
CANADA / JUDGMENT

Eaton v. Riddell

2020 BCSC 734

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2020 BCSC 734 Eaton v. Riddell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Eaton v. Riddell,

2020 BCSC 734

Date: 20200513

Docket: M161453

Registry: Vancouver

Between:

Adrian Eaton

Plaintiff

And

David Gordon Riddell

Defendant

Before: The Honourable Mr. Justice Edelmann

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

January 27-31; and

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Place and Date of Judgment:

Vancouver, B.C.

May 13, 2020

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Introduction

- [1] This action arises out of a motor vehicle accident that occurred on July 3, 2014, near the intersection of Westwood Street and Gordon Avenue in Port Coquitlam, BC (the "MVA"). Liability for the MVA is admitted by the defendant, and the only issues to be determined are those relating to damages.
- [2] The parties agree that the MVA caused some physical injuries, but there is disagreement about whether the plaintiff, Adrian Eaton, has suffered cognitive impairment that can be attributed to the MVA. As a result, there is a substantial divergence between the plaintiff and the defence on the extent of the damages.

Background Facts

- [3] Mr. Eaton was 43 years old at the time of trial, and he is married with three children. His eldest son is from a previous relationship and is 15 years old. Mr. Eaton has a son and daughter from his current marriage. He describes himself as having been active in various sports throughout his youth, and he continued to play hockey recreationally until the time of the MVA.
- [4] Several witnesses, including his ex-spouse, described Mr. Eaton as being an engaged and loving father throughout his eldest son's childhood. From 2011 until the time of the MVA, he coached his eldest son's hockey team and was very engaged with the league and other hockey parents. He did not coach during the 2014-2015 season following the MVA, but he coached again in the 2015-2016 season.
- [5] He met his current spouse, Sara Eaton, in 2007. In 2011, she moved to the Lower Mainland, BC, and they rented a townhouse together. They were married later that year. In December 2012, they were able to rent a house on an acreage at an affordable rate, as the acreage was slated for development. Their daughter was an infant at the time, and Ms. Eaton was pregnant with their son who would be born in July 2013.
- [6] The house and acreage needed substantial work, and Mr. Eaton describes being very engaged in various tasks and projects on the property during this time. The work included painting, changing light fixtures, refinishing or cleaning the patio, deck, and pond. Mr. Eaton also repaired the roof over the pool and cleaned the pool. These projects occupied Mr. Eaton's weekends and weekday nights. Mr. Eaton and his spouse both describe the time they

were on the property as very happy time for their family. Sasa Perkovic, a long-time friend, said this period of time was the happiest he had ever seen Mr. Eaton. He noted that the large house suited Mr. Eaton's lifestyle as it had a den, a fireplace, and lots of room for the kids.

- [7] The arrangement at the acreage was temporary. In 2014, the Eatons purchased a townhome together. During his holidays from work, Mr. Eaton undertook some renovations in the townhome, which he was in the process of completing at the time of the MVA. The family was scheduled to move into the townhome the same week as the MVA. The MVA significantly disrupted the renovations and the move, as Mr. Eaton was no longer able to participate as actively, given his injuries.

The MVA

- [8] The MVA occurred when the defendant turned his van in front of Mr. Eaton's vehicle. Mr. Eaton described seeing the van and applying the brakes. Mr. Eaton's vehicle struck the van, and the airbags deployed. He testified that he then remembers noting smoke in the car and seeing someone putting safety cones around the intersection and taking pictures. He took out his phone and took some pictures as well, and he texted his spouse and called his employer. The damage to Mr. Eaton's vehicle was significant enough that it was not repaired.
- [9] Emergency medical personnel attended the scene, and Mr. Eaton spoke with them. His spouse drove him to the clinic of his family physician, where a doctor examined him the same day.
- [10] Mr. Eaton suffered soft tissue injuries to his neck and back, which persisted for several months. He attended physiotherapy and chiropractic sessions but reports that he continued to feel substantial pain. He and his spouse both described the injuries as taking a significant toll on Mr. Eaton. He was easily fatigued and became moody and irritable with his spouse and children. He had trouble getting out of bed in the morning and was no longer able to participate in household chores or projects in the ways he had before. His relationship with the children deteriorated.
- [11] The physical symptoms eventually improved although he continues to report pain primarily in his neck and upper back. He does stretching exercises he learned from the physiology and kinesiology team that help. He testified that he continues to suffer from regular headaches that are affected by things like lighting, stress, and fatigue. He continues to take Advil and Tylenol to take an edge off the pain to help him sleep. Mr. Eaton denied ever suffering from depression but considers himself to be "moody", particularly when work was stressful. He described himself as being the "moodiest" during the year or two following the MVA.
- [12] Mr. Eaton testified that he has become a more cautious driver since the MVA. He finds that driving long distances has become a problem because of fatigue; night driving is more difficult because the lights give him a headache.

Lay Witnesses

- [13] There were a number of witnesses who testified, both for the plaintiff and the defence in this matter. These included Mr. Eaton's father, two long-time friends, his ex-spouse and several employment-related witnesses.
- [14] According to Mr. Eaton's spouse, he was physically well and active before the MVA. He was "rocking it" at work and very engaged in coaching his eldest son's teams. He worked hard but still had energy for the family afterwards. After the MVA, he became fatigued and moody. He would lose his train of thought, getting lost in the middle of a story after being distracted. He would come home from work, drink, and fall asleep on the couch. His relationships with her and the children were significantly affected and have still not been completely repaired although there have been improvements more recently.
- [15] Julie Barnett has been friends with Mr. Eaton since around 2008, when they were neighbours. She describes Mr. Eaton as a fun, happy, easy-going guy before the MVA. He was a very involved father, someone she described as a "hands-on dad", who participated in activities with his son. After the MVA, she observed him just lying on the couch, being short-tempered, irritable, and prone to blaming his spouse for things that were going wrong. This change continued until the Eatons moved to Alberta, where Ms. Barnett visits them about once a year. When she saw them in September 2019, they seemed happier again, and Mr. Eaton was more like his old self.
- [16] Sasa Perkovic has known Mr. Eaton since about 1999. He described Mr. Eaton as jovial and energetic. Within a few months of the MVA, Mr. Perkovic visited Mr. Eaton at the new townhouse. He described Mr. Eaton as being like an old man--slow and oddly deliberate. He seemed to have less energy and would forget things. He also noted some challenges Mr. Eaton had with time and simple math. A notable example was in the context of a dart club in which they were both members. Mr. Eaton was the only member who used a calculator to keep track of points, which requires rather simple math, because he said he could not focus on the game and the math at the same time. I found this anecdote both genuine and compelling as it did not seem contrived, and for Mr. Perkovic, it was a clear indication of some form of cognitive impairment in his friend.
- [17] Lara Leontowich is Mr. Eaton's ex-spouse and the mother of his eldest son. They have had long-standing issues surrounding custody and child support that have led to repeated court appearances. It is clear they do not get along well, although Ms. Leontowich acknowledged that he was an engaged and dedicated father. In her view, he had never been particularly physically active, which had been a point of contention between them, as she is a fitness instructor. She found that her interactions with him did not change following the MVA. She described him as controlling, unwilling to compromise, and unhelpful in any way, both before and after the MVA.

Employment History

DSL Ltd.

- [18] At the time of the MVA, Mr. Eaton was a long-time employee of DSL Ltd. ("DSL"), a supplier of commercial kitchen equipment. He had started with DSL doing shipping and receiving from 1998-2000, and he came back to work as a sales representative in 2003. By the time of the MVA, Mr. Eaton was a strategic account manager working in sales with large institutional clients and franchises. He continued in that role until he was terminated in September 2016.
- [19] Mr. Eaton testified at some length about his time at DSL. He portrayed himself as a successful salesperson who was at the top of his game at the time of the MVA. He had worked his way up in the company from shipping and receiving to managing some of DSL's largest accounts, which he attributed in large part to his technical knowledge of the products. He placed significant emphasis on his work in securing one account in particular for DSL. He played an important role in the design and development of a new grill, which was eventually to be deployed in some 1,000 A&W restaurants. In his view, A&W was the crown of his sales portfolio and represented around one million dollars in new business for DSL every year.
- [20] As a salesperson, a significant portion of Mr. Eaton's salary was based on commissions. Starting in 2012, there were changes made to the commissions, targets, and earnings on certain accounts. Mr. Eaton was quite frank in stating that he "got his nose out of joint" because the changes specifically capped his A&W earnings. The commissions were further adjusted in 2013 and 2014. In essence, Mr. Eaton felt that the changes meant he had to work harder to earn less money, an assessment that appears consistent with the documentary evidence. Over time, Mr. Eaton's relationship with his superiors continued to deteriorate. He felt that he was having to protect his clients from service issues at DSL and was not able to focus on bringing in the new business that would increase his commissions under the modified structure.
- [21] Mr. Eaton's income at DSL increased until 2014, after which there was some decline. In 2012 and 2013, he earned \$133,000 and \$135,000 respectively. In 2014 he earned a career high of \$157,000 before a decline to \$146,000 in 2015 and then \$139,000 in 2016.
- [22] According to Mr. Eaton, the decline in his productivity following the MVA was in fact much more substantial than his income reflects, as the level of corporate sales in a given year often reflected work in developing the sales that had been done in previous years. He said that after the MVA, he was no longer able to focus on bringing in new orders as he was overwhelmingly focused on the issues his customers were having with the DSL service department. He states that it was much more difficult for him to accomplish tasks he could complete with ease before the MVA. He attributed this to ongoing physical pain, fatigue, and cognitive issues arising from the MVA.

Witnesses from DSL

- [23] Four witnesses testified about Mr. Eaton's time at DSL.
- [24] Ed Tkaczyk started with DSL in October or November 2008 and is now responsible for sales on small and mid-sized accounts. He described DSL as a great company to work for with good salaries and little turnover. He spoke highly of Mr. Eaton, considering him an excellent salesperson and a mentor. He testified that after the MVA, Mr. Eaton was no longer someone Mr. Tkaczyk could count on and that Mr. Eaton no longer dealt well with stress. He confirmed the deteriorating relationship between Mr. Eaton and management.
- [25] L.K. Chieh has been with DSL since 2006 and, along with Mr. Eaton, was one of the two strategic account managers in the Port Moody office. He described Mr. Eaton as a very good salesperson due to his technical knowledge of the products and relationships with his customers. Mr. Chieh thought that Mr. Eaton changed quite a bit after the MVA. He described Mr. Eaton as a bubbly, fun-loving guy before the MVA, but afterwards he became quiet, more withdrawn, and sometimes had a look like he was lost in space.
- [26] Mike Wilson is one of the owners of DSL and knew Mr. Eaton throughout his time at DSL. Mr. Wilson presented as a very neutral witness who expressed genuine compassion for Mr. Eaton. He testified that he had a lot of extra patience for Mr. Eaton because he was a single dad who treated his son well, and Mr. Wilson had been in a similar situation. He recalls speaking with Mr. Eaton the day after the MVA. Mr. Wilson recalls that Mr. Eaton's primary concern was the impact of the MVA on his option to buy his company vehicle. He does not recall Mr. Eaton seeking to take time off or asking for any accommodations as a result of the MVA.
- [27] Grant Banks was hired as the sales manager for DSL in 2010, and in the following years, he implemented a number of changes including commission structures. Mr. Banks was Mr. Eaton's direct supervisor although he was primarily based in Edmonton, AB. He agreed that based on his figures, Mr. Eaton was a good salesperson who exceeded his sales targets for several years.

Performance reviews

- [28] There was a good deal of testimony related to a series of performance reviews prepared during the relevant time period at DSL. Although there were several copies of reviews in evidence, it was evident that some versions were drafts and had not been completed. It appears that at least one was completed prior to the MVA and another was completed in the months after the MVA.
- [29] Mr. Banks was responsible for DSL performance reviews and had implemented them at the company. The reviews included both an aspect of self-assessment and a review by management. Mr. Banks accepted that Mr. Eaton's pre-MVA reviews were good and that it appeared that several aspects of Mr. Eaton's performance declined in the timeframe following the MVA. It was clear from Mr. Eaton's testimony and the comments Mr. Eaton had written on some of the forms that his level of frustration at DSL increased in the years

leading up to 2016.

Buyout

- [30] Throughout his testimony, Mr. Eaton sought to portray himself as having been highly dedicated to DSL prior to the MVA, describing himself as a "lifer". Mr. Eaton testified that problems at DSL began in earnest after the MVA and the resulting problems with stress management and concentration. When asked whether he had ever sought a buyout from DSL, he was quite unequivocal in denying that he had ever done so. This was in direct conflict with evidence from Mr. Banks and Mr. Wilson, who both remembered more than one occasion on which Mr. Eaton had inquired about a buyout.
- [31] Mr. Wilson recalled two occasions when Mr. Eaton had come into his office to ask if there was any way DSL could just buy him out. Mr. Wilson recalled this to be in the context of frustrations Mr. Eaton was having with the service department.
- [32] Mr. Banks said that Mr. Eaton's requests for a buyout occurred about once a year, including prior to the MVA. He estimated that Mr. Eaton had requested a buyout four or five times during the time he was under Mr. Banks' supervision. Like Mr. Wilson, Mr. Banks associated the buyout requests with Mr. Eaton's frustrations with his job, and Mr. Banks was of the view they were not part of annual sales target negotiations.
- [33] I prefer the evidence of Mr. Wilson and Mr. Banks on this issue. Neither of them appeared to have a personal stake in the outcome of the litigation nor hold a personal grudge against Mr. Eaton. Their testimony on this issue was straightforward and did not appear to have been coordinated. Moreover, as they were testifying about separate conversations in which they were the primary participants, it is unlikely they both were mistaken or misunderstood the nature of the respective conversations. I find on a balance of probabilities that on one or more occasions, including prior to the MVA, Mr. Eaton had inquired about the possibility of a buyout at DSL.

Warning Letters and Termination

- [34] Mr. Eaton was given two formal warning letters by Mr. Banks prior to his termination. The first letter was dated November 18, 2015. It raised concerns around attendance and was framed as a reminder that office hours were from 8:00 a.m. to 4:30 p.m. The letter stated that employees were expected to be available to be reached by customers or co-workers in the office during those times or proactively participating in their specified job functions. The second letter, dated March 7, 2016, outlined the same concerns but was framed as a "final warning" and explicitly referenced termination as a possible consequence.
- [35] While Mr. Eaton's evidence about the amount of time he was spending at the office after the MVA was unclear at times, it was evident that he was spending less time there over certain periods. It was clear that Mr. Eaton felt singled out by the warnings, as in his view he was a salesperson who needed to travel in order to go see clients, and the office was "just a place".

This was in some contrast to the testimony of Mr. Chieh, who testified that strategic account managers are expected to be in the office from 8:00 a.m. to 4:30 p.m. While Mr. Chieh noted some flexibility in the hours, this was in the context of saying that he was often in the office earlier than 8:00 a.m. On some days, he might leave earlier in the afternoon, while on other days he would stay late.

- [36] Mr. Eaton was terminated in September 2016.
- [37] Mr. Wilson testified that there were ongoing issues with Mr. Eaton's interactions with others at DSL. The issue of whether to let Mr. Eaton go had been ongoing for several years and would come up every six months or so. While he agreed that Mr. Eaton's sales results were a factor in keeping him on at DSL, he testified the primary factor was his sympathy for Mr. Eaton as a single father. Mr. Wilson reported having smelled alcohol on Mr. Eaton at the office several times over the course of the weeks leading up to his termination in September 2016. Mr. Wilson described the smell of alcohol as the last straw in the decision to terminate his employment. Although Mr. Wilson appears not to have documented the odour of alcohol, I accept his testimony. The decision not to terminate Mr. Eaton for cause is consistent both with Mr. Wilson's general demeanour and his stated compassion for Mr. Eaton.
- [38] Mr. Eaton was offered a severance package in which DSL would continue to pay his salary until March 2017. He was expected to seek other employment, upon which severance payments would stop.
- [39] From September 2016 to March 2017, the Eatons lived on the severance payments. Although both Mr. Eaton and Ms. Eaton described looking for jobs, they were not able to find new work that would pay sufficiently well from the outset to support their lifestyle. They decided to move to St. Albert, AB, where Mr. Eaton grew up and his family still lived.

Zeebest Plastics

- [40] Mr. Eaton applied to Zeebest Plastics ("Zeebest") while still in Vancouver and began work shortly after the end of the severance period with DSL. Zeebest is based out of Alberta, and its primary business is producing containers used in the oil and gas industry. Moving into a different industry involved a steep learning curve for Mr. Eaton, and he described putting in long hours, starting at 8:30 a.m. and sometimes not getting home until six or seven in the evening. He described doing quite well at Zeebest but said that it took a toll on his personal life. The exhaustion started to set in again, and he became increasingly irritable at home.
- [41] Derek Nielsen is the owner of Zeebest plastics and also testified. Although it would appear Mr. Nielsen and Mr. Eaton did not get along well on a personal level and that their business relationship ended poorly, neither appeared hostile or to hold a personal grudge towards the other.

- [42] Mr. Eaton was hired on a contract to be paid \$60,000 plus commission and bonus after successful completion of three months' probation. There was some disagreement about the basis upon which commissions would be paid, and Mr. Eaton became dissatisfied with the failure to pay commissions. He described having done substantial work in reorganizing the sales procedures and working with other departments at the company to institute changes.
- [43] Mr. Nielsen's description was somewhat different. He hired Mr. Eaton because he was the best applicant, and his age was a good fit for the company. However, once they started working together, he found Mr. Eaton "was pretty full of himself" and came across as "big shot know-it-all". His sales did not work out very well, but he was starting to work with management, so Zeebest considered having him move in that direction.
- [44] On October 10, 2017, Mr. Eaton sent a letter of resignation, referring to the payment of outstanding commissions. Following this letter, there was some discussion about the possibility of Mr. Eaton moving from sales into a management position, and a draft offer was prepared. Mr. Eaton considered the offer "laughable" as it was the same salary he was already making but with a discretionary bonus structure rather than commissions.
- [45] In the course of negotiating with Zeebest, Mr. Eaton proposed by email an increase in his annual salary between \$40,000 and \$60,000. The increase in his salary as well as additional expenses were "to be paid to a separate company compared to the current method (for personal and business reasons)". Mr. Nielsen testified that Mr. Eaton had told him this request was related to child support issues, which would be consistent with the ongoing issues Mr. Eaton was having with his ex-spouse. When asked about the request at trial, Mr. Eaton gave the very cursory response that it was because he was going to "re-invest into Zeebest". While I need not make a finding about Mr. Eaton's intention in seeking payments to a separate company, I am not satisfied his testimony provided a full and frank picture of the "personal and business reasons" referenced in the email.
- [46] Mr. Eaton sent a second resignation letter on October 20, 2017, and his resignation was accepted by Zeebest on the same date.

Tafeli Cookies

- [47] Mr. Eaton did not have employment arranged at the time he resigned from Zeebest, but he testified he had been looking at his options. He found employment with Tafeli Cookies, a new business start-up that was selling baked goods, where he continues to work. He considers it a good fit in the context of his 27 years of experience in the food service industry. He testified that he receives a salary of \$5,000 per month plus \$1,000 for expenses.
- [48] Tafeli Cookies is a small company, and the owners give Mr. Eaton a great deal of flexibility in both his approach to the work and his working conditions. He has flexible hours and is very engaged in developing the strategy for the company going forward, having already implemented significant changes.

- [49] According to Mr. Eaton, his new employment allows for a much greater work-life balance, and he is more engaged with his spouse and family. This, in turn, has reduced the level of stress, fatigue, and irritability that he reported during his time at DSL and Zeebest. He attributes the reduction in the symptoms of his injuries to his employment, which is less taxing and he says that he would not be able to pursue the more challenging forms of employment he was capable of in the past without paying a significant price in aggravating his psychological symptoms.

Treatment History and Expert Evidence

- [50] Several experts from various fields gave testimony relating to Mr. Eaton's physical and mental health. Neither party took issue with the qualification of the experts in their respective fields or their ability to give relevant opinion evidence. The plaintiff presented five experts--Dr. Trent Faraday (general practitioner and treating physician for Mr. Eaton's MVA-related injuries), Dr. Dan DeForge (physiatrist), Dr. Paul Waraich (psychiatrist), Dr. Noah Silverberg (neuropsychologist) and Dr. Jamie Patel (psychologist). The defence presented Dr. Sherri Hayden (neuropsychologist) and entered records from treating physicians that were subject to the document agreement in evidence.
- [51] At the time of the MVA, Mr. Eaton's family doctor was Dr. Maunsell. On the day of the MVA, Mr. Eaton was attended to by Dr. Maunsell's colleague Dr. Van der Westhuizen. Mr. Eaton reported pain in his left and right wrist, back, and both legs. Dr. Van der Westhuizen noted that Mr. Eaton was alert and oriented. The doctor also noted that Mr. Eaton also had paravertebral tenderness and a restricted range of motion. Dr. Van der Westhuizen prescribed Naproxen and Cyclobenzaprine and referred Mr. Eaton for massage therapy.
- [52] On July 9, 2014, Mr. Eaton saw Dr. Maunsell, who diagnosed musculoskeletal soft tissue injuries and recommended he continue with current treatment.
- [53] After meeting with counsel in this matter, Mr. Eaton was referred to Dr. Faraday, who assumed primary responsibility for treating Mr. Eaton's MVA-related injuries on September 6, 2014. He saw Mr. Eaton 19 times, with the final visit being March 27, 2017. Dr. Faraday prepared an expert report dated February 2018 and testified in this matter.
- [54] In Dr. Faraday's opinion, Mr. Eaton suffered a concussion with on-going post-concussive dysfunction, sleep disruption, and fatigue, as well as ongoing depressive symptoms. His musculoligamentous injuries to the lower back have resolved, but those to the neck and upper back have ongoing pain symptoms. He also noted a sensory disturbance of tingling in the left arm with ongoing symptoms. Dr. Faraday's prognosis was that additional improvement in the symptoms was unlikely given the time that had passed since the MVA.

- [55] Mr. Eaton attended a total of 39 physiotherapy sessions between November 2014 and January 2017. He attended a total of 23 active rehabilitation sessions between February 2015 and January 2017. He received massage therapy from July 2014 to January 2015 and has not done any more since that time.
- [56] Mr. Eaton had attended at a chiropractic clinic for nine sessions in relation to back problems in November and December 2013, prior to the MVA. In his direct examination, Mr. Eaton sought to portray himself as someone who was physically active and involved in projects like renovations. His initial testimony as to the cause of the back problems was that he tweaked his back moving a toilet around a bathroom cabinet. In cross-examination, he was presented with the chiropractor's notes indicating he had injured his back lifting a child. Mr. Eaton sought to dismiss the inconsistency, accepting that he was not doing renovations at that time. He stated that he may have "retriggered" the back injury by lifting a child.
- [57] After the MVA, Mr. Eaton attended a total of 101 chiropractic sessions from July 4, 2014, to April 22, 2016. He has not attended any chiropractic sessions since that time. He received acupuncture at the same clinic on nine occasions in August and September 2014.
- [58] Mr. Eaton saw Dr. Ho, a neurologist, on March 16 and May 15, 2015. Dr. Ho does not appear to have considered or diagnosed a concussion, as Mr. Eaton was only referred to him in relation to the tingling sensation in his limb.
- [59] Mr. Eaton attended for a medical-legal examination with a physiatrist, Dr. DeForge, on July 19, 2016. Dr. DeForge has extensive experience with traumatic neurological injuries, including concussions. There is some disagreement between the plaintiff and the defendant as to whether Dr. DeForge diagnosed a concussion or relied on the diagnosis by Dr. Faraday. It is not clear to me that much turns on this issue in the circumstances, as it is clear that Dr. DeForge considered the reported constellation of symptoms was consistent with post-concussive syndrome.
- [60] Dr. DeForge noted that Mr. Eaton reported he was consuming six to seven drinks per day at that time, which Mr. Eaton said he was doing to assist with sleep. In his discussion of concussion symptomology, Dr. DeForge's first recommendation was a strong suggestion that Mr. Eaton see a substance abuse counsellor. He noted that Mr. Eaton's level of alcohol consumption was "dangerous at this level of health" and would further impair both his sleep and concussion recovery.
- [61] Dr. DeForge also recommended that an occupational therapist, working in conjunction with a psychologist, could develop strategies to manage and diminish the long-term symptoms and disability associated with post-concussive syndrome.

- [62] Mr. Eaton attended for clinical interviews with psychiatrist Dr. Waraich on November 15 and 16, 2016, who prepared a medical-legal report and testified in this matter. Based on the information provided by Mr. Eaton and in the records he reviewed, Dr. Waraich diagnosed a major depressive disorder and suggested that alcohol misuse, post-traumatic stress disorder, and driving phobia were possible diagnoses that should be ruled out by further investigation.
- [63] Dr. Waraich recommended that Mr. Eaton be assessed for sleep apnea, given his result on one of the screening tests. He noted that if sleep apnea was present, he would caution the use of sedatives, including alcohol. He recommended that the use of alcohol be monitored in any event and that Mr. Eaton be referred to an addiction specialist if he had a "significant flare-up" or had evidence of functional impairment. Dr. Waraich also recommended seeing a neurologist and having neuropsychological testing to determine if he had had a concussion associated with his injuries.
- [64] Mr. Eaton was assessed by neuropsychologist Dr. Silverberg on September 25, 2017. Dr. Silverberg prepared a medical-legal report and appeared as a witness. He diagnosed Mr. Eaton with major depressive disorder in partial remission, although it was not clear to him whether Mr. Eaton had suffered from one lengthy major depressive episode following the MVA or multiple distinct episodes. The overall information with which he was presented was consistent with a mild neurocognitive disorder due to mild traumatic brain injury [concussion]. Dr. Silverberg noted that chronic pain and insomnia could also be contributing to Mr. Eaton's cognitive difficulties. Although Dr. Silverberg performed a number of tests to assess Mr. Eaton's cognitive functioning, it was clear that he relied in large part on self-reporting to establish a pre-MVA baseline.
- [65] Dr. Silverberg's prognosis was that Mr. Eaton would likely continue to suffer from symptoms indefinitely, given the length of time since the MVA. He noted that some symptoms might be alleviated if his pain and sleep could be better managed. He made recommendations for improving sleep and also recommended an occupational therapist.
- [66] Mr. Eaton was treated by Dr. Patel, a psychologist, for a total of 31 sessions between March 2015 and March 2018. Mr. Eaton has not received any psychological treatment since March 2018. Dr. Patel prepared a report and testified in this matter. In her opinion, Mr. Eaton was suffering from a major depressive disorder with anxious distress in 2015 when she first assessed him. At the time of her last session, she was of the opinion that his depressive disorder was in partial remission. This opinion is consistent with the opinions of both Dr. Waraich and Dr. Silverberg, who assessed him at different times.

- [67] Dr. Patel provided a long-term prognosis of a positive psychological recovery with ongoing intervention but noted that, if he continues to suffer from physical and cognitive injuries and functional limitations, the symptoms of depression and anxiety would be perpetuated. She accepted Mr. Eaton's reports that his alcohol consumption was no longer a problem and had largely been addressed by September 2016. Dr. Patel recommended an occupational therapist.
- [68] After moving to Alberta, Dr. Munsamy became Mr. Eaton's family practitioner. The first visit was May 2, 2018. Dr. Munsamy continues to be Mr. Eaton's physician. Mr. Eaton has never received assessment, treatment, or intervention by an occupational therapist, speech and language therapist, or vocational consultant.
- [69] While I found the experts, overall, were highly qualified and very helpful witnesses, the overarching problem with much of their evidence is the reliability of the information that was provided by Mr. Eaton. As noted by Justice Southin in *Sekhon v. Gill* (1991), 61 B.C.L.R. (2d) 273 at para. 49 "It is trite law [...] that in order for an expert to give an opinion the facts upon which he gives that opinion must be proven by the person who has personal knowledge of them". If the credibility or reliability of that information is in question, then it may affect the weight to be given to the expert's opinion (see, for example, *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at para. 49).
- [70] As noted elsewhere in these reasons, there were several troubling aspects to Mr. Eaton's testimony, which raised questions about its reliability. His testimony surrounding his alcohol consumption is illustrative of this problem, which significantly impacts the reliability of the opinions both in relation to diagnosis and prognosis.
- [71] Mr. Eaton testified that following the MVA, his alcohol consumption increased significantly, in what he described as an effort to self-medicate. The exact nature of his alcohol use over time is unclear, and Mr. Eaton was inconsistent in his testimony and in reports to various medical professionals about his alcohol consumption. He testified that before the MVA, he would have between two and four drinks a day--a cocktail, a drink with dinner, and one or two drinks after the kids were in bed. After the MVA, he testified that he would come home after work and have five to six drinks of hard alcohol, which he recognized in retrospect to have been a problem. He testified that this lasted some three to six months after the MVA. At one point in his testimony, he said the heavier drinking had lasted until around September 2014, at another point he estimated it lasted until October or November 2014, and at another point he said that by December 2014, he was back to his pre-MVA levels of alcohol consumption. His spouse confirmed the heavy drinking following the MVA and testified that she confronted him about it at one point because it was affecting the family. She estimated his drinking had gone back to a baseline of two drinks a day by the end of August 2014.
- [72] Mr. Eaton was, at times, deliberately vague in answer to questions about alcohol use and the information he had provided to various professionals.

- [73] On September 6, 2014, Mr. Eaton reported consuming six to seven drinks a day to Dr. Faraday, who recommended he reduce his alcohol intake. At an appointment on September 20, 2014, he reported that he was consuming two drinks per day. In December 2014, he reported consuming three to four drinks per day and was again advised to reduce his alcohol consumption. Dr. Faraday did not diagnose Mr. Eaton with a substance abuse disorder, as Mr. Eaton told him it was "under control".
- [74] In April 2015 when he was first assessed by psychologist Dr. Patel, his level of alcohol use was also raised as a potential concern. In July 2016, he reported consuming six to seven drinks a day to psychiatrist Dr. DeForge, who noted a concern around alcohol use and recommended a substance abuse counsellor. According to psychiatrist Dr. Waraich, at his November 2016 interview Mr. Eaton reported that his alcohol consumption had gone up to ten drinks a day after the MVA and "continued at this level for about a year". Mr. Eaton did not deny in cross-examination that he had reported this level of alcohol consumption to Dr. Waraich, responding simply "that is what it says" when asked whether he had made such a statement. He agreed that he had tried to be truthful with Dr. Waraich. According to Dr. Waraich, Mr. Eaton reported his consumption was down to "three to four cocktails per day in the evenings" at the time of his interview. It is not clear that even the report to Dr. Waraich was truthful, given the proximity to the reports from Mr. Wilson that Mr. Eaton smelled of alcohol in the workplace.
- [75] Not only were the testimony and the varying reports irreconcilable, but the question of how much Mr. Eaton was drinking was clearly relevant to the very issues many of the experts were seeking to assess. Various experts were of the view that alcohol consumption could affect issues including sleep, fatigue, cognitive performance, and recovery from a concussion or psychological injury.

Causation

- [76] A plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause, beyond the range of de minimus. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey] at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [77] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [78] In special circumstances, the "but for" test proves unworkable, and the law has applied a "material contribution" test. As Chief Justice McLachlin wrote in *Clements v. Clements*, 2012 SCC 32 at para. 46:

Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

[79] Causation must be established on a balance of probabilities before damages are assessed. As Chief Justice McLachlin stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

[80] Justice Lambert summarized the principles to be applied in assessing claims of psychological injury in *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.) at paras. 12-13.

The parties' positions

- [81] The plaintiff submits that as a result of the MVA, he sustained a number of soft tissue injuries that are now chronic. Of greater concern, he says that the MVA has left him with persistent post-concussion symptoms as well as a mood disorder. As a result of these symptoms, he has sleep difficulty, his personality is changed, and he lacks energy. His ability to multitask, focus, and concentrate are all much less than before the MVA.
- [82] The defendant agrees that the plaintiff sustained some soft tissue or musculoskeletal injury and "emotional upset" resulting from the MVA. The defendant submits the plaintiff's soft tissue injuries resolved by March 2017 after which the plaintiff moved to Alberta and ceased all treatment related to the physical symptoms he attributes to the MVA. With respect to the psychological symptoms, the defendant submits that these were largely resolved by the last session with Dr. Patel in March 2018, after which he stopped all psychological treatment.
- [83] The defendant submits that the plaintiff was in a period of high stress and life transitions in the two to three-year period prior to the MVA. He was in a new relationship with two infant children as well as caring for a nine-year-old child from a prior relationship, and he was involved in ongoing litigation with the child's mother. At the time of the MVA, the family was in the process of moving from a large rental home to a smaller townhouse with a much smaller yard. The plaintiff had also been experiencing stress and frustration at his worksite and other financial issues.

- [84] The defendant further submits that the precise determination of the nature, severity, and extent of the plaintiff's losses is made most difficult by the plaintiff's own inconsistent and unreliable evidence. I agree that there were several aspects of Mr. Eaton's testimony that were problematic and that portions of his testimony are therefore not reliable. I have set out some of my concerns in the relevant portions above, including whether he was seeking a buyout at DSL, the reasons for seeking payments to a separate company from Zeebest, and the cause of his 2013 back injury. While each of these issues on their own could perhaps be dismissed, in the context of his overall testimony and in particular his evasive testimony around alcohol consumption, I have concerns about the reliability of his testimony.
- [85] In submissions, plaintiff's counsel suggested that even if I were to find Mr. Eaton's testimony about his alcohol consumption was inaccurate, issues such as the odour of alcohol at the office which led to his termination should be attributed to the MVA, as the increase in alcohol consumption was a result of the MVA. However, even if I were to accept the plaintiff had established that the injuries would be the cause of alcohol consumption, to accept that the MVA caused an increase in alcohol consumption I would have to accept Mr. Eaton's reports about his pre-MVA consumption patterns. I find that Mr. Eaton's reports about his alcohol consumption after the MVA are not reliable, and as a result I am not satisfied that his self-reported consumption patterns prior to the MVA can be relied upon either. I am also not satisfied that the testimony of other witnesses can remedy this problem, as Mr. Eaton does not appear to have been forthcoming with the other people in his life. Even on his own evidence, Mr. Eaton was not forthcoming about his alcohol consumption with his spouse, and her understanding of his level of consumption is not consistent with his testimony or the reports he made to various professionals.
- [86] More fundamentally, the issues surrounding his testimony about alcohol consumption undermine both the opinions of the experts upon which he seeks to rely and the reliability of his testimony more generally.
- [87] That being said, I do accept substantial portions of Mr. Eaton's testimony, in particular to the extent it is corroborated by other evidence and testimony.

Determination

- [88] I accept that the MVA has had a substantial impact on Mr. Eaton both physically and psychologically, which continues to be felt today.
- [89] With respect to the physical injuries to his neck and back, I find that, as a result of the MVA, Mr. Eaton has suffered musculoligamentous injuries to his lower back, upper back, and neck. I accept that he also had tingling in his left arm. The lower back injuries have resolved, but the upper back and neck injuries continue to cause problems. While I approach Mr. Eaton's self-reported pain levels with some caution, I accept that he will continue to suffer pain and discomfort for the foreseeable future, including periodic flare-ups. I also accept that he continues to suffer from headaches more frequently as a result of

the MVA.

- [90] With respect to the concussion and psychological injury, I do not accept the defence position that the substantial changes in Mr. Eaton observed by numerous witnesses following the MVA can be attributed exclusively or even primarily to his life circumstances outside of the MVA. While those circumstances may have played a role in the overall situation in which Mr. Eaton found himself at the time of the MVA, I do not find it likely that the fundamental transformation described by multiple witnesses would have coincidentally been triggered precisely around the time of the MVA. I am satisfied on a balance of probabilities that the changes observed in Mr. Eaton following the MVA were caused by the MVA.
- [91] While the observations of third parties are of substantial assistance in corroborating that Mr. Eaton has suffered some form of psychological injury and mild cognitive impairment, I find it more difficult to assess the nature and scope of the injury given the concerns I have outlined above with the reliability of the information provided to medical professionals. Therefore, while I find the plaintiff has established that he likely suffered some form of concussion and psychological injury, I do not find that he has established the scope of the injury being alleged.

Damages

Non-Pecuniary Damages

- [92] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [93] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:
- [46] The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146 that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
 - (h) impairment of physical and mental abilities;
 - (i) loss of lifestyle; and
 - (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).
- [94] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.
- [95] Counsel for the plaintiff submits that non-pecuniary damages of \$175,000- \$200,000 are appropriate in the context of someone who has sustained a permanent life changing injury that causes daily cognitive, emotional and physical symptoms. He has referred me to *Pearson v. Savage*, 2017 BCSC 1435; *Burdett v. Eidse*, 2010 BCSC 219; *Rintoul v. Gabriele*, 2011 BCSC 858; *Mayer v. Umabao*, 2016 BCSC 506; *Grassick (Guardian ad litem of) v. Swansburg*, 2015 BCSC 2355; and *Wallman v. John Doe*, 2014 BCSC 79, where sums in that range or higher were awarded.
- [96] The defendant submits that the plaintiff is entitled to an award in the order of \$40,000 assuming there is not a finding of a brain injury, and refers me to the cases of *Cegielka v. Grace*, 2020 BCSC 115; *Hill v. Swayne*, 2012 BCSC 1126; and *Hussainyar v. Miller*, 2012 BCSC 405 in which similar awards were made. In the alternative, if I were to find there has been a brain injury, then the defendant submits that the case of *Barr v. Accurate Transmission and Driveline*, 2016 BCSC 2432 in which \$65,000 was awarded is also comparable.
- [97] Each of these cases has been of some help in making the assessment, but, naturally, each has important distinguishing features. The plaintiff's cases, while arguably consistent with the position taken about the nature of the injuries, are of limited assistance given my findings in this case. I do, however, accept that the injuries have had a greater impact than submitted by the defence. In addition to pain and suffering, the physical injuries to Mr. Eaton's back and neck have affected a number of areas of his life, including work, recreational activities, housework, and his involvement with his children. The psychological injuries including depression, fatigue, and irritability have had a substantial impact on Mr. Eaton and his relationships with his spouse and children, which continues to be felt to this day and will likely continue to affect them. Making an individualized assessment in the overall circumstances, I find that an award of \$75,000 is appropriate.

Past Loss of Income and Loss of Income Earning Capacity

- [98] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [99] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.
- [100] The legal principles applicable to the assessment of loss of future earning capacity were summarized by Justice Voith in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133:
- [133] The relevant legal principles are well-established:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[101] Relevant factors in applying the capital asset approach were summarized by Justice Finch (as he then was) in *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.) and have been widely adopted in this Court (see *Perren v. Lalari*, 2010 BCCA 140 at para. 11 and *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53):

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[102] The plaintiff's position is that until the MVA, Mr. Eaton demonstrated stable employment with DSL and submits it is likely that Mr. Eaton would still be working there if not for the MVA. The plaintiff presented a series of calculations based on the difference between Mr. Eaton's income at DSL and his reported income in his subsequent employment to support an award of \$250,000 for past loss and \$1,369,000 for future loss of income earning capacity.

[103] The defendant takes the position that there is no temporal or causal connection between the termination of the plaintiff from DSL and the injuries sustained in the MVA. The defendant submits Mr. Eaton's departure from Zeebest was due to a dispute over income and other factors that are not related to his alleged injuries. Had Mr. Eaton remained at Zeebest, his prospects for increased income over time were higher than his current scenario at Tafeli Cookies. The Defendant submits that Mr. Eaton is making a lifestyle decision to remain working at Tafeli Cookies, as this fits well with his longstanding interaction style with superiors and his preference to be the boss.

[104] I agree with the defence that the reliability of Mr. Eaton's testimony makes it challenging to assess the precise nature of the impact of his injuries on his past employment and future employability.

[105] I accept that the injuries sustained in the MVA had some impact on the timing of his departure from DSL and in limiting his employment prospects to some extent following his departure. However, I do not find the plaintiff has established that the difference between his earnings at DSL and those in the following years can be laid solely at the defendant's feet. In my view, \$75,000 adequately reflects the loss of income established by the plaintiff up to the time of trial. I expect that the parties will be able to come to an agreement about the application of s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, to the award

under this head of damages as it relates to the deduction of the amount of income tax payable from lost gross earnings (see *Hudniuk v. Warkentin*, 2003 BCSC 62). Arrangement can be made for further submissions on the issue should they be required.

[106] I also accept there is a real and substantial possibility the ongoing injuries will impact Mr. Eaton's future income earning capacity. While I give limited weight to the prognosis from some of the experts given the unreliable foundation of their opinions, several elements of Mr. Eaton's situation are corroborated by other evidence. In particular, I accept that some form of ongoing pain, fatigue and mild cognitive impairment will be a part of Mr. Eaton's life indefinitely and will impact his performance in the job market. While the income at DSL provides some metric for assessing the future losses, I do not accept the plaintiff's position that a simple calculation of the difference in income at Tafeli Cookies and that at DSL until retirement is appropriate. Given the challenges in accepting Mr. Eaton's evidence about his motivations for employment decisions, I find that a capital asset approach based on factors corroborated by others to be more helpful. Taking into consideration the overall circumstances, I find that \$225,000 is an appropriate reflection of the present value of the future loss of income earning capacity established by the plaintiff.

Duty to Mitigate

[107] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

[108] Once a plaintiff has proved the defendant's liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.

[109] *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 sets out the test for failure to mitigate by not pursuing recommended treatment:

In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

[110] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, Justice Garson further discussed the nature of the test as follows:

[56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment.

[Emphasis in original.]

[111] The defendants submit that that the plaintiff unreasonably failed to mitigate his damages insofar as he did not follow recommendations for treatment and did not seek accommodations from his employers.

[112] Mr. Eaton has attended at range of treatment providers for his injuries, including physiotherapy, massage therapy, chiropractic treatment and psychological counselling. While I have outlined some concerns around Mr. Eaton's inconsistent disclosures to various professionals, I accept that he was an engaged participant in his treatment plan and genuinely wanted to get better. The defence placed some emphasis on Mr. Eaton's failure to be assessed by an occupational therapist despite recommendations from several professionals that he do so. However, I would note that the recommendations were made by medical-legal experts and not his treating family physician. While Dr. Faraday accepted in cross-examination that this could be helpful, he had not referred Mr. Eaton for such an assessment, and it was not unreasonable for Mr. Eaton to follow the advice of his treating physician.

[113] Finally, in relation to Mr. Eaton's failure to seek accommodations at DSL or at Zeebest, it is unclear what accommodations might have assisted him in those positions or what impact those hypothetical accommodations might have had on mitigating his losses.

[114] I am therefore not satisfied the defendant has established a failure to mitigate in the circumstances.

Costs of Future Care

[115] In *Gao v. Dietrich*, 2018 BCCA 372, the court summarized the law regarding cost of future care in the following terms:

[68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be

used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

- [69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.
- [70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).
- [116] I note that an assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
- [117] The defendant submits that the plaintiff is not entitled to any award under this head of damages as he has presented no expert evidence of estimated costs for his future medical and related needs stemming from the MVA. The defendant also submits that the plaintiff has taken no steps since moving to Alberta almost three years ago to pursue the recommendations of the various medical experts.
- [118] I accept that Mr. Eaton will require ongoing medication and treatment for his physical pain symptoms. His counsel suggested \$200 adequately approximates the cost of pain medication, and I agree this is reasonable.
- [119] Dr. Faraday estimated that Mr. Eaton would likely suffer acute exacerbations of his pain once per year on average and require physiotherapy or massage therapy. I have been referred to the tariff in Schedule 3.1 of the Insurance (Vehicle Act) Regulation, B.C. Reg. 447/83, which sets out service fee limits for physiotherapy and massage therapy treatments at \$79.00 and \$80.00 respectively. Allowing four visits per year and applying the present value multiplier provided at Appendix E of the Civil Jury Instructions to age 80, plaintiff's counsel submits a lifetime cost of \$7,666.00. He claims separately for visits with a kinesiologist. While I accept Dr. Faraday's prognosis was made in good faith, as defence counsel pointed out, Mr. Eaton has not pursued any such treatment since moving to Alberta around three years ago. Therefore, while I accept that future flare-ups are likely to occur, I find that \$2500 is a more reasonable assessment of the future cost of this type of care.
- [120] Dr. Patel recommended an initial block of 32 treatments of cognitive behavioural therapy with an allowance for more. With an estimate of \$6,200 for the initial block, Mr. Eaton seeks a total allowance of \$7,500 for these treatments. I accept that, given his ongoing psychological and cognitive issues, this request is reasonable.

[121] Mr. Eaton also claims some \$2,000 for an occupational therapist, based on an agreed hourly rate of \$195 and a reasonable estimate of around 10 hours to complete an assessment. Given the multiple professionals who have suggested Mr. Eaton would benefit from working with an occupational therapist, I agree that this is a reasonable request in the circumstances.

[122] In summary, I award the following in costs of future care:

Medication:

\$200

Physical Therapy:

\$2,500

Psychological Treatment:

\$7,500

Occupational Therapy:

\$2,000

Total Cost of Future Care:

\$12,200

Special Damages

[123] Both parties agree that the plaintiff suffered special damages in the amount of \$7,821.55.

Summary

[124] In summary, damages are awarded as follows:

Non-pecuniary Damages:

\$75,000

Past Income Loss (gross):

\$75,000

Loss of Future Earning Capacity:

\$225,000

Cost of Future Care:

\$12,200

Special Damages:

\$7,821.55

Costs

[125] If the parties are unable to agree on costs, they may arrange to make submissions on the matter.

"Edelmann J."

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