

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Mattu v. Fust***,
2009 BCSC 624

Date: 20090508
Docket: M043152
Registry: Vancouver

Between:

Jasbir Mattu

Plaintiff

And

**Danny Fust, Lila Dutta,
Attorney General of Canada**

Defendants

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for the Plaintiff:

K. Simon
D. Chiu

Counsel for the Defendants:

M.D. Murphy
C. Watson

Date and Place of Trial:

November 17 – 21; 24; 26 – 28;
December 2, 2008

Vancouver, B.C.

[1] Mr. Mattu was injured in a motor vehicle accident on March 16, 2004. He was 39 years old at the time and was driving his minivan north on the Alex Fraser Bridge. Mr. Mattu stopped his vehicle and was struck from behind by a car driven by the defendant Lila Dutta, which had been struck from behind by a vehicle driven by the defendant Danny Fust. Mr. Mattu's vehicle was pushed into the vehicle ahead of him.

[2] Liability is admitted by Mr. Fust. The action against the other two defendants was discontinued before trial.

[3] The issues are general and special damages, past and future income loss/loss of opportunity and future care costs. The defendant acknowledges that Mr. Mattu was injured in the accident.

EVIDENCE OF JASBIR MATTU

[4] Mr. Mattu testified that he was born October 6, 1964, in England. He and his wife moved to British Columbia in 1995. They have three boys ranging in age from six to fourteen years of age.

[5] Mr. and Mrs. Mattu were sponsored to come to British Columbia to work in the herbal medicine profession. Both have diplomas in herbal medicine from England.

[6] From 2000 to 2004, Mr. Mattu was involved with the Dominion Herbal College, teaching two to three one-hour classes on a weekly basis, supervising clinical hours for approximately 25 hours per week and also acting as clinic director. He would mark lessons at home for Distance Learning. He also had a practice in Burnaby, called Elixir

Herbal Health Care (a partnership with Mrs. Mattu) and he was spending approximately two days per week there, practicing as a clinician.

[7] Just before the motor vehicle accident, Mr. and Mrs. Mattu planned to expand their Elixir business and open another practice, possibly in White Rock or Surrey. The intention was to have other therapists there as part of a holistic or natural health care clinic, along with a retail store. The plan solidified in late 2003 and by early 2004 they were more actively looking for a location.

[8] Before the accident Mr. Mattu describes his health as very good. He was involved in recreational activities with his friends and children. He worked out at a gym on occasion. He enjoyed walks and trails in the outdoors. In the year before the accident he went to the Centennial facility in Burnaby and worked out at a gym on Sunday mornings, fairly regularly. Sundays were usually a family day. Before the accident Mr. Mattu was fairly involved in his childrens' lives. He would take them to events, play sports with them at home and describes himself as a 50% caregiver, although he acknowledges that his wife probably did more than he did.

[9] Mr. Mattu said that on March 16, 2004, he was travelling over the Alex Fraser bridge heading north in heavy traffic. He came to a stop and was stopped for a few seconds. He looked into his rear view mirror and saw the car behind him had stopped. He heard the sound of a crash and his vehicle was jolted forward, striking the vehicle in front and a concrete barrier. He felt pain throughout his body, mostly in his arm and leg, back, shoulders and neck. He did not feel able to get out of his vehicle and was taken to Surrey Memorial Hospital by ambulance. He said he was suffering from headache,

nausea, pain in his back, and his arms and legs were tingling. He was told that he was in shock, that his symptoms were quite typical and the doctor suggested that he take Tylenol 3's and muscle relaxants and see his family doctor. He said that for the first few weeks he was physically not good. His body was aching, particularly his neck and shoulders. He had headaches. He had pain in his jaw. He was not sleeping well, he was not able to sit comfortably. Emotionally he was not well. He was not able to go into work. His clients at the Burnaby clinic were notified that he was not well and their appointments were postponed. The Dominion Herbal College was notified and he did not perform his teaching or clinical supervision commitments. His wife took on some of the duties of setting up what became, in late 2004, the Wellness Centre and the Wellness Store in White Rock.

[10] He saw a doctor approximately two days after the accident. He did not have a family doctor, so went to see Dr. Hair at a walk-in clinic. He received medications: Tylenol 3's and Vioxx. He also received treatments: chiropractic, massage therapy, acupuncture and physiotherapy, and he saw a kinesiologist.

[11] Approximately seven to ten days after the accident he went to a second walk-in clinic and saw Dr. Muncey. He said that the medications were not really working and he wanted something stronger. She advised him that his symptoms were fairly typical and should settle.

[12] In April he saw Dr. Parhar, who became his family physician.

[13] For the first few months, March to June 2004, some of his symptoms worsened. Headaches became worse, his back became very sore, and his shoulders and neck

were numb, in pain and stiff. He had difficulties with his posture. His arm, leg and left side were sore. He had a lot of mental and emotional difficulties. His concentration was poor. He had an ongoing headache and ringing in his ears as well as dizziness. He describes himself as quite emotional and frustrated. He had a lot of anxiety about driving.

[14] In this period, he was anxious to get back to work and tried a variety of treatments including acupuncture, massage therapy and chiropractic treatments. However he did not work at Dominion Herbal College or at the Burnaby clinic. He made many visits to therapists with his wife acting as chauffeur.

[15] Between June and September 2004 he noted some signs of improvement. He used herbal medicines that he prescribed for himself. He was still very tired. His sleeping was disrupted. He continued to have numbness and tingling, predominantly in his left arm and his leg, foot and hand. His headaches were ongoing, though not as extreme and he was trying to reduce his medications. His concentration was still poor. He had mental “fuzziness” and was forgetful.

[16] By June 2004, the Burnaby practice had slowed considerably. Mr. Mattu may have seen some clients. He resumed teaching at Dominion Herbal College as well as some clinic supervision. Mr. and Mrs. Mattu found a location for the White Rock facility. Mrs. Mattu had to meet with contractors and order equipment while Mr. Mattu stayed at home. He spoke to sales reps, arranged telephone lines, signage and advertising.

[17] By the end of 2004 things had improved a little more. Some treatments had helped. He was still trying herbal remedies and in late 2004 through early 2005 he took a break from therapies.

[18] In 2005 some of his symptoms improved, but others were still present. His headaches, numbness, tingling and back complaints continued. He decided to look again at therapies and took further chiropractic, acupuncture and massage treatments. He saw his doctor regularly. He purchased an exercise ball, a multi-gym and an inversion table. He found the inversion table to be particularly helpful and would use it a couple of times a day. He continued to have muscle spasms in his back, predominantly on the left side. He had pain in his lower, mid and upper back which would sometimes flare up. He had some good days and some bad days. He used an infrared sauna at the White Rock Wellness Centre.

[19] Through 2005 he worked some at the Wellness Store and some in private practice at the Wellness Centre. He did some student training clinics and some teaching at Dominion Herbal College in June and July, as well as some marking. Because of changes at the Dominion Herbal College, his work there was reduced, which allowed him to do more at the White Rock Wellness Centre. In April 2005 he decided to close the Burnaby location.

[20] Through 2005 he was not able to work at the level he anticipated and his wife continued to do some things that he would otherwise have done. In 2005 Mrs. Mattu stepped in at the White Rock Wellness Store. Mr. Mattu estimates that Mrs. Mattu worked 25 hours per week that he would have, had he not been injured. Only he and

his wife work in the Wellness Store. It is open from 10:00 a.m. to 5:00 p.m., Monday to Saturday. They each receive \$15 per hour. He did not keep precise track of the hours or dates that he worked.

[21] In 2005 he continued to teach summer seminars for Dominion Herbal College. The college had outsourced clinics, in part to the White Rock Wellness Centre, and Mr. Mattu scheduled students to attend seminars at the Wellness Centre. He held intensive clinics there in 2006 and 2007.

[22] In 2006 his complaints gradually improved, with some flare-ups. He received some chiropractic treatment and was still taking some herbal medications. His back continued to cause him problems, as did headaches. Emotionally he was a little better. His clinical practice was building. He was scheduling students and marking at home. He held classes in June and July for Dominion Herbal College and worked in the retail store. He was doing a little bit more.

[23] In 2007, Mr. Mattu felt that his symptoms had started to plateau. He was not improving as much as he wanted to and so he spoke with Dr. Parhar, who suggested that he see Dr. Hershler. He also made a conscious decision to become more involved with his children's activities, taking them to tai-kwon-do, playing ball in the front yard, going to movies, Whistler, etc. At Christmas the family drove to Disneyland. Mrs. Mattu did most of the driving.

[24] In 2008 Mr. Mattu says things have been good with gradual improvement, although he has more or less plateaued. He continues to do what the therapist recommends and is very determined to move forward and get better. In a typical work

week, he works sporadically. Sometimes he works a whole day. He uses the infrared sauna a few times a week. He has meetings with practitioners to promote the business. He also meets with sales representatives. He is involved with the Business Improvement Association in White Rock. He continues to teach students from the college and schedules clinics as much as he is able. He is not able to sit or stand for too long. He now scatters his clients, whereas he used to see a number of clients in one day. He has learned to adapt to his abilities. If he is in spasm or pain he is not able to do appointments. Before the accident he was working 40 – 45 hours per week at the college and 16 hours at the Burnaby clinic. For the past six months he has worked 45 – 50 hours per week. Before the accident that would cause him no problems. Now he is quite wiped out and exhausted after a week of work. In addition, his time is not as productive as he would like.

THE EVIDENCE OF HARWINDER MATTU

[25] Mrs. Mattu is a medical herbalist, an aesthetician and a massage therapist. For the first few years after moving to Canada she was not particularly active in business because she had young children. In the year before the accident she was quite a bit more involved. She was the Director of Herbal Studies at the Dominion Herbal College. She was also slowly building her own practice through Elixir.

[26] In 2003 the Mattus were looking to expand their business and looking for a clinical practice in White Rock, Surrey or Burnaby. They planned to keep the clinic in Burnaby but to expand to a second clinic as well.

[27] Much of the work that she did, she did from home. The teaching at Dominion Herbal College was done at the college, as were the clinics. Other things were not, such as marking lessons, answering emails, scheduling, acting as Director of Herbal Studies, conference calls, etc. In 2002 they were both quite active at the college. Mr. Mattu more so. He was the Clinical Director and ran clinics. In 2003 he was also at the clinic more than Mrs. Mattu.

[28] She described her husband before the accident as a real go-getter, very active, and a regular exerciser. He liked to go to the gym, he enjoyed activities with the kids, and he coached soccer and was socially very outgoing. He was involved in music. He was the life and soul of the party. They both wanted to work hard and enjoy life.

[29] With respect to the White Rock businesses, her involvement was partly from necessity, because Mr. Mattu was not able to do as much. She would drive to the location several times a week to keep on top of the contractor. The Wellness Store opened in November 2004 and the Wellness Centre the following month. She worked at the store even though it had been her intention not to be there much and to pursue her own interests. In 2004 and 2005 she worked there full-time, from 10:00 a.m. to 5:00 p.m., Monday to Saturday. In 2006 she scaled it back a bit, but still put in an extra 25 – 30 hours per week. In 2007 and 2008 she scaled it back more. In 2004 she made nothing from the store, and in 2005 she made approximately \$30,000. In 2006 she made \$16,500 from the store, although she worked there more than she was paid.

[30] Mr. Mattu was not in the store in 2004. In 2005 he was there occasionally. In 2006 he was stepping back in, and in 2007/2008 he was there much more. Mr. Mattu

has been improving during 2008 but there are times when he relapses. He still is not able to work as much as he did before. Concentration is difficult. Their ability to move forward with their businesses lacks the momentum that it had before he was injured.

MEDICAL EVIDENCE

[31] Dr. Parhar has been Mr. Mattu's family physician since April 2004. He provided three reports to the court. In his first report of November 1, 2004, he diagnosed Mr. Mattu with paracervical, parathoracic and paralumbar muscle strain, left shoulder strain and muscle tension headaches. He had received ice, heat, rest, exercises, massage therapy, kinesiology, acupuncture, herbal medicine and medications: anti-inflammatories, analgesics and muscle relaxants. With respect to prognosis and recommendations, Dr. Parhar was impressed by Mr. Mattu's motivation to recover and try different treatments, but was concerned that he may be trying too many modalities. He recommended limiting treatment to massage and physiotherapy and increasing active modalities such as swimming and exercises. He anticipated further treatment and improvement.

[32] In his report of May 26, 2006, Dr. Parhar found that Mr. Mattu continued to have decreased range of motion in the cervical spine, tenderness in the paracervical and paralumbar regions. He found muscle spasm in the paracervical and paralumbar regions. His diagnosis remained the same. His prognosis for full recovery had worsened. Mr. Mattu had tried a variety of treatments with minimal success. Dr. Parhar's recommendations were unchanged, but he thought that Mr. Mattu's condition had plateaued.

[33] In his final report of September 16, 2008, Dr. Parhar considered the MRIs of Mr. Mattu's spine taken September 19, 2006, and July 28, 2008, and concluded that Mr. Mattu's injuries included cervical and thoracic disc herniations. He said: "... it is unclear if the cervical and thoracic disc herniations were caused by the motor vehicle accident ... but certainly, this motor vehicle accident made these spinal lesions symptomatic." He commented on Mr. Mattu's efforts to recover: "... pursued many more modalities of treatment than most patients would have. Despite all of these modalities his pain symptoms persist." He concluded that the prognosis for a full recovery was poor, that Mr. Mattu's condition had plateaued and further improvement in his functioning or symptomatology was unlikely.

[34] Dr. Hershler, a specialist in Physical Medicine and Rehabilitation, saw Mr. Mattu in May 2005 for a medicolegal report. On physical examination, Dr. Hershler found wide areas of spasm on both sides of the spine, worse on the left than the right. The prognosis was guarded, as the pain and limitation had continued for 14 months, despite a wide variety of treatments. Some of the treatments (chiropractic and acupuncture) had provided temporary relief. He also had more anxiety since the accident. Dr. Hershler recommended ongoing heat and stretching for the spasm; continued use of the infrared sauna; massage therapy; chiropractic treatments; acupuncture and pulsed electromagnetic therapy.

[35] Dr. Hershler saw Mr. Mattu again in May 2006. At that time he wrote, "... Jasbir has noticed a small but significant improvement. He now rates his productivity at work at 75% ...", although he reported that he was still working reduced hours. Mr. Mattu had been using chiropractic treatments, the infrared sauna, an inversion table, acupuncture

and massage therapy. He was taking fewer medications. Dr. Hershler still found spasm, more on the left than the right. The prognosis remained guarded. He anticipated that Mr. Mattu would remain impaired by pain for the foreseeable future and require ongoing treatment: infrared sauna, monthly chiropractic treatments and occasional massage (12/year) and acupuncture (6/year).

[36] On September 26, 2006, Dr. Hershler commented on the MRIs:

I cannot be absolutely sure that these changes were not present prior to the motor vehicle accident on March 16, 2004. However, given the persistence of these symptoms and the evidence of spasms, it is likely that the motor vehicle accident rendered these changes more symptomatic or even caused some of these disc herniations to occur. ... the physiological basis for his symptoms is a combination of soft tissue injuries ... and the small disc herniations.

The prognosis was unchanged.

[37] Dr. Hunt, a neurosurgeon, saw Mr. Mattu in March 2007. Dr. Hunt agreed with Dr. Hershler regarding the etiology and ongoing pain arising from the various intervertebral disc herniations. Dr. Hunt opined that in addition to the muscle and ligamentous injuries, Mr. Mattu had clinical findings of facet joint irritation in the lower spine, also due to the motor vehicle accident. Dr. Hunt thought that Mr. Mattu had also suffered a cerebral concussion which would increase emotional and mental difficulties. He wrote, "Although Mr. Mattu has suffered some mental depression and has had problems with emotional control ... it is the writer's opinion that Mr. Mattu's ongoing difficulties are more related to the muscle and ligamentous injuries ...". Dr. Hunt anticipated that Mr. Mattu would be left with ongoing permanent difficulties. He said that

acquiring a personal trainer with a program to recondition would hopefully reduce his chronic pain and improve his sleep.

[38] On September 24, 2008, Dr. Hunt found that the facet joint irritation had settled and his findings were more in keeping with irritation of the paravertebral lumbar muscle groups in the upper lumbar regions.

[39] The defence relied on the evidence of Dr. Sheard, a chiropractor, and the opinions of Dr. Arthur, an orthopaedic surgeon, and Dr. Sui, a neuroradiologist.

[40] Dr. Sheard has been a chiropractor for 45 years. He treated Mr. Mattu ten times between March and June, 2004. He described Mr. Mattu as very vocal, unduly so, with exaggerated response to light pressure. He found Mr. Mattu's movements to be guarded and questioned whether he was malingering.

[41] Dr. Arthur saw Mr. Mattu in August 2006. He concluded that Mr. Mattu had initially had significant lower back and left leg and arm complaints and subsequently developed headache and upper back and neck complaints. His complaints were consistent with a degree of soft tissue injury related to the motor vehicle accident. Dr. Arthur was of the view that Mr. Mattu would benefit from an appropriate supervised exercise program. He was not totally disabled from his pre-accident duties and should be able to increase his hours to his pre-accident state, as his occupation allowed him to change his positions to control his complaints. Dr. Arthur anticipated that he would slowly improve.

[42] Dr. Sui did not examine Mr. Mattu. His opinion was based on his review of the MRIs of September 19, 2006, and July 28, 2008. Dr. Sui found several tiny herniations in the cervical and thoracic spine. They were small or tiny in size. They did not impinge on any nerve roots and he would not expect any neurologic symptoms. He could not determine when the herniations occurred.

FINANCIAL EVIDENCE

[43] The plaintiff relies on the opinion of Ronald J. Tidball, a chartered accountant, dated August 11, 2006. Mr. Tidball provided an estimate of Mr. Mattu's income loss in four areas:

1. Past loss related to college subcontract earnings: estimated at \$46,765, based on information supplied in the college's letter of May 29, 2006: clinic supervisor, \$39,200; college instructor, \$2,565; clinic director, \$5,000.
2. Past loss related to the Burnaby clinic: \$19,000 to October 2006, at \$10,000/year, based on the plaintiff's estimate and net rent of \$400/month.
3. Past loss of income from White Rock Wellness Centre Inc. (clinical practice): nominal, as clinic demand did not exceed plaintiff's capacity.
4. Past loss of income from White Rock Wellness Store Inc. (retail store): \$34,875, based on the plaintiff's information that the store began operating in January 2005, that the plaintiff and his wife worked in the store from 2005 to the date of report and that Mrs. Mattu worked 25 hours/week beyond what she normally would have to accommodate Mr. Mattu's injuries. (January 2005 to October 2006: 93 weeks x 25 hours x \$15/hour = \$34,875.)

Total: \$100,640.

[44] The plaintiff in his submissions extrapolated these calculations to the date of trial, November 2008, as follows:

1. Dominion Herbal College
 - (a) Clinic Director: \$250/week from March 16 to August 21 (20 weeks): \$5,000.
 - (b) Clinic Supervisor (in house): \$35/hour, specified dates to July 2004: \$16,380.
 - (c) Instructor: March 18, 2004, to April 27, 2004: \$45/hour, specified dates: \$2,430.
 - (d) Clinic Supervisor: September 2005 to trial (outsourced to White Rock Wellness Centre): 4 students x 3 days x 7 hours/day at \$9.00 for 37.5 months = \$28,350.
- Sub-total: \$52,160.
2. Burnaby Clinic: March 16, 2004, to trial: \$10,000 x 3.5 years = \$35,000.
 3. White Rock Wellness Store: January 2005 to August 2006 = \$34,875.

Total: \$122,035.

THE POSITIONS OF THE PARTIES

[45] The plaintiff says that he received musculoskeletal injuries to his neck, upper and mid back, low back and jaw. He suffers from headaches, altered sensation in his left arm, leg complaints, shock and vertigo, tinnitus and cerebral concussion. The plaintiff argues that he sustained injuries to the intra-vertebral discs of his cervical and thoracic spine in the motor vehicle accident. The plaintiff says that the disc injury, as well as herniations at four levels of the spine, were caused by the motor vehicle accident.

[46] The plaintiff says that before the accident, he was able to engage in all manner of physical activity and work long hours. He had no history of neck or back pain. The plaintiff says, relying on *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235,

that his injuries were caused or contributed to by the motor vehicle accident and the defendant is responsible for them.

[47] The plaintiff says that since the accident he has experienced functional limitations due to low and mid back pain and neck pain. He complains of referred pain into his leg and arms. He has headaches and suffers from a loss of concentration.

[48] The plaintiff says that because of his injuries, he has not been able to move his businesses forward as he would otherwise have done. Mr. Mattu says that he has been able to maintain employment, in part because he is self employed. However, he has not reached his pre-accident work potential. His wife has taken on additional duties for the businesses since the accident. Mr. Mattu says that his prognosis is guarded to poor and the expectation is that he will have pain and limitation indefinitely.

[49] The plaintiff says that an award of \$80,000 is appropriate for non-pecuniary damages.

[50] With respect to past loss of income and loss of opportunity, the plaintiff seeks \$122,035.

[51] The plaintiff argues that he has also suffered a loss of earning capacity in that his injuries have diminished the value of his capital asset, his earning capacity. The range of employment options has narrowed as a result of his injuries. He requires a flexible work environment to accommodate his physical capacity. Mr. Mattu is less capable overall of any type of employment and less marketable to an employer. The plaintiff says that an award of \$125,000 would be appropriate.

[52] The plaintiff seeks special damages of \$9,741.29.

[53] The plaintiff seeks costs of future care of \$68,085.26 to age 70, or \$75,036.62 to age 80.

[54] As noted above, the defendant concedes that the plaintiff was injured in the accident. The defendant says that the plaintiff is exaggerating the severity of his injuries and the duration of his symptoms. The defendant argues that the plaintiff did not act reasonably to mitigate his injuries and that, to the extent that they have persisted, the defendant should not be held liable. The defendant says that the evidence for the loss of income is inadequate, imprecise, unreliable and unsupported.

[55] With respect to future income loss, the defence points out that the plaintiff's occupational therapist, Linda Waithman, says that Mr. Mattu is able to perform his job. The defence says that it is not sufficient for the plaintiff to testify to a loss of confidence in the absence of any evidence to demonstrate that there is a functional element to such a loss.

[56] With respect to future care, the defendant says that Mr. Mattu has not proved that he needs most of what Ms. Waithman recommends.

[57] The defence says that the only valid special damages are \$589 for the rental vehicle and the cost of therapy for approximately three months following the accident, in total, \$2,432.61.

[58] The defence says that Mr. Mattu should be awarded non-pecuniary damages of \$30,000 to \$45,000; past income loss of \$5,000; no future income loss or cost of future

care; and special damages of \$2,432.61. After a deduction of 25% for failure to mitigate, the defence says that an appropriate award is \$28,000 to \$40,000.

DISCUSSION

[59] I found Mr. Mattu to be an honest witness. Although he was not always a reliable historian, in my view he was not intentionally misleading and was trying to provide the court with accurate information. I also found Mrs. Mattu to be an honest witness, with better recollection of some events and details than Mr. Mattu.

Non-pecuniary loss

[60] I found the evidence of Dr. Parhar to be very helpful. Dr. Parhar has seen Mr. Mattu regularly since shortly after the accident. I accept his opinion that Mr. Mattu suffered paracervical, parathoracic and paralumbar muscle strain, left shoulder strain and muscle tension headaches from the accident; that his condition has plateaued; and that it is unlikely there will be further improvement. I also accept the opinions of Drs. Parhar, Hershler and Hunt that the accident likely caused the disc herniations in Mr. Mattu's back to become symptomatic. Mr. Mattu will continue to need chiropractic treatment from time to time and would benefit from a personal trainer.

[61] I have considered the cases which counsel have provided to me. In my view, an appropriate award for non-pecuniary loss is \$60,000.

Past Loss of Income/Opportunity

[62] Determining the dates on which Mr. Mattu was not able to perform his duties at the college is difficult for several reasons: 1) because invoices to the college for March 1 to April 30, 2004, and June 1 to August 31, 2004, have been lost; 2) because those that are available do not specify who performed the service; and 3) because the witness' evidence was in some respects inconsistent.

[63] The college's letter of May 29, 2006, setting out the dates missed, was prepared on information from Mr. Mattu. The college is not able to verify those dates.

Dr. Birzneck testified that no classes were missed: either Mrs. Mattu or Rob MacDonald covered for Mr. Mattu if he was not there. Mrs. Mattu testified that she was not able to teach her husband's classes. She did work some Thursdays in March 2004, Thursdays and Saturdays in April and May 2004, and some Thursdays and Saturdays in June and July 2004 as Clinic Director/Supervisor. In August 2004 she did not perform any duties at the college. She did not suggest that she did any clinic supervision for her husband after July 2004.

[64] Considering all of this evidence, I find that Mr. Mattu was not able to teach in March and April 2004, and that Mrs. Mattu covered for him as Clinic Director and took on some of his clinic supervision duties in March through July 2004. The value of the work which Mr. Mattu was not able to perform for this period is: instructor - \$2,430; director - 20 weeks at \$250 = \$5,000; and supervisor - \$7,360, for a total of \$15,060.

[65] With respect to the Wellness Store in White Rock, Mrs. Mattu testified that the store opened in November 2004. Mr. Mattu testified that Mrs. Mattu worked 25 extra

hours/week until the end of 2005. Therefore, this loss extends from November 2004 to December 2005, rather than the dates suggested in the plaintiff's submissions. This would total 61 weeks x 25 hours x \$15/hour = \$22,875.

[66] With respect to the Burnaby clinic, in 2003 the clinic had receipts of \$9,664. In 2002, although Mr. Tidball has indicated income of \$15,729 for the clinic, he acknowledged that he could not say that all of that income came from the clinic; it could have come from a number of sources. The clinic receipts for January to March 2004 total \$846.25 for 2 ½ months. At this rate, the annual receipts would be \$4,062. After deduction of rent at \$400/month, the clinic would be losing money. The evidence does not support Mr. Mattu's estimate of a loss of \$10,000 annually from this business.

[67] The evidence does not support the claim for clinic supervision for 3 - 4 more students for 2 - 3 days per month. In 2005 the college outsourced clinic work to clinics in Ontario and British Columbia. The Wellness Centre in White Rock is one of two in British Columbia. The other clinic will stop taking students in December 2008, leaving the Wellness Centre as the only one in British Columbia. There are currently 16 students enrolled and Mr. Mattu is supervising 5 of them. I am satisfied that there will be more students available for Mr. Mattu to supervise with the closure of the other clinic. However, the evidence does not satisfy me that there were additional students available for Mr. Mattu to supervise between 2005 and 2008.

[68] I am satisfied that because of his injuries, Mr. Mattu has suffered a loss to trial of \$15,060 from the college, \$22,875 from the Wellness Store, totalling \$37,935.

[69] Because Mrs. Mattu was able to assume some of Mr. Mattu's college duties, these monies were still paid to them. The college funds had been treated as income by the Elixir partnership. The partnership, the defence argues, suffered no loss, one partner having taken over for the other, and therefore Mr. Mattu suffered no loss and no award should be made. The plaintiff relies on **Hanson v. Smith**, 1990 CanLII 438 (B.C.S.C.) and **Hall v. Miller** (1989), 64 D.L.R. (4th) 369, 41 B.C.L.R. (2d) 46 (C.A.) to argue that this loss should be compensated.

[70] I accept that Mr. Mattu suffered a loss. Mrs. Mattu stepped in to ensure that the college did not suffer and the duties were covered. However, this took her away from other business opportunities which she wished to pursue. Other family members came to assist at home. As in **Hanson** and **Hall**, Mr. Mattu suffered a loss which should be compensated. I note that the defence's argument applies only to the college duties. Mrs. Mattu was paid for her work at the Wellness Store by the company which owns that store. She was paid, not the Elixir partnership, so the issue does not arise.

Future Loss of Opportunity/Capacity

[71] Mr. Mattu has lost a capital asset. He is not as valuable to himself or to an employer as he was before the accident. His physical abilities are limited. If he takes on too much, his symptoms flare. He schedules clients at intervals to accommodate his condition. He is still working, by his assessment, at 80% capacity. He is able to accommodate his work because he is able to change positions and schedule patients to suit his abilities. As I have noted above, I am satisfied that he is not and will not be able to pursue business opportunities as vigorously as he would have were it not for the accident. On this topic, see generally **Pallos v. Insurance Corp. of British Columbia**,

[1995] 3 W.W.R. 728, 100 B.C.L.R. (2d) 260 at paras. 24-44 (C.A.). It is well established that injuries which are not completely debilitating but which nevertheless reduce a plaintiff's level of performance are compensable: **Sinnott v. Boggs**, 2007 BCCA 267, 69 B.C.L.R. (4th) 276 at para. 15.

[72] This loss is not a purely mathematical calculation: **Parypa v. Wickware**, 1999 BCCA 88, 169 D.L.R. (4th) 661 at paras. 36, 69. I must take into consideration positive and negative contingencies: **Milina v. Bartsch** (1985), 49 B.C.L.R. (2d) 33 at 79, 92-97 (S.C.). Using the loss multipliers provided by PETA consultants, a loss of \$5,000 per year would be a loss of \$78,590 to age 65, and a loss of \$10,000 per year would be a loss of \$157,180 to age 65. Considering all of the evidence, and both positive and negative contingencies, I award \$50,000 for this loss.

Failure to Mitigate

[73] The defence argues that Mr. Mattu has failed to mitigate his loss. The defence bears the burden of establishing that the plaintiff has failed to act reasonably to mitigate his loss, in this case that he failed to follow medical direction, and that had he followed that advice, he would have recovered further or faster: see **Janiak v. Ippolito**, [1985] 1 S.C.R. 146 at 163-66.

[74] The defence says that for the first three months after the accident, Mr. Mattu pursued treatment from a number of practitioners: physiotherapy, chiropractic treatments, massage, acupuncture, and herbal and prescription medication. For 14 months, from July 2004 until September 2005, he saw only Dr. Parhar, took medication and ice, heat and rest. He did not take physiotherapy, massage therapy, kinesiology or

acupuncture as recommended by Dr. Parhar. The defence says that Mr. Mattu also did not retain a personal trainer or follow the structured exercise program recommended by various practitioners.

[75] Since September 2005, Mr. Mattu has attended a chiropractor on a regular basis, sometimes more than once/week, and more recently every four to six weeks. Mr. Mattu says that for a period he could not pursue recommended treatments because he had exceeded his coverage and did not have the resources himself to pay for treatment privately. He says that he purchased a home gym and exercise balls and has pursued exercise at home.

[76] In September 2004, Dr. Parhar recommended that Mr. Mattu limit his treatment program to massage and physiotherapy, and increase his active modalities, such as swimming and exercises. By May 2005, when he saw Dr. Hershler, Mr. Mattu had acquired a new mattress for his back, as well as a home gym. He had purchased a gravity extension table which he found to be a useful traction device. He was occasionally receiving massage and acupuncture. He was taking prescription and herbal medication. He was using the infrared sauna at the White Rock facility. Dr. Hershler recommended that Mr. Mattu continue to use the sauna, perform specific stretches two to three times per day, and take massage and chiropractic treatments as well as acupuncture. He also recommended pulsed electromagnetic field therapy. He said, "I cannot be absolutely sure whether any or all of these treatments will lead to complete recovery."

[77] The medical evidence does not satisfy me that had Mr. Mattu pursued the recommendations of Dr. Parhar or others to the letter, as opposed to pursuing the treatment he took, he would have recovered more fully, or more quickly. Dr. Parhar was asked whether the chance of recovery is better if a doctor's advice was followed and agreed that it was. He was not asked whether, in his opinion, had Mr. Mattu followed a particular recommendation, Mr. Mattu would have recovered better. The broad "motherhood" proposition put to Dr. Parhar is not sufficient to satisfy me that Mr. Mattu has failed to mitigate his loss as the defence argues.

Special Damages

[78] The plaintiff seeks \$9,741.29 for special damages. The defendant disputes the cost of items for which there is no receipt (\$450 for home gym, back rest, exercise ball, inversion table, and medication); the cost for the infrared sauna and herbal medicines from the Wellness Store; and the cost of physiotherapy, acupuncture, chiropractic and massage treatments after 3 months post-accident.

[79] I accept the claims for physiotherapy, acupuncture, chiropractic and massage treatments. These were recommended by one or more of Mr. Mattu's physicians and are reasonable. I also accept the claims for expenditures for which the receipts have been lost. The amounts are relatively modest. It may be that were they more significant, the court would expect a higher level of corroboration. However, with the amounts in question I will accept the testimony of Mr. and Mrs. Mattu.

[80] The infrared sauna treatments are more problematic. While I am satisfied that Mr. Mattu used these, I am not satisfied of the costs associated. For example,

Mr. Mattu uses the sauna when it is not used by clients. He brings his own towel and shampoo, etc. Thus, there will be some cost to the business for depreciation of the sauna, electricity, etc. However, I am not satisfied that \$10 per use is the true measure of this cost. The evidence does not support this calculation. Therefore, somewhat arbitrarily, I assess this cost at \$640.

[81] I accept the amount spent on herbal medicines. That invoice was prepared from the medication cards maintained by Mr. Mattu, with dates and amounts, and is calculated using wholesale prices.

[82] In total, I award \$7,181.29 in special damages.

Cost of Future Care

[83] Mr. Mattu seeks future care costs for:

Care	Frequency / Rate	Cost
Massage Therapy	12 sessions/year	\$14,986.80 to \$15,334.92
Chiropractic Treatment	12 sessions/year	\$8,992.08 to \$10,223.28
Acupuncture	12 sessions/year	\$9,991.20 to \$11,359.20
Physiotherapy	4 sessions/year	\$4,329.52 to \$4,992.32
Gym Pass	\$400/year	\$6,660.80 to \$7,572.80
Medication	\$56.16/year	\$935.18 to \$1,063.22
Infrared Sauna	\$1,040/year	\$17,318.08 to \$19,689.28
Pulsed Signal Therapy		\$2,000.00
Various Equipment		\$2,871.60

[84] I accept the claim for chiropractic treatment. Mr. Mattu has been receiving chiropractic treatment for his complaints and Drs. Hershler and Parhar anticipate that this will continue. He has not been pursuing massage therapy, acupuncture or physiotherapy on a regular basis and I will not award the costs for these. Mr. Mattu attended the gym regularly before the accident, and I anticipate that he would have continued to attend without the accident. This is not a future care cost attributable to the accident. I accept the cost of medication to age 70. I accept the infrared sauna as a cost of future care, although on the reduced basis set out above (and recognizing that he could buy such a sauna for something in the order of \$4,500.00). I also accept the obus forme expense as an expense attributable to the accident. Mr. Mattu said that he wanted to consider the pulsed signal therapy. He did not indicate that he would use the treatment, and I will not make this award.

[85] In total, I award \$13,943.46 for cost of future care.

CONCLUSION

[86] In conclusion, I award Mr. Mattu:

1. \$60,000 for non-pecuniary damages;
2. \$37,935 for past income loss/loss of opportunity;
3. \$50,000 for future income loss/loss of opportunity;
4. \$7,181.29 for special damages; and
5. \$13,943.46 for costs of future care.

[87] If the parties are not able to agree on costs, tax consequences, interest and similar matters arising from this judgment, they make further submissions.

“B.J. Brown J.”
The Honourable Madam Justice B.J. Brown