

CANADA / JUDGMENT

De Fazio v. McClelland

2020 BCSC 704

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Supreme Court of British Columbia

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2020 BCSC 704 De Fazio v. McClelland

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Fazio v. McClelland,

2020 BCSC 704

Date: 20200507

Docket: M166624

Registry: Vancouver

Between:

Daniela De Fazio

Plaintiff

And

Robert McClelland and Brembley Tan

Defendants

- and -

Docket: M1710500

Registry: Vancouver

Between:

Daniela De Fazio

Plaintiff

And

Alasdair Chapple, Imogen Farren and The Driving Force Inc.

Defendants

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial/Hearing:

Vancouver, B.C.

January 20 - 24 and 27-31, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 7, 2020

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- [1] These actions arise out of motor vehicle accidents which occurred on January 7, 2015 and September 5, 2016. The parties agreed to consent orders that the trials be heard together.
- [2] Liability is not an issue in either action. My task is to assess damages for the injuries suffered by the plaintiff.

The Collisions

- [3] On January 7, 2015, the plaintiff was driving a 2013 Lexus Sedan. She was driving from her home in Coquitlam to work in Vancouver. She was on her way to work at Lululemon Athletica in Kitsilano.
- [4] The plaintiff was stopped at a traffic light on East Hastings Street. Her vehicle was rear-ended and pushed into the vehicle stopped ahead of her.
- [5] The second collision occurred on September 5, 2016. The plaintiff's husband Julian DeMarco was driving the same Lexus and she was a passenger. They were westbound on Highway 7, west of Hope, BC. The defendant Alasdair Chapple was headed in the opposite direction. He turned left in front of the Lexus. Mr. DeMarco swerved to avoid them. However, a Toyota Tacoma, driven by the defendant Imogen Farren attempted the same turn and struck the Lexus.

The Plaintiff

- [6] Ms. De Fazio is now 31 years old. She met her now-husband Julian DeMarco in high school. They began living together in 2011 and were married September 24, 2016, three weeks after the second collision.
- [7] After high school Ms. De Fazio attended Capilano College, now Capilano University and obtained a certificate in the Legal Administrative Assistant program. She eventually began working at Quay Law Centre. Two years later she obtained a position at Fasken Martineau in downtown Vancouver. She then took paralegal training at Vancouver Community College.
- [8] In 2014, she was hired by Lululemon Athletica as an Executive Assistant. In 2016, she accepted a position as a paralegal at Lululemon.
- [9] The plaintiff liked working at Lululemon. There was good pay and benefits. Lululemon encourages team building by providing a fitness program including yoga classes, meditation, fitness boot camps and spin classes. As will be seen, Lululemon liked the plaintiff.
- [10] Ms. De Fazio testified she was socially and physically active before the first collision. She had no physical limitations. She was an enthusiastic participant in Lululemon fitness activities.
- [11] Before the first collision Ms. De Fazio and her partner were living in Port Moody. She commuted by car.
- [12] The plaintiff testified she regularly saw a psychologist, Dr. Martinez. She saw the psychologist because of issues she had with her father, her parents' divorce and a sexual assault that she experienced. She denied any ongoing issues with these subjects.
- [13] The first collision occurred while she was driving to work. She was in pain and missed work that day. She had neck and back pain and general stiffness. Her partner Julian DeMarco took her to the medical clinic later that day.
- [14] In the first few months after the accident, she had neck pain, back pain, numbness, tingling and bad headaches. When she did a lot of typing the result was numbness and tingling.
- [15] She testified that she exercised less but still did modified exercises at a boot camp.
- [16] Ms. De Fazio testified that although she kept working, she was exhausted and sore at the end of the day. Her partner Julian had to help with household chores.
- [17] Ms. De Fazio testified she tried treatments of various kinds. Massage therapy and physiotherapy both provided relief from her symptoms but only for a short time. Acupuncture was helpful for her headaches.
- [18] Early in 2016, she was promoted to a paralegal position. Her duties changed: she was drafting contracts. She said she was able to do the job but was in pain.

- [19] When the second collision occurred she had not recovered from the first one. But the second caused pain that was noticeably worse. She said that anxiety about driving became more intense. For a time she ceased yoga altogether.
- [20] The plaintiff took two or three days off work at the time of the accident but then returned. She said that Lululemon completed an ergonomic assessment and provided her a new ergonomic mousepad and chair, but made no other accommodations.
- [21] Ms. De Fazio continued to drive, but worked 7:00 a.m. to 3:00 p.m. These earlier hours permitted her to avoid the worst of the traffic.
- [22] The wedding was September 24, 2016. She described it as a "very happy occasion". They honeymooned in Jamaica. One activity was renting ATVs. She said that turning the vehicle caused arm numbness.
- [23] In April or May 2017, she and her husband moved to a townhouse in Coquitlam. It was near the Port Coquitlam border and was a longer drive. She testified she was tired at the end of the day. She also had trouble sleeping. Her husband continued to help with household chores.
- [24] Ms. De Fazio also suffered symptoms of what was later diagnosed as thoracic outlet syndrome and chronic myofascial pain syndrome.
- [25] Ms. De Fazio has been able to return to running.
- [26] Ms. De Fazio became pregnant and started maternity leave in June of 2018. During her pregnancy she eventually could not sleep on her stomach. Her arms became numb in the middle of the night.
- [27] Her son Matteo was born July 16, 2018. She was anxious carrying him in his car seat. She feared her arms would become numb and she would drop him.
- [28] Ms. De Fazio said the accidents have affected her life in a "huge huge" way. She would like to play more with her son without feeling sore; she has lost some physical strength and some confidence. She is anxious about driving. She testified she has had to adapt in many ways.
- [29] When Ms. De Fazio's maternity leave was coming to an end, she began to discuss her return to work with Lululemon. She wanted a somewhat unusual schedule: to work a four day week; three days would be working from home; she would come to work once a week.
- [30] Her supervisor, Sara DeVisser, initially seemed receptive to the idea. However, when Lululemon formally responded the company did not accept it. The company proposed a four day week, one day of which could be worked from home.
- [31] This was not acceptable to Ms. De Fazio. She resigned.

- [32] She started a business selling "Beautycounter Products". These are non-toxic forms of makeup. She has been selling products to friends and relatives, but has only earned some \$400-\$500 from it.
- [33] In June or July 2019, she applied for a job as a recreation clerk in a nearby community centre. She was not successful. She has not applied for any positions in law firms either in Vancouver or in the Coquitlam area.
- [34] In cross-examination, Ms. De Fazio was asked about her commute. She agreed their home is now 15 to 20 minutes further from downtown than their previous location. The drive, via the Barnett Highway, takes about one hour each way. A shorter drive would be to the station of the West Coast Express and commute by train. The total trip length would be about the same as driving.
- [35] Similarly the Lafarge Lake-Douglas Skytrain station is about eight minutes away. The Skytrain trip is then 52 minutes, followed by a 15 minute walk. She has never tried the Skytrain.
- [36] Ms. De Fazio explained in cross-examination why she had not sought treatment for driving anxiety. She thought it would be "arranged by ICBC".
- [37] Ms. De Fazio's driving anxiety did not cause her to miss a single day of work before she went on maternity leave. It never caused her to resort to public transit.

Lay Witnesses

Julian DeMarco

- [38] Julian DeMarco is the plaintiff's husband. He testified that before the first collision the plaintiff was physically active. He described her as happy, outgoing and fit.
- [39] They initially lived in an apartment in Port Moody. At that time he said the plaintiff made the beds, cleaned the bathroom, vacuumed and did laundry. He said that because he purchased the apartment she felt compelled to complete the household chores.
- [40] Mr. DeMarco works as a longshoreman in the Port of Vancouver. He is despatched five days per week to various jobs at various locations. He is qualified for a wide variety of positions.
- [41] After the first collision he gave the plaintiff two Advils and looked after her. There were eventually more and more medical appointments. Her discomfort was clear from her continual flexing back of her shoulders. She also complained of tingling if she raised her right elbow.
- [42] The accident resulted in her having less energy. She was not "so upbeat". She did less cooking and they ate more take-out meals.

- [43] In 2016, she became a paralegal. She found the workload and the related stress very draining.
- [44] The second accident occurred in September 2016. Her injuries meant that he had to assist with household chores such as vacuuming and laundry. She stopped going to spin class and to the gym.
- [45] The parties were married a short time after the second accident. After the wedding and the honeymoon in Jamaica she returned to work at Lululemon. She had very little energy at the end of the day. He testified this affected the intimacy in their relationship.
- [46] They bought the townhome in April-May 2017. It was larger and therefore more work. He assured her that she could do what she could and that he would do the rest.
- [47] Mr. DeMarco's evidence makes it clear that he was a very active partner in sharing parenting duties and housekeeping.
- [48] During maternity leave they discussed her return to work. She told him she had discussed with Ms. DeVisser, her supervisor, the concept of working from home. In that way she could do the work at the time that suited her. Her impression was that Ms. DeVisser favoured the plan. However, the people senior to Ms. DeVisser at Lululemon said no to the plan. Ms. De Fazio was very upset by this turn of events. It led to her leaving Lululemon.
- [49] Since July 2019, Mr. DeMarco said, they have had lots of arguments. Physical activity leads to soreness.
- [50] Mr. DeMarco continues to do whatever he can to make it easier for her including changing diapers, doing vacuuming and laundry.
- [51] Mr. DeMarco has certain views about children. He does not favour daycare for the first few years. He said he was not placed in daycare as a child and did not want it for his son.

Cristina De Fazio

- [52] Cristina De Fazio is the plaintiff's sister. She testified that she and the plaintiff have become close in the last two to three years. She said that before the collisions her sister was "definitely not struggling" with physical activities and was upbeat and outgoing.
- [53] After the first collision Cristina noted that Daniela was struggling emotionally and physically. She has noticed that it is the plaintiff's husband Julian who is the usual driver when they drive.
- [54] Cristina noted that soon after Matteo was born the plaintiff had difficulty carrying the car seat. Cristina helps with this when she can.
- [55] Cristina has also noted decreased mood. The plaintiff often cries when she is on the telephone with Cristina.

- [56] Cristina testified that the plaintiff has had to change many of the tasks she formerly found it easy to do.
- [57] Cristina agreed in cross-examination that she has not seen her sister decide not to do something because it required driving.

Elena Pavlicevic

- [58] Elena Pavlicevic is the plaintiff's mother. She used to live in Guildford, only 15 minutes from Ms. De Fazio. However in May of 2019 she moved to Summerland, 350 km east of Coquitlam.
- [59] Ms. Pavlicevic described her daughter and herself as "best friends". They speak to each other on a daily basis. She described the plaintiff before the accident as hard-working, outdoorsy and very athletic.
- [60] Ms. Pavlicevic said that after the first accident the plaintiff stopped working out. Her arm and her wrist bothered her too much. She had difficulty with cleaning and chores. The witness described the plaintiff's mood as frustrated.
- [61] After the second collision, Ms. Pavlicevic testified, Ms. De Fazio's mood got lower. The witness used to go to her home on Saturdays or Sundays to help with chores. She would do cleaning vacuuming and tidying. Ms. Pavlicevic felt her daughter understated her symptoms. She was hesitant to drive, but coped as well as she could. She described her daughter as "very driven" and "very independent".
- [62] Ms. Pavlicevic attended the plaintiff's 2016 wedding. She described it as "beautiful". She did not recall that Ms. De Fazio's problems had any impact on the celebration.
- [63] Ms. Pavlicevic testified that Ms. De Fazio loved her job. She was not bothered by the prospect of child care for her son. The issues were whether her daughter could keep up with the work due to her injuries and the fact she did not wish to drive.

Sara DeVisser

- [64] Sara DeVisser is the senior designated paralegal at Lululemon. She met Daniela in 2014. She testified that Ms. De Fazio began as a legal assistant. Before the first collision the witness found the plaintiff diligent, professional and smart; she took initiative. Ms. De Fazio also participated in fitness activities.
- [65] After the first collision, Ms. DeVisser said she could tell Ms. De Fazio was in discomfort. She would wince when she was working. She would get up from her desk to stretch.
- [66] After the second collision, Ms. De Fazio experienced neck stiffness, numbness and tingling. She stopped participating in some of the fitness activities. She was in pain, but never let it affect her work. Ms. DeVisser said that if the plaintiff left work early for medical appointments, she logged in at night and did the work she missed.

- [67] In July 2019, Ms. De Fazio was scheduled to return to work after maternity leave. Ms. De Fazio wanted to work a 4-day week and spend the majority of time at home. Ms. DeVisser said she was supportive of the concept.
- [68] However, the company was concerned that such an arrangement would affect Ms. De Fazio's ability to develop "cross functional" relationships in the office. There was also concern about the precedent such an arrangement would create as there were other employees returning from maternity leave around the time.
- [69] Ms. DeVisser said the plaintiff was a junior paralegal at the time she left, but would have advanced. She had the potential to earn more than \$100,000 per year.
- [70] In cross-examination, Ms. DeVisser said Lululemon was a paperless office. There is not a lot of carrying boxes.
- [71] Ms. DeVisser said the motor vehicle accident did not affect the plaintiff's job performance. The company was not inconvenienced by it.
- [72] Finally, Ms. DeVisser said the return to work involved both anxiety about driving and the fact that Ms. De Fazio had not found childcare.

Cameron Clark

- [73] Cameron Clark is the director of Lululemon's legal team. He spent one year in the Vancouver office and now works in the Toronto office. He testified that when he started Ms. De Fazio was already working as an executive assistant to the Vice Presidents. She then completed paralegal training and moved onto that role. Ms. DeFazio reported to Ms. DeVisser who in turn reported to him.
- [74] Mr. Clark was aware of the accidents. He knew she had stopped participating in the company's fitness program. He explained that the program is part of the company's culture at Lululemon. However, it was not a requirement of the job.
- [75] Mr. Clark testified he was not aware of any physical limitations of Ms. De Fazio. He knew she started and left work an hour early to avoid the traffic and minimize her anxiety about driving.
- [76] Mr. Clark learned of the schedule Ms. DeFazio wished to arrange when she returned from maternity leave. He discussed it with management. The company concluded the precedent would not be good. Mr. Clark went this far: he said the company would agree to a four day week with her in the office three days of it.
- [77] Mr. Clark said this was a difficult decision, but Ms. De Fazio decided against returning. He told her that if her circumstances changed she should contact the company. He considered her diligent and hard-working.

[78] Mr. Clark said the plaintiff was doing well and was highly thought of. He expected that if she had stayed on she would acquire additional responsibilities. He said the base salary for a senior paralegal is \$100,000 per year, plus bonus.

Expert Evidence

Dr. Anthony Salvian

[79] Dr. Anthony Salvian is a vascular surgeon. At the plaintiff's request, he examined her and provided an expert opinion.

[80] Dr. Salvian has practised vascular surgery in British Columbia since 1981. He is a former president of the Canadian Society for Vascular Surgery and a Clinical Professor of Surgery at the University of British Columbia. He has had a special interest in diagnosis and treatment of thoracic outlet syndrome ("TOS") since coming on staff at Vancouver General Hospital in 1981. He sees 4 to 6 consults per week for the condition of TOS. He has treated well over 2,000 patients with that diagnosis.

[81] In his report he defined TOS:

There are two types of neurologic thoracic outlet syndrome (compression of the nerves of the brachial plexus).

- a) The first is a very rare condition (occurring in approximately 1 out of 2 million people) where there is relentless compression of the lower nerves of the brachial plexus (C8/T1). The chronic compression of these nerves results in injury to the nerves, and the person presents with paralysis of the small muscles of the hand and will have positive electrophysiological testing. The type of congenital abnormality is usually a fibrous band or abnormal bone causing this relentless compression.
- b) The far more common type of thoracic outlet syndrome and for the purpose of this discussion the most important type of thoracic outlet syndrome is referred to as post-traumatic (myogenic) thoracic outlet syndrome. In this type of thoracic outlet syndrome there is intermittent compression of the lower portion of the brachial plexus (that is, the C8/T1 nerve root, which becomes the ulnar nerve and innervates the fourth and fifth fingers of the hand). This usually results in numbness and tingling in the fourth and fifth fingers but occasionally causes weakness of the small muscles of the hand and even permanent atrophy of these muscles and permanent numbness in the fourth and fifth fingers, although that is very uncommon.

[82] Dr. Salvian saw the plaintiff on April 26, 2017. He obtained a history and carried out a physical examination. He then considered the reports already on file respecting Ms. De Fazio. He reached this diagnosis:

In summary then it is my opinion that Ms. De Fazio suffers from a chronic myofascial pain syndrome of the right more than the left paraspinal neck muscles including the trapezius, the scalenes and pectoralis minor. Furthermore, Ms. De Fazio has developed a significant thoracic

outlet syndrome right more than left with compression of both the subclavian artery and the nerves of the brachial plexus. It is my opinion that the paresthesias of numbness, tingling and pain, radiating down the arm and into the fingers is likely due to the neurologic compression. The further symptoms of weakness, temperature change and fatigue with the arms elevated is due, as well, to the subclavian artery compression.

Ms. De Fazio has had these symptoms ongoing for almost two and half years and in my experience patients with chronic myofascial neck pain will not resolve their symptoms completely. Her neck and shoulder symptoms will likely wax and wane depending on activity and prolonged static positions.

With respect to Ms. De Fazio's thoracic outlet syndrome, again, this will not be cured by conservative therapy. She may be able to cope and have a reasonable quality of life if she is able to follow the conservative therapy as outlined, i.e. avoidance of the arm overhead and heavy lifting and repetitive activities. On the other hand, if she is forced into a situation where she must do more physical activities with the arms, particularly with the arms elevated or heavy lifting, then her symptoms will progress with increased neuralgic pain and paresthesias into the arm and eventually she will simply fail and not be able to cope.

Ms. De Fazio's symptoms may become worse with further paraspinal muscle spasm. This may occur with further trauma, but may occur with simple things, such as sleeping in the wrong position, prolonged driving or typing or sudden unusual movements at home, such as the need for shoveling or moving furniture.

[83] Dr. Salvian then addressed the relationship of her symptoms to the accidents of January 7, 2015 and September 5, 2016:

In summary then, based on these facts and assumptions of fact, it is my opinion that Ms. De Fazio suffered a whiplash type injury at the time of the motor vehicle accident on January 7, 2015. As a result of this motor vehicle accident, she developed a musculoligamentous injury of the muscles and ligaments of the neck and upper back, particularly the trapezius, scalene muscles and pectoralis minor muscles. This myofascial injury has gone onto deteriorate into a chronic myofascial pain syndrome with positive trigger points. Furthermore, Ms. De Fazio has evidence of bilateral post traumatic thoracic outlet syndrome with compression of both the subclavian arteries and the nerves of the brachial plexus.

It is my opinion that Ms. De Fazio does have evidence of congenital anatomic variance in the thoracic outlet (likely a fibromuscular band). These anatomic variance however are common in the general population and are almost always completely asymptomatic until there has been injury to the scalene muscles. It is my opinion that Ms. De Fazio would not have developed her symptoms of thoracic outlet syndrome had she not be [sic] involved in the motor vehicle accident of January 7, 2015.

It is my opinion that Ms. De Fazio's thoracic outlet syndrome and myofascial pain syndrome were well established prior to the motor vehicle accident of September 5, 2016. It appears that the September 5, 2016 [sic] exacerbated her symptoms, however, Ms. De Fazio had an already well established thoracic outlet syndrome prior to that second accident.

[84] Dr. Salvian wrote an addendum report which is quite critical of the defendants' expert, Dr. Karim. He pointed out that Dr. Karim is a cardiac surgeon with a special interest in pacemakers and defibrillators and arrhythmia surgery. Dr. Salvian went on:

Dr. Karim notes that "the nature of my practice involves operative exposure in and around the thoracic outlet on a daily basis and, therefore, a detailed understanding of the anatomy and physiology".

With due respect to Dr. Karim, this is a significant overstatement of the facts. The pacemaker management involves mainly infraclavicular anterior chest surgery. A very occasional patient may require surgery on the subclavian vein. However, this anatomic area is nowhere near the actual arterial and neurologic structures of the thoracic outlet. Furthermore, a passing knowledge of the anatomy nearby does not in any way translate into an understanding of the complex pathophysiology, diagnosis and treatment of thoracic outlet syndrome.

Dr. Shahzad Karim

[85] Dr. Shahzad Karim is a cardiothoracic surgeon. His experience has included working with Dr. Bill Nelems, a leading authority on thoracic outlet syndrome.

[86] Dr. Karim, at the request of the defendants, reviewed the medical evidence in this matter and examined Ms. De Fazio.

[87] His examination resulted in some different findings from Dr. Salvian. For example, he noted that Dr. Salvian:

documented marked tenderness of the trapezius muscle with spasm, as well as marked tenderness of the scalene with palpation. In my examination of the office, she did not have any of these findings. In fact, I couldn't elicit any spasm with either of those muscles.

[88] He said that four out of five manoeuvres which he conducted did not cause neurological symptoms to develop even subjectively. He said that Ms. De Fazio's complaint of subjective numbness in both hands following elevation of the arms was somewhat different from the findings two years earlier.

[89] Dr. Karim reached this conclusion:

I therefore do not feel that Mrs. DeFazio suffers from thoracic outlet syndrome as the cause of her ongoing symptoms. Chronic symptoms such as these after motor vehicle accidents have multi-factorial etiology and there are a number of complex psychobiological factors and other stressors that are responsible for the persistence and progression of these chronic symptoms. A lot of these stressors are related to work and social, as well as psychological issues and anxiety.

They all impact the system and make treatment and ultimate resolution of symptoms very challenging.

- [90] He also disagreed with Dr. Bozek, a neurologist who also diagnosed thoracic outlet syndrome.
- [91] Dr. Salvian was critical of many of Dr. Karim's conclusions and methodologies. Dr. Salvian said there was nothing in Dr. Karim's report that would cause him to change any of the opinions in his report.
- [92] Dr. Karim wrote a further letter on January 15, 2020, a few days before trial. Dr. Karim took obvious offence of Dr. Salvian's criticisms of his earlier report.
- [93] There is obviously a conflict between the opinions of Dr. Salvian and of Dr. Karim. I prefer the opinion of Dr. Salvian. His background and experience with thoracic outlet syndrome is far more extensive than that of Dr. Karim. Dr. Bozek's diagnosis to the same effect as Dr. Salvian's is another factor.
- [94] The defendants argued that Dr. Salvian was argumentative in cross-examination.
- [95] That is not my impression. When the expertise of a medical professional is attacked in cross-examination, the witness can be expected, if the witness does not concede that they are in error, to defend the conclusions reached. It does not make the witness "argumentative".

Simone Szarkiewicz

- [96] Ms. Szarkiewicz is an occupational therapist who is registered in both Australia and British Columbia. She has been doing community assessments in the public healthcare sector since 2013.
- [97] She was qualified as an expert in the cost of future care analysis and in occupational therapy.
- [98] Ms. Szarkiewicz's report analyzes the plaintiff's current and ongoing limitations, her findings from a home visit and recommendations for future treatment.
- [99] Ms. Szarkiewicz spent three hours visiting Ms. De Fazio's home.
- [100] Ms. Szarkiewicz administered the generalized anxiety disorder 7 test (GAD-7). Ms. De Fazio scored 7 out of 21. This is below 10, the score indicating a referral for further evaluation.
- [101] Ms. Szarkiewicz made a number of recommendations which are considered below.

Dr. Sherri Hayden

[102] Dr. Hayden is a neuropsychologist. At the request of counsel for the plaintiff, she conducted an independent neuropsychological assessment on October 24, 2017 to examine the level of cognitive and emotional functioning of the plaintiff. The specific purpose was to address the plaintiff's neuropsychological status as it pertains to the motor vehicle accidents.

[103] Dr. Hayden administered a number of tests. Ms. De Fazio put forth "excellent effort and task persistence". Other tests disclosed this:

Ms. (Defazio) Demarco's general ability and overall intellectual function fall within the average range for age and educational attainment.

[104] Dr. Hayden also noted Ms. De Fazio's anxiety. She wrote:

Diagnostic possibilities raised within this measure include: Adjustment Disorder with Anxiety or Generalized Anxiety Disorder.

[105] Dr. Hayden's prognosis was:

Functional (including cognitive) improvement is possible with treatment/stabilization of mood. I defer prognosis of physical symptoms to medical opinion.

[106] She made three recommendations:

1. As mentioned, psychological treatment (i.e., by a registered psychologist with expertise in anxiety) is strongly recommended to further elucidate and treat Ms. (Defazio) Demarco's considerable mood symptoms, particularly to explore the nature of anxiety issues evident within this evaluation.
2. Psychiatric consultation seems appropriate to provide input on pharmacological management of mood, although this may occur following psychological treatment has been engaged.
3. Ms. (Defazio) Demarco describes impact of physical/pain symptoms on functional status. Such issues should be reviewed medically to determine that optimal treatment options have occurred.

[107] Dr. Hayden provided an addendum report dated January 16, 2020. She stated that she wrote it in response to receiving the clinical records of Dr. Martinez and the reports of Dr. Ganesan.

[108] She points to the fact that she now understands the Anxiety Disorder (NOS) diagnosis by Dr. Martinez arose from issues prior to the motor vehicle accidents and that Ms. De Fazio did not refer to this in her interview during the 2017 assessment. She said the anxiety symptoms she related in 2017 "may certainly reflect" the anxiety issues noted by Dr. Martinez in 2013, well before the accidents.

Dr. Soma Ganesan

[109] Dr. Ganesan is a psychiatrist. He conducted an independent medical evaluation of the plaintiff on September 12, 2017, at the request of her counsel. He interviewed her and heard about her driving anxiety. He conducted two questionnaires, the GAD anxiety questionnaire and the PHQ-9 questionnaire. They both indicated "mild anxiety symptoms". She also complained of trouble concentrating and lack of energy. His diagnostic impression was:

My impression is that Ms. De Fazio suffers from an anxiety reaction and this started with an adjustment difficulty with a feature of anxiety and a posttraumatic stress feature manifested through her fears and nightmares and her difficulty with driving. This is related to the first motor vehicle accident.

The development of pain and numbness, which is diagnosed now as thoracic outlet syndrome, has re-enforced her fear of not being able to improve. She has heavily focused on SSIs and practices whatever she is instructed to do to improve but her symptoms appear to worsen.

The second accident worsened her symptoms of anxiety with increased fear in driving including fear while driving on highways and she is uncomfortable in heavy traffic. She is still bothered by nightmares and occasionally has bad dreams.

Her total sleep time continues to be sub-optimal.

Although her anxiety and depressive symptoms are mild they continue to affect her daily function.

The lack of progress is [sic] her symptoms of numbness and pain of her upper extremities prevent her from working effectively at the office and at home. She experiences low self-esteem at home and has concerns about having a family in the future. She worries about how she could effectively care for her children and this too affects her self-esteem. This would probably induce guilty feelings being unable to function effectively as a mother and as a wife.

Currently her adjustment difficulty with features of anxiety and mild posttraumatic stress symptoms does not prevent her from carrying out her work, however it affects her quality of work. Her progress is uncertain and this relates to the future management of her numbness and pain symptoms, which need to be addressed by other specialists.

[110] Dr. Ganesan recommended she see a psychologist specializing in cognitive behavioural therapy and that she continue meditation and yoga classes. He expressed concern that if she had a baby she should be monitored for post-partum depression. He said that her difficulty in concentration and delayed recall should be monitored.

[111] Dr. Ganesan wrote an addendum report on December 10, 2018. By then he had reviewed the clinical records of Dr. Katherine Martinez, a psychologist whom Ms. De Fazio had seen over the years and continues to see.

- [112] He said that this further information does not change the conclusions he reached in his first report.
- [113] This report is notable for what it does not contain. There is no diagnosis of any disorder. "Mild anxiety symptoms" fall short of a clinical finding. He agreed in cross-examination that what he describes as an "anxiety reaction" is not the same as a diagnosis of anxiety. The reference to cognitive behavioural therapy is no doubt related to her anxiety about driving. Dr. Ganesan makes no comment about the fact that this anxiety about driving has not prevented her from driving to and from work on a daily basis over the years.
- [114] The plaintiff does in fact have access to a psychologist trained in cognitive behavioural therapy, Dr. Martinez. She has seen Dr. Martinez most recently in January 2020, the time of the trial. Driving anxiety is hardly mentioned in Dr. Martinez's clinical notes.
- [115] An examination of Dr. Martinez's clinical records indicates in fact that she saw the plaintiff some 26 days between the date of the first collision and the date of the trial. These sessions addressed her relationship with Mr. DeMarco, the stress of wedding planning, the divorce of her parents, and her relationship with her sister. It was not until February 24, 2017 that driving was mentioned.

Dr. Dean Powers

- [116] Dr. Dean Powers is a vocational rehabilitation consultant. He met with the plaintiff on June 25, 2018, at the request of counsel for the plaintiff, and authored a report dated October 4, 2018. He also supervised the administration of a number of tests. Mr. Powers painted quite a pessimistic picture of the plaintiff's vocational prospects. He said for example:

In my opinion, Ms. De Fazio has been able to maintain employment given the flexibility of the current employer who is supportive of her limitations. She indicated having a supportive team that allowed her to work from home occasionally and take time off as needed. In my experience as a vocational rehabilitation specialist, Ms. De Fazio would continue to require workplace accommodations to address her persisting pain and physical difficulties in order for her to sustain full-time employment. In my opinion, she has likely sustained an interruption in her career trajectory with reduced vocational opportunities given her unresolved symptoms and functional intolerances.

- [117] Dr. Powers also said this:

Ms. De Fazio has been maintaining full-time employment as a Paralegal with substantial accommodations in my opinion and experience. Foreseeably a change in manager or management structure, could place Ms. De Fazio in a vulnerable position affecting jobs stability and subsequently lead to job loss in light of the unresolved residual functional difficulties that interfere with her job performance, productivity and attendance presently. In my view, she is at a competitive disadvantage compared to her nondisabled peers in terms of securing a similar job in the labour market and/or in securing alternative employment and sedentary occupations. She

is at risk of losing promotional opportunities and the wage increases accompanied with vertical movement within the company. Ms. De Fazio's need for accommodation places her in a compromised position to manage similar work with another employer.

[118] He said that Ms. De Fazio's academic skills and fluency with academic tasks are "limited to average". She has "limited proficiency" in math calculation skills.

[119] He questioned her "work durability as a paralegal" and therefore considered other occupations in childcare, animal service, food service and arts/crafts. He said this at paragraph 13 of his comments and opinion:

In terms of Ms. De Fazio's vocational outlook post-collision and in my opinion, she has likely sustained a loss of vocational efficiency as a Paralegal. Looking ahead, her entry into higher earning occupations such as supervisory positions have likely been interrupted if her limitations remain unresolved. In my opinion, Ms. De Fazio's susceptibility to symptom aggravation and pain flare-ups will likely impair competitive employability further impacting vocational activities, work stamina, stress tolerance and productivity. Her post-injury functional limitations preclude her from exploring a number of vocational options in career paths within her areas of interest, transferable skills and aptitudes as a result of her cluster of pain and physical limitations sustained from the two motor vehicle accidents dated January 7, 2015 and September 5, 2016.

[120] I have considerable difficulty with Dr. Powers' conclusions. At the time that he met with the plaintiff Ms. De Fazio was working full-time. Her employer was entirely satisfied with her work. I find no basis in the evidence about her sustaining "an interruption in her career trajectory". At that time, on the evidence, she was highly thought of by Lululemon. Lululemon's positive impression of the plaintiff persists today. She was about to go on maternity leave. They were looking forward to her returning from maternity leave.

[121] Dr. Powers minimized Ms. De Fazio's performance reviews: he referred to them as "satisfactory". They are much better than satisfactory. The evidence of Ms. DeVisser and Mr. Clark, beyond the words of the performance reviews themselves, made no reference to any limitations of Ms. De Fazio or of their need to accommodate her beyond allowing her to take short breaks and to provide an ergonomic work setup.

[122] In 2016, Ms. DeVisser gave the plaintiff a positive rating and wrote:

I have seen you making a huge effort and taking great initiative in inputting contracts into salesforce and you're doing an excellent job reviewing NDA's!

[123] Ms. DeVisser also reported to her that she had been told by Intellectual Property (whom the plaintiff had done some work for):

Kiran is really happy with your work and level of support. Specifically, his comments were:

Daniela is doing a great job supporting me with design patents. As she gets more comfortable with it, she is taking more initiative and ownership of the work, which I encourage her to do more and more. I trust Daniela's organizational skills and will be happy to give her increasing responsibility on design patents if she wants it. Also, if she wants to learn more about design patents, I will look for seminars for her.

[124] In 2017, Ms. DeVisser wrote:

You have made incredible progress this year, and I agree with all your ratings. The team has seen a huge jump in your confidence level and continues to be really happy with your work. I have seen you take projects from start to finish with very little support from other team members. Your enthusiasm for taking initiative and learning continue to be your greatest assets.

[125] In 2018, Mr. Clark gave her a "successful" rating and wrote:

Daniela continues to grow in her role as paralegal. She is strong in NDA and contract review and does an excellent job managing our current contract administration. The search for a CLM tool continues, but Daniela was integral in helping Procurement Secure to Pay tool. Perhaps Daniela's largest area of growth relates to Seawheeze. This event requires a lot of work to support and Daniela managed it almost single-handedly from a legal perspective.

[126] In 2018, Mr. Clark wrote about her job performance overall:

Watching Daniela's growth as a paralegal has been one of the great joys of my time at Lululemon. I am super excited for her return and continued development.

He said this about her work with intellectual property:

Director of IP shared his appreciation for Daniela's efforts. He said she was always willing to help, smart and a huge help.

He said this about her support to the Corporate Secretary and VP, legal:

Daniela was always organized and made sure that all of our filings were made in a timely and accurate manner. She was able to work independently and with an initiative, with an amazingly positive attitude.

[127] There is no mention in these performance appraisals of any lack of performance caused by her injuries or otherwise. There is no mention of performing well despite her injuries. Her injuries are not mentioned. It is significant that at all times she was working there, she was working on a five days per week basis.

[128] Dr. Powers' conclusions appear rather to be based almost entirely on the plaintiff's description of the pain symptoms that she experienced at work.

[129] For these reasons I do not find Dr. Powers' opinion helpful.

[130] To the extent that cognitive difficulties of the plaintiff could interfere with her progress in the future, such difficulties had nothing to do with the accidents.

Andrew Hosking

[131] Mr. Hosking is a physiotherapist and a "certified work capacity evaluator" who performed the functional capacity evaluation of Ms. De Fazio at the request of her counsel.

[132] Mr. Hosking wrote two reports. In the first, dated April 12, 2018, he completed a functional capacity evaluation. He concluded that Ms. De Fazio demonstrated the need for workplace modifications to meet the physical demands of a paralegal. She clearly had difficulty with prolonged overhead reaching. She showed signs of general fatigue when exposed to prolonged sitting and typing. He concluded that she did not require home help for regular housekeeping.

[133] Mr. Hosking recommended she see a physiotherapist trained in the Thoracic Ring Approach.

[134] The second report is dated October 17, 2019. Her new "occupation" as a full-time mother involved upper limb coordination, movement which Dr. Salvian identified as likely to trigger TOS symptoms. Mr. Hosking recommended some hours of childcare each week.

Darren Benning

[135] Mr. Benning is an economist. He wrote reports respecting the present value of loss of future income and costs of future care and loss of income.

Failure to Mitigate

[136] The defendants argue that the award to the plaintiff should be reduced because she has failed to mitigate her damages.

[137] The plaintiff has an obligation to take all reasonable steps to reduce their damages, including undergoing treatment to alleviate or cure injuries: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 201.

[138] The law does not require that a plaintiff achieve perfection in pursuit of rehabilitation. However, it does require the plaintiff to make reasonable efforts to limit her loss: *Gilbert*, at para. 203.

[139] It is the defendants who bear the onus of proving the failure to mitigate. The test is twofold. In a personal injury case the defendant must prove: (1) that the plaintiff acted unreasonably in refusing the recommended treatment; and (2) the extent to which the plaintiff's damages would have been reduced if the plaintiff acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

- [140] There are a number of therapies that the plaintiff decided not to pursue. First, the plaintiff did not pursue physiotherapy regimes recommended to her by Dr. Salvian, Ms. Szarkiewicz, and Mr. Hosking. Dr. Salvian recommended that the plaintiff complete certain exercises outlined in the pamphlet he provided and to do so in conjunction with the Feldenkrais Method of physiotherapy. Similarly, Ms. Szarkiewicz made the same recommendation and testified that it would benefit the plaintiff. Mr. Hosking recommended that the plaintiff complete physiotherapy using the Thoracic Ring Approach. None of these were pursued.
- [141] The plaintiff chose as well to not pursue Botox injection therapies despite Dr. Salvian's recommendation. The defendants also argue that the plaintiff has not pursued an exercise program at her pre-pregnancy level of activity.
- [142] It is a question of reasonableness. The plaintiff is engaged in physical activity. The fact that it is not at the same level as before is understandable. Having a young child at home does not put the plaintiff in the same position as she was before.
- [143] On the other hand, the physiotherapy regimens recommended by Dr. Salvian, Ms. Szarkiewicz and Mr. Hosking are more significant. There is no reason the plaintiff should not have pursued those.
- [144] While it is difficult to pinpoint with precision how much these therapies would have assisted her, I conclude in the circumstances that a reduction of 10% of the non-pecuniary damages should be made for failure to mitigate.

Non-Pecuniary Damages

- [145] An award of non-pecuniary damages must be fair and reasonable and should be measured by the adverse impact of injuries on the plaintiff: see *Prempeh v. Boisvert*, 2012 BCSC 304 at para.73.
- [146] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal identified a number of factors to consider in assessing a claim for non-pecuniary damages: the plaintiff's age, the nature of her injuries, the severity and duration of pain, any disability, emotional suffering, loss or impairment of life, impairment of family and social relationships, impairment of physical and mental abilities, loss of lifestyle, and the plaintiff's stoicism. Stoicism of course should not be a penalty to the plaintiff.
- [147] The plaintiff's position is that an appropriate range for non-pecuniary damages is between \$125,000-\$135,000. The plaintiff points to *Tench v. Van Bugnum*, 2019 BCSC 1877, where the plaintiff's pain and TOS symptoms left her with little energy to cope with the physical demands of work and school. She was awarded \$120,000 in non-pecuniary damages.
- [148] In *MacLeod v. Whittemore*, 2018 BCSC 1082, the plaintiff was unable to return to her former profession as a dental assistant because of her injuries and had to be trained for a new career. Madam Justice Young found that the plaintiff faced real challenges with respect to caring for a newborn baby and that her recreational life and social life had become all but

non-existent. The plaintiff was awarded \$135,000 in non-pecuniary damages. The plaintiff also referred me to *Starchuk v. Hannig*, 2016 BCSC 1655 and *Downey v. O'Connor*, 2017 BCSC 1459.

[149] The defendants submit an appropriate award would be \$75,000-\$85,000 reduced by 20% for failure to mitigate. Mitigation is discussed above.

[150] The defendant pointed to three decisions of this Court: *Gleason v. Yoon*, 2015 BCSC 586; *Jawanda v. Samra*, 2013 BCSC 138; and *Redl v. Sellin*, 2013 BCSC 581.

[151] In *Jawanda*, the 29-year-old suffered neck, back and shoulder pain. The specialists eventually diagnosed thoracic outlet syndrome. The court was satisfied that this resulted from the accident. The award was \$75,000 or, in 2020 dollars, \$83,000.

[152] It is not disputed that as a result of the accident the plaintiff suffered headaches and soft tissue injuries to the neck, back and shoulders and that she continues to experience considerable pain as well as intermittent tingling in her hands and arms.

[153] I accept Dr. Salvian's diagnosis of thoracic outlet syndrome and of myofascial pain. I prefer his opinion to that of Dr. Karim.

[154] The plaintiff also claims the accident caused driving anxiety. That may be. It is not unusual. Any such driving anxiety was mild: it is significant that she did not stop driving to work from Coquitlam to Vancouver. She appears to have seen Dr. Martinez regularly about anxiety but made little mention of driving anxiety.

[155] None of these cases cited by the parties is of course identical to the plaintiff's circumstances. However, reviewing them is useful. On a consideration of the factors in *Stapley* and the circumstances in the cases cited by the parties, I conclude that an appropriate award is \$110,000. This is subject to the consideration of mitigation above.

Past Wage Loss

[156] The plaintiff seeks an award for past wage loss of a "net value" of \$31,848.39

[157] The plaintiff missed very little work because of the accidents. She missed two days of work after the first collision, but was paid for those days from her sick leave bank. After the second collision she missed some days for treatments and assessments. Again these absences were covered by the sick leave bank.

[158] There is no claim for any of these absences. She suffered no financial loss.

- [159] On June 20, 2018, the plaintiff went on maternity leave. She was due to return to work on July 6, 2019. As set out above, she decided to resign from employment when Lululemon turned down the schedule she proposed: essentially she proposed working from home three days per week and going to the office on the fourth day. Lululemon proposed a four day week, three days at the office and one day from home. This was not acceptable to the plaintiff. She resigned on June 10, 2019.
- [160] The plaintiff's case is that during maternity leave and during the period following the leave her symptoms were aggravated by repetitive lifting and reaching. She testified that she had numbness, tingling and weakness in both arms. She feared carrying the baby.
- [161] The plaintiff's claim is that she would have earned a gross income of \$79,620.97 in 2019. The claim is based on working four days per week for one-half year. Half her income, prorated for four days per week, is \$31,848.39.
- [162] The defendants must restore the plaintiff to her original position, that is, her position absent the defendants' negligence: *Abbott v. Gerges*, 2014 BCSC 1329 at paras. 55-57.
- [163] The objective facts do not establish a past loss of income. Ms. De Fazio lost no time from work for the entire period from the start of the first accident, January 7, 2015, through the date of the second accident, September 5, 2016 and up to the time the plaintiff began her maternity leave.
- [164] There is no medical evidence that Ms. De Fazio is presently unable to work fulltime, or that somehow the plaintiff's negligence caused her condition to deteriorate during her maternity leave. The evidence, rather, is that she was successful in carrying out the tasks of her paralegal job which she performed before leaving for maternity leave.
- [165] In May 2016, after the first accident and four months before the second accident the plaintiff was promoted to a junior paralegal position. Lululemon thought highly of her performance. In 2015, her overall rating was "Great". She was rated as "Successful" in 2016. Her "organizational skills" and "initiative" were noted. She was described as "making huge strides".
- [166] In 2017, the company described the plaintiff as having made "incredible progress". "The team continue to be really happy with your work".
- [167] Her 2018 performance appraisal, apparently done while she was on maternity leave, included this:
- Watching Daniela's growth as a paralegal has been one of the great joys of my time at Lululemon. I am super excited for her return and continue development.
- [168] There is no mention in any of her performance appraisals of difficulty she encountered in carrying out her work duties.

- [169] The plaintiff testified that she worked in pain and needed to take frequent big breaks. If that is so it had no effect on Lululemon's high opinion of her performance.
- [170] The plaintiff drove to and from work both before and after the accidents. She continued to drive until her maternity leave began.
- [171] However, she testified in both cross-examination and her discovery that driving anxiety, resulting from the accidents, was a central reason she chose not to return to work.
- [172] The fact the plaintiff drove her car to and from work most days in the 21 months following the second accident is significant. She never sought paralegal work in the area in which she lived. She did not try public transit options: the Skytrain or the West Coast Express. Her sister Cristina testified that she did not know of an instance where the plaintiff refused to drive.
- [173] I do not accept that the accidents caused any significant driving anxiety which persisted at the end of maternity leave. There is no medical evidence that the plaintiff's symptoms from the accident worsened during the period of maternity such that she could work before maternity leave and is disabled from working fulltime after the accident. I conclude that there is no past wage loss.
- [174] There is an apparent inconsistency between the plaintiff's descriptions of her symptoms at work and her supervisors' assessment of her performance. Ms. DeVisser was the plaintiff's direct supervisor. She testified that she observed that the plaintiff's work performance continued to improve during her time at Lululemon. She said she would give the plaintiff a glowing reference.
- [175] Ms. DeVisser was also impressed with the plaintiff's work ethic. She said if Ms. De Fazio attended a medical appointment, she would login remotely that night and make up for missed hours.
- [176] I accept the evidence of Ms. DeVisser.
- [177] The evidence does not establish any past wage loss.

Loss of Future Earning Capacity

- [178] If there has been a loss of future earning capacity, the defendant must restore to the plaintiff to her original position: Abbott.
- [179] In *Perren v. Lalari*, 2010 BCCA 140, the Court of Appeal reiterated the basic principles in *Athey v. Leonati*, [1996] 3 S.C.R. 458 and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229:
- [30] These principles are:
1. A 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], and

2. It is not loss of earnings but, rather, loss of earnings capacity for which compensation must be made [Andrews at 251].
- [180] As Garson J.A. pointed out in Perren, the plaintiff may prove the quantification of the loss of earnings either on an earnings approach or loss of capital asset approach:
- [32] The former approach will be more useful when the loss is more easily measurable, as it was in Steenblok. The latter approach will be more useful when the loss is not as easily measured as in Pallos and Romanchych.
- [181] The plaintiff argues her ability to do work in her chosen career has been forever altered due to the ongoing chronic pain and TOS symptoms. Counsel argues:
252. Daniela has at least 34 years left in the work force. Based on Darren Benning's February 21, 2019 report (Exhibit 21), the present value of her lifetime earnings as a paralegal with the retirement age of 67 and negative contingencies for an adult female is assessed at \$1,950,569. However, the evidence of Cam Clark at trial was that senior paralegals at Lululemon could earn \$100,000 annually, with a bonus structure which includes an additional 10% to 20%. The revised lifetime earnings as set out in the Darren Benning January 30, 2019 addendum calculation is \$2,215,726.
253. The Plaintiff acknowledges the negative contingencies taken into account by Mr. Benning and concedes she is not fully impaired from working. However, her permanent limitations associated with chronic myofascial pain and TOS have resulted in an income earning impairment and a reduction in her income earning capacity which is now 75%. In making such a concession, Daniela is agreeing that she is able to return to work, but will require substantial, likely formal, accommodations for ongoing chronic myofascial pain and symptoms related to TOS and a reduction from full-time hours.
254. It is submitted that an economics approach is supported by the case law, Daniela's established earning trajectory, and the mathematical aids provided. Therefore, an award for loss of future earnings capacity is appropriately assessed at \$553,931.50.
255. In the alternative, using Mr. Benning's report dated November 5, 2018 (Exhibit 20) and the multipliers contained therein, the Court can use the economic multiplier to age 67 of 19,504. The plaintiff submits that a reasonable evaluation using the multiplier approach will see the plaintiff earning \$30,000 less annually on a yearly basis as compared to her pre-First Collision earnings trajectory. Multiplying \$25,000 by 19,504 results in the loss of \$487,600.
- [182] The difficulty the plaintiff faces is this: the plaintiff worked full-time until she went on maternity leave in June 2018. The evidence of the plaintiff's colleagues and her supervisor as well as her performance reviews all indicate the plaintiff was successful in working full-time. She testified she suffers from numbness and tingling. The remedy was for her to take frequent short breaks.

- [183] I am not persuaded there is a loss of future earning capacity established on the evidence in anything approaching the claim the plaintiff makes using either of Mr. Benning's calculations. The claim is simply inconsistent with the objective facts.
- [184] There is, however, a loss to be considered. Ms. De Fazio continues to, and will continue to, experience myofascial pain and the numbness and tingling of thoracic outlet syndrome. While compensated under non-pecuniary damages, there is an effect, albeit intangible, on her value as an employee. This should be assessed using the capital asset approach.
- [185] The fact that the plaintiff requires some accommodations to work as a paralegal means that some future promotions or opportunities may not be suitable for her to pursue. She is less valuable as a person capable of earning income in a competitive labour market: Perren at para. 11 citing *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353 (S.C.).
- [186] The plaintiff has not established that the negligence of the defendant caused her to be unable to work full-time as a paralegal. The evidence shows that Ms. De Fazio excelled at her role as a paralegal despite the pain and accommodations required. If not for the the significant lifestyle changes involved with becoming a parent I have no doubt that given Ms. De Fazio's strong work ethic and desire to succeed she would have continued to excel and take advantage of further opportunities to the extent she could.
- [187] The approach taken to assessing lost future earning capacity in *Rozendaal v. Landingin*, 2013 BCSC 24 is helpful here:
- [94] The essential task of the Court is to compare the likely future of the plaintiff's working life had the accident not happened with the likely future given the accident. This is a matter of judgment based on the evidence; it is not a purely mathematical calculation. The appropriate means of assessment will vary from case to case.
- [98] I conclude that Ms. Rozendaal will for the most part suffer through her symptoms in order to achieve her dream of, ultimately, working as an RN. She also feels a heavy responsibility to support her family as best she can.
- [99] In my view, the possibility of Ms. Rozendaal giving up an advantageous employment offer -- whether in nursing or in another field -- is slight, because of her natural determination to succeed as an individual and as a responsible spouse and parent. However, there is a real and substantial possibility that Ms. Rozendaal's physical challenges will make her less attractive to prospective employers, delaying her entry into a competitive market. Ms. Rozendaal performed extremely well in the LPN program. However, Ms. Sharoom noticed that she required help with physical tasks, and testified that the work was therefore harder for her classmates.
- [100] Ms. Rozendaal's damages for loss of future capacity should reflect the present value to her of one year's earnings as an LPN. On the basis of Mr. Carson's evidence, that value would be \$49,720.

[101] The award for loss of future earning capacity will therefore be \$50,000.

[188] In Ms. De Fazio's case there is a real and substantial possibility that her physical limitations will make her less attractive to prospective employers and make her less competitive in the labour market.

[189] I would make a similar award that reflects the present value of one year's earnings as a paralegal. Based on Mr. Benning's report the 2020 value of her paralegal salary would be \$81,611.

[190] The award for loss of future earning capacity will therefore be \$82,000.

Special Damages

[191] Ms. De Fazio testified that she incurred expenses totaling \$1,113.50. In addition she received treatments that were paid by Great West Life. The total subrogated claim for expenses attributable to the collisions is \$4,522.

[192] The defendants agreed on \$4,522 for expenses paid by Great West Life.

[193] The only disagreement regarding expenses is \$150 for glasses to ease headache pain. The defendants submit this expense was not related to the accident.

[194] I am satisfied that the purchase of the glasses was related to the accident. Special damages of \$1,113.50 are awarded, as well as \$4,522 for the subrogated benefit of Great West Life.

Cost of Future Care

[195] The plaintiff seeks an award of \$294,064 for the cost of future care. The defendant submits that \$10,000 should be awarded under this heading.

[196] The plaintiff is entitled to be compensated for the cost of future care for the harm caused by the defendants' negligence. The approach was set out in *Krangle* (Guardian ad litem of) v. *Brisco*, 2002 SCC 9:

21 Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

22. The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require.

[197] If there is clear evidence the plaintiff will not participate in the particular recommended program, no award should be made for the same.

- [198] The defendants agree that the cost of physiotherapy with Thoracic Ring Approach and the Feldenkrais Method are justified here. The defendants also recognize that massage therapy is beneficial to pain management.
- [199] The plaintiff argues that the experts have made many recommendations and testified about them: physiotherapy using the Thoracic Ring Approach, pre- and post-natal instruction, community occupational therapy, cognitive behavioural therapy for TOS symptoms and myofascial pain, driver rehabilitation program, heating pads, adaptive heating aids, sit/stand workstation, anti-fatigue and wrist mats for the workstation, adjustable ergonomic office chairs, and dictation software, raised monitor, house moving assistants, handyman services and vocational counselling.
- [200] There are also recommendations concerning prescription medication such as antidepressants and cyclobenzaprine to treat driving anxiety.
- [201] There is little likelihood that the plaintiff would avail herself of those latter items. However allowance should be made for occupational therapy, cognitive behavioural therapy for TOS and myofascial pain, dictation software, and vocational counselling.
- [202] The plaintiff has had recommendations concerning Feldenkrais Method physiotherapy and Thoracic Ring Approach physiotherapy and has chosen not to follow these recommendations. I am not prepared to award the cost of such therapies because I conclude she will not use them.
- [203] In all the circumstances, I award \$60,000 for the cost of future care.
- [204] To summarize, the following damages are awarded:
- Non-pecuniary damages:
- (\$110,000 less 10% based on the failure to mitigate)
- \$99,000
- Loss of earning capacity:
- \$82,000
- Cost of future care:
- \$60,000
- Special damages:
- \$1,113.50
- Subrogated entitlement of Great West Life:
- \$4,522
- Total:

\$246,635.50

[205] Costs will follow the event unless there are circumstances of which I am unaware. In that case either party may make application within 30 days.

"Kelleher J."

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