

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Carreon-Rivera v. Zhang*,
2014 BCSC 709

Date: 20140425
Docket: M114437
Registry: Vancouver

Between:

Anna Carreon-Rivera

Plaintiff

And

Guo Qing Zhang

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiff:

Christopher Martin
Jonathan E. Fung

Counsel for the Defendant:

Alessandro Laudadio

Place and Date of Trial:

Vancouver, B.C.
January 6-10 and 13, 2014

Place and Date of Judgment:

Vancouver, B.C.
April 25, 2014.

Introduction

[1] The plaintiff, Anna Carreon-Rivera, was involved in a collision on October 16, 2009 when the vehicle she was driving was struck by the vehicle driven by the defendant Guo Qing Zhang. Ms. Carreon-Rivera was proceeding westbound in the curb lane on 41st Avenue in Vancouver, British Columbia, when the defendant, who was in a vehicle in the adjacent lane, made a sudden lane change and collided with her vehicle. The collision pushed Ms. Carreon-Rivera's vehicle up onto the right hand curb. The vehicle was then dragged along by the defendant's vehicle for half a block before coming to a rest.

[2] Liability was not at issue. Ms. Carreon-Rivera alleges that she suffered soft tissue injuries to her neck, back and right shoulder and headaches caused by the accident. In addition, she alleges that the accident caused an aggravation of what had been asymptomatic cervical spondylitis, that she continues to suffer from chronic pain, and that she has developed depression.

[3] Net past wage loss has been agreed at \$27,000. Special damages have been agreed at \$16,189.18. What remains to be determined are Ms. Carreon-Rivera's claims for non-pecuniary loss, loss of future earning capacity, past diminished housekeeping capacity and future care costs.

Pre-Accident

[4] Ms. Carreon-Rivera is presently 50 years old. She is married to John Carreon-Rivera and is the mother of two children, Nicole, aged 19, and Natasha, aged 16. It is clear that before the accident Ms. Carreon-Rivera had an active and fulfilling life.

[5] Ms. Carreon-Rivera was born in Hong Kong and came to Canada at age ten. Ms. Carreon-Rivera has six siblings. They are a close knit family. She was an enthusiastic participant in regular family gatherings including dinners, celebrations at special holidays and participation as a family in the annual Relay for Life in memory of their mother.

[6] Ms. Carreon-Rivera graduated from high school in 1980 and then completed two years at Langara College. She was working while attending school. She then took a marketing program at BCIT between 1987 and 1989.

[7] Ms. Carreon-Rivera started work very early in her life and, except for maternity leaves, has worked steadily. It is clear that her work has been an important part of her life and her sense of self-worth. She has consistently been a high performer. She has been employed at Telus since 1989. Prior to the accident, she was employed as an Executive Assistant with Telus. This is a demanding position for which she has received consistently positive evaluations.

[8] Ms. Carreon-Rivera had been fit and very active. She enjoyed a variety of sports and activities including tennis, hiking, skiing, swimming, badminton and skating. Before they had children, these were activities that she enjoyed with her husband. After the children were born they included the children in the activities and participated in many of these sports and activities as a family.

[9] Prior to the accident, Ms. Carreon-Rivera was very involved in the children's care and schooling. Because of her husband's work schedule, she did most of the planning, organizing and driving of the girls to and from school and activities. She participated in the Parental Advisory Committee at the girls' school. In addition, she was responsible for most of the cleaning and cooking at home.

[10] Ms. Carreon-Rivera's involvement with karate demonstrates the high standards she set for herself. John and the girls took up karate in 2005 and although she did not have much personal interest in the activity, she took it up so that this could be a family activity. By 2007, Ms. Carreon-Rivera was competing in an international competition, taking home a bronze medal in the 2007 World Championships at Lake Placid, New York. In 2008, her club named her the most inspirational member.

[11] On October 26, 2008, Ms. Carreon-Rivera dislocated and fractured her right hip during a karate training exercise. She required surgery and was off work until

she started a graduated return to work on April 20, 2009. When she started back to work she walked with the assistance of a cane. By June 2009 she had returned to work full time and by the end of that month she no longer needed the cane.

[12] In the summer of 2009 she had returned to her usual routine. She was driving the girls to their summer programs, participating in yoga to assist her rehabilitation, and going for walks and hikes. She resumed playing tennis with her husband.

[13] By September, Ms. Carreon-Rivera was working full time and arranging the girls' school day. She would drive them to school and pick them up at the end of her workday. She would cook dinner and then clean up, after which she would assist the girls with their homework. She would then spend some time with the family and do household tasks until she went to bed between 11:00 p.m. and midnight. She would rise between 5:30 and 6:00 a.m., make breakfast, and organize the girls for the day before leaving to drive them to school and heading to work herself. Her regular shift at Telus was 8:00 to 4:00, but she often worked extended hours.

[14] Donna Wong and Irene Halko, who are co-workers of Ms. Carreon-Rivera at Telus, described her prior to the accident as active and energetic, very positive and sociable, and stated she was well regarded at work.

Post-Accident

[15] Ms. Carreon-Rivera testified that her immediate reaction after the accident was that she was shaken. That evening she experienced pain in her neck, right shoulder and mid-back. The next day her neck was stiff and painful, her right shoulder and forearm were painful, she had pain in her chest and a headache.

[16] She attended Dr. Kee Leong-Sit, her family doctor, on October 19, 2009. He noted a painful neck with diminished rotation. Her back was normal on examination. She was taught stretch exercises to do at home and advised to take medication for pain.

[17] Ms. Carreon-Rivera did not take time off work immediately following the accident. She had just returned from sick leave arising from the karate accident and was just starting to assist a new executive. She said she did not want to get the reputation of someone who needed frequent time off work.

[18] She saw Dr. Leong-Sit on October 28, 2009, at which time he referred her to a physiotherapist, Kam Yan. Ms. Carreon-Rivera started seeing Kam Yan twice a week. She was taking Advil every four hours and using a heating pad at work to cope with pain. She stated that she experienced problems when watching presentations at work because the position of her neck caused pain.

[19] It was her evidence that instead of improving, the pain got worse in November and December. Fatigue was a major problem. She began to cut back on her activities at home, resting when she got home from work, taking a nap after dinner and then going to bed after the nap. She tried to go back to karate, but the pain was too intense for her to continue.

[20] Ms. Carreon-Rivera attended at her family physician for two visits in January 2010 and one in March. She complained of a sore neck and shooting pain in her right shoulder. She mentioned that driving would trigger neck pain that would result in a headache. At this time she was doing some yoga and walking while still attending physiotherapy. She started receiving acupuncture.

[21] Ms. Carreon-Rivera was still attending work every day. She stated that she cut back on attendance at meetings where she was not required. However, she said that before the accident she found such attendances to be a helpful component of her proactive approach to her work.

[22] The notes of the physiotherapist during this period reflect that she was still complaining of pain but there was some improvement and an improved range of motion.

[23] Mr. Carreon-Rivera testified that about this time he became concerned that his wife was not improving. He noticed that she was having difficulties with certain

household tasks such as preparing prawns or stooping over the sink. He changed his shift so that he could take over more of the responsibilities at home, driving the children and assisting with the household tasks.

[24] Ms. Carreon-Rivera saw Dr. Leong-Sit on April 28, 2010, at which time he referred her to a different physiotherapist, Darren Chang. She attended physiotherapy twice a week and continued with yoga. Mr. Chang's notes for this period reflect continuing intermittent problems, some complaints of headaches, though also some improvement. Ms. Carreon-Rivera stated that she was doing less and less at home. She was not as involved with her children, took less of an interest in their activities, and did not attend their games as frequently as before. In addition, Ms. Carreon-Rivera stated that she felt she was starting to be forgetful at work.

[25] She returned to Dr. Leong-Sit in July. He notes that there was improvement in the neck and shoulder with occasional tingling and pinching in the mid-back. He recommended that she continue with physiotherapy twice a week. It appears that she continued with physiotherapy until the end of July 2010.

[26] At some point Dr. Leong-Sit had recommended tai chi and Ms. Carreon-Rivera took up this activity. However, because of a combination of pain and fatigue, Ms. Carreon-Rivera was becoming less and less active.

[27] She returned to Dr. Leong-Sit in November 2010. His notes reflect that she complained of constant pain in the neck and right shoulder especially when driving and doing housework. At Dr. Leong-Sit's recommendation, Ms. Carreon-Rivera resumed physiotherapy with Darren Chang which continued until December 8, 2010.

[28] In early 2011, the family started to see a family therapist. Nicole was experiencing difficulties at school that included being bullied. Ms. Carreon-Rivera stated that she felt overwhelmed. It took all her energy to get through the workday. She could not deal with anything else and asked for more assistance from her husband.

[29] The family went to Hawaii during spring break in March 2011. The trip was not a success for Ms. Carreon-Rivera. She had difficulty on the flight. After a snorkeling trip she had to rest in the hotel for the whole next day. She tried to surf with the family but had to go in. She spent the rest of the trip lying on the beach. She said that she felt guilty, and felt like an outsider who was a burden ruining the family's vacation.

[30] She returned to Dr. Leong-Sit in April 2011 complaining about her neck and headaches. Dr. Leong-Sit referred her to Dr. Spenser Lui, an orthopedic surgeon. Ms. Carreon-Rivera returned to Dr. Leong-Sit in May, at which time he recommended massage therapy, physiotherapy and anti-inflammatory gel. Ms. Carreon-Rivera followed these recommendations, resumed physiotherapy with Darren Chang and started massage therapy with Edwin Shi.

[31] Ms. Carreon-Rivera saw Dr. Lui in August 2011. He noted neck and right shoulder pain that had not responded to treatment, guarded and decreased range of motion in the right cervical spine and right shoulder tenderness. He suggested that an MRI would be appropriate.

[32] Ms. Carreon-Rivera stated that she was still working full time but taking more breaks at work. She did not attend as many meetings. Her boss was, nonetheless, accommodating. She said that she was not being as proactive at work; her mind was not as clear. She felt that her performance was slipping and she was losing confidence.

[33] Ms. Carreon-Rivera saw Dr. Leong-Sit in September 2011. His notes report that physiotherapy had helped and that the combination with massage had been beneficial. However, he also noted that she was still experiencing pain. He advised that she do core strengthening and stretching regularly.

[34] In September, the girls changed schools at the recommendation of the family therapist. Nicole was being bullied again. Ms. Carreon-Rivera stated that she felt

overwhelmed and did not have the energy to deal with the issue. She left it to her husband to meet with the counsellor and school principal.

[35] Ms. Carreon-Rivera started working part time from home to lessen driving, which she stated exacerbated her symptoms. Her employer accommodated the request. She worked one to two days at home per week as needed.

[36] Ms. Carreon-Rivera returned to Dr. Leong-Sit in December of 2011. She came into his office crying and complaining of her ongoing pain. His notes reflect that Dr. Liu had prescribed Lyrica but she felt it made her feel “spaced out”. He encouraged her to do daily stretching and exercise. His notes state “crying and depressed”. He noted the word “depression” in the margin. Dr. Leong-Sit felt that he might have made that note after the visit. He felt that it was possible that Ms. Carreon-Rivera’s depression was not discussed in subsequent visits.

[37] Ms. Carreon-Rivera stated that during this period she was struggling to get through the day at work. She would go home, rest on the couch, eat dinner and then fall asleep on the couch until bedtime. She had no energy for anything other than struggling through her workday. Her visits with her extended family dwindled to next to nothing. On the occasions when it was their turn to host dinners at her home, her husband did virtually everything. She would rest for the whole day to be ready for company.

[38] In February 2012, Ms. Carreon-Rivera saw Dr. Leong-Sit. His notes reflect some improvement, that she was continuing with yoga and tai chi, and that she had good days and bad days.

[39] In March 2012, the family travelled to Seattle and Ms. Carreon-Rivera experienced considerable pain on the drive. She returned to Dr. Leong-Sit on March 22, at which time he made a diagnosis of migraine and prescribed Amitriptyline. Then at a visit in April, Dr. Leong-Sit made a referral to Dr. Dilli, a neurologist.

[40] Ms. Carreon-Rivera saw Dr. Lui in May 2012, at which time he recommended that she take time off work. His notes suggest six weeks of rest treatment and

exercise to bring better control of pain and to allow better function. Ms. Carreon-Rivera followed this suggestion and took time off work.

[41] Ms. Carreon-Rivera was continuing with physiotherapy and massage therapy. In June 2012, she started receiving active release therapy from Dr. Colin McKay, a chiropractor.

[42] The family took a second trip to Hawaii in July 2012 to attend a nephew's wedding. Ms. Carreon-Rivera spent most of the trip on the beach unable to participate in activities. She testified that she wondered if her family would miss her if she was not there.

[43] Ms. Carreon-Rivera saw Dr. Dilli in July 2012. Dr. Dilli's consult report stated that her impression was that Ms. Carreon-Rivera suffered from chronic migraine without aura, with possible links to her caffeine use and analgesic medication overuse. She recommended reduced use of analgesics and caffeine and an increased dose of Amitriptyline. She also advised Ms. Carreon-Rivera to consider Botox if the Amitriptyline proved ineffective.

[44] Ms. Carreon-Rivera testified that she did reduce caffeine and analgesics and did increase Amitriptyline. This did not prove to be effective; however, she did not try Botox. Ms. Carreon-Rivera stated that she was concerned about the cost of Botox and also that the injections would need to be repeated every three to four months. Ms. Carreon-Rivera said that she discussed the matter with Dr. Leone-Sit and they agreed to try an increase of Amitriptyline first. However, while the headaches continued to be a significant problem, Ms. Carreon-Rivera never tried the Botox treatment.

[45] In August 2012, Dr. Leong-Sit wrote his medical legal report which addresses depression. In addition, Ms. Carreon-Rivera saw Dr. William Craig, a physical medicine and rehabilitation specialist, who also addressed her mood issues. Ms. Carreon-Rivera understood that Dr. Craig recommended that she receive treatment for depression; however it was her view that if she had depression it was because of

the pain and she wanted to make the pain go away. She said that she felt that the suggestion she was depressed implied that her pain was not real, that she was imagining the pain.

[46] Ms. Carreon-Rivera had a visit with Dr. Leone-Sit on August 29, 2012. His notes do not refer to depression. He stated that it was possible that this was not discussed in the meeting. However, he also stated that he believed that he did discuss her depression with her on that date. He stated that he suggested that she should get counselling, as it was his opinion that Ms. Carreon-Rivera was suffering from depression in August 2012 and that she would benefit from treatment. He stated that the reason he did not make a referral was that she indicated that she did not want to see a psychiatrist.

[47] Ms. Carreon-Rivera started a gradual return to work in September 2012. She was continuing to attend with Mr. Chang for physiotherapy and Dr. McKay for active release.

[48] On September 24, 2012, Ms. Carreon-Rivera saw Dr. Leone-Sit. By this time she had read the medical legal report of Dr. Craig who recommended treatment for depression. She had started back to work. She was taking 10 mg of Amitriptyline three times a day and reported receiving some relief. Counselling for depression was discussed and Ms. Carreon-Rivera told Dr. Leone-Sit she did not feel she needed it. Ms. Carreon-Rivera testified that Dr. Leone-Sit raised it as a question not a recommendation. She felt that she had good family support. She said that she read on the internet that Amitriptyline was an anti-depressant. While at one time this was regarded as true, the drug is no longer used for that purpose and had not been recommended by her physicians for treatment of depression. Moreover, the dose she was taking was too low for there to have been any ameliorative effect on her depression.

[49] Dr. Leone-Sit stated that when he discussed depression with Ms. Carreon-Rivera, she was not keen on seeing a psychiatrist and did not want to take anti-depressants.

[50] In cross-examination, she stated that she did not agree to treatment for depression at that time because she did not know what depression was. She said that she was focused on dealing with her pain. She also said that she had not been specifically assessed for depression at that time. Later, she stated that she trusted her family physician and he was not recommending treatment for her mood. Of course, Dr. Leone-Sit was in fact recommending treatment for depression, at least in his medical legal report. Ms. Carreon-Rivera stated that she never saw this report, although she agreed that she reviewed the other reports.

[51] Dr. Craig had also recommended a variety of medications for Ms. Carreon-Rivera. She did not take any of these, nor did she discuss them with Dr. Leone-Sit. When asked why not, she said that she trusted her doctor and she had not taken an active role in her treatment because it took all of her energy just to get through the day.

[52] Dr. Craig has also suggested injections into the facet joint. Ms. Carreon-Rivera stated that she had discussed this with her doctor but decided not to pursue it. She said she recalled someone saying that it addresses the symptoms rather than the root of the problem, and that she was only interested in dealing with the cause of her symptoms.

[53] In October, Ms. Carreon-Rivera started a new course of physiotherapy with Patrick Embley and Kadi Nicholson on a referral from her chiropractor.

[54] Ms. Carreon-Rivera received a performance review in October 2012. In the past her reviews had typically been exemplary; however, this time her score, while still positive, was somewhat reduced to reflect her absences. Ms. Carreon-Rivera testified that she was very concerned and felt that senior management had come to view her as an unreliable employee.

[55] Ms. Carreon-Rivera saw Dr. Leone-Sit in November and reported some progress. She had been to see Dr. Lui, who was retiring.

[56] In 2012, it was their family's turn to host the Christmas dinner for the extended family. Mr. Carreon-Rivera did all the work for the dinner. Ms. Carreon-Rivera stated that she felt exhausted and did not really participate.

[57] In January 2013, Ms. Carreon-Rivera began to see Brenda Colaire, a massage therapist. She was continuing with Dr. McKay, the chiropractor and the physiotherapists he had recommended.

[58] In March 2013, Dr. Leone-Sit made another referral for massage therapy and physiotherapy.

[59] In April 2013, Ms. Carreon-Rivera's executive left Telus and she had to find a new posting. She stated that in the past when this had happened, colleagues would be seeking her out and recommending her. This time, however, the search proved more difficult and she had to go through an application process. Nonetheless, she was successful in finding a new executive.

[60] In May 2013, Ms. Carreon-Rivera began attending on Dr. John Davis, a chiropractor. At the end of the month, she visited Dr. Leong-Sit and reported a 50% improvement. Dr. Davis had told her to stop yoga and tai chi. She had stopped physiotherapy, was no longer taking Lyrica and had cut back on Amitriptyline.

[61] In July 2013, Ms. Carreon-Rivera started working with her new executive, Andrew Turner.

[62] In general during this period, Ms. Carreon-Rivera stated that she was experiencing more relief than at any time since the accident. However, she continued to have problems with her neck and shoulder, still had headaches and was still mentally foggy. She still needed naps after work each day.

[63] In August 2013, Ms. Carreon-Rivera saw Dr. Leone-Sit and complained of foggy and headache. She reported being unable to take part in physical activities such as vacuuming and that her relationship with her husband was being

affected. She was taking Lyrica, Amitriptyline, Aleve and still seeing the massage therapist and chiropractor.

[64] In September, Ms. Carreon-Rivera was assessed by Dr. Miller, a psychiatrist, who diagnosed a major depression and recommended counselling. Ms. Carreon-Rivera's evidence was that because she had now been diagnosed by a psychiatrist, she accepted the diagnosis and was prepared to accept counselling. However, her actions do not completely bear this out since she did not take steps to implement Dr. Miller's recommendations at that time.

[65] In November, she saw Dr. Leone-Sit complaining about severe headaches. She mentioned that she had seen a psychiatrist and Dr. Leone-Sit requested recent reports.

[66] While Dr. Miller had recommended a number of medications for Ms. Carreon-Rivera's depression, she has not taken any of them. She stated that she did not want to take more medications, noting the concern that Dr. Dilli had expressed concerning over-the-counter analgesics. It was her evidence that Dr. Leone-Sit told her that the medications Dr. Miller recommended were more suited to other kinds of depression.

[67] Dr. Leone-Sit testified that after reviewing Dr. Miller's report, he told Ms. Carreon-Rivera that she should try anti-depressants. However, she did not want to. He stated that the reason he ultimately referred her to a psychologist rather than a psychiatrist was because the psychologist would not prescribe medication.

[68] On December 6, 2013, Dr. Leone-Sit referred Ms. Carreon-Rivera to Back in Motion for structured rehabilitation and strengthening, and to Dr. Terry Estrin, a registered psychologist.

[69] Ms. Carreon-Rivera spoke with Dr. Estrin, who recommended that she consult with the chronic pain clinic. This has not occurred.

[70] As at the date of trial, Ms. Carreon-Rivera was still seeing Dr. Davis on a weekly basis. She was receiving massage therapy at least bi-weekly.

[71] Ms. Wong and Ms. Halko described the changes they observed in Ms. Carreon-Rivera after the accident. Ms. Wong stated that Ms. Carreon-Rivera seemed to be in discomfort. She was quieter, and less vivacious. Ms. Wong thought that she was depressed. Ms. Halko observed that Ms. Carreon-Rivera became quieter, and did not socialize with her co-workers as she had before. She was not animated as before. She did not join the group for walks at noon.

Expert Reports

Dr. Kee Sheen Leong-Sit

[72] As noted above, Dr. Leone-Sit is Ms. Carreon-Rivera's family physician. She has been a patient since February 1999. Dr. Leong-Sit wrote a first opinion dated August 16, 2012 in which he expressed the following opinions:

Diagnosis/Comments:

Anna Carreon-Rivera suffered moderately severe soft tissue injuries affecting her neck and shoulders. As a result of these injuries, she has also been having more frequent migraine headaches as described above.

Anna did not have persistent neck or shoulder symptoms prior to the motor vehicle accident.

It is my opinion that the accident caused the soft tissue injuries as mentioned above. I based this conclusion on the fact that she had no ongoing problems in her neck or shoulders prior to the accident.

Anna had migraine headaches prior to the motor vehicle accident. Her complaint of migraine headache dated June 21, 2003. I did not treat her for any further migraine complaints until after the motor vehicle accident.

Her headaches after the motor vehicle accident [were] severe and recurrent and Dr. Dilli diagnosed chronic migraine headaches without aura.

It is my medical opinion that her recurrent headaches are related to the motor vehicle accident. It is my observation that the accident had caused a lot of stress, chronic lack of sleep, frustration and distress in her life. All of the above are triggers for migraine headaches and hence, my conclusion that the accident is responsible for her headaches.

She is also depressed and has not had such symptom prior to the accident. It is my opinion that her depression is a result of the motor vehicle accident.

Prognosis and Comments:

Anna has had musculo skeletal symptoms of persistent neck and shoulder pain and intermittent headaches for the past two years and ten months.

She continues to have significant symptoms. Her headaches have improved since she saw Dr. Dilli and she says that on a scale of 10, her headache is now down to about three or four (10 being worse and one being normal).

Her neck and shoulder symptoms remain significant. Her frustration and depression remain significant.

It is my opinion that she will benefit from counseling to manage her frustrations, stresses and depression. She will also likely benefit from core strengthening exercises to prevent spasm.

Prognosis is guarded at present.

[73] He also prepared a second report dated September 1, 2013 in which he expressed the following opinions:

My diagnosis as stated in my last report dated August 16, 2012 has not changed.

I wish to add that Anna does have symptoms of depression. She recently completed a patient health questionnaire (PHQ 9) which is used by physicians to assess the degree of depression and she had a score of 12. The score puts her in the category of moderate depression. A score of 1-4 means minimal depression; 5-9 mild; 10-14 moderate; 15-19 moderately severe; 20-27 severe depression.

In my opinion, her depression is related to the accident....

Prognosis

With psychiatric help to treat her depression and with the help of a rehabilitation program to do proper stretching and strengthening exercises, it is my opinion that there is still room for further improvement of her symptoms. I am also of the opinion that she does not need to keep on seeking passive treatment with massage therapist, chiropractic treatment and physiotherapy treatment for now.

She needs to concentrate on doing all exercises taught to her by the therapists. Referring her back for a structured rehabilitation program such as that provided by "Back in Motion" or the "Canadian Back Institute" or "KARP Rehabilitation" will be an option for future management.

She still has significant symptoms as noted above. Prognosis remains guarded. Future re-assessment will be needed after she has had psychiatric help and core rehabilitation and strengthening exercises through a structured program.

In my opinion, I feel that there is still room for improvement and progress. I also feel that she will be able to continue working full-time at Telus as an administrative assistant.

[74] He stated that, in his opinion, if Ms. Carreon-Rivera takes medication for depression, and receives cognitive behavioral therapy, she could improve.

Dr. William Craig

[75] Dr. Craig was qualified in the area of physical medicine and rehabilitation. He examined Ms. Carreon-Rivera on August 17, 2012 and provided a report dated September 7, 2012 in which he expressed the following opinions:

Neck - It is my opinion that Ms. Carreon-Rivera had a moderate soft tissue injury to her neck and right shoulder with possible cervical facet injury, as a result of the October 16, 2009 accident. Based on exam and the primarily right-sided symptoms, I do not think that the disc bulges noted on the MRI are significant contributors to her symptoms. She may have injured a right-sided cervical facet joint.

Right Shoulder - I do not think that she had a significant injury to the rotator cuff, as a result of this accident.

Headaches - It is my opinion that her headaches likely related to ongoing issues with her neck, due to injuries from the October 16, 2009 accident.

Mood - I would defer comments on diagnosis to a psychologist or a psychiatrist.

Prognosis: Ms. Carreon-Rivera is almost three years out from the October 16, 2009 accident. I suspect that there are some concurrent mood issues which are a major barrier to further improvement. Her mood and sleep issues need to be addressed in addition to her pain.

I feel that there is moderate room for improvement with the treatment options outlined in the assessment section of this report. She should be capable of starting a graduated return to work in the next few months, with further treatment. I am concerned that a prolonged period of time off would be a poor prognostic factor for return to full-time employment. I would expect that with further treatment, she should be capable of all aspects of her sedentary job.

I would encourage her to return to regular recreation. At present, it is too early to say whether she could return to doing karate but I would expect that she should be able to participate in other exercise such as Tai Chi, yoga, or Pilates. At present, I suspect that these activities would aggravate her symptoms but with further treatment she should be able to return to them.

With further treatment, I would expect that she should be able to do all of her activities of daily living without significant symptoms. She should be capable of returning to all of her prior household tasks, although she may have some initial flare in her symptoms as she increases the amount she is doing around her house.

Ms. Carreon-Rivera was able to return to work shortly after the October 16, 2009 accident and was able to continue working for most of the following 2½ years. She reported that she was working with significant discomfort at that

time. The fact that she was able to return to work and continue working is a favorable prognostic factor for her being able to return to full-time work, after further treatment.

[76] Dr. Craig recommended referral for six to eight sessions of active release therapy. Another option would be trigger point injections. He suggested medication options including duloxetine gabapentin, baclofen, tapentadol and tramadol. He stated that if she did not respond to these interventions, he would recommend assessment of the cervical facets.

[77] With respect to her headaches, there were several additional treatment options if addressing the neck symptoms did not resolve the headaches. These included subcapital blocks or occipital nerve blocks and Botox injections as well as medications including a beta blocker, calcium channel blockers and topiramate.

[78] Dr. Craig stated that it was his opinion that Ms. Carreon-Rivera's mood issues are a barrier to improvement. His expectation is that her condition would improve if she were to receive treatment for her mood issues.

[79] Dr. Craig stated that the fact that Ms. Carreon-Rivera was working was a good diagnostic indicator that she would be able to continue in her employment in the long term. His opinion was that if Ms. Carreon-Rivera followed the treatment recommendations in his report, she should be able to continue working full time at her present employment without impairment. It was his opinion that Ms. Carreon-Rivera should be able to return to all of her activities of daily living with the possible exception of heavy tasks such as moving furniture. She should be capable of performing her prior household tasks.

[80] He did not recommend that Ms. Carreon-Rivera continue with passive therapies such as physiotherapy and massage therapy except for a session or two in the event of an acute flare-up of her symptoms.

Dr. Fadi Tarazi

[81] Dr. Tarazi was qualified as an orthopaedic surgeon. He examined Ms. Carreon-Rivera on September 5, 2013 and prepared a report dated that same day in which he expressed the following opinions:

OPINION:

In my opinion, the motor vehicle accident of October 16, 2009 has most likely caused cervical and lumbar myofascial soft tissue injuries. This has affected the muscles and ligaments around the neck and back. This has resulted in pain. With conservative therapy, her back pain has significantly improved. However, she still has residual neck pain on the right side, which is aggravated by physical activity. The cervical spondylosis consisting of disc desiccation and disc protrusion/osteophyte complex likely pre-dated the motor vehicle accident of October 16, 2009. However, this condition was asymptomatic. The motor vehicle accident likely aggravated this spondylosis, which has contributed to the pain. Treatment of Ms Carreon-Rivera's neck injury should continue to be conservative in nature. I recommend for her to continue with her chiropractic treatments as well as a rehabilitation program, best directed by a physiotherapist or kinesiologist. Such rehabilitation should focus on improving her posture as well as strengthen her paraspinal, core and abdominal muscles. She should also do the exercises that she has learned from these trained professionals on an ongoing basis in a gymnasium setting. Even though these exercises may not improve her pain or function significantly over time, they will at least prevent any flare-ups of pain with physical activity. I would recommend for her to take anti-inflammatory medications such as Celebrex 200 mg daily, on an ongoing basis to control her pain. Short courses of narcotic medications such as Tylenol #3 can be used for acute flare-ups of pain.

...

In summary, Ms Carreon-Rivera has suffered significant soft tissue injuries to her neck and back as well as her right shoulder. This is in addition to the aggravation of the pre-existing cervical spondylosis. She still has ongoing pain in her neck and right shoulder, which are affecting her physical activities. She will have to make modifications to her activities to accommodate her symptoms. Her prognosis, for a complete recovery, is quite guarded. In my experience, patients with significant mood abnormalities, such as anxiety, depression or [difficulty] with concentration and lack of focus, commonly have chronic pain from musculoskeletal injuries. It would be best for her to be evaluated by a psychologist or neurologist, who could hopefully treat these symptoms.

[82] Dr. Tarazi stated that Ms. Carreon-Rivera's work station should be adjusted. Telus has a group that performs such assessments and adjustments; however Ms. Carreon-Rivera has not pursued that with her employer.

[83] Dr. Tarazi agreed with Dr. Craig's suggestion of facet block injections as a reasonable course for diagnostic purposes and then to address flare-ups.

[84] Dr. Tarazi stated that Ms. Carreon-Rivera's mood is very relevant because soft tissue injury symptoms become much more prolonged when there are mood issues. It was his opinion that if Ms. Carreon-Rivera's mood issues were treated she would experience improvement but would likely have some level of residual pain.

Dr. Robert Miller

[85] Dr. Miller was qualified as a psychiatrist. He examined Ms. Carreon-Rivera on September 27, 2013 and prepared a report dated October 2, 2013 in which he expressed the following opinions:

2. Has Ms. Carreon-Rivera had any previous disabilities or conditions that have been affected by this accident?

There is no evidence that suggests Ms. Carreon-Rivera has had any pre-existing psychiatric conditions that pre-disposed her to her current psychiatric symptoms or which have been aggravated by the accident of October 2009.

3. Your opinion regarding the likely cause of Ms. Carreon-Rivera's injuries and conditions, including whether any pre-accident disabilities or conditions made her more susceptible to the resulting injury.

Ms. Carreon-Rivera has developed symptoms of depression since the 2009 accident. These symptoms did not come on immediately but appeared to progress through 2010. [Their] progress was associated with Ms. Carreon-Rivera feeling that she was unable to do many of the things that she ought to be able to do within her family. She continued working but believed that her performance at work had declined. The symptoms of depression included, tiredness, problems with concentration, low mood, decreased appetite, weight loss, guilt, passive suicidal ideation, and sleep disturbance. These symptoms were, in my opinion, sufficient for a diagnosis of a major depression disorder. These symptoms appeared to have onset in 2010, although the first documentation of the symptoms in the collateral records was in 2011. Ms. Carreon-Rivera's symptoms of depression are related to her experience of pain. It is beyond my expertise to say whether or not the pain that Ms. Carreon-Rivera has experienced was caused by injury sustained in the accident of October 2009. I do note, however, that the collateral information that I have been provided states that this is the case. I would make a diagnosis of a somatic symptom disorder with predominant pain.

It seems likely to me under those circumstances that Ms. Carreon-Rivera's symptoms of depression would not have occurred but for the motor vehicle accident.

There are references to Ms. Carreon-Rivera having sustained previous injuries in motor vehicle accidents. It is beyond my expertise to say whether or not these contributed towards her physical condition. There is no history to suggest that Ms. Carreon-Rivera had a psychiatric condition prior to the accident that made her more susceptible to the development of a psychiatric condition following the development of the pain which she experienced in 2009/2010.

4. Your opinion regarding any vocational disability following the accident and how the injuries may have affected Ms. Carreon-Rivera's ability to look after her personal care and any household duties or activities of daily living.

Ms. Carreon-Rivera's abilities to function seem to have been initially affected by her experience of pain. She and her family had been active in karate and had also been active in other sports, including tennis. I think it likely that Ms. Carreon-Rivera's participation in these activities was mentally beneficial for her and I think it likely that her decision/need to withdraw from these activities was detrimental towards her mood state.

Ms. Carreon-Rivera's depressed mood has likely contributed towards her having a pessimistic outlook with regard to her possibilities for rehabilitation and her capabilities.

5. Your opinion regarding any future treatment recommendations or investigations.

Ms. Carreon-Rivera needs treatment for depression. I would recommend that she is treated with antidepressant medications, starting with an SSRI in a relatively low dosage but increasing as required. If this were not to be successful in improving her mood state, I would add in a medication such as Bupropion.

Ms. Carreon-Rivera requires psychological treatment, including best practice cognitive behavioral psychotherapy. I would initially recommend 12 – 16 sessions.

I would also recommend that Ms. Carreon-Rivera is referred to a multidisciplinary pain clinic.

Ms. Carreon-Rivera requires physical rehabilitation, as is recommended by the physical medicine specialist.

6. Your prognosis including whether a complete recovery is likely.

Ms. Carreon-Rivera has a major depressive disorder and a chronic pain disorder. She has not thus far been afforded the opportunity for comprehensive treatment for depression, nor has she been afforded the opportunity for treatment in a pain clinic. I think that there is a reason to hope that her state will improve with treatment. In my opinion, one would need to see evidence of failure of response to several months of treatment for depression, as well as multidisciplinary pain clinic management, before one would be able to make statements as to

whether or not complete recovery is likely. At this time, I would remain hopeful.

[86] Dr. Miller testified that the recommended treatment for depression is medication and counselling, in particular cognitive behavioral psychotherapy (“CBT”). He stated that there was a 45-50% chance that medication will assist and a 60-70% chance that CBT will benefit the patient. He explained that benefit does not necessarily mean removal of all symptoms, but rather improvement. With respect to Ms. Carreon-Rivera, he stated that he believed that she had a good chance of improvement with treatment for her depression, in the range of 50-70%. It was his opinion that with treatment Ms. Carreon-Rivera would become more functional.

[87] Dr. Miller noted that Ms. Carreon-Rivera’s main vocational difficulty appeared to relate to problems with concentration. He stated that such problems can be a manifestation of depression.

[88] Dr. Miller stated that Amitriptyline is not part of his recommended protocol for treatment for depression.

Dr. Terrance O’Farrell

[89] Dr. O’Farrell was qualified as an orthopedic surgeon. He did not examine Ms. Carreon-Rivera, but prepared a report based upon his review of her records in which he expressed the following opinions:

Impression: It is my impression that this patient has not suffered a substantial organic injury that she has some mild degenerative changes in her neck that may have possibly been aggravated by the accident, but nothing more. It is my opinion that she will have no significant long-term sequelae as a result of her accident of an organic nature, that she will not be a surgical candidate as a result of her accident, and that she should be fit physically to be able to return to her normal duties.

[90] It was Dr. O’Farrell’s opinion that the mild degenerative changes were not having any effect on the spinal cord or the nerves coming from it. He agreed that it was possible that the spondylosis was accelerated by the accident and would defer to Dr. Tarazi’s opinion regarding the aggravation effect of the injury.

[91] He did not disagree with the conclusion that Ms. Carreon-Rivera had chronic pain syndrome which required treatment.

Michael Smith

[92] Mr. Smith is an occupational therapist. He provided an opinion with respect to Ms. Carreon-Rivera's functional abilities and limitations related to injuries incurred in the accident.

[93] Mr. Smith performed a functional capacity assessment and concluded that in his opinion Ms. Carreon-Rivera demonstrates the requisite functional capacity to manage the demands of her position as an Executive Assistant.

Credibility

[94] With two qualifications I found Ms. Carreon-Rivera's evidence to be both a credible and reliable account. Her evidence of her situation before and after the accident was consistent with the evidence of her husband and two co-workers. She gave her evidence in a careful fashion. For the most part, her evidence was consistent with the record of the progress of her symptoms as recorded in the clinical records.

[95] The first qualification is that I believe that Ms. Carreon-Rivera's account of the degree of her disability and the course of her symptoms is somewhat more pessimistic and negative than is warranted. I think that this feature of her evidence is consistent with her depression. As Dr. Miller noted, her "depressed mood has likely contributed towards her having a pessimistic outlook with regard to her possibilities for rehabilitation and her capabilities".

[96] The second qualification is in relation to Ms. Carreon-Rivera's evidence concerning treatment for depression. In this area I felt that Ms. Carreon-Rivera was attempting to argue her case as opposed to providing evidence and I did not find her account in this area to be particularly credible.

Non-Pecuniary Loss

[97] Ms. Carreon-Rivera submits that the appropriate range for non-pecuniary loss is \$90,000 to \$110,000, citing the following cases: *Foran v. Nguyen*, 2006 BCSC 605; *Testa v. Mallison*, 2009 BCSC 957; *Tabet v. Hatzis*, 2013 BCSC 1167; *Ahonen v. Thauli*, 2013 BCSC 1607; *MacKenzie v. Rogalasky*, 2011 BCSC 54; *Prince-Wright v. Copeman*, 2005 BCSC 1306; *Neumann v. Eskoy*, 2010 BCSC 1275; and *Verge v. Chan*, 2012 BCSC 876.

[98] The defendant submits that the appropriate award for non-pecuniary loss is \$55,000, citing *Sharifi v. Chaklader*, 2012 BCSC 685; *Middleton v. Morcke and Lee*, 2007 BCSC 804; and *Naidu v. Mann*, 2007 BCSC 1313.

[99] The approach to be taken by the court in the assessment of damages for non-pecuniary loss was summarized by Madam Justice Wedge as follows in *O'Rourke v. Kenworthy*, 2009 BCSC 1277 at paras. 84 and 85:

[84] An award of damages for non-pecuniary loss must address the specific circumstances of the individual case. It is not possible to develop or point to a tariff to set the award: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, 263 D.L.R. (4th) 19.

[85] Various factors have been considered by the courts when assessing a claim for non-pecuniary loss. In *Stapley*, Kirkpatrick J.A., writing for the majority of the Court of Appeal, identified the following factors at para. 46: the age of the plaintiff; the nature of the injury; the severity and duration of pain; ongoing disability; emotional suffering; loss or impairment of enjoyment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. The Court also observed that the plaintiff should not be penalized for his or her stoicism.

[100] I am satisfied that, as a result of the accident, Ms. Carreon-Rivera has suffered soft tissue injuries to her neck, right shoulder and back. In addition, she suffered an aggravation of cervical spondylosis that, but for the accident, would have remained asymptomatic for at least another 10 to 20 years. I am satisfied further that Ms. Carreon-Rivera suffers from recurrent headaches that are related to the accident. In addition, her pain has become chronic, or, as Dr. Miller states, she has a somatic symptom disorder with predominant pain. Finally, Ms. Carreon-Rivera

suffers from a major depression disorder that I find is related to her pain and is the result of the accident.

[101] These injuries have had a negative impact on Ms. Carreon-Rivera's life, particularly in her social and recreational activities and family life. Prior to the accident, she was active and animated, very involved in her home and with her family, and active in many sports. Since the accident she has withdrawn from social and family life. Her husband has taken over much of her role in the home with respect to the cooking, cleaning and organizing the children. While before the accident Ms. Carreon-Rivera was very involved with her children, since the accident she has withdrawn, feeling too overwhelmed to deal with issues that have arisen. This has been a source of great distress for her.

[102] Ms. Carreon-Rivera continued to work except for one period off at the recommendation of Dr. Lui. She has continued to receive strong performance appraisals and has secured a new executive to report to in the period since the accident. However, her impression is that her abilities at work have been impaired; and this impression has contributed to her distress. While it is clear from her appraisals that she remains a capable employee, her performance is accomplished at a great cost in terms of fatigue and lack of energy for other activities.

[103] The defendant argues that the headaches have both a cervicogenic and a migrainous component and that since the migraine-like symptoms only appeared in 2012, they are not related to the accident. However, Dr. Craig stated that Ms. Carreon-Rivera had many of the features he sees typically in people with cervicogenic headaches. He stated that headaches are often multifactorial and that if there is a predisposition to migraine, the accident will make the patient more susceptible so that they would have more difficulties after.

[104] Ms. Carreon-Rivera had a minor history of migraines before the accident. She had been treated for migraine in 2003 but had no further treatment for migraine until after the motor vehicle accident.

[105] I have concluded that the headaches Ms. Carreon-Rivera experienced are related to the accident and that it is not appropriate to treat them as somehow divisible.

[106] In my view the real issue here is the question of Ms. Carreon-Rivera's prognosis. The clear consensus of the medical opinion is that Ms. Carreon-Rivera's present condition is strongly influenced by her depression. The depression and the pain are interrelated. There is also evidence, which I accept, that appropriate treatment for depression will improve her condition. In addition, recommendations have been made for treatments for headache and neck pain that she has not undertaken. In these circumstances it is not appropriate to conclude that Ms. Carreon-Rivera's circumstances have plateaued and that her condition is likely to continue largely unchanged. In this respect her condition is not as serious as that in the cases cited by plaintiff's counsel.

[107] Having considered the specific circumstances of Ms. Carreon-Rivera and the factors identified in the case law as relevant, together with the authorities cited by counsel, I award \$80,000 for non-pecuniary loss.

Mitigation

[108] A plaintiff in a personal injury action has a positive duty to mitigate her loss. This duty includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing her injuries: see *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 201.

[109] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of her loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to her by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably. See: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, citing *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[110] The defendant seeks a reduction of 40% from the claim for non-pecuniary general damages due to Ms. Carreon-Rivera's failure to mitigate. Counsel submits that Ms. Carreon-Rivera's principal failure to mitigate stems from her refusal to follow the advice of her treating and consulting physicians to seek treatment for depression. Drs. Miller, Tarazi and Craig all discussed Ms. Carreon-Rivera's pain being interrelated with her depression. Those doctors and her family physician all recommended that Ms. Carreon-Rivera receive treatment for depression.

[111] Counsel notes that Dr. Leong-Sit recommended counselling in September 2012. In September 2012, Dr. Craig recommended further assessment of her depression, noting that this can be a major barrier to recovery and can also impact pain threshold and perceived capacity. Ms. Carreon-Rivera did not seek either further assessment or treatment. Dr. Miller recommended a combination of CBT and medication at the end of September 2013. However, Ms. Carreon-Rivera rejected medication and did nothing to even inquire about treatment until the week before trial.

[112] In addition, counsel notes that Ms. Carreon-Rivera has also disregarded the advice of Dr. Craig with respect to recommended medications and the combined facet block and rhizotomy treatment. Both Dr. Craig and Dr. Dilli suggested Botox treatments which Ms. Carreon-Rivera has not undertaken.

[113] Ms. Carreon-Rivera submits that she acted reasonably having regard to the information in her possession and when it came into her possession. Counsel states that her depression did not become real for Ms. Carreon-Rivera until after Dr. Miller's examination, at which time she sought a referral from Dr. Leone-Sit.

[114] I do not agree with the plaintiff's characterization of the facts. As noted earlier, I am satisfied that Dr. Leone-Sit did recommend that she seek counselling for depression. Ms. Carreon-Rivera rejected the recommendation. Ms. Carreon-Rivera stated that it was only after she had been assessed by the psychiatrist that the diagnosis became real for her. However, Dr. Craig, while not a psychiatrist, is a specialist in the area of physical medicine and rehabilitation; Dr. Craig also stressed

the importance of addressing her mood issues and recommended that she receive further assessment in September 2012, yet she did not seek out such an assessment.

[115] Moreover, Dr. Miller's examination was in September 2013. It is not accurate to state that she then sought a referral. She did nothing to act upon this recommendation until Dr. Leone-Sit ordered all the reports in November. She took no action until shortly before trial. In addition, she did not follow Dr. Miller's recommendations regarding medication. Ms. Carreon-Rivera stated that Dr. Leone-Sit told her that Dr. Miller had recommended inappropriate medications. I find that no such conversation occurred. Rather, Ms. Carreon-Rivera indicated to Dr. Leone-Sit that she was not prepared to take anti-depressant medication.

[116] Counsel submits, in addition, that the defendant has failed to show the extent to which the damages would have been reduced by that treatment as required by the second part of the test. Counsel submits that the defendant has not demonstrated that Ms. Carreon-Rivera's damages would have been reduced had she sought treatment earlier.

[117] Dr. Miller stated that with appropriate treatment he believed that Ms. Carreon-Rivera had a good chance of improvement, in the range of 50-70%. However, improvement is not to be taken as an elimination of her symptoms. I am satisfied that the defendant has established that Ms. Carreon-Rivera's refusal to seek appropriate treatment for depression was unreasonable and that there was at least a 50% chance that she would have experienced a substantial improvement in her symptoms and functioning had she done so. I find that Ms. Carreon-Rivera failed in her duty to mitigate her loss. Because appropriate treatment would not likely have eliminated Ms. Carreon-Rivera's symptoms entirely, I reduce the award for non-pecuniary loss by 10% to account for this failure to mitigate. The plaintiff is therefore entitled to receive \$72,000 in non-pecuniary damages after the appropriate deduction for her failure to mitigate is made.

Past Wage Loss

[118] As noted above, by agreement the award for past wage loss is \$27,000.

Special Damages

[119] Also as noted above, the parties have agreed that the plaintiff should be awarded \$16,189.18 for special damages.

Loss of Future Earning Capacity

[120] The threshold question to be determined by the court in relation to a claim for loss of future earning capacity is whether there is a real and substantial possibility of a future event leading to an income loss: see *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[121] Ms. Carreon-Rivera seeks an award of \$100,000 for loss of future earning capacity. Counsel submits that Ms. Carreon-Rivera remains impaired and that she will need to take time off work to attend to her rehabilitation and as necessary should her symptoms flare up in the future. It was submitted that Ms. Carreon-Rivera requires accommodations from her employer that she did not require before the accident. She requires time off work to attend treatment and the ability to work from home.

[122] In addition, counsel submits she is not the employee that she once was. Her memory and concentration have been impaired, and her attendance is no longer reliable. Further, she has lost confidence in herself as an employee.

[123] Counsel submits that:

...[Ms. Carreon-Rivera] cannot continue in the manner she has since the accident. Something has to give in order to balance her professional and home life. She needs:

- (1) counseling;
- (2) a structured rehabilitation program for her chronic neck and shoulder pain;
- (3) continued accommodation in the work place which would include flexible hours and time off work to deal with flare-ups and headaches; and

- (4) continued passive treatment (ie: physiotherapy, chiropractor, and massage) to deal with flare-ups and address her discomfort.

[124] Finally, counsel submits that before the accident, Ms. Carreon-Rivera planned to work to age 65 and it was probable that she would have done so given her good health and commitment to work. However, there is now a substantial possibility that because of her chronic mental and physical condition she will not be able to work to age 65.

[125] The defendant submits that the plaintiff has failed to prove that there is a real and substantial possibility that she will suffer a loss of future earning capacity as a result of the accident in that:

- (a) there is general agreement as between her medical experts that she is not restricted by her injuries in performing her duties of employment;
- (b) her occupational therapist performed extensive functional testing and determined that she was restricted with respect to looking up, overhead reaching and far extended reaching, none of which are required for her work. He concluded that the plaintiff is not restricted in her current position as an executive assistant;
- (c) she has continued to work full time as an executive assistant since the accident, save for a four-month absence recommended only by Dr. Lui. Although Dr. Tarazi effectively ratified Dr. Lui's advice after the fact, Dr. Craig stated in cross-examination that he did not consider such a lengthy absence from work as a suitable therapeutic tool;
- (d) her performance reviews since the accident have been favourable; and
- (e) as evidence that she is somehow diminished in her ability to perform her duties of employment and maintain her position as an executive assistant, she cites only her own feeling of a reduction in her level of confidence and perceived but unsubstantiated diminution of her corporate reputation.

[126] I have concluded that Ms. Carreon-Rivera has not established that there is a real and substantial possibility that she will sustain a future loss of income. I note that Ms. Carreon-Rivera has continued to work full time since the accident except for the four-month absence recommended by Dr. Lui. I agree with the submission of the defendant that there is general agreement among the medical experts that Ms. Carreon-Rivera is not restricted by her injuries in performing her duties. In particular, it was Dr. Craig's opinion that in the long term she will be able to continue working full time at her occupation without impairment. This was also the conclusion reached by the occupational therapist.

[127] In addition, as noted above, Ms. Carreon-Rivera has not received treatment for depression. As I have concluded earlier, such treatment is likely to have a positive effect on her pain and mood symptoms. In addition, there are a number of treatment modalities recommended by Drs. Dilli and Craig that have not been explored to deal with Ms. Carreon-Rivera's headaches and neck pain. Thus, at present, Ms. Carreon-Rivera's injuries do not prevent her from performing her work functions and with appropriate treatment her condition is likely to improve.

[128] Ms. Carreon-Rivera has stated that she requires flexible hours to accommodate treatment and the ability to work from home. However, the treatment she refers to are passive treatments. With respect to those therapies, Dr. Craig stated that he would not recommend that they continue except for perhaps a session or two in the event of an acute flare-up. Dr. Leone-Sit stated that she does not need to keep seeking passive treatment through massage, chiropractic treatment and physiotherapy.

[129] Ms. Carreon-Rivera has suggested that she requires time off work to undertake treatment. While it is the case that various treatments have been recommended, there is no evidence that she would require a leave of absence from work to undertake any or all of these interventions. While Ms. Carreon-Rivera has in the past worked from home, there is no medical evidence that this is an accommodation that she requires. In addition, since she has started work with her

new executive she has not been working from home, suggesting that this is not an accommodation that she requires.

[130] I make no award under this head of damages.

Past Diminished Housekeeping Capacity

[131] As noted in *Foran v. Nguyen et al*, 2006 BCSC 605 at paras. 115 and 116:

[115] An award for loss of housekeeping capacity is designed to compensate a plaintiff for his/her loss of ability, or diminished capacity, to do regular housekeeping tasks. Depending on the circumstances, loss of housekeeping capacity may fall under any of five heads of damages (non-pecuniary damages, special damages, past loss of income, cost of future care or loss of future earning capacity) – or it may constitute its own separate head of damages: *McTavish v. MacGillivray*, 74 B.C.L.R. (3d) 281, 2000 BCCA 164; *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178, 123 D.L.R. (4th) 652 (C.A.).

[116] Where family members have provided replacement services, the scope of that assistance may help the Court determine what services were reasonably necessary: *Sorenson v. Muker*, 2002 BCSC 204 at para. 50...

[132] Prior to the accident, Ms. Carreon-Rivera did the majority of the cooking and indoor housework. Since the accident, Ms. Carreon-Rivera cooks only on occasion. She does laundry with some assistance from the children. Her husband and the children have assumed the other household chores.

[133] Ms. Carreon-Rivera seeks an award of \$10,000 under this category. The defendant submits that no award should be made in this category, relying on the opinion of Dr. Craig that if Ms. Carreon-Rivera followed his recommended treatment, she would be able to resume all of her usual activities including regular housework. In addition, counsel submits that Ms. Carreon-Rivera had a very busy life before the accident and likely spent little time on household matters. There is only vague evidence with respect to the extent of her loss.

[134] I am satisfied that housekeeping activities and cooking formed a significant part of Ms. Carreon-Rivera's busy life before the accident and that as a result of her injuries, including her fatigue, other members of the family have had to perform tasks she has been unable to do. I agree that it is likely that had she followed Dr. Craig's

recommendations, she would have been able to resume her duties at home either in full or to a great extent. However, in my view there has nonetheless been a compensable loss and I award \$8,000 for this head of damages.

Cost of Future Care

[135] The legal principles governing an award for cost of future care were recently summarized by Mr. Justice Wong in *Campbell v. Swetland*, 2012 BCSC 423 at para. 198. The summary included the following:

- (a) there must be a medical justification for claims of cost of future care;
- (b) the expense should not be a squandering of money. In considering any particular item of future care, the test is whether a reasonably minded person of ample means would incur the expense;
- (c) the weight to be given to an opinion on future care will depend on the extent to which recommendations for things like psychological counseling and physiotherapy are supported by the evidence of experts within the relevant field of expertise; and
- (d) awards for cost of future care must be reasonable, both in the sense of being medically required and in the sense of being costs that, on the evidence, the plaintiff will be likely to incur.

Passive Therapies

[136] Ms. Carreon-Rivera seeks 12 treatments per year for life at a cost of \$26,802.36. Counsel notes that Ms. Carreon-Rivera has been going to physiotherapy since the accident and currently receives chiropractic treatment once a week and massage therapy twice a month.

[137] The defendant notes that Drs. Craig and Leone-Sit are not recommending passive therapies, except on occasion in response to acute symptom flare-ups. I conclude that the appropriate award is for the lower end recommended by Mr.

Smith, the plaintiff's consultant occupational therapist, that is \$480 annually for 19.422 years, totalling \$9,323.

Gym and Pool Fees

[138] Ms. Carreon-Rivera seeks \$8,526.26 as the present value of a gym pass and \$420 as a one-time cost of four to six sessions of instruction on a proper exercise program. The defendant accepts that these have merit and they are consistent with Dr. Craig's recommendations. I therefore award \$8,946.

Counselling

[139] Ms. Carreon-Rivera seeks the costs of a multidisciplinary pain program, being \$2,720 for the initial review and \$13,560 for the program, together with \$2,720 for ongoing psychotherapy to address depression after the initial treatment. These are all consistent with Dr. Miller's recommendations.

[140] The defendant submits that Ms. Carreon-Rivera has demonstrated through her actions that she is not likely to follow Dr. Miller's recommendations.

[141] I think there is reason to believe that Ms. Carreon-Rivera will finally address her depression and follow Dr. Miller's recommendations. She did at least follow up on the referral to a psychologist before trial.

[142] I therefore award \$2,720 for the initial assessment, \$13,560 for the pain clinic and \$2,720 for further psychotherapy for a total of \$19,000.

Housecleaning

[143] Ms. Carreon-Rivera seeks \$2,600 annually for the first 10 years and then \$3,120 for the next 15 years for housecleaning assistance, amounting to a present day total of \$21,710 and \$28,282.80 respectively.

[144] The defendant submits that no award should be made in this category on the basis of Dr. Craig's opinion that, with appropriate treatment, Ms. Carreon-Rivera should be able to do all of her normal household duties.

[145] I agree with the submission of the defendant and make no award under this category.

Medication

[146] Ms. Carreon-Rivera seeks \$5,588.49 for medications. This is the present value of the medications that she currently takes to control her symptoms. The defendant submits that the Amitriptyline was prescribed to treat an unrelated condition and notes Dr. Dilli's comments regarding overuse of analgesic medications. However, I have concluded that the Amitriptyline was not prescribed for an unrelated condition. Ms. Carreon-Rivera currently only takes over-the-counter medication on an occasional basis to control her pain on bad days.

[147] I have concluded that an award of \$5,589 is appropriate.

Assessments

[148] Ms. Carreon-Rivera seeks a home-based ergonomic assessment together with ergonomic equipment – a chair tray and monitor mount. These items total \$3,669. When Ms. Carreon-Rivera works from home or uses her computer at home, at present she sits on the couch with her laptop on her lap. That cannot be doing her neck any good and this is a relatively modest expenditure which I find to be appropriate. I award \$3,669.

Total

[149] In the result I have made the following awards for the cost of future care:

Passive Therapies	\$ 9,323
Gym and Pool	\$ 8,946
Counselling	\$19,000
Medication	\$ 5,589
Assessment	\$ 3,669
Total	\$46,527

Conclusion

[150] It is clear that Ms. Carreon-Rivera has suffered both emotional and physical injuries as a result of the accident. Taking into account her failure to mitigate some of her non-pecuniary losses, I award the plaintiff the following:

Non-pecuniary damages	\$ 72,000.00
Past wage loss	27,000.00
Special damages	16,189.18
Past diminished housekeeping capacity	8,000.00
Cost of future care	<u>46,527.00</u>
Total	<u>\$169,716.18</u>

[151] I have made no award for a loss of future earning capacity. Absent any facts of which I am unaware, the plaintiff is entitled to her costs.

“Ross J.”