cognitive behavioral therapy.

[660] Dr. Valentin also recommended counselling for Mr. Graul. She testified that, although Mr. Graul 's prognosis for further recovery is poor, it remains important to continue his treatment. She testified that the people who don't receive treatment

will get worse. She believed that Mr. Graul requires substantial psychological treatment for the rest of his life.

[661] The defence's Dr. Waisman also discussed Mr. Graul's need for treatment. He specifically recommended psychological counselling but conceded that the therapy will not cure Mr. Graul. Instead, the goal would be to improve his quality of life and depression symptoms.

[662] Ms. Tennen provided the cost of psychological counselling for two years at 48 sessions per year. The cost of that psychological counselling totalled \$10,560 per year. In year three, she recommended 24 sessions of psychological counselling at a total cost of \$5,280 for year four through to life expectancy. Ms. Tennen recommended additional reserves of 24 sessions throughout Mr. Graul 's lifetime at a cost of \$21,120.

[663] Ms. Tennen provided the cost of Mr. Graul continuing with social work counselling. She recommended 24 sessions a year for two years at a cost of \$3,120 per year. In year three, she recommended 15 sessions at a cost of \$1,950.

[664] Mr. Wollach reported the lifetime cost for this item as \$54,379.

### ***Analysis***

[665] The defence acknowledged the need for counselling and submitted that psychological counselling for life was appropriate. The defence submits that those

services can be funded in the amount of \$46,169 based on Ms. Tennen's proposed rates but for fewer hours.

[666] Mr. Graul's request is less than the defence acknowledges. Accordingly, I grant judgment in the amount of \$27,052 for psychological counselling and social work therapy.

### ***Occupational Therapy***

[667] Mr. Graul testified that he has significant impairments in his activities of daily living. As a result, he has participated in courses of occupational therapy. After Mr. Graul exhausted his accident-benefit medical and rehabilitation fund, he could not continue his occupational therapy. He testified that, if he had funding, he would go to occupational therapy as he found it helpful. Specifically, he testified it helped him organize his appointments and medication, as well as decide whether he should eat and how to organize his paperwork.

[668] Dr. Valentin commented on Mr. Graul's impairments affecting his ability to perform his basic activities of daily living. Dr. Valentin specifically recommended ongoing cognitive rehabilitation by an occupational therapist.

[669] Dr. Westreich also stated that he was fully supportive of Mr. Graul's ongoing work with an occupational therapist, with behavioural activation as a goal.

[670] Dr. Friedlander referred to the need for occupational therapy and stated it seemed reasonable and necessary.

[671] Ms. Tennen provided the cost of occupational therapy for Mr. Gaul. Specifically, she recommended 24 sessions of occupational therapy intervention in the first year with a cost of \$3,000. She recommended 16 sessions per year for life expectancy at \$2,000 per year.

[672] Ms. Tennen also recommended the use of a rehabilitation support worker, who would help Mr. Gaul work on his occupational therapy techniques, but at a much-reduced rate. Ms. Tennen recommended 4.5 hours a week for 48 weeks in the first year at a total cost of \$14,040, and then 4.5 hours a week for 24 weeks for year two at a cost of \$7,020.

[673] Mr. Wollach opined that the lifetime cost for this need would be \$54,240.

[674] The defence denies that such services are necessary.

### ***Analysis***

[675] Besides the medical evidence referred to by Mr. Gaul, his witness Dr. Basile also agreed with the therapies suggested by Ms. Tennen as they related to the traumatic brain injury, cognitive impairments, and care for neck and back pain management. I find that occupational therapy falls into this category and is reasonable.

[676] I accept the evidence of the need and the value of this expense. I find that judgment should follow for \$54,240 for occupational therapy.

[677] With all the other supportive assistance Mr. Graul will have, I find that a rehabilitation support worker is redundant. Such services are recommended only by Ms. Tennen. I deny that item of future care.

***Physiotherapy, Massage Therapy, Gym Membership, Personal Trainer***

[678] Mr. Graul testified that he had participated in many sessions of physiotherapy since the collision to address his physical injuries and impairments. He indicated that physiotherapy was interrupted as funding stopped, which he found to be detrimental. He said that his muscles were stronger, and he was feeling like they moved better when he participated in regular physiotherapy. Mr. Graul testified that, if funding is restored, he will participate again in physiotherapy.

[679] Dr. Friedlander stated that Mr. Graul should continue working at active muscle strengthening and core muscle training. He said that Mr. Graul should work with a trainer to develop a physical exercise program focussing on cardio and conditioning. He agreed that a gym membership and supervision by a trainer would be therapeutic. He confirmed these expenses are reasonable and necessary.

[680] Dr. Basile testified that Mr. Graul could benefit from physiotherapy to assist with his neck and back pain.



[681] For the defence, Dr. Lang did not think that the injury justified a regular attendant and supportive care. Mr. Graul did not need long-term passive therapy.

[682] Dr. Lang agreed that Mr. Graul could benefit from a personal trainer for a period, but not perpetually. Rather, he could be educated and then re-educated overtime.

[683] Dr. Lang did not support physiotherapy for chronic conditions, as it is best to use it for early treatment and then move to a personal trainer. In his opinion, Mr. Graul requires active exercise rather than passive therapy from a physiotherapist.

[684] However, the defence acknowledges the need for physiotherapy. It submits that the lifetime total is more properly \$15,000, rather than Ms. Tennen's rates.

[685] Ms. Tennen provided the cost of physiotherapy treatment. She recommended physiotherapy, in the first year, twice a week for 24 weeks and then once a week for 24 weeks at a cost of \$9,000. She then recommended physiotherapy, for year two, once weekly for 48 weeks at a cost of \$6,000. Finally, she recommended 20 sessions a year as required for year three through to life expectancy at the cost of \$2,500 per year.

[686] In addition to physiotherapy, Ms. Tennen provided the cost for the gym and trainer. She recommended a yearly membership at a fitness facility at a cost of \$900 per year from present to age 75. She also recommended a personal trainer

for the first year to provide Mr. Graul with guidance on an exercise program, at a cost of \$90 per hour. She costed 24 sessions, for a total one-time trainer cost of \$2,160.

[687] Dr. Friedlander recommended passive therapy such as heat ultrasound massage and a tens machine to provide Mr. Graul with temporary pain relief. He also supported Ms. Tennen's recommendation for massage therapy.

[688] Ms. Tennen provided the cost of massage therapy for Mr. Graul. In year one, she recommended 48 sessions at a cost of \$4,800. In year two, she recommended 24 sessions at a cost of \$2,400. From year three to life expectancy, she recommended 15 sessions a year at a cost of \$1,500 per year.

[689] Mr. Wollach calculated a lifetime cost for these items (age 75 for fitness membership and trainer) at \$139,006.

### ***Analysis***

[690] I accept the medical evidence that Mr. Graul will benefit from physiotherapy, a gym membership, and massage therapy. I accept Ms. Tennen's and Mr. Wollach's calculations of those costs. I find for Mr. Graul, the sum of \$139,006 is appropriate.

### ***Pain Management***

[691] As set out above Mr. Graul has been diagnosed as suffering from chronic pain.

[692] Dr. Basile testified that Mr. Graul would benefit from a pain management program to address his neck and back pain.

[693] Dr. Friedlander considered Mr. Graul's need for pain management and recommended various interventional pain management techniques to try and assist him in coping with his pain. Dr. Friedlander stated that it would require a multi-modal analgesic approach, likely into the future and probably indefinitely. Specifically, he stated that a coordinated and more intensive multidisciplinary approach is needed.

[694] Ms. Tennen estimated a multi-disciplinary chronic pain management program would cost \$11,375.

[695] Mr. Wollach opined that a lifetime cost would be \$11,375.

[696] The defence denies the need for such counselling.

### ***Analysis***

[697] The evidence of both defence and Mr. Graul demonstrates he has chronic pain. Accordingly, he needs this treatment and I accept the requirement and cost of this care. Mr. Graul is granted judgment for \$11,375.

### ***Speech Language Therapy***

[698] Ms. Brotman, Mr. Gaul's treating speech language pathologist, explained in her reports that Mr. Gaul experiences cognitive communication difficulties, including with his attention memory, oral expression, social communication information processing, and areas of executive functioning. Ms. Brotman provided Mr. Gaul with speech language pathology services. Ms. Brotman testified that, in her experience, Mr. Gaul's need for speech language will continue as therapy is an ongoing process, with new goals emerging which require tweaking.

[699] Both Dr. Valentin and Ms. Mair also testified that they believe that Mr. Gaul requires ongoing speech language pathology services.

[700] Dr. Friedlander opined that, to address Mr. Gaul's ongoing post concussion syndrome symptoms, speech language therapy is reasonable and necessary.

[701] Ms. Tennen provided the cost for speech language therapy. She recommended 24 sessions a year for two years at a cost of \$3,720 per year.

[702] Mr. Wollach opined that the lifetime expense for this need was \$7,440.

[703] The defence denies the need for this expense.

### ***Analysis***

[704] As above, the reasonable need and expense for this treatment is in evidence. There is no evidence contrary. I grant judgment for \$7,440.

### ***Case Management Services***

[705] Ms. Tennen also provided the cost for a case manager to help Mr. Gaul coordinate his future therapy and services. She opined that two years of case management services would be adequate, after which time Mr. Gaul's occupational therapist could assume this rehabilitation coordination role as part of their work. Ms. Tennen recommended seven hours a month of case management services for two years at a cost of \$10,500 per year.

### ***Analysis***

[706] Given all the other assistance Mr. Gaul will receive, I am confident that he will need some practice to do some things for himself. To the extent that he cannot manage, his other treaters will give him the skills to overcome. In any event, he has been managing this for more than two years now. I dismiss this claim.

[707] Mr. Gaul made no claim for a case manager.

### ***Transportation Assistance***

[708] Mr. Gaul has not driven a car since his collision. He testified that, due to issues with his vision, his hearing, his balance, and vehicle anxiety, he does not believe he could safely operate a vehicle at this time.

[709] Dr. Carlson and Dr. Quaid both agree with Mr. Gaul's decision to not drive.

[710] Ms. Graul typically drives Mr. Graul, and at other times Mr. Graul takes a taxi. With a transportation allowance, Mr. Graul could function more independently by hiring a taxi without imposing on his wife. Further, Mr. Graul requires transportation to attend treatment sessions and doctor appointments, and to get around town independently.

[711] Ms. Tennen costed this transportation allowance on two alternate bases. One option provides Mr. Graul with \$4,800 per year for life, in case he is not able to resume driving.

[712] Another option provides \$4,800 per year for two years of transportation. This option assumes that Mr. Graul will be able to resume driving in two years and would require him to participate successfully in a driving assessment and desensitization lessons. The one-time cost of the driving assessment is \$535. Twelve lessons of driver desensitization total \$1,080.

[713] It is acknowledged by the experts that the driver desensitization lessons would target the anxiety impairments which prevent Mr. Graul from driving. These lessons would not improve his visual, auditory, or vestibular issues which prevent him from driving.

[714] Mr. Wollach testified the lifetime cost of this expense, if Mr. Graul does not return to driving, is \$111,264.

[715] The defence acknowledges the cost of a driver desensitization course, but only acknowledges transportation expenses if Mr. Graul does not return to driving.

### ***Analysis***

[716] The medical evidence from Dr. Berge and Dr. Quaid indicates Mr. Graul's injuries are permanent. Dr. Quaid is hopeful that Mr. Graul will improve in the future but is not certain to the extent. From the evidence, I find that it is best for all if Mr. Graul does not drive. It seems likely that restriction will be for life. He still needs a desensitization course to assist him with being a passenger.

[717] Accordingly, I grant judgment for Mr. Graul in the amount of \$111,264 for a lifetime transportation allowance and \$1,080 for a desensitization course. Given the evidence to date, Mr. Graul does not need a driving assessment or driving lessons.

### ***Assistive Devices***

[718] Assistive devices have been recommended for Mr. Graul's use. In her report, Ms. Tennen detailed that Mr. Graul has been provided an Obus-form back support, knee pillow, long-handled toilet brush, and lightweight mop by his occupational therapist Megan McLean.

[719] Ms. Tennen opined that Mr. Graul would also benefit from a chronic pain management device, regular replacements of his present assistive devices, and

Bluetooth headphones to cancel out extra noise. Ms. Tennen also believed that Mr. Gaul could benefit from a home heating pad and Obus-form back and neck massager, supportive cognitive devices, and a mindfulness app. She costed those devices at \$1,000, plus a yearly allowance of \$400 per year for life to replace items as needed.

[720] Dr. Friedlander specifically stated the recommendation for these assistive devices is reasonable and necessary.

[721] Mr. Wollach provided a lifetime cost of \$9,872.

### ***Analysis***

[722] Based on Dr. Friedlander's evidence of need and Ms. Tennen's evidence of cost, I grant judgment in the amount of \$9,872.

### ***Hearing Aids***

[723] Dr. Berge gave evidence that Mr. Gaul could benefit from the use of noise-cancelling hearing aids to provide him with some relief from his constant tinnitus. Dr. Berge indicated that Mr. Gaul's experience of tinnitus, misophonia, noise-induced hearing loss, and dizziness could be improved with these hearing aids. Ms. Tennen priced these hearing aids at \$3,000, every five years. These hearing aids are recommended for Mr. Gaul for his life expectancy.



[724] The defence does not dispute this expense and agrees with the expense rounded to \$15,000.

[725] Accordingly, I grant judgment on this claim for \$15,000.

### ***Vision Therapy***

[726] Mr. Graul testified he has participated in vision therapy for several years and that this therapy assists with his blurred vision. Dr. Quaid's testimony confirmed this account. Dr. Quaid testified that, in his opinion, Mr. Graul should continue with this therapy. Dr. Quaid also believed that Mr. Graul would require new prism glasses as his prescription changes every few years.

[727] Ms. Tennen provided the cost for vision therapy. She indicated that therapy once a week for 24 weeks, for three years, would cost \$4,200 per year. She also priced glasses with prism and blue-tinted clip bonds at \$1,200 per pair to be replaced every two years for Mr. Graul's life expectancy.

[728] Mr. Wollach provided a lifetime value of \$26,883.

[729] The defence denies this claim.

### ***Analysis***

[730] I accept the evidence of Dr. Quaid; it is uncontradicted. I accept the calculations of Ms. Tennen and Mr. Wollach.

[731] I grant judgment for vision therapy and glasses with prisms in the amount of \$26,883.

***Attendant Care Assistance***

[732] Mr. Gaul testified that he has daily trouble with his memory, cognition, balance, and dizziness. Mr. Gaul testified that he frequently forgets to perform his usual and necessary activities and requires cueing and prompting.

[733] Mr. Gaul testified that he has on several occasions since the collision engaged in unsafe activities because of his poor memory and concentration.

[734] In Dr. Carlson's opinion, Mr. Gaul suffers executive function impairments, including difficulties with problem-solving, poor judgment, organization and planning, and fatigue, as a result of the brain injury he suffered in the 2017 collision.

[735] Dr. Valentin stated in her reports that Mr. Gaul experiences ongoing and significant cognitive impairments, including memory impairments affecting his functioning, as a result of the brain injury. Dr. Freedman concurred on many of these impairments.

[736] Dr. Basile noted in his reports that Mr. Gaul suffers cognitive impairments including memory dysfunction and difficulty with initiation. Dr. Basile agreed with Ms. Tennen's recommendation that Mr. Gaul be provided some attendant care assistance due to these impairments.

[737] Dr. Berge testified that Mr. Graul suffers significant vestibular dysfunction from his traumatic brain injury and associated impairments. As a result, he is often unsteady on his feet and at risk of falling.

[738] For all these reasons, it was submitted that Mr. Graul requires, and will continue to require for his lifetime, assistance to safely perform some of his activities of daily living. Though Ms. Graul currently assists him for free, it was submitted that Mr. Graul should be provided a fund for hiring third party care providers.

[739] Ms. Tennen costed the required attendant care at 99.24 hours per month, or \$2,580.24 per month. This totals \$30,962.58 per year.

[740] Mr. Wollach provided a lifetime value of \$811,023.

[741] The defence denies that attendant care is necessary.

### ***Analysis***

[742] While I agree that Mr. Graul has some times that require attendant care assistance, it is nowhere near the 99.24 hours a month that Ms. Tennen suggests. If Ms. Graul is prepared to leave Mr. Graul alone for a week at a time, so too am I.

[743] Although Ms. Graul should not have to provide this service for free, most times she is there in any event. She will certainly retire before the end of Mr. Graul's

lifespan. They will not need a third person at home for much of that time. Ms. Tennen provides no explanation of why almost 100 hours a month is required.

[744] I can, however, imagine acute times that might assist Mr. Gaul to have some supervision. In my view, 20 hours a month over his lifetime should be ample.

[745] Accordingly, I reduce this claim to \$160,000.

### ***Housekeeping Assistance***

[746] Mr. Gaul testified that since the collision, his pain, balance issues, fatigue, and cognitive impairments have prevented him from resuming his usual housekeeping tasks. He testified that he continues to try to assist Ms. Gaul, but that he is limited and must pace himself. As a result, these tasks take much longer to perform and can cause him pain. Ms. Gaul confirmed this evidence.

[747] Ms. Tennen provided the cost for housekeeping assistance for Mr. Gaul. She recommended four hours of assistance each week at \$22 per hour to age 75. She identified the cost of this assistance at \$4,576 per year.

[748] Mr. Wollach said that the lifetime cost for this assistance would be \$81,286.

[749] The defence denies that Mr. Gaul needs housekeeping services.

### ***Analysis***

[750] The evidence is clear that, before the accident, Mr. Gaul did most of the work around the home since Ms. Gaul has a bad back. Mr. Gaul continues to help out and to keep himself busy. Ms. Tennen recommended housekeeping assistance for four hours a week. I find that amount will fill the gap between what Mr. Gaul did in the past and what he can still do.

[751] I find for Mr. Gaul, \$81,286 for housekeeping assistance.

### ***Outdoor Maintenance Assistance***

[752] Mr. Gaul gave evidence that, prior to the collision, he was solely responsible for performing all gardening and snow shovelling at his home. Mr. Gaul's evidence was that he continues to try to take care of the garden and lawn and shovel light snow, but he is far less efficient, and these tasks take him much longer. There will be times where Mr. Gaul's pain and vestibular issues may prevent him from performing these tasks at all.

[753] Ms. Tennen provided the cost for Mr. Gaul to receive a seasonal contract for assistance with gardening services and snow shovelling. She opined that each service would cost \$600 per year and should be provided to age 75.

[754] Mr. Wollach valued these items at \$10,658 each to age 75.

[755] The defence denies that Mr. Gaul needs such assistance.

### ***Analysis***

[756] While Mr. Graul can do some work around the house and is well advised to keep active, this claim will again fill the gap between what he was able to do and what he can do now. His neighbours should not have to help with shovelling free of charge.

[757] I grant judgment on these claims for \$10,658 each.

### ***Handyman Assistance***

[758] Mr. and Ms. Graul testified that Mr. Graul was a skilled handyman who independently carried out significant home renovations, adding value to their home and saving them from the expense of hiring professional contractors. Mr. Graul also performed all routine maintenance and basic repairs on the family's vehicles. Mr. Graul testified that since the collision he has been essentially unable to engage in these activities.

[759] The couple also testified they had plans to do more renovations to their kitchen and even had some drawings done. The plan was that Mr. Graul would do the work, but he has been unable to since the collision.

[760] Ms. Tennen provided the cost for a handyman to complete the household repairs and maintenance which Mr. Graul previously performed. She

recommended five hours per month at \$65 per hour, to age 75, for a total of \$3,900 per year.

[761] Mr. Wollach provided a value of \$69,278 to age 75.

[762] The defence denies that Mr. Graul requires this assistance.

### ***Analysis***

[763] The evidence is clear that Mr. Graul carried out this work to his former benefit and can no longer do so.

[764] Ms. Tennen recommends five hours a month. That seems reasonable to bridge the gap as described above.

[765] I therefore grant judgment for Mr. Graul in the amount of \$69,278.

### ***Summary of Future Care Costs:***

[766] Using Mr. Graul's written submission list, I find that the defendants shall pay as follows:

Psychological and Social Work Therapy \$27,052

Occupational Therapy \$54,240

Rehabilitation Support Worker \$0

Physiotherapy \$76,525

Massage Therapy \$44,053

Chronic Pain Management Clinic \$11,375  
Speech Language Therapy \$7,440  
Case Management \$0  
Gym Membership \$15,987  
Personal Trainer \$2,441  
Driving Assessment \$0  
Driving Lessons \$0  
Assistive Devices \$9,872  
Hearing Aids \$15,000  
Vision Therapy \$12,684  
Glasses with Prisms \$14,199  
Transportation Allowance (Lifetime) \$112,344  
Transportation Allowance \$0  
Attendant Care Assistance \$160,000  
Housekeeping Assistance \$81,286  
Gardening Contract \$10,658  
Snow Clearing Contract \$10,658  
Handyman Assistance \$69,278  
**Total: \$735,092**



[767] There is a disconnect between the evidence given by Mr. Wollach with respect to the capitalized value he calculated, and the figures used by Mr. Graul in his written submissions. I may have made an arithmetical error or missed a point of evidence or argument that clarifies that difference. I do not wish the parties to need to appeal to correct that discrepancy. I do not suggest that I can change any findings of fact. However, if I have missed something in my calculations, counsel may make brief written submissions with respect to arithmetic with their costs submissions.

### **Result**

[768] Accordingly, I find the defendants liable to Mr. Graul. They shall pay to Mr. Graul:

1. General damages in the amount of \$225,000;
2. Special damages in the amount of \$38,177.40;
3. Past lost wages in the amount of \$75,308.00;
4. Future income losses fixed in the amount of \$1,282,074;
5. Future care costs fixed in the amount of \$735,092.

[769] I understand that, on consent, the defendants shall be entitled to their legislated subrogated interests pursuant to s. 267 of the *Insurance Act*, R.S.O. 1990, c. I.8.

### **Costs**

[770] If costs cannot be agreed upon, Mr. Graul shall provide his costs submissions within the next 20 days. The defence shall provide their response within 20 days thereafter.

[771] Each submission shall be no more than five pages, not including any Bills of Costs, Offers to Settle, or submissions relating to any arithmetical errors. No reply submission will be accepted unless I request it. If I have not received any submissions within the timeframes set out above, I will assume that the parties have resolved the issue and I will make no order as to costs.

[772] Neither party need include the authorities upon which they rely so long as they are found in CanLII and the relevant paragraph references are included.

[773] Any costs submissions shall be forwarded to my office in Guelph by electronic transfer to Teresa.pearson@ontario.ca or by mail to Guelph Superior Courthouse, 74 Woolwich St., Guelph, N1H 3T9.

*“Justice Lemon”*

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Justice G. D. Lemon

Released: April 08, 2022

CITATION: Graul v. Kansal, 2022 ONSC 1958  
COURT FILE NO.: CV-18-201  
DATE: 2022 04 08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Jonathan A. Graul

Plaintiff

– and –

Dev Raj Kansal

- and –

Rakesh Kansal

Defendants

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REASONS FOR JUDGMENT

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Justice G.D. Lemon

Released: April 08, 2022