

CANADA / JUDGMENT

Dostal v. McLeod

2020 BCSC 1145

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1145 Dostal v. McLeod

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dostal v. McLeod,

2020 BCSC 1145

Date: 20200805

Docket: M81324

Registry: Nanaimo

Between:

Joseph Harold Dostal

Plaintiff

And

William Justin McLeod, WJM Oilfield Painting Ltd.,

Steven Wayne Janecke, Baker Hughes Canada Company,

Rolla Pub Ltd., Patricia Ann Martin, John Doe Ltd. and John Doe

Defendants

And

Insurance Corporation of British Columbia, William Justin McLeod,

WJM Oilfield Painting Ltd., Steven Wayne Janecke,

Baker Hughes Canada Company, Rolla Pub Ltd.,

Patricia Ann Martin, John Doe Ltd. and John Doe

Third Parties

Before: The Honourable Mr. Justice Thompson

Reasons for Judgment

Counsel for the Plaintiff:

M. Bishop

S. Cappus

Counsel for the Third Party,

Insurance Corporation of British Columbia:

R. Hornquist

B. Durvin

No other appearances

Place and Dates of Trial:

Nanaimo, B.C.

June 8-12, 15-19 & 22-25, 2020

Place and Date of Judgment:

Nanaimo, B.C.

August 5, 2020

- [1] Joseph Dostal, now 33 years old, claims damages arising from injuries he sustained in a motor vehicle collision on 17 September 2015. This MVA occurred in Dawson Creek at the intersection of Rolla Road and Highway 2. Mr. Dostal was the passenger in a pickup truck driven by his friend, William McLeod.
- [2] Mr. McLeod did not obey the stop sign on Rolla Road and the pickup T-boned a fracking truck owned by Baker Hughes Canada Company and operated by Steven Wayne Janecke. This very heavy collision was entirely the fault of Mr. McLeod. Neither Mr. McLeod nor the owner of the pickup, WJM Oilfield Painting Ltd., have taken steps to defend Mr. Dostal's claims.
- [3] Claims against all defendants except Mr. McLeod and WJM Oilfield Painting Ltd. have been dismissed by consent. Third party claims filed by defendants have also been dismissed by consent. The Insurance Corporation of British Columbia ("ICBC") is the remaining third party, and it has party status on the basis of its allegation that Mr. McLeod breached his contract of insurance by consuming alcohol in sufficient quantity to render him incapable

of proper control of his vehicle. Mr. McLeod has in fact been convicted of impaired driving offences arising out of the events of 17 September 2015.

- [4] There is little controversy in the medical evidence. Mr. Dostal suffered multiple injuries including a concussion and some depression, but he has been most affected by the pain from his low back and left hip injuries. His case is that this pain will continue to interfere with his work as a truck driver and roofer. He claims compensation for non-pecuniary loss, damages for loss of capacity to earn income (past and future), cost of future care, and special damages.
- [5] There is a prominent issue apart from the assessment of Mr. Dostal's damages: ICBC seeks a 40 percent reduction from the amount of damages otherwise payable. ICBC alleges that Mr. Dostal knew or ought to have known that Mr. McLeod's ability to drive was impaired by alcohol, and by riding with Mr. McLeod was contributorily negligent by failing to take reasonable care for his own safety.

The Plaintiff's Life Before the MVA

- [6] Mr. Dostal was born and raised in the Dawson Creek area. His father is a retired roofer, and his mother retired in 2018 from her work as a care aide in a seniors' home. Mr. Dostal graduated from South Peace Secondary School in 2005. He testified that he did "alright" in school -- he recalls his grades as C's with a few higher grades in classes he liked such as woodwork, electronics, and gym. He participated in various sports in his youth, and into adulthood he carried on with outdoor pursuits such as hunting, quadding, camping, and fishing.
- [7] Soon after high school, he obtained his Class 1 driver's license with an airbrake endorsement. In the years leading up to the MVA, his principal occupation was truck driving for various companies in the oil and gas industry. Mr. Dostal preferred to be home each night rather than commute or work in camps, and this resulted in him working less than he otherwise could have. In 2014, he completed an online Gas Plant Operator course but that has not led to any work in that field.
- [8] Mr. Dostal's relationship with his high school girlfriend lasted for several years, off and on. They moved in together in 2009, and their daughter A.D. was born in 2011. Mr. Dostal testified that the relationship with A.D.'s mother ended in 2012, and since this time a flexible parenting time arrangement has been in place, currently week-on, week-off.
- [9] At the time of the September 2015 MVA, Mr. Dostal was 28 years old and in good health. He was living in the basement of his parents' home in Dawson Creek, and in the months leading up to the MVA he had been doing some roofing work in partnership with his father and a close family friend. He testified that his plan was to return to trucking for the winter months and to try to make a success of the new roofing venture when the weather allowed -- essentially, from May through September each year.

The Plaintiff's Credibility

- [10] Mr. Dostal has in some circumstances been dishonest in order to advance his financial interests. For this reason, I accept ICBC's submission that Mr. Dostal's evidence must be approached with caution on contested matters where it is not supported by reliable evidence.
- [11] The first example of deception for financial gain is Mr. Dostal not declaring his roofing income. It is clear that he received cash for all or almost all of the roofing work he did, both before and after the MVA. It is equally clear that he did not declare this income when he filed his annual income tax returns. He was asked about this during his examination in chief. He testified that when he received this cash, he did not plan to declare the income. When asked why, he said that it "kind of got away from us; it turned out to be more money than any of us [i.e., he and his partners] expected."
- [12] Mr. Dostal kept some records of his roofing jobs done in 2015, 2016, 2018, and 2019. He produced the 2015 records on the day before he was examined for discovery in December 2019. He did not explain why he failed to produce these documents until that late date; and, he was unable to explain why it took him even longer to produce his other roofing income documents. Soon after the examination for discovery, Mr. Dostal made contact with an accountant who organized a voluntary disclosure of roofing income to CRA for 2015, 2016, and 2018. Mr. Dostal testified that he retained this accountant to make the disclosure, and paid \$6100 for estimated taxes owed, because he wanted to "clean up the mess" he had created.
- [13] During the trial, it became apparent that Mr. Dostal did not keep a complete set of records, and did not disclose all of his roofing income to the accountant who prepared his amended returns. He was confronted during cross-examination with a \$4500 receipt for a roofing job done in Dawson Creek. The plaintiff's handwriting was on the part of the receipt that described the details of the job.
- [14] The second example of financial deceit occurred in mid-2019. In June 2019, Mr. Dostal was diagnosed with perimyocarditis and admitted to hospital in Vancouver for approximately a week, including a few days in the intensive care unit. He was discharged on 14 June 2019, and advised to do no commercial driving for three months. Mr. Dostal testified that on the advice of the hospital social worker, he applied for Employment Insurance medical benefits. Mr. Dostal made the EI claim online on 21 June 2019, and his claim was accepted. He testified that "somehow the back injury got jumbled in there" and his claim was backdated to 6 April 2019, his last day of work as a trucker. The trucking work had come to an end for reasons that had nothing to do with Mr. Dostal's health, after he returned from a holiday in Thailand. In cross-examination, Mr. Dostal admitted that when he received a relatively large cheque for EI medical benefits he must have been aware that his claim had been backdated thus resulting in an overpayment. He also admitted that he has not advised Service Canada, the agency that administers the EI program, of the overpayment and has made no

repayment. Further, he admitted that notice to Service Canada and repayment would have been the honest and proper steps to take.

- [15] Relatedly, Mr. Dostal's records show that he worked roofing jobs on June 28, July 4, and July 10, 2019. The first of these jobs was only one week after he applied online for EI medical benefits. He confirmed that he did not disclose this roofing income to the EI authorities. When asked why he had not, he testified, "I really don't know; it wasn't the right decision."
- [16] The plaintiff cites *Wong v. Hemmings*, 2012 BCSC 907 at para. 104. Justice Fitch, then of this Court, said: "A witness who has acted dishonestly in the past is not necessarily a dishonest witness." I accept that Mr. Dostal's EI fiddles and his failure to declare income to CRA must be considered in the context of the whole of the evidence. There are some objective signs of injury. And, Mr. Dostal's return to work relatively soon after the MVA and his persistent efforts to stay in the labour force, as well as his acceptance of a series of injections into his L5/S1 disc space despite his strong dislike of needles, are facts that assist his credibility.
- [17] I reject no part of Mr. Dostal's evidence "out of hand" as a result of his demonstrated capacity to behave dishonestly for financial advantage. On the other hand, these episodes persuade me to examine his evidence with a critical eye considering that the stakes are much higher in the present context than they were when he dealt with CRA and Service Canada. Counsel for Mr. Dostal submits that his less-than-honest actions might be attributable to his lack of extensive education and shortage of business sophistication, but I think his dealings with CRA and Service Canada are better explained by Mr. Dostal being tempted by financial gain on those occasions. That said, deciding the issues in this case requires consideration of all the evidence; significant parts of the evidence are not derivative of Mr. Dostal's subjective reporting and are capable of corroborating important parts of his account. See *Andraws v. Anslow*, 2016 BCCA 51 at paras. 12-16.
- [18] ICBC questions the veracity of Mr. Dostal's evidence. Its further submission is that Mr. Dostal's evidence ought not to be accorded weight because he is not a reliable historian. In support of this submission, ICBC points to Mr. Dostal's inability to recall speaking to Cst. Guest at the scene of the accident about alcohol consumption; the differences between what he said to Cst. Guest on that subject and his trial evidence; and various inaccuracies in the information he provided to the experts retained by his counsel.
- [19] I conclude, however, that Mr. Dostal has an adequate capacity for recalling and transmitting his relevant history. I am not persuaded to discount the reliability of Mr. Dostal's evidence because he cannot remember speaking to Cst. Guest at the scene of the MVA or on the basis that what Mr. Dostal said at that time is at odds with his trial evidence. Mr. Dostal's mother and Dr. Daniel Botha, Mr. Dostal's long-time family doctor, each saw him in the hospital emergency ward. This was not long after Mr. Dostal spoke to Cst. Guest. I accept their evidence that Mr. Dostal seemed confused. He was diagnosed as concussed, and, for reasons that I will explain, I find that he was concussed. I think it would be unsafe to draw conclusions from what Mr. Dostal said while lying on the ground in a concussed state at the

scene of the MVA. (I will return to the details of Mr. Dostal's statement to Cst. Guest when discussing the contributory negligence issue.)

- [20] I acknowledge that there are several material inaccuracies in what Mr. Dostal reported to various experts. Most of these discrepancies are within the bounds of what is expected when a person is called upon to recall events to different persons at different times over the course of nearly five years. Of course, it is important to carefully consider the weight to be accorded expert opinion evidence where it depends on a history that contains material inaccuracies and I have done so in this case.

Contributory Negligence

- [21] The parties agree on the legal principles applicable to ICBC's contributory negligence plea. ICBC bears the onus of establishing Mr. Dostal's contributory negligence on a balance of probabilities. It must establish that the plaintiff failed to take reasonable care for his own safety. A passenger is liable to be found to have breached this standard if they knew or should have known that the driver is intoxicated, and an objective assessment of all the circumstances is required to determine this issue. See *Shaw v. Storey* (1991), 53 B.C.L.R. (2d) 257 at 265 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 26.
- [22] ICBC urges a finding that Mr. McLeod and Mr. Dostal were drinking together in the hours leading up to the MVA, and submits that in such circumstances it need not prove that Mr. McLeod was exhibiting overt signs of intoxication. This is so because a passenger in such a case is fixed with knowledge of the driver's overconsumption: *Telford v. Hogan*, 2014 BCSC 1925 at para. 104.
- [23] Mr. Dostal concedes that Mr. McLeod's ability to operate his truck was impaired by alcohol at the material time in sufficient measure to support Mr. McLeod's guilty pleas to the charges of impaired driving and driving with a blood alcohol concentration ("BAC") over 80 mg%. And, there is no doubt on the facts of this case that Mr. McLeod's impairment played a causative role in the collision: Mr. McLeod was thoroughly familiar with the intersection and well knew there was a stop sign facing his direction. His impairment is the best explanation for why he failed to stop before entering the intersection.
- [24] However, I conclude that ICBC has not proved that Mr. Dostal knew or ought to have known about Mr. McLeod's state of impairment. Much depends, of course, on proof of Mr. Dostal's awareness of Mr. McLeod having too much to drink to safely drive or on proof of overt signs of Mr. McLeod's impairment. ICBC must establish that a reasonable person in Mr. Dostal's shoes would have appreciated that Mr. McLeod's ability to drive was impaired, and it has not done so on a balance of probabilities. As will be seen, the evidence from witnesses about what occurred in the hours leading up to the MVA lacks cogency. As a body of evidence, it is unclear and not a convincing fit with ICBC's position that the two men spent many hours together getting drunk.

- [25] In the absence of a clear evidentiary picture of what occurred in the time leading up to the MVA, the linchpin of ICBC's case on contributory negligence is the opinion evidence of Brian Image, a well-qualified blood alcohol expert. Before getting to that important evidence, I will review the evidence bearing on what happened in the hours before the MVA -- the parties agree that the MVA happened at 10:56 p.m.
- [26] Mr. McLeod was called by ICBC and made a remarkably brief appearance as a witness. When asked by leading question to confirm that he did not recall the collision, he responded, "I have no memory of anything." When asked in cross-examination about a detail in his driving record dating to 1995, he said, "I have a hard time remembering yesterday." I heard evidence from other witnesses that Mr. McLeod was rendered comatose by the collision and that he did not recover consciousness until days later. It could be that Mr. McLeod's memory is compromised by his closed head injury, although he was not asked about this and did not say so.
- [27] However, in response to questions from counsel for ICBC, Mr. McLeod testified about his usual weight during his adult life being in the range of 185 to 195 pounds (in order to prove an elimination-rate assumption underlying Mr. Image's opinion to the effect that a male of Mr. McLeod's weight with a BAC of 260 to 270 mg% would, if drinking beer, have had to consume more than ten bottles/cans plus one-half bottle/can per hour from the time drinking commenced). And, Mr. McLeod testified to having pleaded guilty to impaired driving. I was left to wonder about whether his memory might extend to other relevant facts. But he was not asked any questions by either party about material events prior to the MVA -- perhaps for tactical reasons -- and so I am unable to appreciate whether Mr. McLeod has any recollection of what he was doing, who he was with, and what he had to drink in the hours leading up to the MVA.
- [28] Mr. Dostal testified that he and Mr. McLeod had known one another for at least 20 years. They were close friends at the time of the MVA, seeing one another at least once a week. They hunted, quadded, and fished together. They would frequently drink beer together. Mr. Dostal described Mr. McLeod as a relatively heavy drinker who could hold his liquor well. Mr. Dostal had seen Mr. McLeod drink to excess plenty of times before the MVA; when Mr. McLeod was intoxicated, he slurred his words and mumbled.
- [29] On the day of the MVA, Mr. Dostal testified that he and Mr. McLeod planned to go moose hunting after work. Mr. Dostal arrived home from a roofing job at around 5:10 p.m. and began to put his hunting gear together. Mr. McLeod arrived in his pickup truck not long after. Mr. Dostal put his side-by-side ATV in a trailer and they hooked the trailer up to Mr. McLeod's pickup. They put the hunting gear in the truck and left. Mr. Dostal said that he thinks it was less than ten minutes from the time of Mr. McLeod's arrival at the Dostal home until they departed with Mr. McLeod at the wheel. Mr. Dostal thinks they left between 5:30 and 5:45 p.m.

- [30] Mr. Dostal understood that Mr. McLeod had also been working that day, and does not remember if Mr. McLeod said that he had consumed any alcohol up to that point in the day -- he detected no signs that he had, and had no concerns about Mr. McLeod's ability to drive. Mr. Dostal said that they headed toward their planned hunting ground, a logging block near Tomslake, just over 30 minutes south of Dawson Creek.
- [31] On the way, they made a brief stop at a liquor store in Pouce Coupe. Mr. Dostal went into the store, and bought a pack of six or eight cans of beer. Mr. Dostal put their time of arrival at the logging block at about 6:30 p.m., the hunt having been planned for the period before sunset. Once they arrived, they unloaded the side-by-side and loaded the hunting equipment and beer onto this vehicle which Mr. Dostal drove. While hunting, the two men drank all of the beer they bought in Pouce Coupe -- Mr. Dostal said that he had more of it than Mr. McLeod, four or five cans to Mr. McLeod's two or three. Mr. Dostal testified that this was the first drinking he had done that day.
- [32] The hunt was unsuccessful and the sky was dark when it finished. The side-by-side was equipped with lights and Mr. Dostal turned them on. After the men returned to the truck, they left with Mr. McLeod driving. They planned to go to the Rolla Pub, with a stop at Mr. McLeod's home so he could check on a pot of chili that had been left to simmer. When they arrived at Mr. McLeod's place, a drive of about 25 minutes, Mr. Dostal stayed in the truck. Mr. McLeod returned to the truck after about 10 or 15 minutes. Mr. McLeod then drove to Rolla, a small farming community northeast of Dawson Creek. This took 15 or 20 minutes. Mr. Dostal testified that Mr. McLeod's driving was fine, giving rise to no concerns. Mr. Dostal reconstructed their time of arrival at the Rolla Pub to be at about 9:30 p.m., although I conclude from his answers in cross-examination that Mr. Dostal's timeline reconstruction was based on his belief that the MVA happened just before 10:30 p.m. when it in fact happened about one-half hour later.
- [33] The only other people in the Rolla Pub when Mr. Dostal and Mr. McLeod arrived were its owner, Patricia Martin, and two customers, Denna Miliken and Morgan Ireland. Mr. Dostal said that he and Mr. McLeod each ordered one beer, and that the other two customers joined them at their table. In the course of the conversation, Ms. Ireland called Mr. McLeod "old" and he took offence. He stormed out the door to his truck, and began honking his horn to summon Mr. Dostal. Mr. Dostal says that he finished his beer and jumped in the truck. Mr. Dostal estimated that they were at the pub for only 20 or 30 minutes. Mr. Dostal testified that Mr. McLeod showed no signs of intoxication. He did not stumble or stagger when he left the pub and was not slurring his words.
- [34] Mr. Dostal testified that their intended destination when they left the pub was Mr. McLeod's house. They were going to eat some chili there, then spend the night in a tent at the Tomslake logging block and hope to get a moose at first light. The MVA happened on the way to Mr. McLeod's place.

- [35] In the course of the 18 km drive from the Rolla Pub to the MVA intersection, Mr. Dostal says they had nothing to drink. (An open beer bottle was found in the centre console area of the pickup truck after the MVA, but the parties agree that this fact has no evidential value.) Mr. Dostal testified that when they were fairly close to the intersection, Mr. McLeod pulled off to the side of the road for a few minutes so they could pair one of their phones to the truck stereo. Soon after they got back on the road, the pickup truck approached the MVA intersection. Mr. Dostal remembers seeing the lights on a tractor-trailer unit, and he had just enough time before the collision to yell, "Stop, slow down!"
- [36] Mr. Dostal's evidence can be summarized thus: when he and Mr. McLeod met up shortly after 5:00 p.m., there was no sign that Mr. McLeod had been drinking; he and Mr. McLeod went out hunting and went to a pub; he was with Mr. McLeod for nearly every minute of the six hours before the MVA, and he saw Mr. McLeod drink no more than four beer; at no time did Mr. Dostal notice any sign of Mr. McLeod being intoxicated or have any concern about his ability to drive until the very last seconds before the MVA. Mr. Dostal's account may be true, but the concerns I have with Mr. Dostal's credibility shake my confidence in his evidence on three live issues: the amount of time he spent with Mr. McLeod through the evening; how much Mr. McLeod had to drink; and whether or not Mr. McLeod exhibited signs of impairment.
- [37] Cst. Guest spoke to Mr. Dostal at the MVA scene. Mr. Dostal was complaining of neck and chest pain, and at the time of their brief conversation was lying on the ground with a couple of civilians at his side. Cst. Guest asked him if they had been drinking. Cst. Guest's evidence is that Mr. Dostal told him "they had had some drinks, him and the driver at the Rolla Pub; while they were there, they had approximately 12 drinks each, breaking it down so much as about three or four tequilas, three or four whiskeys, and three or four beers apiece, at the pub." Cst. Guest testified that he was within three or four feet of Mr. Dostal, and his answers seemed quite clear and concise: "He didn't seem to be rambling." (I pause to say that this statement about alcohol consumption at the Rolla Pub is completely at odds with the evidence of the pub owner, and ICBC does not seek to use the statement to Cst. Guest -- as an admission or otherwise -- as evidence of the amount or type of alcohol consumption. As noted earlier, ICBC points to the statement as inconsistent with the pub owner's evidence and Mr. Dostal's own trial evidence in aid of its argument that Mr. Dostal is an unreliable witness.)
- [38] Laurissa Haagsma was one of the paramedics who attended to and assessed Mr. Dostal. Relying on the times recorded on the patient care report, she testified that she recorded Glasgow Coma Scale results at 11:45 p.m. and 11:58 p.m. (i.e., approximately 50 minutes and then just over one hour after the collision). On each occasion, Mr. Dostal achieved a full-measure score. Ms. Haagsma testified that Mr. Dostal was making sense when he spoke. She testified: "From what I recall, they said that they had been hunting all day." She referred to "they" again later in her evidence in a similar context. I do not know what to make of this evidence: Mr. McLeod was unconscious and could not speak to Ms. Haagsma. I do not know

who Ms. Haagsma was referring to as "they."

- [39] In cross-examination, Ms. Haagsma was asked about the indication that the men had been hunting "all day." She responded by saying that she had noticed the trailer and hunting gear at the scene. When pressed, she admitted that she could be mistaken on the discrete point that they had been hunting "all day" given that the first time she was called upon to recall what Mr. Dostal had said was seven months after the collision when she gave a statement to the RCMP. I accord no weight to Ms. Haagsma's evidence about what the men had been doing that day or the length of time they had been doing it.
- [40] Ms. Haagsma testified that the ambulance was in a clean condition when she drove it to the scene, but the "smell definitely changed" when Mr. Dostal was loaded into the ambulance. She said it then smelled as if one was around a person who had been drinking, the smell of alcohol, of being in a bar. It is common ground that Mr. Dostal was in the Rolla Pub for part of that evening and consumed some alcohol while there. This evidence from Ms. Haagsma only serves to corroborate that fact.
- [41] The Rolla Pub is owned by Ms. Martin who has worked in the pub for over 30 years. Ms. Martin has taken the Serving It Right course, and this training along with her long experience provides ample reason for her confidence in her ability to detect alcohol intoxication. She testified that she is cautious and vigilant because she runs the pub by herself.
- [42] She testified that she had known Mr. McLeod as a customer for about three years before the MVA. He was good at holding his liquor. When Mr. Dostal and Mr. McLeod arrived on the evening of 17 September 2015, the only other people in the pub were Ms. Ireland and Ms. Miliken. The men each ordered a beer and finished it. They ordered another, but Ms. Martin does not think they finished that round because Mr. McLeod left the pub in anger after Ms. Ireland called him old.
- [43] Ms. Martin testified that she had the opportunity to assess whether Mr. McLeod was impaired by alcohol. She said that he was not. She testified that there was no slurring of speech, no stumbling or staggering, and no glazing over of his eyes. There was no raucous or disruptive behaviour, although he seemed fatigued and his angry exit was at odds with his usual demeanour.
- [44] Ms. Martin put the men's time of arrival at her pub at about 5:45 or 6:00 p.m., and their departure at approximately 8:00 p.m. However, this evidence is inconsistent with the information she gave to an investigator on 2 February 2016. The investigator sent Ms. Martin an email that said, in material part: "Please find the attached photos of the two men who were at your pub from approximately 10:00 p.m. (to 10:20 pm?) on Thursday, September 17, 2015." Ms. Martin's reply began as follows: "I do recognize the two men. I believe that the time frames are accurate." In cross-examination, Ms. Martin was shown her statement to the RCMP given on 10 October 2015 -- a statement that roughly accords with her trial evidence that their arrival and departure times were significantly earlier in the evening.

- [45] In cross-examination, Ms. Martin explained why she thinks the men were at her pub early in the evening. She said that it was light outside when the men arrived. And she said that Ms. Ireland and Ms. Miliken were at the pub to talk because Ms. Miliken was upset about giving evidence in court on a matter earlier that day and Ms. Martin thinks they came to the pub shortly after court ended that day. Her recollection is that she spoke with the women for about an hour before the men arrived. Neither party called Ms. Miliken or Ms. Ireland to give evidence. Counsel for both parties were -- as these lawyers invariably are -- well-prepared for this trial, and I have no doubt that these potential witnesses were not called because counsel for each party decided that this approach best suited their clients' cases.
- [46] I accept Ms. Martin's evidence about the amount of alcohol served to Mr. McLeod and Mr. Dostal, and about Mr. McLeod's demeanour when she dealt with him and her impression that he was not intoxicated. And I note that her evidence fits fairly well with Mr. Dostal's evidence about the small amount of alcohol consumed at the pub and Mr. McLeod's apparent sobriety. As for the time of the men's arrival at and departure from the Rolla Pub, the quality of the evidence does not permit a finding. Ms. Martin was trying to be helpful and reconstruct a timeline, but given her clearly inconsistent statement I will not attach weight to her evidence on this subject.
- [47] Dr. Daniel Botha had been Mr. Dostal's family doctor for ten years by the time of the MVA. He saw Mr. Dostal in the emergency room at the hospital after the collision and described him as quite confused, but "not like he was under the influence [of alcohol]." It is the degree of impairment of Mr. McLeod -- not Mr. Dostal -- and Mr. Dostal's opportunity to appreciate the degree of impairment that are the central issues, but Dr. Botha's evidence is a poor fit with ICBC's hypothesis that Mr. Dostal and Mr. McLeod had been drinking together for many hours before the MVA and each consumed large quantities.
- [48] Mr. Dostal's mother is a down-to-earth woman and a credible witness. She testified that her son and her husband arrived home around 5:00 p.m. on the day of the MVA. She saw Mr. McLeod's truck backed up to their trailer in the carport area shortly after her son and her husband arrived home. Her son was home for approximately 20 minutes before he left. Later that evening, the Dostals received the call that their son had been in an MVA and was at the hospital. They left immediately, and in fact beat the ambulance carrying their son to the hospital. He was confused and muttering when she saw him; he could not put his words in sentences and was not making sense. She testified that she spent a couple hours with him that night, and he did not seem drunk -- she said that she is "pretty good at telling when he has been drinking." I accept Ms. Dostal's evidence about these events.
- [49] Putting together the solidly reliable evidence from the witnesses about the evening leading up to the MVA leaves almost nothing of assistance to ICBC. The evidence from Ms. Martin about the small amount Mr. McLeod had to drink at the Rolla Pub and her impression that he was not intoxicated, the absence of evidence from Ms. Miliken and Ms. Ireland, the lack of any useful evidence from Mr. McLeod, and the caution with which I must approach Mr. Dostal's uncorroborated evidence on contested issues, leaves me able to confidently find

only a few facts: that Mr. Dostal was with Mr. McLeod for at least some parts of that evening -- when they met at Mr. Dostal's home to hitch up the Dostal trailer, and when they were at the Rolla Pub and had one or two beer; and that whenever it was that they left the pub, Mr. McLeod was not showing any marked signs of impairment.

- [50] ICBC's case on contributory negligence therefore depends on Mr. Dostal's admissions that at the time of the MVA Mr. McLeod's ability to drive was sufficiently impaired to support the guilty pleas to the charges of impaired driving and driving with a BAC over 80 mg%, and Mr. Image's expert opinion evidence. The impairment admissions carry ICBC's case some distance but not nearly far enough -- the degree of impairment is important in the analysis. If, for instance, a person's BAC barely exceeds 80 mg% then, as Mr. Image opined, a person will typically exhibit few of the outwardly observable effects of alcohol consumption. ICBC's contributory negligence position is tenable only if significant weight can be attached to Mr. Image's conclusion that Mr. McLeod's BAC at the time of the MVA was very high (he put it in the range of 260 to 270 mg%), and if Mr. McLeod would likely have been exhibiting observable signs of impairment if he had a BAC in this range. Mr. Image's opinion is that an average social drinker would exhibit such signs with this very high BAC. I accept this opinion, but has the premise that Mr. McLeod was an "average social drinker" been established? For reasons that I will explain I conclude that I cannot attach significant weight to the conclusion that Mr. McLeod's BAC was at or approaching the very high level indicated, and in any event I cannot find that Mr. McLeod would likely have been displaying overt signs of impairment.
- [51] The weight to be attached to expert opinion often depends on proof of the underlying assumptions. If there is a failure to prove an assumption that does not go to the root of the opinion, the opinion may still carry significant weight. If the assumption is essential to the opinion, then a failure of proof is a different kettle of fish. In the absence of proof of essential underlying facts, an opinion can be given no weight: *R. v. J.-L.J.*, 2000 SCC 51 at para. 59.

Mr. McLeod's Blood Alcohol Content

- [52] Mr. Image's opinion on Mr. McLeod's BAC at the time of the MVA is founded on various assumptions. Mr. Image assumed that the blood analyzed by the RCMP forensic analyst was a sample from the blood drawn from Mr. McLeod at the hospital in the aftermath of the MVA. He assumed the accuracy of the blood analysis conducted by the RCMP forensic analyst. And, he assumed that Mr. McLeod's blood was unadulterated by alcohol from the time of the MVA to the time of the RCMP analysis. In varying degrees, there are problems of proof with each of these assumptions.

- [53] ICBC set out to establish the foundation for Mr. Image's BAC opinion. A notice to admit was drawn requesting the admission of facts that, taken together, would have proved that the blood in the vial received and analyzed by the RCMP forensic analyst, Sarena McHugh, was blood drawn from Mr. McLeod at 11:57 p.m. on 17 September 2015. The reply to notice to admit indicated that the requisite facts were not admitted.
- [54] In the midst of the trial, after the Dawson Creek and District Hospital had responded to an order that I made at trial on application of ICBC for production of its records, the parties agreed that "[t]he blood samples in question in this matter were drawn from the Defendant William McLeod at 23:57 on September 17, 2015 at the Dawson Creek Hospital." To be clear, the "blood samples in question" refer to the samples drawn at hospital -- this is not an admission that the sample analyzed by Ms. McHugh at the RCMP lab was a sample from the blood drawn from Mr. McLeod. The mid-trial agreement accomplished ICBC proving the time the blood was drawn from Mr. McLeod without having to call the technician who drew the blood.
- [55] ICBC called evidence endeavouring to prove that the blood analyzed by Ms. McHugh was a sample from the blood drawn from Mr. McLeod that evening. When RCMP officers arrived at the collision scene, Mr. McLeod was still in the driver's seat of his vehicle, unconscious and slumped over toward the passenger side. He was transported to hospital by ambulance and arrived at 11:37 p.m. In the course of Mr. McLeod's treatment at the hospital in Dawson Creek, he was kept under police observation from a distance of 10 to 15 feet. Before blood was drawn, Cst. Guest observed that Mr. McLeod was apparently receiving fluid intravenously. This fluid was not identified by any witness.
- [56] Cst. Guest testified that it was necessary to rely on his notes and material in the Information to Obtain (the "ITO") in order to give his evidence about the drawing of blood samples. Cst. Guest made no notes on the subject, but within 24 hours of the collision he helped prepare the ITO, which was sworn by another RCMP member. Cst. Guest testified that he provided the information in paragraph 18 of the ITO:

At 2357 hours a Lab Technician Jodi SIMMONS was observed by Cst. GUEST to take eight vials of blood from MCLEOD's arm directly into sealed containers to be used for hospital testing. The containers were labeled "William MCLEOD".

- [57] I think it likely that this ITO paragraph uses the words "vials" and "containers" interchangeably. Cst. Guest testified that this paragraph is true and I accept that he personally observed the drawing of the blood. However, it is difficult to appreciate how he would have been able to see the labels on blood vials when he was standing away from Mr. McLeod. Cst. Guest testified that the lab technician left with the samples in her possession, and headed toward the hospital lab. Cst. Guest testified that he did not follow her, but I suppose he may have had an opportunity to see the labels if the lab technician happened to be close to him when she attached the labels or passed close by him on her way to the lab.

- [58] Cst. Semeniuk testified that at 1:49 a.m., he conducted an inquiry of the lab technician who drew the blood from Mr. McLeod to address continuity of the blood samples for the impaired driving investigation. Cst. Semeniuk testified that he relied on his notes because he had no independent recollection of this brief interview conducted five years ago. In fact, his notes clearly indicate that he spoke with a nurse who told him the name of the lab technician who drew the blood. In any event, his notes indicate that the person he spoke to told him that eight vials were drawn from Mr. McLeod but there would end up being more than eight vials because they were "being broken down to do tests." Cst. Semeniuk was also told where the blood was located, and who would have access to it. No one from the hospital was called to give evidence about the content of the intravenous liquid administered to Mr. McLeod in the period before the blood samples were taken, the process of blood extraction and vial labeling, or the manner of vial storage. Cst. Semeniuk's second-hand account covers little of this ground, and in any event is not admissible for the truth of what he was told.
- [59] The police subsequently obtained a warrant in connection with their impaired driving investigation of Mr. McLeod. There was no evidence led about execution of the warrant, but a blood sample came into the possession of Cst. Semeniuk who shipped the sample to the RCMP forensic assessment centre. Cst. Semeniuk replied in the affirmative when he was asked, "Did you check to make sure that it had the right name on it when you shipped it?" I am satisfied that Cst. Semeniuk shipped, and the RCMP lab received, "one green closed vial of blood" with Mr. McLeod's name on it. It might have been one of the eight vials drawn by the lab technician, and it might be that the blood was in the same condition it was in when it was drawn from Mr. McLeod. I was left to wonder about whether the labelling on the shipped sample was applied by the hospital lab technician, or by the officer seizing the sample, or an exhibit officer, or Cst. Semeniuk. The evidence also left me in the dark about the handling of the sample at the hospital and the handling of the sample between the time of its seizure and the time it came to Cst. Semeniuk.
- [60] Using a gas chromatography method, Ms. McHugh analyzed the contents of the vial of blood that arrived at the forensic lab. She ran the same test twice. The results were 249.58 mg% and 250.12 mg%, and were reported as 250 mg%, plus or minus 6 mg%. The computer program that Ms. McHugh works with indicated 99% confidence that the true BAC is in the indicated range of 244 mg% to 256 mg%.
- [61] Mr. Dostal's closing argument treated alleged shortcomings in proof of the assumptions underlying Mr. Image's opinions as matters going to weight rather than to admissibility of his opinions. Having had the opportunity to review the authorities, I think this is the correct approach. With respect to gaps in the evidence about handling of the blood sample before it was received at the RCMP lab, proof of continuity is not a legal requirement and gaps in continuity are not to be treated as inevitably fatal to the admissibility of evidence: *R. v. Adam*, 2006 BCSC 1430 at paras. 14-19; *R. v. Donovan*, 2005 BCSC 1552 at para. 9; *R. v. Gill*, 2017 BCSC 1816 at paras. 65-66, *aff'd* 2019 BCCA 260.

[62] *Rapchalk v. Atlas Assurance Co. Ltd.* (1967), 63 D.L.R. (2d) 612 (Sask. Q.B.), is a civil case addressing the issue of the effect to be given to analysis of a blood sample drawn from a driver. This case was cited in *Adam* but the principal holding in *Rapchalk* stands for a stricter approach. A blood sample was taken from the plaintiff by a doctor at the hospital. The vial of blood was given to a police constable who kept it in his exhibit locker before forwarding it by registered mail to the crime laboratory. The analyst testified that by the time the vial arrived in his hands the seal on the outside envelope had been broken, although the vial was inside the envelope in a closed box. He testified that the envelope had been handled by at least two people before it came to him. No one else testified as to who handled the blood sample or what was done with it. At 617, Sirois J. held as follows:

In my opinion, there is only one proper manner in which facts of this nature may be offered as evidence in any contested matter. This was not done in this case, even though the law enforcement officials are well aware of the long established practice of proving continuity. Here the chain was broken and I find that evidence of the blood sample reading is not admissible.

The judge carried on to make the alternative finding that if the result of the analysis was admissible, "then its weight would surely be negligible or nonexistent" and that the expert opinion based on the analysis "is of no assistance to the court." I think the alternative holding is supportable on a modern approach to "proof of continuity" -- i.e., the weaknesses in proof go to the weight to be attached to the analysis -- but the principal holding of inadmissibility runs against the grain of recent authority such as the Supreme Court of Canada's decision in *R. v. J.-L.J.* and the *Adam*, *Donovan*, and *Gill* cases referenced above.

[63] Returning to the case at bar, there are gaps in evidence about (1) what was in the solution being introduced into Mr. McLeod's bloodstream before blood was drawn; (2) the handling of the sample at the hospital; and (3) the handling of the sample between the time of its seizure and the time it went to Cst. Semeniuk. These gaps, together with the possibility, albeit slight, of error in the measurement of BAC at the forensic lab, cause me concern about the usefulness of the lab's BAC results. In the result, Mr. Image's evidence about Mr. McLeod's BAC at the time of the MVA has substantially reduced evidential value, relying as it does on the blood analysis.

Observable Signs of Impairment

[64] If Mr. McLeod had a BAC in the range of 260 to 270 mg%, or indeed anywhere close to this BAC, then I accept Mr. Image's characterizations of this as being in the "zone of intoxication" and as a "very high BAC." Mr. Image would expect the "average social drinker" with this BAC to present with some or all of the following symptoms: watery or glassy or bloodshot eyes; flushed face; odour of liquor on breath; slurred speech; and motor incoordination and poor balance including staggering gait. At this BAC, some may exhibit mental confusion, emotional instability, or stupor. However, "[a] tolerant drinker will have fewer symptoms." In cross-examination, Mr. Image testified that heavy drinkers can exhibit extremely high tolerance and show few observable signs.

[65] The evidence leaves me with no proper basis to make a judgment about Mr. McLeod's drinking habits or level of tolerance. I do not know whether to categorize him as an "average social drinker" or a "tolerant drinker." There is some evidence that hints at the latter: Mr. Dostal described Mr. McLeod as a fairly heavy drinker, and both Mr. Dostal and Ms. Martin describe him as being able to hold his liquor well. ICBC has the onus on this contributory negligence issue and I am not satisfied that Mr. McLeod has been shown to be an "average social drinker" or a non-tolerant drinker. Even if I were able to find that the evidence supported a very high BAC for Mr. McLeod at the time of driving, I do not have enough information about Mr. McLeod's tolerance to alcohol to do anything other than speculate about what observable signs of intoxication Mr. McLeod may have exhibited in the time leading up to the MVA.

Conclusion

[66] In order to satisfy the onus of proof on the balance of probabilities standard, the evidence of contributory negligence must be sufficiently "clear, convincing and cogent": *F.H. v. McDougall*, 2008 SCC 53 at para. 46. The quality of evidence necessary to meet the relative standard described in *F.H. v. McDougall* depends on the "nature of the claim and of the evidence capable of being adduced": *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 40.

[67] I have examined each piece of evidence in order to determine its probative value, but when conducting the objective analysis of whether Mr. Dostal knew or should have known that Mr. McLeod's ability to operate his truck was impaired, it is necessary to stand back and examine the evidence in its totality and not on a piecemeal basis. When I do so, I find that ICBC has not proved its allegation of contributory negligence. The body of evidence on this issue is in considerable disarray. Because I am leery of accepting Mr. Dostal's account of events of the evening where it is not corroborated by other evidence, I am left without a clear picture of how much time Mr. Dostal spent with Mr. McLeod in the hours before the MVA, and how much Mr. McLeod had to drink. I have concerns about the reliability of the measurement of Mr. McLeod's BAC, and I have no good basis to judge whether Mr. McLeod was a "tolerant drinker" who may have appeared unimpaired, or a drinker that would have shown signs of impairment. This body of evidence cannot be described as clear, convincing and cogent in the context of the evidence capable of being adduced. ICBC has failed to prove contributory negligence on a balance of probabilities.

Effects of the Collision

[68] I am satisfied that Mr. Dostal suffered a concussion in the MVA, albeit a relatively mild one. I accept his evidence that his last memory before the MVA was in the seconds before impact when he appreciated that Mr. McLeod was about to go through the stop sign, and his first memory after the MVA was at the hospital being wheeled around on a gurney. In making this finding, I acknowledge that there is no reliable evidence of a loss of consciousness, and that Mr. Dostal achieved a full score on the Glasgow Coma Scale when this rudimentary

screening test was administered twice by the ambulance attendants within an hour of the collision. And, I have not lost sight of Cst. Guest's evidence that Mr. Dostal's responses to his questions seemed clear and concise during their brief interaction at the MVA scene, nor of Ms. Haagsma's testimony that Mr. Dostal was making sense when she spoke to him.

- [69] The observations of Mr. Dostal by his mother and Dr. Botha at the emergency ward that Mr. Dostal was confused and their impressions that this confusion was not caused by intoxication persuade me that it is more likely than not that Mr. Dostal suffered a concussion. His mother and Dr. Botha each know Mr. Dostal very well, and his mother was with Mr. Dostal for hours in the emergency ward. Mr. Dostal's confusion in the aftermath of the MVA, reflected in the wildly inaccurate information he gave to Cst. Guest about what he and Mr. McLeod had to drink at the Rolla Pub and the observations of his mother and Dr. Botha, are important facts that dovetail with Mr. Dostal's post-MVA complaints of headaches, nausea, dizziness, vision and balance problems, and cognitive impairment.
- [70] Some of these issues have resolved, while others have persisted but are not as troubling as they were in the weeks and months following the MVA. Mr. Dostal still complains of headaches that come on once or twice a week. Some are mild, some are severe and require medication or lying down in a quiet dark room. Sometimes he gets ringing in his ears -- he noticed this soon after the MVA. It now occurs a few times a month. His nausea went away soon after, other than when he is a backseat passenger in a vehicle. His balance issues have improved with time. He had blurred vision early on, but this resolved in the months after the MVA. He uses sunglasses, especially while driving, to reduce exposure to bright light.
- [71] Mr. Dostal continues to complain of memory and concentration problems. He gave examples: leaving the stove on, having to return home to check to make sure he locked the doors, and forgetting medical appointments. He says he is easily distracted and gets irritated when others interrupt him when he is trying to concentrate. He testified that he is moody and prone to feeling depressed and anxious.
- [72] Mr. Dostal was discharged home from the hospital emergency ward several hours after the MVA. For the next two weeks, he was sore all over and essentially bedridden. His mother assisted him with bathing and toileting. He was followed by his family physician, Dr. Botha, in the months following the MVA, and was prescribed narcotic painkillers, anti-inflammatories, sleep medication, and muscle relaxants.
- [73] It is common ground that Mr. Dostal was unable to work for the six months immediately after the MVA. During this period, beginning in October 2015, he attended a physical therapy clinic where he received physiotherapy and attended kinesiology sessions. Shealan Anderson, his first physiotherapist, testified that on his first visit she observed extensive bruising and swelling around Mr. Dostal's sacrum, and in the first few visits she had difficulty positioning Mr. Dostal for treatments because of reported pain in this area. Samuel Moxon took over Mr. Dostal's physiotherapy from Ms. Anderson; he testified that he treated Mr. Dostal until mid-March 2016 and at that time Mr. Dostal was speaking of attempting a

return to work.

- [74] In December 2015, Mr. Dostal saw an optometrist to address the vision problems that had arisen since the MVA. He prescribed prism glasses and advised Mr. Dostal to use sunglasses. In that same month, Mr. Dostal's daughter A.T. was born. Mr. Dostal and A.T.'s mother met on a dating site and had a brief relationship in the spring of 2015. Over the years since, Mr. Dostal has had some parenting time with A.T., although my impression after hearing the evidence of Mr. Dostal and A.T.'s mother is that they do not have an effective co-parenting relationship.
- [75] Mr. Dostal returned to roofing work in the spring and summer of 2016. Because Mr. Dostal did not keep proper records, I do not know how much roofing work he did. In May 2016, he received an epidural steroid injection. Dr. Botha performed this procedure; he testified, as did Mr. Dostal, that he has an aversion to needles. This injection provided some temporary relief. He received further injections in January and December 2019. I take Mr. Dostal's agreement to undergo these injections as strong evidence of ongoing and significant low back pain.
- [76] In the summer of 2016, Mr. Dostal met a woman who lives in Grande Prairie. Mr. Dostal relocated there and moved in with her. By September 2016, he found trucking work in the Grand Prairie area. This relationship that caused Mr. Dostal to move to Grande Prairie lasted approximately two years. In the midst of the time they lived together, their daughter B. was born in June 2017. As is the case with Mr. Dostal's two older daughters, B.'s primary residence is with her mother and Mr. Dostal has parenting time.
- [77] In November 2016, Mr. Dostal saw Dr. Dirk Kotze, a psychiatrist, on referral from Dr. Botha. After he saw Dr. Kotze, he took a course of anti-depressant medication and began using zopiclone as a sleep aid. Mr. Dostal is frustrated by his sleep issues. He testified that he is restless and finds it hard to get to sleep -- in fact, he says that he cannot get to sleep without zopiclone. He frequently wakes up, and cannot sleep in like he could before.
- [78] Very shortly after Mr. Dostal broke up with B.'s mother, he began seeing a counsellor, Dr. Shirley Karseboom; he saw her for six sessions between June and August 2018. Mr. Dostal said that he went to her for help because he was depressed and emotional.
- [79] Mr. Dostal returned to live with his parents in Dawson Creek when his relationship with B.'s mother ended in the late spring of 2018. In the result, he was commuting from Dawson Creek to his work in Grande Prairie at Ledarco Construction & Trucking Ltd. Mr. Dostal had begun this steady and well-paying job in July 2017. His last work there was in early August 2018. Mr. Dostal testified that he decided to quit at Ledarco because he was tired of the commute and emotionally affected by the end of his relationship with B.'s mother.

- [80] Mr. Dostal began a two-month round of physiotherapy treatments with Ms. Anderson in November 2018. In December 2018, he tried chiropractic treatment and took the first of two massage treatments. Mr. Dostal does not think he achieved any lasting benefit from any of the different types of physical therapy he has undergone since the MVA.
- [81] Mr. Dostal began a relationship with his present girlfriend, Amanda Oijen, in early 2019. She lives in Tumbler Ridge, approximately an hour and a quarter drive from Dawson Creek. She testified that Mr. Dostal lacks patience. They have taken a few road trips together -- during which Mr. Dostal was antisocial and irritable -- and each trip caused a temporary breakup of their relationship. Ms. Oijen also testified that Mr. Dostal is forgetful to the point of sometimes retelling the same story many times over.
- [82] In December 2019, Dr. Botha sent Mr. Dostal to Dr. Mark McConkey, an orthopaedic surgeon, for an opinion on his left hip. Like the orthopaedic surgeons that Mr. Dostal saw for medical-legal purposes, Mr. Dostal testified that Dr. McConkey recommended against surgery. (This second hand information is not admissible opinion. In any event, it is common ground that hip surgery is not in prospect.)
- [83] Dr. Botha has also referred Mr. Dostal to a neurosurgeon, Dr. Aaron Hockley, for an opinion on treatment of his lower back. This consultation has yet to be scheduled, although Mr. Dostal underwent an MRI in May 2020 so that Dr. Hockley will have recent imaging. All the expert evidence put before me is in accord that Mr. Dostal's condition does not call for back surgery: although he has a disc herniation at L5/S1, there is no evidence of significant impingement on the nerve root. And, this is not a situation where Mr. Dostal's back condition is worsening -- it has plateaued. It is, of course, theoretically possible that Dr. Hockley will take a different view than the experts I heard from, but I think the proper approach is to ignore what I see as a remote possibility. In any event, the possibility of back surgery is a contingency that cuts both ways. Undergoing surgery would tend to increase the non-pecuniary damages award and give rise to a period of near certain future loss of income for the recovery period; on the other hand, Dr. Hockley would presumably recommend surgery only if there was a real prospect of significant improvement for Mr. Dostal, and the expectation of lessened pain and disability would have a dampening effect on non-pecuniary damages, future loss of capacity to earn income, and cost of future care.
- [84] I turn to the expert opinion evidence, much of which is in accord. I will make findings where there are differences of opinion but these findings have little impact on the quantum of damages.
- [85] Dr. Jonathan Hawkeswood is a physiatrist who assessed Mr. Dostal in August 2016, about 11 months after the MVA, at the request of his counsel. He diagnosed a whiplash disorder affecting the cervical, thoracic, and lumbar regions, as well as a fractured sternum. The sternum pain had resolved in short order. The thoracic pain had also resolved by the time he saw Dr. Hawkeswood, although it left some restriction in range of motion. The CT lumbar spine was noted to show a large haematoma in the lower lumbar spine. (Photos showing

extensive bruising in this region, and Ms. Anderson's observations of bruising and swelling near the sacrum also support the conclusion that Mr. Dostal's low back was directly injured in the MVA.) Dr. Hawkeswood's opinion is that Mr. Dostal's low back pain is perpetuated by a pre-existing asymptomatic disc protrusion at L5-S1. The pain in his left hip, groin, and thigh is attributed to extensive tearing of the anterior labrum that Dr. Hawkeswood saw on the MR arthrogram (conducted two days after he examined Mr. Dostal). He suggested an assessment by Dr. Gilbert, an orthopaedic surgeon, to determine the advisability of hip surgery.

- [86] Dr. Hawkeswood's opinion is that Mr. Dostal suffered a concussion with some lingering headaches and cognitive effects, and depression. The concussion diagnosis was based on Mr. Dostal's reports of dizziness and nausea, visual changes, amnesia for time around the time of the MVA, and ongoing difficulties with concentration and memory. Dr. Hawkeswood suggested that a neuropsychological evaluation conducted around two years post-MVA would provide clarity on the cognitive issues. He also suggested a consultation with a psychiatrist (which may have been what triggered the referral to Dr. Kotze).
- [87] Mr. Dostal was examined by Dr. Gilbert in December 2016. His reading of the left hip arthrogram is similar to Dr. Hawkeswood's: his opinion is that it shows a full thickness separation of the labrum from the underlying acetabulum. Some but not all of his pain in his left hip girdle is emanating from the joint -- i.e., some relates to the tear, but some is myofascial pain. He is not a candidate for surgery. Dr. Gilbert also diagnosed musculoligamentous strain to Mr. Dostal's neck, mid-back, and low back. With reference to his low back, Dr. Gilbert testified that the X-ray of the lumbar spine three weeks after the MVA showed spondylosis -- narrowing of the disc spaces, and it is probable that this degeneration occurred prior to the MVA.
- [88] By the time he saw Dr. Gilbert, Mr. Dostal had returned to truck driving but he was finding the work painful. Dr. Gilbert concluded that he will probably be able to perform some light physical work but pain would cause difficulty with heavy physical jobs; because of pain, "he may have to retrain in a more sedentary job in the future." His ability to continue working as a truck driver will depend on his ability to tolerate the pain. Dr. Gilbert's prognosis is guarded. He thinks it probable that Mr. Dostal will continue to experience some pain in the future, but his MVA injuries do not put him at significant risk of degenerative changes or requiring surgery.
- [89] ICBC arranged for Mr. Dostal to be assessed by Dr. Bassam Masri in December 2019. Dr. Masri's opinion is that Mr. Dostal's L5-S1 disc herniation was probably caused by the MVA. While he is at risk of developing sciatica, he has not to this point -- the effect of the herniation has been unresolved mechanical low back pain. He has not reached maximal medical improvement -- if Mr. Dostal strengthens his core and loses some weight, he can expect the pain will improve. If Mr. Dostal develops sciatica, most of these symptoms will likely resolve within six months. Only ten percent of patients with sciatica require a discectomy. Dr. Masri's recent practice does not include labral repairs, but he does many hip replacements and sees the condition of many labra because they are removed during hip

replacements. He does not agree with the conclusions of Dr. Hawkeswood and Dr. Gilbert that Mr. Dostal suffered a labral tear in his left hip, but he does agree that Mr. Dostal has a left hip injury that has left him with permanent impairment and this injury is not amenable to surgical repair.

[90] Dr. Masri's opinion on vocational disability was expressed as follows in his report:

Prior to the motor vehicle accident he used to work as a truck driver. I do not believe that he will be able to return to truck driving because of his back injury. Truck driving is notoriously hard on the back, and considering his back pain, and considering that he tried to go back to truck driving and failed, he needs to consider a more sedentary employment that allows him to vary his position. I will defer other vocational considerations to other experts.

[Emphasis added.]

In reaching this conclusion about Mr. Dostal's ability to continue work as a truck driver, Dr. Masri relied on the history he was given by Mr. Dostal. In particular, he accepted that Mr. Dostal had stopped truck driving work because of difficulty with pain. In fact, the evidence is to the contrary. The reason that Mr. Dostal's work as a truck driver came to an end in April 2019 had nothing to do with back pain. And, less than a month after his December 2019 examination by Dr. Masri, Mr. Dostal returned to truck driving jobs and did not finish up truck driving until COVID-19 issues shut off the available work in late March 2020.

[91] Dr. O'Breasail is the psychiatrist who saw Mr. Dostal in February 2018 at the request of plaintiff's counsel. He concluded that Mr. Dostal suffered a relatively mild concussion, and that his symptoms such as cognitive difficulties and irritability are the result of post-MVA mood changes and chronic pain. Dr. O'Breasail testified that his mental status examination results were not significant enough to suggest the need for neuropsychological testing. Dr. O'Breasail's opinion is that Mr. Dostal had a major depressive episode following the MVA, with symptoms of anxiety and posttraumatic stress. By the time he saw Dr. O'Breasail, he had experienced some improvement. In 2016, he had seen Dr. Kotze, a psychiatrist, on referral from Dr. Botha, his general physician. Dr. Kotze prescribed antidepressant medication and Mr. Dostal took it for a time but in Dr. O'Breasail's opinion, not for long enough to obtain therapeutic benefit. Dr. O'Breasail suggests a proper trial of anti-depressant medication, and particularly emphasizes the importance of counselling or psychotherapy.

[92] Bruce Hunt is a kinesiologist and exercise physiologist, qualified to administer work capacity evaluations and functional assessments. He assessed Mr. Dostal in November 2019. His validity testing indicated that Mr. Dostal gave good effort throughout the assessment, and Mr. Hunt noted no obvious cognitive deficits impacting ability to follow and recall instructions, or give a history, or fill out the various questionnaires. Mr. Hunt's opinion is that Mr. Dostal does not durably meet some of the physical demands of trucking and roofing work because of low back, hip, and buttock pain. Mr. Hunt explained that Mr. Dostal has developed pain management strategies including "habitual left leg offweighting" -- i.e., he puts more weight on his right leg when he crouches and lifts and this puts him in suboptimal

work positions that risk further injury. These "maladaptive pain management strategies" are barriers to all manner of physical labour. I accept Mr. Hunt's evidence that Mr. Dostal is at an increased risk of injury when he performs work in ergonomically incorrect postures and that he is not well-suited to physical work.

- [93] Karen Cross is a vocational rehabilitation consultant. She is not qualified to administer the General Aptitude Test Battery and did not administer it or other vocational aptitude tests. She spoke with Mr. Dostal by telephone on two occasions in January 2020 and prepared a report. She was not provided with and did not ask for school records, records relating to the gas plant operator course, documents relating to the various first aid and other tickets Mr. Dostal has acquired from time to time, income tax information, or employment records. The part of her report that addressed transferable skills and possible alternative occupations such as truck dispatcher, truck driving instructor, and transportation route and crew scheduler was of some assistance to me, although this was based solely on his work history and came with the caveat that his actual aptitudes "have not been formally evaluated and are considered estimates." Little evidence was led about Mr. Dostal's capacity to retrain, but, having heard Mr. Dostal give evidence, my impression is that he has the necessary intelligence and other cognitive abilities to retrain for many occupations. I also formed the impression that he presently has little interest in retraining.
- [94] One of the few areas of controversy in the medical evidence is whether Mr. Dostal has a labral tear or not. Accustomed as I am to hearing expert medical evidence, I am not well positioned to arbitrate a question of clinical judgement between two highly qualified hip surgeons who have sufficient regard for each other's ability that they refer patients back and forth. Each was an impressive witness, and each capably and persuasively defended their opinion in cross-examination without advocating for the party responsible for their retainer. I conclude that the balance is ever-so-slightly tipped toward Dr. Gilbert's opinion on the basis that one focus of his surgical practice is repair of labral tears. I understand that Dr. Masri sees the condition of labra when they are removed during hip replacement surgeries, but Dr. Gilbert's decisions whether to conduct surgeries to repair tears require him to squarely answer the "tear or no tear" question on a more frequent basis than Dr. Masri who conducts hip replacements for many patients that do not have suspected labral tears. In reaching this conclusion that Mr. Dostal probably suffered a labral tear in the MVA, I recognize that the outcome on this issue is not particularly important to the assessment of damages. If he has a tear, it is not amenable to surgery. And, tear or not, he has other soft tissue damage to his hip that will continue to cause him significant discomfort when working or doing other physical activity. As is often the case when assessing personal injury damages, the functional effect matters a great deal more than the precise medical diagnosis.
- [95] Another difference of expert opinion is whether the MVA caused Mr. Dostal's L5/S1 disc protrusion. I am persuaded that the disc space narrowing pre-dated the MVA. While it is possible that this disc space narrowing pre-dated the accident but the disc protrusion was caused by the MVA, having considered the evidence of Dr. Hawkeswood, Dr. Gilbert, and Dr.

Masri, I think it more likely that the protrusion also pre-dated the MVA. I accept that the protrusion may be playing a role in perpetuating Mr. Dostal's ongoing back pain issues, although the evidence does not support a finding of "true sciatica." Again, whether or not the disc protrusion was caused by the MVA does not have a significant bearing on the damages assessment. It might be different if the protrusion was compressing a nerve root or if Mr. Dostal had back pain prior to the MVA, or the evidence suggested that the degenerative changes in his lumbar spine would have caused him disability if the MVA had not occurred. The evidence establishes that Mr. Dostal has back pain caused by the MVA and this pain is not expected to resolve; these are the facts that drive the assessment of damages.

- [96] I accept Mr. Dostal's evidence that since the MVA his physical injuries have affected his roofing and trucking work in significant ways, and his evidence about how his back and hip pain inhibits his work finds considerable support in the expert opinion evidence of Dr. Hawkeswood, Dr. Gilbert, Dr. Masri, and Mr. Hunt. Mr. Dostal can expect the pain to continue, albeit at a reduced level if he follows -- as I think he will -- the advice to pursue core strengthening exercise therapy. Mr. Dostal testified to the many difficulties arising from his injuries but they have not caused him to miss work. Mr. Dostal deserves credit for his fortitude and efforts to mitigate his income losses.
- [97] Any continuing cognitive effects from the MVA are mild and I find that they are related to chronic pain. The chronic pain and its effects on his work and lifestyle have also caused Mr. Dostal to experience low moods and irritability. If he takes up Dr. O'Breasail's sound treatment recommendations, he can expect some improvement in his psychological condition.
- [98] Mr. Dostal is not enthusiastic about any of the alternative vocational options presented to him. My impression is that he is willing to put up with some pain to carry on with his truck driving work, and do some roofing. Any improvements he achieves through core strengthening and psychiatric treatment will help him stay this course. At present the COVID-19 epidemic is crimping his employment opportunities, but when the labour market effects of the epidemic recede, I expect that Mr. Dostal will soon find truck driving work. However, I think it possible that Mr. Dostal will tire of working through the pain, and may in the future consider less physical employment options; I think this is only a slight possibility in the near run, but the chance will grow over time. In the long run -- i.e., in the latter half of his working career -- I think there is a significant chance of a career change.
- [99] Not surprisingly, Mr. Dostal's chronic pain, irritability, and lessened patience have affected his relationships with his parents, his daughters, and his intimate partners. I make this finding notwithstanding the evidence of A.T.'s mother. She testified that she has not observed any differences in Mr. Dostal's demeanor since the MVA. I was unimpressed by her evidence. It seemed to be infected by animosity toward Mr. Dostal.

- [100] Mr. Dostal's physical injuries have taken away much of his ability to enjoy hunting, an activity that he has been involved with since a child and in which he participated daily in late summer and autumn. Julian Scheck, a long time hunting pal of Mr. Dostal's, explained that dressing a moose or elk in the field is very physical labour. It is unlikely that Mr. Dostal will ever again be able to fully participate in a hunt for large game. His hunting and quadding will likely continue to be significantly curtailed, but he will be able to continue with some outdoors activities such as camping and fishing.
- [101] Mr. Dostal gave little evidence of how his injuries affect his domestic chores; he did say that he continues to shovel snow and mow the lawn, but each of these activities causes an increase in his pain. He lives with his parents and has done for most of the time since the MVA. Both parents testified, but neither gave evidence about this aspect of their son's case.

Non-Pecuniary Damages

- [102] The Court of Appeal outlined the proper approach to the assessment of non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46. The factors to be considered include Mr. Dostal's age, the nature of his injuries, the severity and duration of his pain, disability, emotional suffering, loss or impairment of life, the impairment of family and social relationships, the impairment of physical and mental abilities, and loss of lifestyle. Stoicism ought not to result in a lesser award.
- [103] I think Mr. Dostal has borne the effects of his ongoing injuries with some stoicism. He has stuck with his truck driving and to do so has put up with significant pain and discomfort. His chronic pain has affected his mood, and has had some impact on his relationship with his family and his current girlfriend. His previously active outdoors lifestyle has been curtailed.
- [104] Each case must be decided on its own facts. An individualized assessment is called for, and it is neither possible nor desirable to develop a tariff: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637; *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 39-43. However, reference to awards made in similar cases can be of assistance in arriving at a fair award for non-pecuniary damages.
- [105] Mr. Dostal submits that an award of \$180,000 is appropriate, citing *Pike v. Kasiri*, 2016 BCSC 555 (\$190,000); *Carmichael v. Kwon*, 2016 BCSC 265 (\$175,000); *Sundin v. Turnbull*, 2017 BCSC 15 (\$175,000); and *McCullagh v. Rozinbaum*, 2020 BCSC 429 (175,000). ICBC submits that \$80,000 is fit compensation, relying on *Bischoff v. Gudaitis*, 2019 BCSC 2169 (\$70,000); *Hale v. Keyes*, 2020 BCSC 559 (\$75,000); *Sharma (Litigation Guardian of) v. Kandola*, 2019 BCSC 349, varied on other grounds 2020 BCCA 161 (\$75,000); *Palmer v. Ansari-Hamedani*, 2019 BCSC 114 (\$85,000); and *Sen-Laurenz v. Napoli*, 2019 BCSC 1379 (\$90,000).

- [106] All of these cases can be distinguished on their facts, but I found the cases cited by ICBC to be much more closely comparable. Tailoring compensation to Mr. Dostal's circumstances, I award \$90,000 for non-pecuniary damages. In assessing this head of damages, I have borne in mind the increase in pain that results when Mr. Dostal does heavier domestic chores.

Past Loss of Capacity to Earn Income

- [107] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 30-31, the Court of Appeal explained that a claim for what is often described as "past loss of income" is actually a claim for past loss of earning capacity -- i.e., "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury". The test to be applied to hypothetical events, whether past or future, is whether there is a real and substantial possibility that the events would occur: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Smith v. Knudsen*, 2004 BCCA 613 at para. 29; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 43-46; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. In measuring the value of the loss, the events are to be given weight according to the relative likelihood that they would have occurred: *Athey*, at para. 27; *Smith*, at paras. 29, 31.
- [108] Mr. Dostal restricts his past-loss claim to losses in the six-month period immediately after the MVA, i.e., until the end of March 2016. This is the period that he was off work on doctor's orders. The plaintiff's case is that but for the MVA he would have returned to truck driving in the weeks following the MVA, and would have remained in that work until mid-May 2016 when he would have returned to roofing.
- [109] Mr. Dostal did not have a truck-driving job lined up for the 2015/2016 winter, but I think it is fair to assess this aspect of his claim on the basis of his track record of earning an average of approximately \$55,000 per annum in non-roofing income. ICBC argues that this approach amounts to speculation since he had not worked as a trucker for nearly a year before the MVA and no evidence was led about which job or jobs Mr. Dostal might have worked at. I disagree; I find a real and substantial possibility -- indeed a strong likelihood -- that Mr. Dostal would have been employed as a trucker during the material six month period. Over the years, Mr. Dostal has shown attachment to the work force and I find that he would have sought out and likely found trucking work during the period for which he claims. The significant contingency of periods of underemployment or unemployment during this six-month period can be addressed by using his historical average earnings -- which of course take account of gaps in his employment.
- [110] Following are the rounded figures for Mr. Dostal's non-roofing earnings for years 2009 through 2019, other than the MVA-affected years of 2015 and 2016. I note that other than when he had a very short-lived drilling job, his earnings are from truck driving.

2009 29,000

2010 31,000

2011 30,000

2012 54,000

2013 90,000

2014 38,000

2017 92,000

2018 91,000

2019 39,000

[111] Mr. Dostal's claim is for six months' earnings. I award one-half of the annual average of Mr. Dostal's non-roofing earnings. This is \$27,500. Income tax must be accounted for, and I am satisfied that I can make a fairly accurate estimate of the appropriate deduction. I award the net figure of \$21,000.

Future Loss of Capacity to Earn Income

[112] A plaintiff is required to prove a substantial possibility of a future event resulting in a loss in order to recover damages for loss of future earning capacity. If such an event is proven, then the loss may be quantified according to the earnings that he will lose (the "earnings approach"), or by the harm that has been caused to his capacity as a capital asset in the working world (the "capital asset approach"): *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach will be appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64.

[113] The capital asset approach involves considering factors such as: (1) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (2) whether the plaintiff is less marketable or attractive as a potential employee; (3) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (4) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at 356 (S.C.); *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53, 56.

[114] It is true that Mr. Dostal has earned more on average in the years since the MVA than he earned on average before the MVA. ICBC submits that the plaintiff has failed to establish a substantial possibility of a future event resulting in a loss, but -- notwithstanding the pattern of increased earnings -- this argument is not tenable. His truck driving and his roofing work have been affected in ways that diminish the value of his capital asset. Before the MVA, he was well-suited to these lines of work. Because of his MVA injuries, this is no longer the case.

- [115] It is difficult for Mr. Dostal to sit and drive for long periods of time, and especially difficult if on rough roads or in vehicles with suspensions that do not protect the driver from being jostled. The evidence establishes that truck driving in the oil and gas industry requires a driver to carry out some physical work, including tying down loads, packing and lifting materials, and chaining up the tires in the winter season when much work is done. Jordan Sweezey, who worked as a swamper -- a driver's helper -- with Mr. Dostal both before and after the MVA, persuasively described how Mr. Dostal takes more driving breaks than he used to. He also corroborated Mr. Dostal's evidence of lesser stamina in relation to the more physical aspects of the work. I take account of the fact that Mr. Dostal has often worked without a swamper, and in these situations there is no one around to pick up the slack.
- [116] I accept Mr. Dostal's evidence that roofing work is difficult for him now. When he is doing this work, he works shorter days and spends more time passing out material (as opposed to shingling) than he used to.
- [117] The expert evidence provides support for Mr. Dostal's evidence that while he has been able to continue trucking and roofing work, he does so with difficulty. Mr. Dostal's back and hip problems have rendered him less capable overall of earning income from all types of employment, and less capable of taking up all opportunities that might otherwise have been open to him: before the MVA he had no impediment to doing heavy physical work. In a modest way, he is also less attractive as a potential employee doing trucking work in a competitive labour market; for instance, there may be jobs that Mr. Dostal could accept only if an employer agreed to hire a swamper to work with him.
- [118] ICBC argues that if there is a loss of capacity to be assessed, then \$60,000 would be fair compensation based on the application of a present value multiplier to an annual loss of \$2,000. The plaintiff submits that a capital asset approach is appropriate, and urges assessment by an award of \$300,000; he says this is the equivalent of three years' of full-time earnings as a truck driver. Awarding a plaintiff's annual income for one or more years is well-recognized as an available method of assessing the loss of capacity to earn income: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43 (C.A.).
- [119] This is a difficult assessment. I foresee that Mr. Dostal will likely continue to work as a truck driver and doing some roofing. Presently, he seems unenthusiastic about any career change, but I think it is a real possibility that in the midst of the remainder of his working life he will alter course toward more sedentary work such as truck dispatching (which on average pays only \$46,000 per annum). I think it is fair to both parties to assess his loss at \$120,000, representing two years' annual income. I make the award using an annual income of \$60,000, comprised of his \$55,000 average annual earnings as a truck driver plus \$5000 per annum representing his capacity to do roofing or other work on the side.
- [120] Taking account of all of the circumstances and contingencies in play in this case, I am satisfied that \$120,000 compensation for Mr. Dostal's diminished future earning capacity is an assessment that is fair to both sides.

Cost of Future Care

- [121] Damages for cost of future care compensate for expenses to be incurred to sustain or promote mental or physical health. The services and items must be reasonable -- both in the sense of being medically required or justified, and in the sense that the plaintiff will be likely to incur them. See *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 28-30; and *O'Connell (Litigation Guardian of) v. Yung*, 2012 BCCA 57 at paras. 55-56. There must be a link between a physician's assessment of pain, disability, and recommended treatment, and the recommended future care item: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 39; *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68-70.
- [122] Mr. Dostal claims \$50,000 as an amount that would fairly compensate him for the expense of a six-month exercise program, one year of psychological treatment, vocational testing and counselling, ergonomic equipment, and prescription medicines. ICBC urges a cautious approach on the basis that there is reason to believe Mr. Dostal may not take prescribed treatments, and urges an award restricted to the cost of a core-strengthening program. I award a total of \$32,000. My reasons for allowing or disallowing each of the claimed items follow.

Exercise and Psychological Counselling

- [123] Dr. Gilbert, Dr. Masri, and Mr. Hunt all support an exercise program. ICBC does not contest this item. I find that Mr. Hunt's recommendation of an intensive program for three months, decreasing to once per week for another three months is reasonable. I assess this cost at \$4000.
- [124] Dr. O'Breasail recommends psychological counselling. He explained that this will mitigate the psychological sequelae of the MVA and help with his chronic pain. The recommendation, which I find reasonable and important for Mr. Dostal to follow, is that Mr. Dostal have weekly sessions for three months, and sessions once every two to four weeks for another nine months. This amounts to approximately \$5500 and I award this sum. Dr. O'Breasail made his recommendations two years ago, and I acknowledge that there is a possibility that Mr. Dostal will not follow through with this treatment. However, Dr. O'Breasail persuasively explained the interrelationship between his psychiatric condition and his pain, and bearing in mind that Mr. Dostal has been amenable to consulting a therapist in the past, I think it quite likely that Mr. Dostal will take this prescribed treatment. Moreover, I have assessed damages on the basis that Mr. Dostal will likely achieve some reduction in his chronic pain when he adopts Dr. O'Breasail's treatment plan and in these circumstances fairness requires that the elements of this treatment plan be funded.

Vocational Expenses and Ergonomic Equipment

- [125] Mr. Hunt recommends vocational testing and career counselling. These costs amount to \$10,000. At some point in the future, Mr. Dostal might avail himself of vocational assistance, but I think the chances of this happening in the near future are remote. I make a reduced award in order to take account of the significant chance that Mr. Dostal will never do the testing or counselling, and that if he does incur these costs it will be several years away and the cost must be discounted to arrive at a present value. I award \$2500.
- [126] On the basis of some evidence given by Mr. Hunt, Mr. Dostal submits that if he transitions at some time to sedentary work, he may require equipment such as an ergonomic chair or an automated sit-stand desk. This claim is speculative and if Mr. Dostal at some point makes a career change I doubt he will make these purchases. I decline to make an award for ergonomic equipment.

Medication

- [127] Mr. Dostal's medication claim is based on use of a series of medications to manage his pain and sleep difficulties. His counsel estimates the present value of the cost of his current medication regime through retirement to be approximately \$50,000, but accepts that there are contingencies that ought to reduce the amount awarded for medication. ICBC submits that there is an insufficient evidentiary basis for awarding any cost of future medication. It argues that there is little support in the expert evidence for Mr. Dostal's current pain control and sleep medication regime. ICBC acknowledges that Dr. O'Breasail suggests a return to Cymbalta or Zoloft, but submits that it is highly unlikely that Mr. Dostal will follow through with this recommendation.
- [128] I disagree. I think it likely that Mr. Dostal will follow Dr. O'Breasail's recommendations, and that these treatments alongside the strengthening program will help Mr. Dostal to manage his pain and his sleep difficulties. This will, in turn, allow him to reduce his medication intake. He will, however, continue to have some pain -- this conclusion is well-supported by the medical evidence. And, it is surely reasonable that he have access to some medication to allow him to do as he has done to this point: carry on with his work and thus mitigate his income loss. Doing the best I can in the context of many uncertainties, I award \$20,000 as a medication allowance.

Special Damages

- [129] Mr. Dostal claims \$6884 for special damages. Of this sum, ICBC contests only the \$1200 claimed for psychological services. I agree that this aspect of the special damages claim has not been satisfactorily proved. The sessions were taken on the heels of a break-up with one of his girlfriends, the records related to these sessions were not made available, and the counsellor was not called as a witness. Because of the concerns that I have expressed about Mr. Dostal's credibility, his evidence that these sessions were MVA related, standing alone,

does not meet the standard of proof. Accordingly, I allow \$5684 for special damages.

Order

[130] ICBC has not proved its allegation of contributory negligence. Mr. Dostal is entitled to the following award of damages against the defendant McLeod, without deduction:

Non-pecuniary damages

\$ 90,000

Past loss of earning capacity

21,000

Future loss of earning capacity

120,000

Cost of future care

32,000

Special damages

5,684

Total

\$ 268,684

The plaintiff is also entitled to court order interest on his past pecuniary losses.

[131] I heard no evidence that establishes the allegation that Mr. McLeod was operating the pickup with the expressed or implied consent of its owner, WJM Oilfield Painting Ltd. I suspect but cannot assume that Mr. McLeod is a principal of this company. In the result, there is seemingly insufficient evidence to establish the company's liability under s. 86 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318. I appreciate that ICBC as third party has admitted that Mr. McLeod was operating the pickup with the consent of its owner, but my preliminary view is that this admission may not be sufficient to found a judgment against the company. However, I did not hear argument on this issue. The parties have liberty to speak to it.

[132] The parties also have liberty to apply if they cannot agree on the appropriate costs order.

"Thompson J."

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