
CANADA / JUDGMENT

Mathews v. Noble

2020 BCSC 1499

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Supreme Court of British Columbia

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2020 BCSC 1499 Mathews v. Noble

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mathews v. Noble,

2020 BCSC 1499

Date: 20201007

Docket: M182973

Registry: Vancouver

Between:

Maggie Ka Mun Mathews

Plaintiff

And

Sarah May Noble

Defendant

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

Y.S. Wong

Counsel for the Defendant:

P.A. Mazzone

Place and Date of Trial:

Vancouver, B.C.

August 31, 2020;

September 1 - 4 and 8 - 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 7, 2020

- [1] The plaintiff, Maggie Ka Mun Mathews, claims damages for injuries sustained in a motor vehicle accident that happened on June 19, 2016 in Surrey, BC (the "Accident"). Ms. Mathews was rear-ended by the defendant while she was stopped on 152nd St. behind a vehicle which was waiting to turn left. The defendant admits liability for the Accident.

Background

The Plaintiff

- [2] Ms. Mathews was born in 1960 in China. She came to Canada with her family when she was 13 years old.
- [3] She graduated high school in 1979 and then attended BCIT where she obtained a diploma in finance and accounting. Since graduating from BCIT, she has worked continuously in the area of bookkeeping and accounting. She has carried on her own private practice since the early 2000's, which she operates out of her home office.
- [4] Ms. Mathews was previously married, but divorced in 2013. She has three sons from that marriage. For the past five years, she has been in a relationship with Rodney Brown. They live together in a townhouse in Surrey, along with two of her sons and her one son's fiancée.

Pre-Accident Health, Work and Activities

- [5] Ms. Mathews testified that prior to about 2002, she was generally healthy, save for a mood disorder, for which she had been prescribed anti-depressant medication by a psychiatrist. In 2002, she experienced significant, life-threatening problems with her liver.
- [6] She recovered, but missed approximately three months of work. At the time, she was working part-time for one company and had a few of her own clients as well. Once she was able to return to work, her employer asked her to switch to full-time. Ms. Mathews declined, preferring instead to pursue her own private practice.

- [7] In the years before the Accident, Ms. Mathews continued to operate her practice. She provided a range of bookkeeping and accounting services such as ledger entries, year end reconciliations, and PST/GST returns. Her clients were both individuals and small businesses. One client in particular provided her with a significant volume of work. Much of her business came through referrals from Gloria Inkster, who has a business preparing tax returns.
- [8] Ms. Inkster testified that she often referred clients to Ms. Mathews for bookkeeping and accounting services. According to Ms. Inkster, Ms. Mathews was at the top of her list for people she referred clients to because of the quality of Ms. Mathews' work.
- [9] In 2014, Ms. Mathews lost her one large client when the client hired a full time in-house bookkeeper. She testified that she had to build and expand her client base in order to make up for the lost income.
- [10] Prior to 2015, Ms. Mathews charged clients \$25 per hour for her services. In 2015, she increased her rate to \$30 per hour. For the years up to and including the year of the Accident, Ms. Mathews calculated her gross billings as follows:

Year Hours Amount

- a) 2011 1,530.80 \$39,595.00
- b) 2012 1,556.10 \$38,902.50
- c) 2013 1,579.05 \$39,476.25
- d) 2014 954.40 \$23,860.00
- e) 2015 1,094.33 \$27,363.33
- f) 2016 1,140.33 \$34,210.00

- [11] Ms. Mathews did not specifically record her hours but produced a summary based upon her billings divided by her hourly rate. The reduction in billings in 2014 and 2015 was the result of Ms. Mathews losing her one large client.
- [12] Following her illness in 2002, Ms. Mathews changed her lifestyle dramatically. She embraced a new approach to fitness, after previously not being very physically active. It started when her then husband bought her a spot in a running clinic as a gift. She began running consistently and for greater distances. She participated in various organized races, starting with 5 and 10 km and then progressing to half and full marathons, including the New York Marathon in 2008. According to Ms. Mathews, running was good for her physical and mental health. She enjoyed the feeling of accomplishment it gave her as well as the camaraderie with other runners.

- [13] A couple of years after she started running, Ms. Mathews added swimming and cycling to her training regime and joined a triathlon club. In the years before the Accident, she regularly trained at least six days a week: swimming three mornings, cycling two mornings and on the weekend, and running in the evenings and on the weekend. It is apparent that both the physical and social aspects of these activities were central elements of her pre-Accident life.
- [14] Susan Taylor is a friend of Ms. Mathews who also functioned as her coach and trainer. Ms. Taylor coached Ms. Mathews in swimming and cycling. She said that Ms. Mathews loved training and had no physical limitations in what she could do.
- [15] Both Ms. Mathews' partner, Mr. Brown, and her son, Wesley, affirmed how committed she was to her training. Mr. Brown also described some of their pre-Accident activities, including going to movies, dining out, and touring on his motorcycle.
- [16] Wesley has lived with his mother since about 2014. Both he and Ms. Mathews testified that she did the majority of the cooking and attended to most of the household tasks prior to the Accident.

The Accident

- [17] On July 19, 2016, Ms. Mathews was driving her dog to "doggy daycare". She was travelling on 152nd Street in Surrey at about 8:00 a.m. and came to a stop behind another vehicle that was waiting to turn left. She looked behind her to see if there was an opportunity to go around the stopped vehicle when she saw another vehicle approaching. As she realized this vehicle was not going to stop, it struck the rear end of her vehicle. She said she had no time to prepare for the impact.
- [18] Ms. Mathews pulled ahead and turned right onto the next side street. The other driver followed her. Ms. Mathews got out of her vehicle, looked for damage, and took photographs of both vehicles. The other driver was very upset and crying.
- [19] After ensuring that the other driver was OK and had someone coming to get her, Ms. Mathews got back in her vehicle and continued on to the doggy daycare. She then returned home. She was planning to work, but her neck and shoulder were sore. Mr. Brown took her to see her doctor, Dr. Wong, who diagnosed her with soft tissue injuries and told her to take ibuprofen.

Post-Accident Health, Work and Activities

- [20] Shortly after the Accident, Ms. Mathews connected with her friend Paige Wiancko, who is a registered massage therapist. Ms. Mathews complained of neck and shoulder pain on her left-side, as well as hip pain on her right-side. Ms. Wiancko advised her to rest and started massage therapy with Ms. Mathews, which continued through until the fall of 2019.

- [21] Ms. Mathews also undertook chiropractic and physiotherapy treatments. She initially did not find the chiropractic treatments to be very helpful; however, in the past year she has seen another chiropractor, Dr. Bryson Chow, whose treatments have provided her with some relief, albeit temporarily.
- [22] Ms. Mathews' physiotherapist, Mylee Ross, gave her exercises to do as part of her treatment. Ms. Mathews would do these exercises with her friend, Ms. Taylor.
- [23] Ms. Mathews testified that despite the treatments and exercise program, she continues to experience pain in her neck and shoulders, as well as periodic lower back and hip pain. Occasionally, she experiences headaches and blurry vision when she is working.
- [24] According to Ms. Mathews, she has gradually returned to swimming, although not competitively. She uses a snorkel to swim because she cannot turn her neck to breathe in the water. She has been unable to return to running. She has cycled periodically in Ms. Taylor's studio but has been unable to return to road biking.
- [25] In addition to not being able to exercise and pursue her fitness interests as she could prior to the Accident, Ms. Mathews said she has some difficulty attending to household chores. She still does the majority of the cooking and cleaning, but she needs to space out these tasks throughout the day.
- [26] Both she and Mr. Brown testified that they are less active now. In particular, they do not tour for any great distance on his motorcycle as Ms. Mathews cannot tolerate sitting on the bike for more than a half hour or so.
- [27] Ms. Mathews returned to work soon after the Accident. She needed to earn income, as she is self-employed and does not have health benefits. While she has continued to provide similar services to her clients, and has generally maintained a stable client base, she says she is much less productive since the Accident. Previously, if she worked for six or eight hours, she would bill for the entire time. Now, however, it may take 10 or 12 hours to complete the same amount of billable work. She says she only bills clients for the amount of time that she can reasonably justify for any given project.
- [28] According to Ms. Mathews, she typically begins her work day at about 8:00 a.m., but takes frequent breaks throughout the day as she cannot tolerate sitting at her computer for long amounts of time. She experiences pain in her neck and shoulder as well as periodic blurred vision and headaches. As a result, she often works well into the evening. She also works on weekends, which she rarely did before the Accident. Mr. Brown confirmed that Ms. Mathews works long hours. He described her work as "all consuming."
- [29] In the years after the Accident, Ms. Mathews calculated her billable hours and gross billings as follows:

Year Hours Amount

- a) 2017 1,487.67 \$44,630.00
- b) 2018 1,435.86 \$43,075.93
- c) 2019 1,774.80 \$53,244.00
- d) 2020 (Jan. 1-Jun. 30) 1,053.83 \$31,615.00

[30] In 2018, Ms. Mathews actually recorded income of \$58,075.93, but that included a one time payment of \$15,000 in connection with her father's estate.

[31] Ms. Mathews testified that her busiest time of year is the first six months and that billings over the second half of the year are typically 15% less. Applying that figure to her 2020 billings results in anticipated annual billings of approximately \$58,000. As can be seen, Ms. Mathews increased her annual billings significantly in 2019 and 2020. She did not explain how she achieved this increase.

Expert Evidence

[32] Ms. Mathews relies on the opinion evidence of four expert witnesses:

- a) Dr. Mark Adrian -- a physical medicine and rehabilitation specialist (physiatrist);
- b) Dr. Chris Babbage -- a psychiatrist;
- c) Ms. Jessica Ditson -- an occupational therapist and functional capacity evaluator; and
- d) Mr. Darren Benning -- an economist.

[33] The defendant relies on the expert opinion evidence of:

- a) Dr. Robin Rickards -- an orthopaedic specialist;
- b) Mr. Tim Winter -- an occupational therapist and functional capacity evaluator; and
- c) Mr. Mark Gosling -- an economist.

[34] I will briefly summarize the key aspects of the experts' opinions and then will discuss their evidence in more detail as needed when considering Ms. Mathews claims.

[35] Dr. Babbage assessed Ms. Mathews on April 7, 2020 and prepared a report dated June 2, 2020. In his opinion, Ms. Mathews developed an Adjustment Disorder following the Accident. He noted that she had a pre-existing psychiatric vulnerability and had relied upon intense exercise to help manage her symptoms, which were stable at the time of the Accident. After the Accident, she experienced anxiety and depression due to pain and diminished coping skills as a result of not being able to exercise to the same degree. Dr. Babbage opined that Ms. Mathews' long-term psychiatric health is contingent upon her physical symptoms and function.

- [36] Dr. Adrian assessed Ms. Mathews on March 16, 2020 and prepared a report dated March 25, 2020. Based on his assessment of Ms. Mathews, he diagnosed her as suffering from mechanical neck and lower back pain and left shoulder girdle soft tissue pain. According to Dr. Adrian, mechanical pain implies that there is structural damage to the tissues of the spinal column. In his view, her left shoulder pain is, in part, referred pain from her neck problems. It is also caused by a soft tissue injury to her shoulder. He noted that Ms. Mathews also complains of hip pain which is likely referred pain from her lower back problems and that the headaches she complains of are cervicogenic, i.e. related to her neck injury.
- [37] In Dr. Adrian's opinion, Ms. Mathews is not likely to experience further recovery because she has continued to experience pain for over two years after the Accident.
- [38] Dr. Rickards assessed Ms. Mathews on March 5, 2020 and prepared a report dated March 23, 2020. Based on his assessment and review of relevant medical records, he diagnosed Ms. Mathews with "soft tissue strain [in her] posterior cervical spine."
- [39] In Dr. Rickards' view, her symptoms should resolve in 6 - 18 months with appropriate treatment. In particular, he recommends an exercise program aimed at strengthening her neck and shoulders. However, he acknowledged in his testimony that the longer someone experiences pain, the less likely it is that they will recover and that it is possible that Ms. Mathews' pain is now a permanent condition.
- [40] Ms. Ditson conducted a functional capacity evaluation ("FCE") of Ms. Mathews on April 30, 2020 and prepared a report dated May 15, 2020. She identified certain mild to moderate limitations with sitting, reaching out and overhead, bending/stooping, and crouching/squatting. In Ms. Ditson's opinion, Ms. Mathews is functionally capable of meeting the requirements of a bookkeeper, as defined in the National Occupational Classification; however, her limitations render her less competitively employable and require accommodation. Ms. Ditson also prepared a cost of future care report that I will address under that head.
- [41] Mr. Winter did not assess Ms. Mathews but prepared a report dated June 25, 2020 critiquing Ms. Ditson's report. His principal criticism is that Ms. Ditson's assessment of work activities was too short and therefore she was not properly able to comment on Ms. Mathews' work tolerances and limitations.
- [42] Mr. Benning and Mr. Gosling both prepared reports setting out multipliers for calculating future income loss and future care costs. I will come back to their evidence as necessary when considering those heads of damage.

Findings of Fact on the Plaintiff's Condition

- [43] There is no dispute in the evidence that Ms. Mathews suffered soft tissue injuries to her neck as a result of the Accident. Both Dr. Adrian and Dr. Rickards were of this opinion. Both recorded Ms. Mathews experiencing neck pain during their examination of her, particularly as she rotated her neck. I accept Ms. Mathews' evidence that she also experiences pain in her left shoulder, which, as found by Dr. Adrian, is part referred pain from her neck injury and partly due to soft tissue injury to the shoulder.
- [44] I also accept Ms. Mathews' evidence that she experiences periodic lower back pain, as well as occasional right hip pain related to her lower back problems. As noted above, Dr. Adrian attributed this lower back pain to soft tissue injury in her spinal column. Dr. Rickards did not note any issues of lower back pain or hip pain when he examined her, but he did acknowledge that these symptoms were reported in some of the medical records he reviewed. However, it is clear that these symptoms affect Ms. Mathews less than the problems with her neck.
- [45] In terms of Ms. Mathews' prognosis, I accept Dr. Adrian's opinion that Ms. Mathews is unlikely to experience a full recovery and that she will continue to experience some degree of pain, principally in her neck, well into the future.
- [46] Ms. Mathews' injuries have negatively impacted her enjoyment of life. As described above, in the years preceding the Accident, she had become immersed in her fitness activities. She enjoyed both the physical and social aspects of training for and competing in events. Much of that has been taken from her as she is unable to train with the same intensity and to compete in races.
- [47] Her ability to work has also been affected. I accept her evidence, which is consistent with the medical evidence and with the FCE results, that she does not have the same capacity to work as she had prior to the Accident. Specifically, I accept her evidence that she now has to work longer hours in order to produce a similar output to what she did previously. This is due in large part to the fact that she requires numerous breaks throughout the day to accommodate her symptoms.
- [48] I would add that I do not accept Mr. Winter's critique of Ms. Ditson's FCE, specifically his point that insufficient time was spent testing Ms. Mathews' work tolerance. Rather, I accept Ms. Ditson's evidence that she observed a functional decline in Ms. Mathews over the course of the testing that was done and that it was not necessary to conduct further testing. I note again that the limitations identified by Ms. Ditson were consistent with Ms. Mathews' evidence as well as the evidence of Mr. Brown who regularly observes Ms. Mathews while she works.
- [49] The same degree of consistency does not exist between Dr. Babbage's opinion and Ms. Mathews' evidence. While Dr. Babbage opined that Ms. Mathews continues to experience symptoms of anxiety and depression, as well as a fear of driving, she in fact testified to

minimal ongoing psychological problems. She has stopped taking the medications that she had been on for some time and is not currently seeing her psychiatrist. Mr. Brown described her attitude as generally upbeat. She does experience frustration and disappointment about the fact that she can no longer race, but that is not surprising given how central those activities were in her life. She continues to see her counsellor once a month, but those sessions have generally focussed on issues relating to the breakdown of her marriage.

[50] In short, the evidence does not establish that Ms. Mathews' continues to suffer any significant psychological symptoms resulting from the Accident.

Damages

Non-Pecuniary Damages and Loss of Housekeeping Capacity

[51] The factors that the court must consider when assessing non-pecuniary damages are well known and have been set out in a number of cases, including by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I have taken those factors into consideration.

[52] Awards of non-pecuniary damages in other cases provide a useful guide to the court; however, the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by that specific plaintiff. Moreover, the compensation award must be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at paras. 188 - 89; *Miller v. Lawlor*, 2012 BCSC 387 at para. 109 [Miller], citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

[53] Ms. Mathews seeks an award of \$140,000.00. She cites the following cases in support of her position:

- a) *Chai v. Greenwood*, 2020 BCSC 1294;
- b) *Kirkham v. Richardson*, 2014 BCSC 1068;
- c) *Soligo v. Turner*, 2001 BCSC 205, aff'd 2002 BCCA 73;
- d) *Verjee v. Dunbrak*, 2019 BCSC 1696;
- e) *Sood v. Galea*, 2020 BCSC 1236; and
- f) *Gill v. Lai*, 2018 BCSC 101, var'd in part 2019 BCCA 103.

[54] Some of these cases involve plaintiffs who, like Ms. Mathews, were very physically active prior to their respective accidents and have been unable to continue pursuing their physical activities to the same degree because of ongoing chronic pain. The range of non-pecuniary damages awarded in these cases is \$115,000 - \$205,000, including adjustments for inflation.

[55] The defendant submits that an award of \$50,000 is more appropriate. She cites:

- a) *Dennison v. Jensen*, 2019 BCSC 725;

- b) *Ludwiczak v. Nguyen*, 2020 BCSC 1202;
- c) *Fiorda v. Say*, 2011 BCSC 1293;
- d) *Johnson v. Heer*, 2020 BCSC 1168; and
- e) *Liu v. Conn*, 2020 BCSC 1195.

[56] The range of non-pecuniary damages awarded in these cases is \$45,000 - \$75,000.

[57] Ms. Mathews' injuries and ongoing symptoms preclude her from engaging in her competitive athletic activities which were central to her enjoyment of life. Her work is also very important to her and her injuries have also impacted her ability to perform her professional functions in the same manner as she could before the Accident. I find that the impact of Ms. Mathews' injuries is generally more significant than that experienced by the plaintiffs in the cases cited by the defendants. At the same time, Ms. Mathews does not have the same degree of ongoing psychological problems experienced by many of the plaintiffs in the cases that she relies upon.

[58] In light of the evidence, the submissions and authorities cited by counsel, and the relevant factors as set out in *Stapley*, I find that an appropriate award of non-pecuniary damages is \$80,000.

[59] Ms. Mathews testified to some difficulty in doing household chores. She did say that she is able to do most things around the house, although she now has to spread them out. Depending upon the circumstances, a claim for loss of housekeeping capacity may be assessed as a separate pecuniary head of damages or may be considered as part of a claim for non-pecuniary damages: *Kim v. Lin*, 2018 BCCA 77 at paras. 33-34.

[60] Given Ms. Mathews' evidence about the relatively minimal impact of her injuries on her ability to perform household tasks, the housekeeping capacity claim in this case is properly considered as a claim for loss of amenities and I am satisfied that the non-pecuniary damages award set out above properly encompasses and accounts for this claim.

Loss of Past and Future Earning Capacity

[61] I will deal with Ms. Mathews' claims for past and future income loss together, as both are claims for lost earning capacity rather than claims for loss of specific, identifiable income. As noted by the Court of Appeal in *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19, citing its earlier decision in *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141:

[19] While in many cases the actual lost income will be the most reliable measure of the value of the loss of capacity to earn income, this is not necessarily so. A hard and fast rule that actual lost income is the only measure would result in the erosion of the distinction made by this Court in *Rowe*: it is not the actual lost income which is compensable but the lost capacity i.e. the damage to the asset. The measure may vary where the circumstances require; evidence of the value of the loss may take many forms (see *Rowe*). As was held in *Rosvold v. Dunlop*,

2001 BCCA 1 at para. 11, 84 B.C.L.R. (3d) 158, the overall fairness and reasonableness of the award must be considered taking into account all the evidence. An award for loss of earning capacity requires the assessment of damages, not calculation according to some mathematical formula.

- [62] The Court of Appeal has discussed the principles governing claims for loss of earning capacity in numerous cases. In *Morgan v. Galbraith*, 2013 BCCA 305, the Court of Appeal, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge as follows at para. 53:

in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach or the capital asset approach

[Emphasis in original.]

- [63] I am satisfied that Ms. Mathews has established a real and substantial possibility that her earning capacity has been impaired. While she has increased her income in the years since the Accident (as set out above), due to her injuries she has to work significantly more hours and is unable to bill for all of the time she spends. But for the Accident, Ms. Mathews would have been able to maintain a similar income by working fewer hours or, alternatively, could have earned substantially more if she was able to bill for all of the time she currently puts in. This constitutes a compensable loss: *Ibbitson v. Cooper*, 2010 BCSC 1916 at para. 58; *Harry v. Powar*, 2018 BCSC 845 at para. 130.

- [64] Ms. Mathews submits that there is a basis on which to use the earnings approach to assess her damages. She submits that, absent the Accident, she was capable of working and billing 45 hours per week, but as a result of the Accident, she is realistically only capable of billing 25 hours, resulting in a loss of 20 billable hours per week. Applying her hourly rate of \$30 and extrapolating that weekly loss over 50 weeks, results in an annual loss of \$30,000. Applying an actuarial multiplier of \$8,900, which Mr. Gosling testified was "roughly" correct to age 70, gives rise to a total loss of \$267,000. Ms. Mathews then proposes applying a 25% negative contingency to reflect labour market participation rates and other factors, which results in a future loss claim of \$200,000.

- [65] There are several problems with this approach. First, Ms. Mathews testified that she did not keep specific track of her hours. As noted above, the hours identified by Ms. Mathews at paras. 10 and 29 above were arrived at by dividing her total billings by her hourly rate and are not supported by any specific records. As such, there is no evidentiary foundation for using an hours-based approach to assessing her future loss. I would add that Ms. Mathews' evidence about the extent of her diminished capacity (i.e. how much longer she has to work to complete her work) was vague and does not support the mathematical approach she advocates.

- [66] Second, using 45 hours per week as the benchmark for her likely billings but for the Accident, would result in annual gross billings of \$67,500, which is substantially more than her best previous year. It also equates to total annual billable hours of 2,250, which is also unrealistic given her history. Ms. Mathews did not provide any evidence as to where that additional work would come from. As noted above, Ms. Mathews did bill approximately \$53,000 in 2019 and is on track to bill approximately \$58,000 in 2020. These are by far her best earning years, yet still fall well short of \$67,500.
- [67] Third, the 25 hours suggested as her post Accident capacity, would result in annual gross billings of \$37,500, which is very similar to her pre-Accident billings. Again, she has demonstrated an ability to generate income above that amount in 2019 and 2020.
- [68] Given these issues, the earnings approach to assessing future capacity damages is of minimal assistance. Rather, the capital asset approach fits better with the circumstances of this case.
- [69] The capital asset approach involves consideration of a number of factors, such as whether the plaintiff:
- a) has been rendered less capable overall of earning income from all types of employment;
 - b) is less marketable or attractive as a potential employee;
 - c) has lost the ability to take advantage of all job opportunities that might otherwise have been open to them; and,
 - d) is less valuable to him or herself as a person capable of earning income in a competitive labour market.

Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8; Gilbert v. Bottle, 2011 BCSC 1389 at para. 233.

- [70] Applying the capital asset approach, courts have often awarded the equivalent of one or more years of a plaintiff's salary as the measure of damages: see e.g. Miller at paras. 136 - 40; Mackie v. Gruber, 2010 BCCA 464 at paras. 14, 18 - 20.
- [71] An award equivalent to one year of Ms. Mathews' average annual salary is reasonable in the circumstances of this case, namely where Ms. Mathews has increased her income yet is likely to continue experiencing chronic neck pain that will impact her capacity to earn. Her average annual billings for the years 2017 - 2020 are just under \$50,000. Accordingly, I award this amount for loss of future earning capacity.
- [72] The same analysis applies to Ms. Mathews' claim for past loss of earning capacity. In the circumstances, I find that an award of \$25,000, or 50% of her average annual earnings, is reasonable.

- [73] In light of my finding, it is not necessary to address or resolve the differences in the approaches taken by Mr. Benning and Mr. Gosling in arriving at the future income loss multipliers.

Cost of Future Care

- [74] For a treatment or care item to be included in an award for future care costs, the plaintiff must establish that it is both reasonable and medically justified. To be medically justified, the treatment or care item must be directly related to the plaintiff's injuries. It must also be intended to ameliorate the impacts of the plaintiff's injuries and to promote the physical and mental health of the plaintiff: *Owen v. Folster*, 2018 BCSC 143 at paras. 311 - 12; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 84, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).
- [75] Ms. Ditson's report sets out a number of recommended future care items and services based upon her own assessment and the recommendations of the various medical professionals. Mr. Benning provided an estimate of the present value of those items, arriving at a sum of \$54,582. Mr. Benning and Mr. Gosling do not differ significantly on the present value multiplier for future care costs.
- [76] Some of the items or services identified by Ms. Ditson were not supported by the evidence. For example, she includes an amount for a driving assessment and subsequent driving lessons to address Ms. Mathews' anxiety about driving. However, Ms. Mathews testified that she has minimal ongoing driving anxiety other than being "hyper vigilant".
- [77] A significant cost item identified by Ms. Ditson, based largely on Dr. Babbage's recommendations, is for psychological assessment and ongoing treatment. However, as noted at para. 50 above, the evidence does not establish that Ms. Mathews is suffering any significant ongoing psychological problems resulting from the Accident. As such, there is no basis for a future care cost award for these services.
- [78] The defendant does not take issue with the recommendation for an ergonomic assessment and proper ergonomic equipment for Ms. Mathews' home office. The assessment and the ergonomic equipment total approximately \$1,650. This does not account for replacement of any of the equipment. The defendant submits that replacement costs should not be included because Ms. Mathews' remaining working life is relatively short. Given that Ms. Mathews may well continue to work until at least age 70, some contingency should be made for replacement costs. I award \$2,500 for the ergonomic assessment and equipment.
- [79] Ms. Ditson includes an amount for a yearly pool pass; however, Ms. Mathews fairly concedes that she would likely have continued to purchase a pass in any event.

- [80] Both Dr. Adrian and Dr. Rickards say that Ms. Mathews would benefit from ongoing exercise. Dr. Rickards recommends sessions with a kinesiologist or personal trainer to develop and direct the exercise program. Ms. Ditson identifies the initial cost for kinesiologist services as approximately \$1,000. I do not agree that Ms. Mathews will need to work regularly with a kinesiologist, but some allowance should be made for periodic consultations. I award \$1,500.
- [81] Ms. Mathews testified that she receives some benefit from the chiropractic treatments provided by Dr. Chow. Dr. Adrian supports this treatment as long as it continues to provide her with some relief. Given that she has only recently started these treatments and that her evidence was somewhat vague about both the nature of the treatments and the benefits experienced, the evidence does not support an award of costs for such treatments on a permanent basis. However, some allowance for periodic chiropractic treatments is reasonable and I award \$3,000.
- [82] Finally, Ms. Mathews testified that she uses over-the-counter pain medications periodically as needed. A modest award of \$200 is appropriate for these costs.
- [83] In sum, I award a total of \$7,200 for future care costs.

Special Damages

- [84] Ms. Mathews claims special damages of \$8,760.42, which is the net amount she paid for physiotherapy, chiropractic and massage treatments plus the cost of a new ergonomic work chair and some medications.
- [85] The defendant has some questions regarding this number and whether it includes some document production costs.
- [86] I accept Ms. Mathews' figure and award \$8,760.42.

Conclusion

- [87] In summary, Ms. Mathews is awarded the following:
- a) Non-pecuniary damages \$80,000
 - b) Loss of past earning capacity \$25,000
 - c) Loss of future earning capacity \$50,000
 - d) Cost of future care \$7,200
 - e) Special damages \$8,760.42

Total: \$170,960.42

- [88] Ms. Mathews is entitled to her costs. If the parties are unable to agree, they may make arrangements to speak to the matter.

"Skolrood J."

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