

CANADA / JUDGMENT

Liu v. Swan

2022 BCSC 1954

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1954 Liu v. Swan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Liu v. Swan,

2022 BCSC 1954

Date: 20221108

Docket: M203057

Registry: New Westminster

Between:

Hua Liu

Plaintiff

And:

David Allen Swan and Eco-Options Energy Cooperative

Defendants

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.

November 22-26, 29-30, 2021

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I. INTRODUCTION

[1] The plaintiff, Ms. Hua (a.k.a. "Helen") Liu, was injured in a motor vehicle accident on June 24, 2016, in Surrey, British Columbia ("Accident"). Liability is admitted.

[2] The issues in dispute relate to the appropriate amount of non-pecuniary damages, loss of past earning capacity, loss of future earning capacity and the cost of future care.

[3] The parties have agreed on special damages in the amount of \$4,754.10.

II. FACTUAL BACKGROUND

A. Agreed Facts

[4] The parties have also agreed to the following facts.

(a) Ms. Liu was born in China in May 1971. She graduated from Nanjing University in China, having studied what she described as "computer communication." In or around 2002, she moved to Canada. In or about 2003, Ms. Liu obtained a masters of business administration.

(b) At the time of the Accident, Ms. Liu was 45 years old. She was living in a townhouse in Surrey, British Columbia, with her husband, Yan Kwai Lo, and children, Anna (born March 2011) and Samuel (born April 2013). She later moved to Prince George in or about August 2017.

- (c) In or about March 2015, Ms. Liu began working for Boundary Bay Enterprises Ltd. in an office assistant and bookkeeping capacity for about 40 hours a week, and earned about \$2,600 per month. In the 12 months prior to the Accident, she earned a gross income of about \$32,448.

The Accident

- (d) At the time of the Accident, Ms. Hua was driving a 2012 Nissan Sentra. Ms. Hua's vehicle was facing eastbound at or near 138A Street, waiting to make a left turn. The defendant, David Allen Swan, was driving a white pickup truck.
- (e) Mr. Swan was behind Ms. Hua's vehicle, driving eastbound along 16th Avenue, and rear-ended Ms. Hua's vehicle.
- (f) After the Accident, an ambulance attended. Ms. Liu was treated at Peace Arch Hospital.

Post-Collision

- (g) The last day that Ms. Liu was paid for her employment at Boundary Bay Enterprises was June 23, 2016. For the period from approximately July 3, 2016, to July 1, 2017, she obtained Employment Insurance benefits.

Ms. Liu's earnings history based on her income tax records

- (h) According to income tax records, Ms. Liu's earnings history is as follows base on her Line 150 or Line 150000 income ("Line 150 income") and her Line 236 or 23600 income ("Line 236 Income"):

2014: Line 150 Income of \$8,323; Line 236 Income of \$8,323

2015: Line 150 Income of \$29,334; Line 236 Income of \$23,665

2016: Line 150 Income of \$22,895; Line 236 Income of \$16,334

2017: Line 150 Income of \$9,201; Line 236 Income of \$9,201

2018: Line 150 Income of \$90; Line 236 Income of \$90

2019: Line 150 Income of \$4,278; Line 236 Income of \$4,278

2020: Line of 150 income of \$151; Line 236 Income of \$151

Treatment attended

- (i) Ms. Liu received the following treatment after the Accident:
- (i) Legacies Health Centre: In 2016, Ms. Liu attended "about, or at least" 30 physiotherapy and message treatments; in 2017, Ms. Lu "attended about or at least 20 treatments."

(ii) Physionorth Sports and Wellness Centre: In 2017, Ms. Liu attended physiotherapy "about or at least 14 times"; in 2018; "about or at least 41 times"; in 2019; "about or at least 33 times"; in 2020, Ms. Liu attended "on at least the following date January 7."

(iii) Prince George Family Chiropractic: From about February 19, 2020, to March 10, 2020, Ms. Liu attended treatment "approximately or at least 7 times."

(j) Ms. Liu's family doctor in Vancouver was Dr. Helen Ting. Ms. Liu's family doctor in Prince George from about September 2017 is Dr. Rong Zhang.

B. Evidence of Ms. Liu Before the Accident

[5] Ms. Liu testified that she was raised in a loving family, and has no history of emotional or physical abuse. She also testified that she had no history of physical injuries or health issues prior to the Accident.

[6] Ms. Liu testified that she was employed at Boundary Bay Enterprises full-time as an office assistant at the time of the Accident. Her duties were clerical in nature, and also included speaking to customers and suppliers over the phone. She sorted files, and handled faxes, email and mail. She was also responsible for billing customers and bookkeeping. Ms. Liu testified she enjoyed her job. While she worked at Boundary Bay Enterprises, she and her husband relied on daycare services for their children.

[7] Before the children were born, Ms. Liu and her husband enjoyed hunting together. Prior to the Accident, after the children were born, the parties enjoyed camping, hiking and fishing. The family would also go on shopping trips across the border.

[8] Ms. Liu testified that prior to the Accident, she would do the following household chores: cooking, mopping the floors, cleaning the kids' rooms, vacuuming once a week, laundry almost every day, and cleaning the bathroom and toilet.

[9] Ms. Liu testified that her sitting, standing, and walking tolerances were higher before the Accident. Before the Accident, she could sit for approximately two hours without discomfort; she could stand for approximately one hour without discomfort; and she could walk or hike for two hours without feeling uncomfortable. She also asserted she could lie down for ten hours before feeling uncomfortable.

[10] Ms. Liu reported she had stopped working when her daughter was born in March 2011. She stayed at home for about two years after delivering her first child and then went back to work for approximately three months. After the birth of her second child in April 2013, she stayed at home until she started working again part-time near the end of 2014. She was at this office job for another short period of time. As noted earlier in these Reasons, Ms. Liu's next job was at Boundary Bay; she was hired in March 2015 and worked full-time until the Accident.

- [11] Ms. Liu testified that she had a good relationship with her co-workers, and that she also enjoyed socializing, having dinner and shopping with friends.
- [12] In regard to her pre-accident health, Ms. Liu acknowledged she had some back pain after she gave birth to her daughter. In 2006, she discovered that she had Type 2 Diabetes, which she manages with medication.

C. The June 24, 2016 Accident

- [13] Ms. Liu stated that she was stopped at an intersection and was about to make a left-hand turn in the moments before the Accident. She was wearing her seatbelt. She looked in the rear-view mirror and saw a truck travelling towards her at a fast speed. The truck collided with her vehicle, causing her car to spin around twice. She testified her head moved forward and back, hitting the head-rest. She also recalled that her knee hit the front panel of the car near the steering wheel.
- [14] Ms. Liu testified that her airbags did not deploy but that her car "was damaged very badly." She recalled that immediately after the Accident, she was trying to get out of her car but she felt dizzy and leaned back into her seat. The other driver came over to her and asked her if she was "OK." She responded that she was not OK, and he then called an ambulance. She was still in her car when the ambulance arrived. She recalled they put a neck collar on her and she was transported by ambulance to Peach Arch Hospital. She was examined at the hospital and was given Tylenol 3 for 5 days and Advil before being released into her husband's care.

D. Evidence of Ms. Liu Regarding her Post-Accident Symptoms

- [15] Ms. Liu testified that right after the Accident she developed a headache and was dizzy; the right side of her neck and shoulder were also painful, as was her knee. After several days, she stated she felt pain in her arm, wrist and hands, as well as her upper and lower body, in her waist, legs, knee and ankles.
- [16] She described having problems "moving around," including walking up and down stairs, getting dressed, brushing her hair and going to the bathroom by herself.
- [17] He recalled her doctor prescribed cyclobenzaprine "to relax the muscles." She was also eventually prescribed Naproxen which she says helped with her recovery in the "short term."
- [18] Ms. Liu recalled she was diagnosed with depression by her family doctor, about two months after the Accident. She testified that she was prescribed Trazodone for sleeping, as well as Bupropion and Escitalopram for anxiety and depression. As noted earlier in these Reasons, Ms. Liu was also referred to massage and physiotherapy approximately three weeks after the Accident.

- [19] According to Ms. Liu, she has experienced continual headaches since the Accident. She says her headaches are "always there" and get worse at the end of the day. She stated that the intensity of the headaches ranges from a 4 out of 10 to a 6 or 7 out of 10. On the day of her testimony, she described her pain level at a 5 out of 10. She described being sensitive to noise and having to ask her children to be quiet because noise made her headaches worse.
- [20] She explained that she first takes a painkiller like Naproxen for her headaches, and sometime Tylenol 3. She also uses a heating pad for rest.
- [21] Ms. Liu testified that there has been improvement in her neck pain. She noted that when she has both neck pain and headaches, her headaches get worse and she has to "lie down and take a rest." She said that she has to take a rest every two hours, several times a day. Ms. Liu also testified that she cannot sit down for more than one hour at a time because sitting made her neck hurt.
- [22] Ms. Liu described having pain in her shoulder area close to her neck. She stated the area felt very tight, like a stone, and stated that she feels the pain getting worse if she sits or stands for a long time. She explained that she needed to do stretching exercises to "make neck and shoulder a bit better." She said that she uses the "heat pad and medicines to kill the pain."
- [23] Ms. Liu acknowledged on cross-examination that she prepares the children's breakfasts, accompanies them as they get on the bus to go to school, and prepares their snacks after school. She agreed she advised Dr. Zaki that she does the laundry most of the time, and that she cleans the bathrooms but cannot scrub the tub. She added that she does "light laundry" and that her husband mops the floors, vacuums and helps her with the grocery shopping. Ms. Liu testified that she cannot lift or carry heaving things; she said her weight tolerance is 10 lbs, and lifting makes her neck worse.
- [24] Ms. Liu acknowledged that the injury to her upper back, which she described as eliciting a pain level between a 4 to 6 out of 10, has now essentially resolved. She testified that the upper back pain lasted "I think until 2020" and "now I don't have upper back pain anymore."
- [25] Ms. Liu testified that after the Accident, her right knee was bruised and the skin on her knee was "broken but not bleeding." She said the pain "got worse" after several days and lasted until she went to Prince George. She explained that her knee pain has improved but has not totally healed, noting that if she takes care of herself, she "won't feel it." She also stated that if she stands for more than 30 minutes or walks for an hour then she "feels it" and has to rest with a heating pad for a couple of days. She described her knee pain as "a 3 to 5 out of 10."
- [26] She testified that Post-Accident, "at one point" both arms were very sore especially the right arm. Ms. Liu testified that this injury from the Accident prevented her from holding or hugging her children. She also said for half a year after the Accident, she could not lift her right arm. She acknowledged that she has no limitations now moving her arm. She also asserted that her right arm was back to normal "maybe within a year."

- [27] Ms. Liu acknowledged on cross-examination that she felt post-Accident leg and ankle pain to a lesser extent than her other injuries. She testified that the left ankle healed within three months and the right ankle healed within six months.
- [28] Ms. Liu testified that her sitting, standing, and walking tolerances were reduced after the Accident. Specifically, she stated that, on at least two occasions after the Accident, she could only sit for a maximum of an hour, as compared to her ability to sit for 2 hours without feeling uncomfortable prior to the Accident. On one occasion, she testified she could feel pain after sitting for a half hour.
- [29] In regard to Ms. Liu's standing tolerance, she testified that after the Accident, if she stood for more than 30 minutes, she needed to do stretching exercises and she felt pain in her knees, as compared to prior to the Accident where she could stand for one hour before feeling uncomfortable. Ms. Liu testified that she could only walk for an hour after the Accident, as compared to her pre-Accident tolerance of walking for two hours with "no problem."
- [30] Ms. Liu testified that she has had difficulty sleeping after the Accident. She explained that before the Accident, she could sleep 8 to 10 hours a night. Now, she sleeps about 6 hours at night but says her quality of sleep is "low." She states she wakes up with pain and still has nightmares about the Accident. Ms. Liu also described how she is short tempered with her children and husband the day following these troubles sleeping. She takes Trazodone to sleep. Ms. Liu testified she also needs to take naps during the day, which is something she did not have to do before the Accident
- [31] She stated that after the Accident she did not "feel normal" and could not "take care of [herself] in the beginning" or "take care of [her] kids." She said she had "low moods everyday" and started feeling this way within one and a half to two months after the Accident. She describes feeling useless. She testified that on a scale of 10, with 10 "being the worse" her mood was a 7 or 8 out of 10. She also stated that sometimes she felt she even worse, at 9 out of 10 or a 10, and thought that her family would be "better without her". She added that "with pills" she is now a "5 of 10" but that she is not happy.
- [32] Ms. Liu testified that her husband was a tour bus driver and that after the Accident, he could no longer do the longer seven-day tours as he once did. Instead, he did city tours so he could come home at night as the family needed him there.
- [33] Ms. Liu described how she felt "shame" that she "had to move out" of the Vancouver area and felt like "a big failure." Ms. Liu testified that she does not go out very much and that she did not tell her friends that she had moved to Prince George. She testified that she no longer goes, fishing, hiking or shopping and she spends less time with her children.

- [34] While Ms. Liu testified during her direct examination that she enjoyed fishing two or three times a year, during cross-examination she confirmed that she did not go fishing in the two years before the Accident. Similarly, while Ms. Liu testified that she enjoyed hunting once a year with her husband, she confirmed on cross-examination that she has not gone hunting since 2011.
- [35] Ms. Liu acknowledged that her doctor recommended she go to counselling in August 2016, but that she did not go. Ms. Liu testified that her family physician said it "it was up to [her]" and she chose not to go to counselling. Ms. Liu added that it was not a strong recommendation and that it involved contacting a social worker. She explains that in China she was taught to be strong and tough; she thought she could handle her feelings by herself. She added that in China "you don't talk about how sad you are" and that "talking to someone is just like a drug you just have to work hard to be successful - no one talks about their feelings."
- [36] During cross-examination, Ms. Liu was taken to Dr. Zhang's clinical notes dated August 27, 2019, which stated she "doesn't like to exercise." Ms. Liu responded that she does not remember if she told Dr. Zhang that she did not like to exercise during that appointment. Ms. Liu was also taken to Dr. Zhang's clinical notes dated November 22, 2019, which repeated that Ms. Liu does not like to exercise. Ms. Liu responded that she "has no idea whether [she] said that" but acknowledged she may have said so. She added that she does exercise, and that her husband also reminds her to exercise.
- [37] Ms. Liu described how she cannot "carry heavy things", is forgetful, and has "poor concentration." She is apprehensive about going back to work given her problems with memory and concentration.
- [38] Ms. Liu testified that she "took a half-year break from work" after the Accident and then spoke to her employer about going back to work part-time. She stated that her employer advised her that her position was no longer available. Ms. Liu testified that she "looked for a job for a long time" and that she searched for work in the employment section of Chinese newspapers but "could not find a job." Ms. Liu also testified that she could not find work after moving to Prince George. As noted above, she received Employment Insurance benefits.
- [39] Ms. Liu testified that she and her husband moved to Prince George for financial reasons. She explained that he also lost his job and was not physically well. Ms. Liu and her husband are now living in a mobile home, mortgage free, which they purchased after moving to Prince George. Ms. Liu agreed on cross-examination that her family would not have moved to Prince George if her husband was able to continue working in Vancouver.
- [40] Ms. Liu was cross-examined on a clinical entry of Dr. Ting, dated September 30, 2016, that indicates she tripped and fell on a sidewalk and bruised her right knee. Ms. Liu could not remember this incident.

- [41] Ms. Liu was taken to the clinical records of Physionorth Sports and Wellness Centre, dated March 9, 2018, which indicated that Ms. Liu reported she was 70% recovered from her Accident-related symptoms at that time. Ms. Liu largely agreed with this entry: she admitted her back, shoulder and knee were 70% recovered by March 9, 2018, but she did not agree her neck was 70% recovered.
- [42] Ms. Liu agreed on cross-examination that her biggest complaint was her neck. She testified that she "feels pain" when she turns her neck fully to the right. She stated she does not have any issues turning her neck fully to the left, and she has no issues looking downward. She reported having some pain looking up; she cannot fully bend her neck back. Ms. Liu agreed she noticed some improvement in her neck pain about six months after the Accident. She testified that after moving to Prince George, her symptoms got worse; however, she went for treatment and her symptoms "got better."
- [43] During cross-examination, Ms. Liu also agreed she noticed an improvement in her shoulder symptoms six months after the Accident. When it was suggested to her that her upper back pain had resolved in 2016, she initially responded that it had not at that time and that she was treated for upper back pain in Prince George. Ms. Liu was then shown Dr. Ting's clinical notes dated November 25, 2016, stated that Ms. Liu reported her upper back pain had resolved. Ms. Liu responded that "maybe at that time, it was resolved but then it came back." She acknowledged, however, that she could not quite remember and added, "maybe at that time [she] told [Dr. Ting] that it resolved because [she] had no pain."
- [44] Ms. Liu confirmed on cross-examination that she suffers from knee pain on an intermittent basis.
- [45] Ms. Liu agreed that she was given home exercise instruction by Mr. Matthias Muller but she lost the instructions. She says she does "towel roll and stretches" on her bed.

E. Evidence of Mr. Lo

- [46] Mr. Lo is Ms. Liu's husband of more than 17 years. He testified with the assistance of an interpreter.
- [47] Mr. Lo testified that before the Accident, his schedule would change throughout the year. Sometimes he would work seven days in a row for out of town tours and he would be gone overnight, and sometimes he worked five days a week like an office worker. During the slow season from about January to April, he would work an average of two or three days a week. He confirmed that, after the Accident, he only did the city tours so that he could be home at night.
- [48] Mr. Lo was laid-off from his job in early 2017 due to what he described as "a lack of work." This was a very difficult time for the family since Ms. Liu was also not working at that time.

- [49] Mr. Lo testified that before the Accident, his wife took care of the children, worked, cleaned the house and cooked their meals. However, after the Accident, his wife complained of pain in her neck, shoulders and lower back. He also recalled that she vomited on a number of occasions. He testified that it was like having a third child. He took over all the household responsibilities, including housekeeping, shopping, cooking, laundry and caring for the children. His wife also became irritable and he noticed she started having problems with her memory. For example, Ms. Liu sometimes forgot to pick-up the children at the bus stop, or feed them.
- [50] On cross-examination, Mr. Lo acknowledged that he and his wife stopped going on hunting trips after the children were born. He confirmed the family went camping at Cultus Lake prior to the Accident but not afterwards.
- [51] Mr. Lo also testified his wife was anxious about driving. He explained that she did not drive the car immediately after the Accident but that he later "forced" her to drive. She now drives short distances, and seldom drives longer distances like she once did.
- [52] Mr. Lo stated that after the Accident, their marital relationship suffered. He would hug her but this caused her "neck pain." He stated that Ms. Liu lost interest in sex. He added that their physical intimacy improved after they moved to Prince George.
- [53] Mr. Lo testified that after the children were born, and before the Accident, Ms. Liu did not go out with her friends. He stated that after the children were born Ms. Liu was more focused on being at home, and on family life; he added that when she went out, he or the children were with her.
- [54] Mr. Lo testified that, a few months after the Accident, he became very ill with a serious hyperthyroid condition. He recalled that when he stood his "legs were weak and [his] heart palpated." He received treatment and has since recovered.
- [55] During cross-examination, Mr. Lo acknowledged that he was treated with various medications for approximately three months, including a round of radioactive iodine. He acknowledged he had to sleep in the garage for seven days, away from the children and did not leave the garage for that period; he could not even walk and was reduced to crawling. After seven days, he was able to isolate himself in the house for an additional seven days. He acknowledged that during this time, his wife took care of the children and did all the household chores.
- [56] Mr. Lo testified that Ms. Liu's emotional condition improved after the couple moved to Prince George. He explained that after he lost his job while living in Vancouver, their financial situation was very stressful but after the family moved to Prince George and he was gainfully employed again, her emotional condition improved.

- [57] Mr. Lo testified that he now has a stable income and his wife's mood is "much, much better" because the couple can "make ends meet" on his monthly income. He stated that his wife is "emotionally better" but not physically better.
- [58] Mr. Lo testified that he was laid-off either in January or February 2017, and did not find work again until December 2018. He recalled he did find work for one day, in April or May 2017, but stopped working because he was bullied. Mr. Lo testified that during 2017 and 2018, when he was not working, he was at home with his children and wife, stating "we were always together." Mr. Lo has been steadily employed since December 2018.

F. Mitchell Bourne

- [59] Mr. Bourne is a physiotherapist who treated Ms. Liu at Physionorth Sports and Wellness Centre in Prince George for a three-month period, commencing September 2017 and culminating in 14 visits. Specifically, he treated Ms. Liu for neck, symptoms, headaches, lower back pain and right knee pain.
- [60] Mr. Bourne testified that Ms. Liu experienced intermittent relief of her neck and headaches; some days she reported "her neck and head were good." He testified that the frequency and intensity of pain decreased over time but there was no absolute relief of her neck pain and headaches during the three months he saw her in 2017. On cross-examination, Mr. Bourne confirmed that he recommended a home exercise program for Ms. Liu.

G. Mr. Matthias Muller

- [61] Mr. Matthias also treated Ms. Liu at Physionorth Sports and Wellness Centre. He started treating Ms. Liu in December 2017, and stopped treating her in January 2020. He testified that overtime, Ms. Liu favourably responded to his physiotherapy treatment. He noted improvement and diminished symptoms in her neck and shoulders.
- [62] On cross-examination, Mr. Muller was taken to his clinical notes relating to a physiotherapy treatment on March 9, 2018. Mr. Muller confirmed that there is a subjective assessment portion of his clinical notes, where he writes what the patient reports to him. In his notes for that day, he wrote, "client reports 70% recovered from MVA." When questioned about this entry, Mr. Muller did not change his evidence; he confirmed that is what Mrs. Liu told him that day, otherwise "[he] wouldn't have reported it."

H. Dr. Gurpreet Palak

- [63] Dr. Gurpreet Palak is a physiatrist who was tendered by Ms. Liu, and qualified as an expert in physical medicine and rehabilitation.

[64] Dr. Palak conducted an independent medical examination of Ms. Liu on January 7, 2021, and issued his expert report on February 19, 2021. At the time of her examination, Ms. Liu reported "pain in the head bilaterally, neck particularly the midline, upper fibers of the trapezius and interscapular region in the thoracic spine," as well as "bilateral right, more so than left, anteromedial knee and shin pain." Ms. Liu described the pain as "as stiffness and tightness."

[65] Dr. Palak rendered the following diagnoses:

- (a) Post-traumatic cervicogenic headaches;
- (b) Post-traumatic migraines;
- (c) Concussion;
- (d) Whiplash-associated disorder grade II;
- (e) Injury to C4 - C5 - C6 facet joints bilaterally;
- (f) Thoracic spine sprain;
- (g) Lumbar spine pain/strain;
- (h) Medial meniscal injury right knee;
- (i) Pes anserine bursitis likely secondary;
- (j) Partial tear of ACL unlikely related to motor vehicle accident;
- (k) Severe anxiety symptoms;
- (l) Clinically significant pain catastrophizing symptoms;
- (m) Severe Depression symptoms;
- (n) Clinically significant kinesiophobia; and
- (o) Significant pain-related sleep disturbance.

[66] Dr. Palak opined that the ACL tear was likely not caused by the Accident. It was also his view that the pes anserine bursitis under the knee likely developed after the Accident as a result of the initial knee injury. He opined that the remainder of the diagnoses listed above were a direct result of the Accident.

[67] Dr. Palak noted that Ms. Liu reported her current sitting tolerance to be 20 minutes. He testified that his assessment of Ms. Liu lasted two hours, two-thirds of which was spent devoted to taking her history and one-third of this time was on his clinical examination. Dr. Palak did not record any signs of physical distress from sitting. He agreed during cross-examination that if he did not record any signs of distress, it was because Ms. Liu was not displaying such signs.

- [68] Dr. Palak agreed on cross-examination that Ms. Liu reported to him that her current strategies of using Naproxen, a heating pad and pain cream provides her with 60% relief from her pain symptoms.
- [69] Dr. Palak also opined that he was of the view that Ms. Liu should have attempted a gradual return to work sooner than she did, although he noted that Ms. Liu reported not being able to find work due to poor memory. Dr. Palak also opined that Ms. Liu "continues to be able to perform many of her usual activities of daily living."
- [70] Dr. Palak recommended the following multimodal treatment to improve Ms. Liu's physical condition and symptoms:
- a) Passive therapies: these include physiotherapy, chiropractic therapy, acupuncture and massage therapy involving a "coordinated effort once weekly with the active treatment discussed below."
 - b) Active therapies: enrollment in an active rehabilitation program that involved, ideally, "water-based exercise treatments under the guidance of the physiotherapist and or kinesiologist."
 - c) Self-management: enrollment in a community-based self-management program to assist with skills and techniques to allow her to live with chronic pain. These programs, according to Dr. Palak, are available free of charge; he notes that Pain BC is an excellent resource with online tools and programming.
 - d) Psychological management: assessment by a psychologist and or psychiatrist for her mood and anxiety symptoms. More specifically, Dr. Palak recommended:

Ms. Liu should be provided with overall pain management strategies as she was found to have negative predictors of functional improvement post-injury. I would recommend that she work with a psychologist to address these issues and perceptions in a cognitive behavioural therapy framework. If her family physician is unable to, she should be referred to a psychiatrist for pharmacological management.

- e) Pharmacological management: for symptom management and "to allow for further functional gains", as well as "treatment of sleep symptoms as well her psychological symptoms which will benefit her overall well being." Dr. Palak also identified a number of medications if not already tried to be considered at the discretion of her family physician. "
- f) Referrals: if Ms. Liu continues to suffer from headaches and migraines, she should be referred to a neurologist or headache specialist for ongoing treatment.
- g) Investigations: if Ms. Liu continues to have knee pain, she should have an MRI on her knee.
- h) Intervention therapies: if Ms. Liu continues to have difficulty with her symptoms, or has plateaued with her gains, after a reasonable trial of active rehabilitation and the above therapies, Dr. Palak recommends

assessment by an interventional pain physician and or physiatrist to determine if diagnostic or therapeutic injections and procedures may be appropriate. Based upon my assessment today, Ms. Liu may benefit with treatment targeted at the cervical facet joint and intraarticular knee joint injections.

[71] Dr. Palak opined that since Ms. Liu had ongoing persistent pain symptoms for greater than four years, the likelihood of spontaneous resolution of her chronic pain symptoms, given her current course, is low. Nevertheless, he also opined:

However, given that she has not undergone optimal management of her chronic pain symptoms to date it is my opinion that further improvements in her symptom management may be made if the recommended treatment is undertaken. Given the severity of the anxiety and depression symptoms as well as associated pain behaviours, failure to address these issues will likely result in poor outcomes of the related physical pain symptoms.

[72] Dr. Palak offered to "reassess Ms. Liu in the future once further treatment has been undertaken to determine her progress and provide a more detailed prognosis."

I. Dr. Alexander Leung

[73] Dr. Leung was tendered as an expert witness by Ms. Liu and was qualified as a psychiatrist. He has a general psychiatry practice and treats mood disorders, depression and anxiety. He conducted an independent medical examination of Ms. Liu on January 22, 2021, and issued his expert report on March 8, 2021.

[74] Dr. Leung noted Ms. Liu reported no history of mental disorder prior to the Accident. He diagnosed Ms. Liu with "major depressive disorder, moderate severity" and an "other specified trauma and stressor-related disorder."

[75] Dr. Leung also opined that Ms. Liu developed major depressive disorder and some symptoms of posttraumatic stress disorder following the Accident. He clarified his opinion by stating that:

My impressions are that her posttraumatic stress disorder (PTSD) symptoms do not meet full DSM-5 criteria for a diagnosis of posttraumatic stress disorder in terms of the breadth, clinical severity or functional impairment caused by these symptoms. However, her PTSD symptoms did cause her clinically significant distress, especially while driving. Her PTSD symptoms can be conceptualized as meeting criteria for a DSM-5 diagnosis of other specified trauma - stressor-related disorder.

[76] Dr. Leung reported that Ms. Liu's depression and PTSD-like symptoms have "somewhat improved" since the Accident "in the context of engaging in appropriate psychiatric medication treatment, as well as having some improvement in her physical pain issues." He stated, however, that Ms. Liu continues to present with depression and some PTSD symptoms.

[77] Dr. Leung described Ms. Liu as having "minor cognitive issues," referring to her reports of poor concentration and poor memory following the Accident. He states:

Based on her cognitive symptoms and overall clinical picture, my impressions are that MDD [major depressive disorder] is a contributing factor to her poor concentration and poor memory. I would defer to an expert in neurology or psychiatry to comment on causation, course, functional impact, and ongoing prognosis of Ms. Liu's cognitive symptoms. If she has persistent cognitive health issues after recovery from MDD and PTSD symptoms, it would be important to rule out a separate neurocognitive disorder.

[78] Dr. Leung also opined that Ms. Liu's concussion "was likely also a risk factor" for the development of her depressive disorder but also deferred to an expert in neurology or psychiatry on the causation, course, functional impact, and ongoing prognosis in regard to Ms. Liu's concussion.

[79] Dr. Leung was definitive about the cause of Ms. Liu's psychiatric diagnoses:

Ms. Liu's physical pain issues and resulting physical limitations have likely been precipitating and perpetuating factors for her MDD.

[80] It is also noteworthy that Dr. Leung addressed the following issues:

My impressions are that Ms. Liu did not optimize the doses of her medication for treatment of her MDD and PTSD symptoms until November 2018. Further, she was not engaged in psychotherapy following the 2016 MVA, as she reports wanting to avoid talking and thinking about the 2016 MVA. She may have some stigma concerns affecting her engagement in psychiatric treatment. She may have had more progress with regards to recovering from MDD and PTSD symptoms if she had engaged in fully optimized medication and psychotherapeutic treatment for MDD and PTSD symptoms early following the 2016 MVA.

Her anxiety and PTSD symptoms were further exacerbated by the Covid-19 virus pandemic, as she was concerned about the health risk to her family members. Further some aspects of her treatment were likely delayed due to the COVID-19 virus pandemic.

[81] Regarding Ms. Liu's prognosis relating to her depression, Dr. Leung opines:

Recovery from MDD, typically begins within three months of onset for two in five individuals [footnote omitted]. The National Comorbidity Survey Replication reports that the mean duration of major depressive episodes is 16.2 weeks [footnote omitted]. However, higher levels of anxiety and comorbid conditions are associated with a longer duration of treatments, and greater likelihood of treatment non-response [footnote omitted].

[82] Dr. Leung opines that PTSD symptoms are generally expected to improve over time:

PTSD symptoms are generally expected to improve over time [footnote omitted]. Approximately one-half of individuals with PTSD will have complete recovery within three months of onset, while some individuals with PTSD remain symptomatic for longer than 12 months [footnote omitted].

[83] Dr. Leung noted that Ms. Leung's symptoms are beyond typical durations and, while she has had some improvement, she is likely to continue struggling with some MDD symptoms for as long as she is struggling with her physical pain symptoms. He qualified this prognosis as follows:

However, if Ms. Liu engages in full a bio-psycho-social mental health treatment plan, including optimizing her medication treatment and engaging in psychotherapy, she will increase the likelihood of having further improvement of MDD and PTSD symptoms. My impressions are that her cognitive symptoms would likely improve if her MDD symptoms improved .

[84] Dr. Leung recommended the following treatment:

- a) Establish a clinical relationship with a psychiatrist for purposes of a diagnostic assessment and treatment over time. This included an initial assessment, with follow-up appointment every one to two months for one to two years, with subsequent review of whether further follow-up care from a psychiatrist is required.
- b) Engage in a structured psychotherapeutic treatment program such as Cognitive Behavioural Therapy (CBT) for MDD and Traumatic Focused Cognitive Behavioural Therapy (TF-CBT) for treatment of PTSD. This would entail a 10-session course of individual CBT for MDD and a 10-session course of TF-CBT for PTSD symptoms, with subsequent evaluation from her psychologist regarding whether further sessions are required.
- c) Ms. Liu may also benefit from 10 sessions of group CBT for depression and anxiety if she has not recovered to her pre-2016 MVA mental status after engaging in courses of individual treatment.
- d) Teaching by a mental health professional "regarding the nature of MDD and PTSD symptoms and the impacts of MDD and PTSD symptoms on her occupational, social and recreational functioning," and "teaching regarding the impact of MDD on her perception of pain and physical limitations."
- e) A trial of Cymbalta for treatment of MDD and PTSD symptoms. Ms. Liu would likely required longer-term medication treatment, "given her concurrent MDD, PTSD symptoms and pain issues." Ms. Liu's psychiatrist or family physician should review the duration of antidepressant treatment on an ongoing basis.

- f) Ms. Liu's psychiatrist, psychologists, family physician, or another clinician continue to review her healthy sleep habits and behavioural interventions for sleep, including: getting up at the same time every day, exercising in the morning, avoiding sleeping in the daytime, avoiding use of caffeine in the afternoon and evening, avoiding use of electronic screens prior to sleeping and optimizing her sleep environment.
 - g) Supporting Ms. Liu in engaging in her regular recreational exercise routine and engaging socially with others "as regular recreational exercise routine and engaging socially with others, as exercise and social connection are typically beneficial in recovery from MDD and PTSD symptoms." Dr. Leung deferred "to [his] physical medicine and recreational therapist colleagues to comment on the specifics of these recommendations."
 - h) "If Ms. Liu has ongoing or worsening cognitive health issues despite improvement in MDD and PTSD symptoms, it would be important to assess for any potential neurocognitive disorders as appropriate." Dr. Leung added that he would "defer to my neurology colleagues to comment on the specifics of assessment and treatment of potential ongoing cognitive issues."
- [85] Dr. Leung's report also identified factors, unrelated to the Accident, that negatively affected Ms. Liu's mental condition, including her husband's health difficulties and extended unemployment.

J. Dr. Helen Ting

- [86] Dr. Ting was Ms. Liu's family physician from August 26, 2005 until August 2017, when Ms. Liu and her family moved to Prince George.
- [87] Dr. Ting confirmed her clinical notes documenting her appointments with Ms. Liu. She testified that she first saw Ms. Liu three days after the Accident and that Ms. Liu complained of headaches, neck and shoulder pain, back pain, leg pain and tinnitus, as well as a tingling sensation when shower water hit her back and neck. Dr. Ting prescribed Naproxen and Tylenol 3. She recommended physiotherapy and also that Ms. Liu take one month off work.
- [88] During Ms. Liu's second visit with Dr. Ting after the Accident on August 3, 2016, Dr. Ting noted that Ms. Liu was reporting a decrease in her pain overall but also a decrease in her energy level, a decreased libido, a decreased appetite, hypersomnolence, and knee pain. Dr. Ting queried depression and prescribed the anti-depressant Cipralex. Dr. Ting testified that she could not recall whether she referred Ms. Liu to a counsellor at that time or whether it was "just an idea" and a "possibility."

- [89] Dr. Ting noted that Ms. Liu reported not taking Cipralex right away but did begin taking the medication later in August 2016 and by her September 1, 2016 visit with Dr. Ting, Ms. Liu reported feeling "much better", as well as experiencing a decrease in anxiety and irritability. Dr. Ting made a clinical note that "depression better." Ms. Liu also reported her appetite was "OK." However, she also reported "pain in her neck, both shoulders and back", as well as poor sleep due to "aches."
- [90] Dr. Ting confirmed her clinical notes dated September 30, 2016 with Ms. Liu. Ms. Liu reported tripping on a sidewalk and bruising her right knee. She also reported not sleeping well and experiencing severe headaches, neck pain, shoulder tightness, decreased concentration and memory, and low energy. The clinical log also states that Ms. Liu reported that her mood was "more stable". In addition, Ms. Liu reported being nervous while driving. She was going to physiotherapy once a week and reported feeling sore for two to three days after her physiotherapy. Dr. Ting increased Ms. Liu's dose of Cipralex antidepressant and prescribed Flexeril for muscle spasms.
- [91] At the end of October 2016, Ms. Liu reported not sleeping well and "some improvement" in regard to her soft tissue injuries, Dr. Ting thought it necessary to increase the dosage of her anti-depressant medication. She also provided Ms. Liu with a doctor's note confirming she should be off work until December 31, 2016.
- [92] During her testimony, Dr. Ting confirmed that her November 25, 2016 clinical log notes Ms. Liu reported her "upper back pain resolved," although she was still having lower back pain. Dr. Ting confirmed at that time that she recommended a gradual return to work in January 2017.
- [93] In March 2017, Dr. Ting referred Ms. Liu to Rapid Access Psychiatry Clinic. The referral form identified "Depression" and "Psychosocial issues" as the presenting issues and reasons for the referral. The form, written by Dr. Ting states:
- Depression starting after MVA; initially ++neck and back pain which have improved; poor concentration, irritable, insomnia, husband has recent health issues - radioactive iodine treatment for Grave's disease; financial stressors
- *this is NOT requested by a lawyer; not related to ICBC case
- [94] Dr. Ting acknowledged that Ms. Liu was first referred to the Rapid Access Psychiatry Clinic by her lawyer and her application was refused because the referral was considered to be part of an ICBC claim. Dr. Ting then resubmitted the referral. However, Dr. Ting has no record of the Clinic accepting her referral. Dr. Ting did not refer Ms. Liu to another clinic, psychologist or psychiatrist; she testified that she treated Ms. Liu herself.
- [95] Dr. Ting testified that she called the Rapid Access Psychiatry Clinic to consult with a psychiatrist there, as the clinic provides consultation services to family physicians. She testified that she could not recall exactly what she said but she would have explained Ms. Liu's history and that she was feeling sleepy on her depression medication. Dr. Ting

confirmed that the scope of conversation was limited to optimizing and managing Ms. Liu's depression medication. She added that it was through this clinic's recommendation that she changed Ms. Liu's medication and prescribed Wellbutrin, which treats depression and addresses sleepiness by increasing a person's energy level.

- [96] Dr. Ting confirmed that on August 23, 2017, Ms. Liu reported improved energy levels on Wellbutrin and that she was sleeping better on Trazodone. She also reported that her back pain was "much better" and that her shoulder stiffness was also "much better." She reported headaches radiating from the neck, neck stiffness, and pain below the right knee. She also discussed feeling easily discouraged, feeling frustrated and "up and down" with her memory being "low."
- [97] Dr. Ting testified that while she was continuing to prescribe antidepressant and sleep medications, she stopped prescribing Naproxen. She explained that Ms. Liu's "pain had improved a lot" and so she was of the view that Ms. Liu did not need to take Naproxen any longer.

K. Dr. Rong Zhang

- [98] Dr. Zhang was called as a fact witness by counsel for the defendants. She has been Ms. Liu's family physician since the fall of 2017, after Ms. Liu and her family moved to Prince George.
- [99] Dr. Zhang testified that it was her practice to record what patients tell her during appointments as the patient is speaking. Specifically, she records what patients say to her, along with her objective findings, treatments and prescribed medications. She followed this practice with Ms. Liu.
- [100] Dr. Zhang testified that her first appointment with Ms. Liu was on September 15, 2017. During this first visit, Dr. Zhang took a medical history. She confirmed that her notes accurately reflected what Ms. Liu reported to her that day; that is, that she was in an accident in June 2016 and suffered from depression afterwards. Ms. Liu also advised Dr. Zhang that she had diabetes.
- [101] Dr. Zhang testified that Ms. Liu did not express any specific concerns during this first appointment and she did not complain about any physical symptoms. She noted Ms. Liu "looked well" and sent Ms. Liu for routine blood tests.
- [102] The next appointment with Dr. Zhang was on November 7, 2017. Dr. Zhang's notes indicate that Ms. Liu was following-up on her blood tests and prescription medication for her "DM" or depressed mood. Dr. Zhang also confirmed that Ms. Liu reported "feeling fine"; her objective assessment notes indicates Ms. Liu's blood pressure and blood sugar were "unconcerning." Regarding her assessment plan for that appointment, Dr. Zhang confirmed her clinical note refers to "DM" (depressed mood) and "care reviewed, continue with current care, RX given."

- [103] Dr. Zhang confirmed her clinical record for Ms. Liu's next visit on February 8, 2018 also states Ms. Liu reported she was "doing well", "condition stable", "no concern" and "no concern of medication side effect, satisfied with medication effect." Dr. Zhang noted Ms. Liu "looks well," "BP normal," and recorded her specific blood sugar level. Her assessment plan noted "DM/ depression", an increase to Ms. Liu's Wellbutrin dosage, and recommended "healthy lifestyle."
- [104] Ms. Liu's next visit to Dr. Zhang, on May 22, 2018, was much the same as the first three. There is no mention of physical complaints. Ms. Liu is reported to have expressed she was "doing well" and with "no concern." There was no change in medication and Dr. Zhang recommended a "healthy lifestyle."
- [105] Dr. Zhang testified that she advised Ms. Liu to exercise as this would improve her energy level and was good for her diabetes. Dr. Zhang confirmed her clinical notes which recorded that Ms. Liu did not like to exercise.
- [106] Dr. Zhang testified that it was not until an appointment on January 3, 2019, that Ms. Liu complained to her about physical pain symptoms.
- [107] Dr. Zhang testified that as of August 27, 2019, she had no major concern about depression. Ms. Liu had a skin rash but did not complain of physical pain.
- [108] Dr. Zhang confirmed that her clinical notes for July 16, 2016 state that Ms. Liu reported she had was able to handle "light housework" such as washing dishes, cooking and other "light cleaning."
- [109] Dr. Zhang testified that the first time she prescribed Naproxen to Ms. Lu was on November 22, 2019.
- [110] During her testimony, Dr. Zhang was taken to her clinical notes written during a January 7, 2020 visit, which state that Ms. Liu reported "neck and shoulder pain, with stiffness." Dr. Zhang testified that her medical log for that day states that Ms. Liu had "no difficulty" putting her coat back on. Dr. Zhang confirmed that Ms. Liu did not exhibit objective signs of pain during her movements during that appointment.
- [111] Dr. Zhang also testified that in cases where her patients are recovering from motor vehicle accidents, she is often asked to fill out forms regarding their return to work. In discussing the matter with Ms. Liu, Ms. Liu confirmed she did not have a job. Dr. Zhang advised Ms. Liu that she could return to work on a modified work schedule.
- [112] Dr. Zhang's January 7, 2020 clinical notes state that Ms. Liu reported she did not feel she could tolerate a full-time job. Under the heading "A/P" (i.e., Assessment/Plan), Dr. Zhang writes "discussed about back to work, she still has no job to go back to, if she has job, she should go back for modified duty work with no heavy lifting." Dr. Zhang recalled this conversation, adding that Ms. Liu told her she was not interested in returning to work and that she had two kids at home that still needed her. Dr. Zhang's testimony in this regard was

not objected to at the time of her evidence, and counsel for Ms. Liu choose not to cross-examine Dr. Zhang on any issue. It was not until closing argument that counsel for Ms. Liu objected to this aspect of Dr. Zhang's evidence on the basis that it violated both the rule against hearsay and the rule in *Brown v. Dunn* [1893], 6 R. 67 (H.L.).

L. Dr. Zhang's Evidence Pertaining to Ms. Liu's Stated Disinterest in Returning to Work

[113] Dr. Zhang's evidence, relating to Ms. Liu statement to her in January 2020 that she was not interested in returning to work, is admissible evidence. Admissions against interest are a long-standing exception to the hearsay rule: *R. v. Duncan* (1981), 73 Cr. App. R. 359 (Eng. C.A.); *R. v. Rojas*, 2008 SCC 56; *Cunningham v. Slubowski*, 2003 BCSC 1854; *Bancroft-Wilson v. Murphy*, 2009 BCCA 195; *Smith v. Wirachowsky*, 2009 BCSC 1434. This exception is based on the common-sense principle that "what people freely say which is contrary to their interest is probably true": *R. v. Hodgson*, [1998] 2 S.C.R. 449 (S.C.C.) at para. 17

[114] Further, the hearsay exception for admissions against interest in the context of admissions made by a plaintiff to a doctor was summarized by MacKenzie J. in *Cunningham*:

The defendants may cross-examine the plaintiff on his prior statements recorded by Dr. Abelman [his physician] in the clinical records. If the plaintiff admits that he made a particular statement to Dr. Abelman, and it is inconsistent with his testimony at trial, the statement can generally be used only to assess the plaintiff's credibility. The statement is not admissible for the truth unless it constitutes an admission against the plaintiff's interests. If it is an admission against interest, it is admissible for the truth of its content, depending on the jury's assessment of it.

[115] While Ms. Liu's statement to Dr. Zhang was made out of court, it was a clearly an admission against interest that can be tendered for the truth of its contents as an exception to the hearsay rule. Dr. Zhang was a fact witness who was, subject to cross-examination at trial. Ms. Liu's counsel chose not to exercise the right to cross-examination and probe Dr. Zhang on her evidence regarding Ms. Liu's admission against interest. The choice not to cross-examine Dr. Zhang cannot either compromise the credibility of Dr. Zhang or undermine the admissibility of her evidence. I found Dr. Zhang to be a credible, professional witness whose evidence was clear and reliable.

[116] Counsel for Ms. Liu also submits that the rule in *Browne v. Dunn*, (1893), 6 R. 67 (H.L.) has been breached because the question of whether Ms. Liu had chosen to stay home with her children rather than work was not put to Ms. Liu during her cross-examination. Counsel for Ms. Liu further submits that the issue of whether Ms. Liu told Dr. Zhang she did not want to work should have been put to Ms. Liu because her "lost income earning capacity" was "too critical not to have been put to Ms. Liu on cross-examination." In addition, counsel for Ms. Liu submits that, in any event, Ms. Liu testified in cross-examination that "I have no income. I want to get back to work to earn money" and that this evidence rebuts the defence theory that Ms. Liu did not want to work. I would note, in this regard, Ms. Liu also testified

that she asked her former employer, Boundary Bay Enterprises, to take her back in January 2017, after she took a "6 month break." She further testified about applying for jobs in early 2017, including making several employment applications at that time but not since.

- [117] Counsel for the defendants acknowledge that the particular part of Dr. Zhang's testimony, relating to Ms. Liu not being interesting in returning to work, was not specifically put to Ms. Liu on cross-examination. However, they submit, first, that it "would have been essentially impossible to do", presumably because Dr. Zhang's evidence in this regard was given after Ms. Liu gave her evidence and no objection was made to Ms. Zhang's evidence until closing argument. Second, they submit that the Court "must not conclude there is no evidence that outlines [Ms. Liu's] inability to return to the workforce due to her childcare obligations." Counsel for the defendants assert that there are a number of clinical records that indicate Ms. Liu was busy and focused on her children rather than on returning to work, and these records were put to Ms. Liu on cross-examination.
- [118] The clinical entries of Ms. Liu's physiotherapist, Mr. Muller, where he states Ms. Liu was busy with her children, were put to Ms. Liu; Ms. Liu disputed each of these clinical entries and dismissed such discussions with Mr. Muller as "small talk." Counsel for the defendants argue that Ms. Liu "continuously disputed all clinical entries put to her in cross-examination that were unfavourable to her case" and she would likely have done the same in regard to this evidence of Dr. Zhang if it had been put to her.
- [119] The principle in *Browne v. Dunn* is a procedural rule of evidence designed to facilitate a fair trial. The case is often cited for the proposition that when a party intends to call evidence to contradict evidence that has been given by another witness, the witness who is being contradicted should be given an opportunity in cross-examination to address or explain the point on which their evidence is being challenged: *R. v. T.W.W.*, 2022 BCCA 312 at 16 and 127.
- [120] I am not persuaded that that an unfairness or injustice has occurred on the facts before me. While counsel for the defendant's did not ask Ms. Liu whether she told Dr. Zhang that she was not interested in returning to work, Ms. Liu's evidence both in direct and cross-examination was that she wanted to return to work. She, in effect, was given the opportunity to directly address the issue of her commitment to return to work both during her direct and cross-examination. Ms. Liu specifically stated she attempted to return to work but could not find a job. I am also mindful that counsel's concern regarding the principle in *Browne v. Dunn* was not raised until his closing argument. No request was made by Ms. Liu to address this evidence in light of *Browne v. Dunn* by having Ms. Liu recalled to address or rebut Dr. Zhang's evidence. This issue ought to have been raised at the time Dr. Zhang gave her evidence on this point or, at very least, before the parties closed their case.

[121] In any event, it is clear that this Court has a broad discretion, in light of all the facts before it, to decide how to best treat the evidence in dispute. In *R. v. Lyttle*, 2004 SCC 5, at para. 65, the Court reasoned:

It is a sound principle of general application that is "designed to provide fairness to witnesses and parties" it is not fixed and the extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case.

[Emphasis added]

[122] I am also mindful of authorities who underscore that the rule in *Browne v. Dunn* is one of fairness rather than admissibility: see Sidney N. Lederman, Alan W. Bryant, and Michelle K. Fuerst, *Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada, 2018) at §16.212; and Hodge M. Malek, ed, *Phipson on Evidence*, 19th ed (London: Thomson Reuters, 2018) at 12-35. In the final analysis, having considered the evidence as a whole, I am not inclined to disregard Dr. Zhang's evidence on the question of what Ms. Liu told her about her interest in returning to work. Dr. Zhang's evidence will be considered in light of the entirety of the evidence before me, including that of Ms. Liu. In any event, I do not find Dr. Zhang's evidence conclusive in and of itself. The rest of the evidentiary matrix provides the Court with an ample basis upon which to make the necessary findings of fact regarding Ms. Liu's capacity to work, and her interest or commitment to doing so.

M. Dr. Sami Zaki

[123] Dr. Zaki was tendered by the defendants and qualified as an expert in physical medicine and rehabilitation. He conducted an independent medical examination of Ms. Liu on April 29, 2021, and issued his expert report that day.

[124] Dr. Zaki provided the following clinical diagnoses:

- a) Whiplash Associated Disorder, Grade II of the neck and upper shoulders with no neurological involvement. This is most likely soft tissue related; Dr. Zaki added there were no broken bones or damaged nerves;
- b) Cervicogenic, tension-type headaches (headaches stemming from painful structures in the neck being myofascial soft tissue pain); Dr. Zaki added the headaches stemmed from neck pain "referred to" the head";
- c) Chronic right knee pain related to soft tissue and possible infra patellar tendinopathy; he added that this was tendon pain just below the knee.

[125] Dr. Zaki acknowledged that he relied on Ms. Liu's self-reports in making these diagnoses, after having reviewed her medical history and documentation.

[126] Dr. Zaki noted that Ms. Liu "still reports being depressed and having issues with her memory, which could be the result of low mood." However, he stated that he is not able to provide a psychiatric diagnosis and deferred "to a specialist for "more specific diagnoses, causation, and recommendations for management" of Ms. Liu's psychological condition.

[127] Dr. Zaki opined further as follows:

In terms of chronic soft tissue related pain, per se, while she seemed to have undergone a lot of physio treatments, it seemed that a significant focus was on pain reduction with mostly passive interventions and some gentle stretching and light strengthening routine to her upper body. She has not been given a dedicated active physical rehabilitation program to focus on reconditioning, strengthening her body, and allowing her to have better endurance.

[128] Dr. Zaki opined that Ms. Liu was not in a condition to work full-time, based "more likely on her emotional/psychological and reported cognitive difficulties, more than what I would expect on her physical symptoms of whiplash and chronic myofascial pain." However, he recommended an active rehabilitation program for Ms. Liu and a gradual return to work. He opined that most conditions can be helped, especially with soft tissue injury, even if the injury has been symptomatic for a number of years. He noted that while Ms. Liu expressed feeling hopeless, she has options for treatment. He opined:

For most individuals at this stage of an injury or in recovery from a motor vehicle accident, they are able to return to gainful employment after a period of active rehabilitation and with support and [a] gradual return to work plan .

[129] Deferring to the expertise of a psychiatrist or psychologist on the question of "the length of her disability if any as it relates to her depression," Dr. Zaki opined Ms. Liu could return to work following an active rehabilitation program:

From a strict physical medicine standpoint, I would expect with the successful completion of an active rehabilitative program, with ongoing recommendations for pain management, that she would reach a point where she would be able to return to some form of employment in an office setting, at least on a part-time basis to start, and gradually increase her hours and days.

[130] Dr. Zaki testified that it was common to see patients like Ms. Liu over a longer period of time and agreed that symptoms tend to fluctuate. He stated that Ms. Liu's rehabilitation and pain management was not complete. He specifically recommended "active rehabilitation for 12 to 16 weeks, involving weekly sessions with an exercise therapist or kinesiologist."

N. Derryck Smith

[131] Dr. Smith was tendered by the defendants and was qualified as expert in psychiatry including PTSD and major depressive disorder. Dr. Smith conducted an independent medical examination on February 10, 2021, and issued his report on February 15, 2021.

[132] During her interview with Dr. Smith, Ms. Liu denied that she sustained any kind of brain injury during the Accident. However, she stated that "her brain was shaking," which she though resulted in some kind of damaged. She told Dr. Smith that she forgets the names of her friends, she forgets things that her husband tells her, and she has forgotten to pick up her children.

[133] Ms. Liu has not undergone any cognitive testing.

[134] At the time of Dr. Smith's assessment, Ms. Liu was taking the following medications:

- (a) Cipralex, 20 mg;
- (b) Trazodone at bedtime, 25 mg;
- (c) Metaform; and
- (d) Glycoside.

[135] Dr. Smith opined that, based on his assessment, Ms. Liu's major complaint from the Accident is ongoing neck pain. He noted that she appears to have misinterpreted the imaging study of her neck, and believes that her soft tissues have become like a "bone."

[136] During his testimony, Dr. Smith confirmed his opinion, in light of the medical and other information before him, that Ms. Liu did not suffer a concussion. He explained that just hitting one's head or moving one's hide violently back and forth does not in and of itself result in a head injury and is not conclusive of a concussion or mild traumatic brain injury. He added that one does not develop traumatic brain injury symptoms days after the accident; instead, the symptoms should present at the time of the accident.

[137] Dr. Smith made the following diagnosis:

- (a) Major depressive disorder;
- (b) Posttraumatic stress disorder; and
- (c) Insomnia disorder.

[138] Regarding her reported difficulty with memory and concentration, Dr. Smith opined that Ms. Liu's cognitive difficulties are most likely the result of her depression rather than a concussion or a mild traumatic brain injury.

[139] Dr. Smith opined that Ms. Liu's treatment for her accident-related symptoms "has not been ideal." He was of the view that Ms. Liu's treatments to date were "in fact not working" and that a different treatment approach was needed. He made the following treatment recommendations for Ms. Liu:

- (a) more aggressive treatment for managing her psychiatric diagnoses, stating that "ideally, she should be referred to a psychiatrist for expert treatment of major depressive disorder, posttraumatic stress disorder, and insomnia disorder."

- (b) Ms. Liu start on the antidepressant Effexor XR (venlafaxine), which also treats PTSD, beginning at 75 mg and possibly increasing the dosage as high as 225 mg.
- (c) Ms. Liu would likely benefit from psychological treatment for PTSD using manualized cognitive behavioural therapy. He estimated that Ms. Liu would benefit from eight to twelve sessions of treatment.
- (d) In order to treat Ms. Liu's insomnia disorder, her dose of trazodone should be increased from 25 mg to 50 mg.

[140] In addition, Dr. Smith opined that Ms. Liu's physical inactivity has "no doubt" increased the burden of her discomfort from neck pain. He recommended the following exercise program:

Vigorous exercise is also a potent treatment for mixed symptoms of depression, anxiety, insomnia and pain [footnotes omitted]. I recommend that she be referred for a program of active rehabilitation. She should be supervised by a kinesiologist, with a view toward transitioning her to a self-directed program of vigorous exercise such that she is exercising three to five times per week for a minimum of 30 minutes each time with a heart rate over 120 beats per minute. The program would have to be introduced gradually, as she is likely experiencing kinesiophobia due to ongoing pain in her neck. The treatment for neck pain is vigorous exercise, but I defer to other experts on this issue. I also noted that Ms. Liu has had excessive amounts of passive treatment from physiotherapists, which does not appear to be indicated; however, I again defer to other experts on this matter. For reference, a recent article provides a practical guide on how to prescribe

exercise as a treatment for depression [cite omitted].

[141] During his cross-examination, Dr. Smith confirmed that vigorous exercise is recommended for chronic pain, beginning with a course of supervised and facilitated exercise.

[142] While Dr. Smith was of the view that his three current psychiatric diagnoses were caused by the Accident, he was also of the view that:

if there had been a more aggressive approach to her psychiatric treatment, including a program of active rehabilitation, [Ms. Liu] would have recovered in one year.

[143] Regarding her prognosis, Dr. Smith opined:

I am confident that with full implementation of the treatment program outlined above Ms. Liu's symptoms and level of functioning will significantly improve within six months.

[144] In this light, Dr. Smith was of the view that Ms. Liu would benefit from vocational counselling:

In my opinion, she would be capable of returning to office work, which is what she was doing in Vancouver before the motor vehicle accident. She should benefit from vocational counselling to help her identify a job in Prince George for which she is trained and of which she is capable. In my opinion she is currently capable of sedentary work.

[145] Dr. Smith was also of the view that, with a course of active rehabilitation, Ms. Liu would be able to resume household activities and rely less on her husband. Further, he was of the view that she would be able to return to her usual course of recreational activities as well.

[146] Dr. Smith acknowledged on cross-examination that he was not an expert in chronic pain. He candidly deferred to the expertise of a physiatrist with expertise in this area regarding her prognosis. Dr. Smith acknowledged that treatment may not entirely eliminate Ms. Liu's symptoms but added that both he and Dr. Leung are of the view that Ms. Liu would benefit from better treatment including active rehabilitation involving exercise.

III. RELIABILITY OF EVIDENCE

[147] Counsel for the defendants submits that Ms. Liu was an unreliable witness. They refer to various cases on credibility and reliability, and properly note the distinction between these two factual assessments: see *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.); *Bradshaw v. Stenner*, 2010 BCSC 1398; *Mather v. MacDonald*, 2016 BCSC 948 at para. 18; *R. v. H.C.*, 2009 ONCA 56. In this case, the evidence before me indicates there are issues that arise with regard to the reliability of Ms. Liu's testimony, particularly in regard to the accuracy and consistency of her testimony. For example:

- (a) Ms. Liu gave very clear and specific answers about her history including the particulars of the Accident, yet, during cross-examination, she appeared unresponsive or unwilling to confirm relatively straightforward matters of fact such as, as an example, her use of various medications.
- (b) During her direct examination, Ms. Liu testified that she enjoyed fishing two or three times a year. In cross-examination, she changed her evidence and stated that she did not go fishing in the two years before the Accident.
- (c) During her direct examination, Ms. Liu testified that she enjoyed going hunting once a year with her husband. During cross-examination, she acknowledged she had not gone hunting since 2011.
- (d) During her examination for discovery, Ms. Liu testified that she quit her job with Coast Fraser in January 2015 due to the company's "culture." During her cross-examination, she confirmed she was fired.

- (e) Ms. Liu testified that she maintained a close relationship with previous classmate and co-workers prior to the Accident, and that they enjoyed spending time together, attending dinner parties and going shopping. However, her husband testified that after their children were born (i.e., before the Accident), Ms. Liu did not go to such social gatherings; when she did go out, it was with her husband as a couple or as a family. I found Mr. Lo's evidence persuasive in this regard.
- (f) When the clinical records of Dr. Zhang (from September 7, 2017, to January 3, 2019) were put to Ms. Liu to confirm that there was no discussion with regard to her physical pain symptoms during these appointments, Ms. Liu questioned the intelligence of Dr. Zhang, in a rather animated and less than respectful manner, and disputed the accuracy of her clinical notes, which Dr. Zhang later verified on the stand;
- (g) Ms. Liu testified that the prescriptions Metformin, Cipralex, Wellbutrin, and Trazadone were prescribed for her physical pain symptoms. The evidence established that was not accurate.
- (h) Dr. Zhang testified that she did not discuss the Accident with Ms. Liu until January 3, 2019, approximately a year and three months after the first appointment between Ms. Liu and Dr. Zhang. Ms. Liu denied this was the case. I prefer the evidence of Dr. Zhang in this regard. Again, Dr. Zhang's evidence was clear and consistent.
- [148] I found Ms. Liu's self-reporting in regard to the severity, frequency and duration of her symptoms was not consistent with the evidence as a whole and not entirely reliable. This is by no means intended to dismiss the seriousness of Ms. Liu's injuries and symptoms, although I have concluded these have much improved, as discussed later in these Reasons.
- [149] I am also not persuaded by Ms. Liu's evidence that she made a concerted effort to find work in 2017 or thereafter. Relatively little evidence was tendered regarding her search for employment, and the only employment applications she pursued related to the early part of 2017. Furthermore, of her relatively few job applications, she admitted she made no efforts to follow-up with those employers.

IV. DAMAGES

- [150] A key first principle underpinning the proper assessment of damages is, so far as is possible, to put a plaintiff in the position they would have been in absent the defendant's negligence. In properly assessing damages, the Court is mindful of considering both the pre-accident and post-accident circumstances of the plaintiff, as articulated in the following, often-cited passage in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 32 [Athey]:

The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also

to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position." The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

[Emphasis in original]

[151] Where it is necessary to assess hypothetical or future events, such as how Ms. Liu's life would have proceeded in the absence of the defendants' negligence, it is well-settled that the standard of proof is not the balance of probabilities but, rather, whether there is a real and substantial possibility that an event will occur. Accordingly, a future possibility may be properly taken into consideration by the Court where it "is a real and substantial possibility and not mere speculation": *Athey* at para. 27. This analysis is to be distinguished from assessing past events, which must be proven on a balance of probabilities. Once proven, such past events are "treated as certainties": *Athey* at para. 28.

[152] Where it is established that a future or hypothetical event is a real and substantial possibility and not mere speculation, it is to be given weight according to its relative likelihood. In *Athey*, the court provides the following example, at para. 27:

if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation : *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.) .

[153] In *Dornan v. Silva*, 2021 BCCA 228, Grauer J.A. of our Court of Appeal reasoned that once it is established that a contingency or risk is a real and substantial possibility, the trial judge must then assess its relative likelihood. Furthermore, he affirmed that the court's assessment of positive or negative contingencies, which are specific to the circumstances of the plaintiff, must be grounded in the evidence before the trial judge. At para. 92, he relied on the following passage in *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.):

47. If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility

[emphasis added]

[154] In *Lo v. Vos*, 2021 BCCA 421, at para. 39, the Court of Appeal clearly stated that the onus of establishing a real and substantial possibility is on the party asserting it.

[155] Accordingly, once a court concludes that there is a real and substantial possibility of a future or hypothetical event and it is in the process of assessing its relative likelihood, a party must be able to point to the evidence before the court which supports the contingency in question. Further, in reaching its conclusion, the court must ground its reasons and conclusion on the contingency's relative likelihood having regard to that evidence. In Dornan, Justice Grauer reasoned:

[134] There is no doubt that the task of the trial judge in circumstances such as these is not easy. By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence, not to averages and approximations based on imprecise evidence.

[156] This jurisprudence has guided, along with other related cases, my assessment of the various heads of damages.

A. Non-Pecuniary Damages

[157] Non-pecuniary damages are intended to compensate plaintiffs for their past and future pain, suffering, disability, and loss of enjoyment of life: Javorovic v. Booth, 2021 BCSC 336 at para. 54. In determining non-pecuniary damages, each case must be assessed based on the particular facts before the court: Trites v. Penner, 2010 BCSC 882 at paras.188-189. When making that assessment, the following factors delineated in Stapley v. Hejslet, 2006 BCCA 34 at para. 46, are key considerations:

[46] The inexhaustive list of common factors cited in Boyd that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life.

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff): Giang v. Clayton, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54 (B.C.C.A.).

[158] Further, as noted by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260, the amount of the non-pecuniary award should compensate for more than just direct injuries:

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries [citations omitted]. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

Thus, the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury." In dealing with an award of this nature it will be impossible to develop a "tariff." An award will vary in each case "to meet the specific circumstances of the individual case."

[159] An appreciation of the individual's particular loss is key and the award will vary in each case to meet the specific circumstances of the individual case.

1. Ms. Liu's Physical Injuries from the Accident

[160] Having reviewed the evidence in its entirety and with the assistance of the expert evidence, I am satisfied that Ms. Liu suffered the following physical injuries as a result of the Accident:

- (i) Whiplash-Associated Disorder, Grade II to the neck and upper shoulders;
- (ii) Headaches stemming from the soft tissue neck injury;
- (iii) Upper back area; and
- (iv) Right knee injury.

[161] In addition, Ms. Liu stated she also felt pain in her arm, wrist and hands, as well as her lower body, namely in her waist, legs, and ankles. This was part of what she described as feeling pain "all over" after the Accident. I accept this evidence, although the evidence does not establish that these specific, additional symptoms lasted for longer than 3 - 6 months after the Accident.

[162] Based on Ms. Liu's own evidence, her upper back pain resolved some time ago, and her knee pain is intermittent. On cross-examination, Ms. Liu admitted her back, shoulder and knee were 70% recovered by March 9, 2018. However, she did not agree her neck was 70% recovered by that time, although I accept Mr. Muller's evidence that she reported to him in March 2018 that she was 70% recovered from the Accident. I found Mr. Muller's evidence persuasive in this regard; his evidence was clear, cogent and consistent on this point.

- [163] I find that Ms. Liu has significantly recovered from her physical injuries arising from the Accident but that she continues to have some intermittent neck pain and flare-ups, accompanied with associated headaches. These conclusions are best supported by the evidence as a whole, on a balance of probabilities, including not only a careful examination of Ms. Liu's evidence but also that of her husband, the experts, and her family physicians and physiotherapists.
- [164] While I accept that Ms. Liu suffered a knee injury in the Accident and has intermittent knee pain, the issue arises as to whether her current intermittent knee pain is a function of the partial ACL tear diagnosed by Dr. Palak that is not related to the Accident, or whether her current intermittent knee symptoms are caused by the Accident. I am satisfied that the medial meniscal injury to the right knee and the secondary bursitis were caused by the Accident. I accept Dr. Palak's evidence in this regard. I also accept Ms. Liu's evidence that her knee pain has improved and that if she takes care of herself, she "won't feel it."
- [165] The evidence before me does not establish, on a balance of probabilities, that Ms. Liu suffered a concussion in the Accident. I accept the opinion and explanation of Dr. Smith in this regard, outlined above, and found it persuasive. Further, the evidence before me does not establish that Ms. Liu's concentration and memory problems are a direct result of a concussion or mild traumatic brain injury caused by the Accident. The experts' opinions in this specific regard were inconclusive and this issue is beyond this Court's expertise.

2. Mood and Sleep Disturbances

- [166] I find that on a balance of probabilities, Ms. Liu developed depression and sleep disturbances as a result of the Accident. I find that her minor cognitive issues relating to poor concentration and memory loss are most likely a function of her depression. These conclusions are consistent with the expert opinions of both Dr. Leung and Dr. Smith. I also accept Dr. Leung's opinion that Ms. Liu's major depressive disorder was of moderate severity. Further, I accept Dr. Leung's opinion evidence that while Ms. Liu suffered symptoms of PTSD following the Accident, her symptoms do not meet the full criteria for a diagnosis of PTSD "in terms of the breadth, clinical severity or functional impairment caused by these symptoms."
- [167] I also accept Dr. Leung, Ms. Liu, and Mr. Lo's evidence that Ms. Liu's depression and PTSD symptoms have improved since the 2016 Accident. As noted earlier in these Reasons, Ms. Liu's husband testified that after the family moved to Prince George and he was gainfully employed again, her emotional condition improved considerably. Specifically, Mr. Lo testified that since he has started earning a stable income, his wife's mood is "much, much better" because the couple can "make ends meet" on his monthly income.
- [168] It is clear on the evidence that, in addition to her physical injuries from the Accident, Ms. Liu's depression was negatively impact by her husband's illness and the couple's financial distress. Dr. Zhang's evidence is consistent with that of Mr. Lo in supporting the conclusion that Ms. Liu's psychological condition improved significantly after the couple settled in

Prince George. This conclusion is also supported by my findings that Ms. Liu's physical symptoms have also improved significantly since March of 2018. Nevertheless, both Dr. Leung and Dr. Smith recommend Ms. Liu continue on antidepressant medication and Ms. Liu has remained on antidepressants to this day.

3. Appropriate Quantum of Non-pecuniary Damages

[169] Ms. Liu submits that her non-pecuniary damages should be \$150,000. She relies on the decisions in the following cases, suggesting a range of approximately \$130,000 to \$160,000:

- (i) Lavoie v. Purwonegoro, 2021 BCSC 1511 [an award of \$135,000];
- (ii) Vo v. Navarro, 2021 BCSC 1534 [an award of \$160,000];
- (iii) Amaral v. Glasser, 2020 BCSC 639 [an award of \$135,000]
- (iv) Marois v. Plech, 2007 BCSC 1969 [an award of \$130,000 or \$166,000, adjusted for inflation];
- (v) Alafianpour-Esfahani v. Jolliffe, 2017 BCSC 701 [an award of \$120,000 or \$131,000, adjusted for inflation]
- (vi) Redmond v. Krider, 2015 BCSC 178 [an award of \$150,000 or \$168,000, adjusted for inflation]; and
- (vii) Tolentino v. Nair, 2021 BCSC 825 [an award of \$130,000].

[170] Counsel for Ms. Liu submits that Ms. Liu's injuries merit the high end of the range presented for non-pecuniary damages, noting the severity of her injuries and symptoms, as well as their chronicity. They also underscore the effect of her symptoms on "her professional career" and note the large "number of treatments she has taken to date" including the amount of different treatment modalities and potential specialist referrals the experts recommended."

[171] Counsel for the defendants submit that the proper range of non-pecuniary damages is between \$75,000 and \$90,000. The defendants rely on the following cases: Dueck v Lee, 2019 BCSC 1936 [an award of \$75,000]; Roth v. Hes, 2015 BCSC 161 [an award of \$90,000]; Achan v. Jin, 2020 BCSC 1430 [an award of \$90,000].

[172] I have examined each of the factors in Stapley and our Court of Appeal's functional analysis in Moskaleva in light of the circumstances before me and my findings of fact, including those relating to the nature and scope of Ms. Liu's injuries and subsequent symptoms, and her level of recovery as discussed earlier in these Reasons. Furthermore, I have considered the authorities relied upon by both parties, giving due consideration to what guidance they offer and their relative comparability to the facts before me, keeping in mind that the compensation awarded must be fair to both parties. I have considered how the symptoms Ms. Liu has suffered as a result of these injuries have impaired her physical health, moods, recreational abilities, and general lifestyle including the impact on her capacity to work. I have also provided an allowance for Ms. Liu's loss of capacity to perform housekeeping

tasks as a result of her Accident-related injuries: *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 101. In this light, I have determined that Ms. Liu's non-pecuniary damages should be \$110,000.

B. Past Loss of Earning Capacity

[173] It is axiomatic that compensation for past loss of earning capacity is based on the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[174] In *Gao v. Dietrich*, 2018 BCCA 372 at paras. 39-40, our Court of Appeal provided guidance on the applicable standard of proof when assessing this loss:

[39] The rationale for distinct standards of proof for past actual events and past hypothetical events was explained by Madam Justice Rowles in *Smith v. Knudsen*, 2004 BCCA 613 at para. 29:

What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[40] These principles have been reiterated by this Court recently in *Grewal* at paras. 43 46, and *Rousta* at paras. 14 17. To the extent that other decisions could be read to hold that a past hypothetical event must be proven on a balance of probabilities they must be regarded as *per incuriam*: *Grewal* at para. 47.

[175] Accordingly, a plaintiff is not required to prove hypothetical losses of past earning capacity on a balance of probabilities. The question is whether there is a real and substantial possibility of the loss. A future or hypothetical possibility may be considered if it is a real and substantial possibility, and not mere speculation: *Athey*, at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[176] Further, compensation for past loss of earnings is based on the plaintiff's past net income loss: *Hudniuk v. Warkentin*, 2003 BCSC 62 at para. 40; *Shogi v. Lin*, 2019 BCSC 1818 at para. 303; s. 98 of Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.

[177] I have considered the lay and expert evidence, including that of Ms. Liu, in relation to the loss of her past income earning capacity. The nature and scope of her injuries including the improvement in her symptoms, as set out above, lead me to conclude that there is a real and substantial loss of earning capacity at a result of the Accident. Accordingly, she is entitled to be compensated for this past loss of income earning capacity. The challenging aspect of this assessment is discerning the proper quantum of damages.

1. Submissions of Ms. Liu on Past Loss of Earning Capacity

[178] Ms. Liu began working for Boundary Bay Enterprises in an office assistant and bookkeeping capacity in March 2015. After the Accident of June 24, 2016, she never returned to work. Notwithstanding this fact, Ms. Liu testified she took a half-year break from work and then spoke with her employer and asked to return part-time. However, her position was no longer available and she lost her job.

[179] Ms. Liu submits:

(i) The Accident caused injuries that contributed to her absence from the workforce and similarly impaired her ability to return to it.

(ii) Had she not been injured, she would have continued working at either Boundary Bay Enterprises or in a similar position. Given her personal skills and professional background (namely, experience in office work, bilingualism, and an education in business), there should be no difficulty in finding that she was otherwise employable but for the Accident.

(iii) Ms. Liu wanted to return to work, as evidenced in her job applications. In addition, Mr. Lo testified that initially his wife was very serious in looking for work. He could not provide details, citing language reasons, but he was very clear that his wife did look for jobs, which would have been "very useful for the family." He explained the couple owed the bank "a lot of money." Counsel underscores there was no reason why she was not looking for a job. In cross-examination, Ms. Liu also explained she had no income and wanted to get back to work to earn money.

[180] Counsel for Ms. Liu notes that while Ms. Liu admitted under cross-examination that she discussed a graduated return to work with Dr. Ting at the November 2016 visit, Ms. Liu stated that she was still experiencing pain from her injuries at that time.

[181] Counsel for Ms. Liu also argues that it would be "an oversimplification" for the defendants to submit that Ms. Liu was ready to return to work at this time. Counsel submits that this is evidence of Ms. Liu's desire or an interest to return to work but not proof of her early recovery and capacity to work. Counsel further submits that Ms. Liu's return to work "could easily not have succeeded" if she had attempted to return to work, "especially since she said that she was not 'confident' that she could do a full-time job."

[182] Counsel for Ms. Liu submits that her loss of past earning capacity ought to cover the period from the date of the Accident to the date of trial, which comprises a period of 65 months. Ms. Liu's net monthly income at the date of the Accident was \$2,151.36. Counsel multiplied this sum by 65, which yields the sum of \$139,815. Ms. Liu adjusted this number somewhat and seeks an award of \$139,000 for past loss of earning capacity.

2. Submission of Defendants on Past Loss of Earning Capacity

[183] The defendants submit that Ms. Liu did not have a history of working consistently after her first child was born in March 2011. They point out that she started work in June 2012 but worked at that job for only three months. She was then unemployed again until after the

birth of her second child in April 2013. She started working again after the birth of her second child in October 2014 but that job was also short lived. She left that position in January 2015 and began working at Boundary Bay Enterprises in March 2015 where she continued to work full-time until the Accident, about 16 months later.

- [184] Following the Accident, the defendants point out that Dr. Ting initially recommended that Ms. Liu take one month off work and provided a doctor's note to that effect. Ms. Liu started collecting Employment Insurance in July 2017. On October 26, 2016, Ms. Liu received a second doctor's note excusing her from attendance at work from October 20, 2016, to December 31, 2016. There were no doctor's notes excusing Ms. Liu from attending work from July 27, 2016, to October 26, 2016. The defendants also note that Ms. Liu testified that she approached her employer, Boundary Bay Enterprises, in December 2016 to inquire about returning to her job, but she was told her job was no longer available. They underscore Ms. Liu's evidence that if her job was still available, Ms. Liu would have returned to work in January 2017.
- [185] The defendants also submit that Ms. Liu could have found another job in early 2017 if she was committed to doing so. They say that her actions both before and after the Accident demonstrate that she does not have a significant attachment to the workforce. From 2010 to November 2021, Ms. Liu worked for a total of 22 months. During this time, her husband was the sole breadwinner.
- [186] Counsel for the defendants emphasize Dr. Leung testimony that persons like Ms. Liu who suffer from major depression would be able to return to some form of work if their treatment is fully optimized. Like Dr. Smith, Dr. Leung was of the opinion that Ms. Liu's treatment was not optimized. Dr. Palak opined that Ms. Liu should have attempted a gradual return to work soon after the Accident. Under cross-examination, Dr. Palak testified that while taking one month off work to recover from her injuries would have been reasonable, he is always in favour of individuals trying to normalize their lives as soon as possible. He added that those who do so have the best prognoses.
- [187] The defendants noted that Dr. Smith was of the view that Ms. Liu is currently capable of sedentary-type of work.
3. Reply of Ms. Liu on Past Loss of Earning Capacity
- [188] Counsel for Ms. Liu submits that the evidence Ms. Liu gave on her ability to return to work in January 2017 is more nuanced than what the defendants claim. Counsel for Ms. Liu submits as follows:
- (a) When asked whether she would have gone back to work in January 2017 if her position at Boundary Bay had been available to her, she answered, "yes for part-time - just try, because if you don't try, you'll never know."

- (b) When asked if she was ready to return to the workforce in February 2017, she said that, "actually," she had sent out her resume to see if she would get any responses to decide if she could take the work. When asked again if she was ready to return to the workforce in February 2017, she said, "Yeah, at that time, yes."
- (c) When asked if she was ready to return to the workforce in March 2017, she replied, "yes."
- (d) Respecting several job applications she sent out by email, she was asked if she applied to these jobs because she was ready to return to work. She said, "no, because I just tried to but I'm not confident [to] think I can do the full-time job."
- (e) When asked if she applied to these jobs because she was ready to return to the workforce, she said, "Yes, at that time, yes."
- (f) A few minutes later, she volunteered, "I have no income. I want to get back to work to earn money."

[189] Counsel for Ms. Liu argues that she had an intention to return, which is not to be confused with a capacity to return. He submits that it can "reasonably be inferred that her symptoms were holding her back or contributing to holding her back."

[190] Regarding Ms. Liu's employment record before the Accident, counsel argues that it is of little consequence. He submits:

What matters is she had a position at Boundary Bay, for a significant period of time pre-Collision, which position is reasonably indicative of what she would have earned at the time of the Collision had she continued to be employed, either there or elsewhere in some comparable position. It's her "capacity" to work and earn an income that matter--and her employment at Boundary Bay is the best evidence we have of what her capacity was, as well as what it was worth.

4. Findings on Past Loss of Earning Capacity

[191] I am satisfied that Ms. Liu's had the capacity to return to work in January 2017 part-time and would have done so if her employer had held the job for her at Boundary Bay Enterprises. This conclusion is based on a careful review of the evidence as a whole, which includes but is not limited to: my findings (articulated above) on the nature, scope and severity of her symptoms; Ms. Liu's evidence that she wanted to work and wanted to go back to her former place of employment six months after the Accident; and the evidence of her family physician, Dr. Ting, who examined and treated Ms. Liu during this period and recommended a gradual return to work at this time. In light of evidence in its entirety, I simply do not see a real and substantial possibility that Ms. Liu was not capable of returning to work at all, in January 2017.

- [192] However, I also find that there is a real and substantial possibility, and indeed a high likelihood, that Ms. Liu was not able to return to work on a full-time basis in January 2017. I accept Dr. Ting's evidence recommending a gradual return to work. Further, as counsel for Ms. Liu points out, she testified that she was not sure she could return to work full-time in January 2017. As such, I find that Ms. Liu would very likely have continued to suffer some past income loss after January 2017.
- [193] In regard to the issue of when Ms. Liu was well enough to return to work, I am very mindful of Ms. Liu's submissions and the various conclusions of the experts witnesses in the regard; these have been outlined earlier in these Reasons and need not be repeated here. The expert evidence regarding Ms. Liu's continued inability to work was formulated without the benefit of hearing all the evidence in its entirety on this issue, including the cross-examination of Ms. Liu and Mr. Lo. This Court, however, had the benefit of being better informed in the light of the considerable evidence led at trial.
- [194] I am also satisfied based on the evidence for me and my findings of fact that Ms. Liu was well enough to return to work full-time by April 1, 2018. Indeed, I conclude that the likelihood of her being able to do so at that time is very high. I have already found, as I have discussed earlier in these Reasons, that by March 2018 her physical injuries had significantly improved. Further, my findings of fact regarding her psychiatric diagnoses and conditions, which I also describe earlier in these Reasons, show that Ms. Liu was being treated with medications and that her mental health had improved by this juncture in time. In light of the evidence as a whole, and these findings in particular, I am simply not able to conclude there is a real and substantial possibility that Ms. Liu was not able to work full-time by April 1, 2018.
- [195] Both parties agree on the base sum of \$2,151.36 a month as Ms. Liu's net monthly income loss. Using that number, from the date of the Accident to the end of December 2017, Ms. Liu's net loss was \$17,267 for this period. As well, Ms. Liu must be compensated for an additional loss because she very likely would only have been able to return to work part-time due to her Accident-related symptoms between the period of January 1, 2017 to April 1, 2018. I find that a reasonable assessment of Ms. Liu's net income, working part-time, would be approximately half of her monthly net income of \$2,151.36, or \$1,075.68 per month. That sum of \$1,075.68 multiplied by the intervening 15 months between January 2017 and April 1, 2018, would yield an additional net loss of \$16,135.20. Accordingly, the sum of \$17,267 plus \$16,135.20 results in a total net loss of \$33,402.20, representing Ms. Liu's award for past loss of earning income capacity.

C. Future Loss of Earning Capacity

[196] In order to receive an award for loss of earning capacity, a plaintiff must prove that there is a real and substantial possibility of a future event leading to income loss: *Athey* at para. 27; *O'Connell v. Yung*, 2012 BCCA 57 at para. 56. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[197] This Court's task is to consider these guiding principles in light of the relevant factors found within the evidence as a whole: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10. Such factors include:

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

[198] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, Justice Voith, as he then was, conveniently summarizes the applicable first principles as follows:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;

- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37;
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[199] In assessing Ms. Liu's loss of future earning capacity, the Court is engaged in the hypothetical exercise of comparing her likely future had the Accident not happened to her likely future after the Accident. Clearly, this is not a mathematical or linear exercise. It is an assessment that depends on the type and severity of a plaintiff's injuries coupled with the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144.

[200] In *Rab v. Prescott*, 2021 BCCA 345, our Court of Appeal reframed the analysis involved in assessing a future loss of earning capacity and affirmed a three-step analysis:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras 93-95.

[Emphasis added]

[201] In *Harris v. Gill*, 2019 BCSC 1665, the Court reasoned that the capital asset approach may be used when the earnings are not easily quantifiable. In *Harris*, while the plaintiff had only mild restrictions resulting from his injuries, his employment options were nevertheless limited causing him to be less marketable and to lose the ability to take advantage of all job opportunities. In the result, a capital asset loss was found.

[202] In *Morlan v. Barrett*, 2012 BCCA 66 at para. 39, the court reasoned that evidence of ongoing pain may be sufficient to prove a plaintiff's future impairment.

1. Ms. Liu's Position on Future Loss of Earning Capacity

[203] Counsel for Ms. Liu submits the evidence discloses a potential future event that could lead to a loss of capacity. He refers to the evidence of her ongoing symptoms include her major depressive disorder, and related memory and concentration functions amongst other

evidence. He submits there is a real and substantial possibility in the future that these symptoms will cause a pecuniary loss. He argues Ms. Liu's chances of recovery are low and that she still has not returned to work. He emphasizes that it has been over five years since the Accident and Ms. Liu has not returned to work. He asserts that "it is thus very difficult to say that she will be returning any time soon."

[204] Counsel for Ms. Liu submits that a "capital asset" approach is reasonable, acknowledging that there is "only a small sample of Ms. Liu's earnings in the two years before the [Accident, by which] to value her capacity." In addition, he submits that Ms. Liu's injuries satisfy the factors set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353. Counsel also argues that Ms. Liu has not been able to return to work since 2016, and thus has been losing years of valuable work experience in building her resume. He asserts that the job openings pursued in the spring of 2017 yielded no results, and that her husband has described her as having changed into a different person. Her depressive disorder, submits counsel, is contributing to her poor concentration and memory, and leading to "poor daytime energy," all of which no doubt makes her a less valuable employee. Further, counsel submits, that her value to herself as a person was diminished as made apparent by her evidence that not being able to return to work made her feel like "not a person." Having been out of the job market for a long time, she felt "failed" in her career.

[205] In this context, counsel for Ms. Liu asserts Ms. Liu has suffered a capital loss and uses the "CIVJI tables" to calculate the loss until her assumed retirement age of 65 years of age.

[206] Specifically, counsel asserts that:

- (a) Ms. Liu will be 65 in May 2036, approximately 14 years from the time of trial;
- (b) Assuming Ms. Liu had pre-Accident earnings capacity of approximately \$30,000 per year, and assuming a retirement age of about 65, then one must discern the net present value of 14 years of earnings;
- (c) For 14 years of earnings, the corresponding 1.5% multiplier in the CivJI present value table is 12.5434;
- (d) Accordingly, the loss of future earning capacity is calculated at \$376,302; that is, \$30,000 per year multiplied by 12.5434.

[207] Counsel submits that Ms. Liu will lose \$376,302 if the status quo remains and she never returns to work. Counsel acknowledges, however, that as part of the loss assessment, the Court may consider both positive and negative contingencies. Positive contingencies include the possibility that Ms. Liu takes more treatment, improves her condition, and returns to work in some capacity, for some period of time, for example by way of part-time work. Negative contingencies might include the possibility that Ms. Liu does not improve and never returns to her original pre-Accident position.

[208] Weighing all of the evidence, counsel for Ms. Liu submits that a fair assessment is to take the present value of this future loss and find that Ms. Liu is 65% impaired, in all of the circumstances, and thus will experience a 65% reduction in future earnings. As a result, $0.65 \times \$376,302 = \$244,596.30$. On this basis, Ms. Liu submits her future earnings loss may be assessed at \$245,000.

2. Defendants' Position on Future Loss of Earning Capacity

[209] Counsel for the defendants assert that the loss of future earning capacity should be zero. In the alternative they assert that if their primary submissions are not accepted by the Court, no more than one year's income should be awarded under this head of damage. Counsel referred to evidence in support of their position, some of which included:

- (a) Ms. Liu testified she would have returned to her previous employment at Boundary Bay Enterprises in January 2017 had the position been available to her.
- (b) Ms. Liu also testified she was ready to return to work in February 2017 and March 2017 and that she applied to a minimum of seven jobs within a five-week period from February 9, 2017, to March 17, 2017.
- (c) Ms. Liu applied for the following seven positions since January of 2017:
 - 1. an assistant administrative position with Trust Mortgage Corporation on February 9, 2017;
 - 2. an administrative position with Can America on February 15, 2017;
 - 3. an office coordinator position with Total Fleet on February 20, 2017;
 - 4. an office administrator position with IGS Electric on February 22, 2017;
 - 5. an administrative assistant positions with Sohan Paul Associates on March 9, 2017;
 - 6. an administrative assistant position with Coast Truck Ltd. on March 13, 2017; and
 - 7. an administrative position with "North West" on March 17, 2017.
- (d) Ms. Liu testified that she did not receive a call back from any of these job applications and she did not follow-up with any of these companies.
- (e) Dr. Ting testified that Ms. Liu attended two job interviews in March 2017. This is contrary to Ms. Liu's evidence on cross-examination that she did not receive a call back in regard to any of her job applications.

[210] Counsel for the defendants submit that Ms. Liu has failed to establish a real and substantial possibility of a future event leading to an income loss as a result of the Accident. They submit this failure is "due largely to the fact [Ms. Liu] is not gainfully employed", "has demonstrated that she does not intend to return to the workforce" and has chosen not to do so to date.

- [211] Counsel for the defendants underscore that the fact that Ms. Liu is not gainfully employed is not due to the defendant's negligence but, rather, to the plaintiff's decision not to return to the workforce. They point out that the plaintiff testified she applied for job in February and March 2017, which was corroborated by her husband. Yet, she made no efforts to secure new employment since she moved to Prince George in August 2017.
- [212] The defendants submit that should their submissions in this regard not be accepted by the Court, they argue in the alternative that an assessment for loss of future earning capacity should be made according to the capital asset approach. The defendants submit that once Ms. Liu completes the recommended treatment outlined by the experts, it is reasonable to expect that she will have the ability to return to work force full-time within one year's time. It is on this basis that submit their alternative position.
- [213] In their alternative argument, counsel for the defendants submit that Ms. Liu had an obligation to mitigate her loss and to seek out alternative employment or pursue retraining.

3. Ms. Liu's Reply

- [214] Following a continuation of the trial prior to the conclusion of closing submission, counsel for Ms. Liu confirmed the parties' agreement to use the sum of \$30,000 as a reasonable approximation of one year's income earning capacity for Ms. Liu.

4. Findings on Future Loss of Earning Capacity

- [215] The fundamental difficulty with Ms. Liu's case in regard to future loss of earning capacity is that she relies on factual assumptions and assertions regarding the extent of her symptoms and her capacity to work that I have not accepted in light of the evidence before me. For example, as I have discussed more fully above, I have found that Ms. Liu has recovered to a significant extent from her physical injuries, and that her psychological condition has also improved significantly since the Accident. Further, the evidence before me does not establish that her cognitive complaints relating to memory and concentration are debilitating; rather, the experts agree these are minor in nature, are related to her depression, and are very likely to improve with proper and further treatment.
- [216] As regards the prognoses of Dr. Palak and Dr. Zaki, again, they did not have the benefit of additional evidence and information that arose during the course of the trial, including cross-examinations, that informed the extent to which Ms. Liu's symptoms have actually improved. Also, as discussed early in these Reasons, I found Ms. Liu's evidence regarding the severity, frequency and duration of her symptoms was not entirely reliable.

- [217] Nevertheless, notwithstanding that Ms. Liu's physical and mental health have significantly improved since the Accident, my analysis must not simply consider whether Ms. Liu is currently able to work full-time but must also consider whether her capacity to work has been impaired, and whether there is a real and substantial possibility that it may be impaired in the future. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset.
- [218] The factors summarized in Rosvold at para. 10, reproduced above, are of considerable assistance. While I have found that Ms. Liu's physical and psychological condition do not currently preclude her from working full-time, the application of these factors reveals that Ms. Liu's continuing depression and psychological condition, coupled with her intermittent physical pain, leads to the conclusion that there is a real and substantial possibility that Ms. Liu will suffer a loss of future income capacity that must be compensated. The unresolved nature of Ms. Liu's psychological and physical conditions coupled with her intermittent knee pain, neck pain and associated headaches has rendered her less capable overall of earning income in all types of employment. Her marketability and her competitive position in the marketplace have also been limited by her continuing symptoms. I am also satisfied that Ms. Liu has felt less valuable to herself as a person capable of earning income in a competitive market place, particularly given her struggle with depression. This, in turn, has compromised her ability to take advantage of all job opportunities which might otherwise have been available to her. I find Ms. Liu is entitled to an award for future loss of earning capacity.
- [219] Ms. Liu has not demonstrated an established earning pattern or history of employment income before the Accident or since. Accordingly, the approach in *Brown v. Golaiy* is more useful in quantifying her loss. Clearly, Ms. Liu's loss is not easily measurable on an earnings approach: *Perrin* at paras. 11-12; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (B.C.C.A.); *Romanchych v. Vallianatos*, 2010 BCCA 20. Indeed, both parties preferred the capital asset approach, although with very different conclusions.
- [220] In cases where the capital asset approach has been applied, courts have awarded the plaintiff's annual income for one or more years: *Devito v. Watson*, 2020 BCSC 1106 at para. 103; *Da Silva v. Pollard*, 2019 BCSC 2249 at para. 151; *Pallos* at para. 43.
- [221] Both counsel have agreed on a \$30,000 per year annual income for purposes of assessing Ms. Liu's annual income, although they clearly do not agree on the number of years of loss that ought to be awarded.
- [222] I find that awarding one year of income or \$30,000 is a fair and reasonable assessment of Ms. Liu's loss, in light of the evidence as a whole. This assessment of loss includes a consideration of the significant improvement in Ms. Liu's symptoms, her unresolved symptoms and Dr. Smith's opinion that with the appropriate psychiatric treatment, including a program of active rehabilitation, Ms. Liu's prognosis is a positive one.

[223] I do not accept the defendants' argument that Ms. Liu failed to mitigate her damages for loss of future income capacity because she did not seek alternate forms of employment or retraining. Ms. Liu had a history of doing administrative office work and she has looked for work in that area. This approach is entirely reasonable as it does not require heavy lifting or demanding physical work. I also accept Dr. Smith's opinion that she is currently capable of sedentary work; further such work is clearly within her proven skill set. I also so not accept their argument that Ms. Liu will likely not return to the workforce at all.

D. Past and Future Loss of Housekeeping Capacity

[224] Ms. Liu submits that she has suffered a meaningful impairment to her housekeeping capacity and relies on the following passages from *Yip v. Saran*, 2014 BCSC 1283:

[81] Awards for loss of housekeeping capacity may be made for either past or future losses, or both: see *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652, 1995 CanLII 761 (B.C.C.A.), at para. 25. [] Such claims are different from a future cost of care claim in that they reflect a loss of a personal capacity and are not dependent on whether replacement housekeeping costs are actually incurred: see *O'Connell v. Yung*, 2012 BCCA 57, at para. 67. An award ordered for loss of housekeeping capacity is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. A claim in respect of loss of housekeeping capacity is also distinct from a claim for non-pecuniary damages. Even though the claim is not dependent on whether replacement housekeeping costs are actually incurred, it is frequently valued using a replacement cost approach.

[82] However, any award should be approached conservatively: see *Kroeker*, at para. 29.

[225] Counsel for the defendants submit, among other things, that a discrete award for loss of housekeeping is not appropriate in this case. They state that they "factored in a loss of housekeeping in their proposed non-pecuniary award." They also underscore the following evidence:

1. Ms. Liu's admission that she takes care of some of the household chores and parenting responsibilities while her husband is at work;
2. Dr. Zhang's testimony that Ms. Liu reported to her, on January 9, 2020, that she was very active looking after her two children; and
3. clinical records from Physionorth Sports and Wellness Centre from September 26, 2018 to April 9, 2019 (addressed above) that "reinforce the idea that the plaintiff is busy with her children."

[226] Counsel for the defendants acknowledge that Ms. Liu disputed the physiotherapist's entries and dismissed them as "small talk" with her physiotherapist. However, I did not find Ms. Liu's response entirely satisfactory or persuasive in this regard.

- [227] Nevertheless, I have accepted Ms. Liu's evidence, supported by her caregivers, that for the first few months after the Accident she was unable to do her housework. However, the evidence establishes that, over time, Ms. Liu was able to do some cooking and cleaning, but not heavy housework or lifting. Furthermore, as noted earlier, I have found that her various physical injuries have significantly improved, and her psychological conditions have also improved. Moreover, I have taken Ms. Liu's loss of housekeeping capacity into account in determining the appropriate and fair amount of her non-pecuniary damages.
- [228] Specifically, my assessment of non-pecuniary damages has considered both her past and future loss of housekeeping capacity, taking into consideration the improvements in her symptoms as well as those that are likely to continue into the future. With Ms. Liu's improved physical and psychological condition, she and her husband now have an arrangement where they share the housekeeping workload, with Ms. Liu doing the lighter housekeeping tasks and her husband also assisting with the other tasks. I am also of the view, that Ms. Liu's symptoms are likely to improve following a period of active rehabilitation.
- [229] In *Firman v. Asadi*, 2019 BCSC 270, Justice Verhoeven reasoned at para. 235 that judges have the discretion to address a claim for housekeeping capacity as part of the non-pecuniary loss or as a segregated pecuniary head of damage: see also *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 100.
- [230] In *Riley*, Justice Groberman reasoned:
- [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.
- [102] I acknowledge what was said in *Kroeker* about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.
- [231] In *Firman*, Justice Verhoeven addressed the discretion of the trial judge in discerning how to address this loss, and he underscored the importance of avoiding duplication of compensation:

- [236] Duplication in the award must be avoided. Where potential costs for housekeeping assistance are awarded, in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case. In this case a minor award for housekeeping assistance has been made.
- [237] With these comments in mind, and after consideration of the evidence in this case, I am not satisfied that the evidence supports a distinct pecuniary award for loss of housekeeping capacity in this case. The evidence establishes only that the plaintiff is limited in her ability to do housework, and as a result her house is now untidy compared with before. There is no particular reason to distinguish this loss from her other limitations, which are reflected in the non-pecuniary award.
- [232] I am of the view that there is a sound basis in this case to follow the same approach as Justice Verhoeven did in *Firman*. I have considered and taken into account the effect of the Accident on Ms. Liu's housekeeping functions in granting her award of non-pecuniary damages. The evidence does not point to any exceptional circumstances that would justify a distinct pecuniary award for loss of housekeeping capacity in this case.

E. Cost of Future Care

- [233] In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, the Supreme Court of Canada provided the following guidance on assessing damages for cost of future care:
- [21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present costs of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.
- [22] The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require
- [234] The test for determining the appropriate award for cost of future care is an objective one based on the evidence, and on costs reasonably and medically necessary to restore plaintiffs to their pre-accident condition, insofar as possible. Such costs must be also be reasonable in the sense that they are costs the plaintiff will likely incur: *Pololos* at para. 144 and *Tsalamandris v. MacDonald*, 2012 BCCA 239 at paras. 62-63. Each case must be determined based on its own unique circumstances. Further, the assessment of damages for cost of future care is not a precise accounting exercise: *Krangle* at para. 21; *Peters v. Ortner*, 2013 BCSC 1861 at para. 144.
- [235] In *Dzumhur v. Davoody*, 2015 BCSC 2316, Justice Kent provided further guidance, as

follows:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[236] I have also considered that the costs awarded must be fair to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at para. 26.

[237] Simply put, costs of care should be awarded for items that are medically justified, and they must be reasonable and fair.

1. Position of Ms. Liu on the Cost of Future Care

[238] Counsel for Ms. Liu submits the following costs of future care ought to be awarded.

- (i) Based on Dr. Palak's recommendation for chiropractic or physiotherapy treatments at an average cost of \$66 per session, with four sessions per month at \$3,168 per year and assuming a five-year future need. Counsel applies a 4.7135 multiplier, for a claimed loss of \$14,932.37. He asserts the \$66 fee "based on the average cost per Schedule" referring to the schedule in the Insurance (Vehicle) Act Regulation, B.C. Reg 447/83; that is Schedule 3.1 entitled "Health Care Services, Fee Limits and Pre-authorized Treatments."

(ii) Ms. Liu acknowledges that the evidence for the cost of "active therapies" is less clear and nevertheless assesses her loss "holistically" at \$15,000.

(iii) Based on Dr. Leung's recommendation that Ms. Liu receive psychiatric treatment, and Dr. Leung's evidence that the initial consultation cost is \$241.18 for MSP-insured patients and \$107.43 per half-hour follow-up appointments, Ms. Liu claims the cost of \$1,207.96 which represents the cost of an initial consultation and nine half-hour follow-up appointment over 1.5 years.

Also based on Dr. Leung's recommendations, Ms. Liu claims the cost of a "structured psychotherapeutic treatment program such as Cognitive Behaviour Therapy (CBT)" for her depressive disorder and "Trauma-Focused Cognitive Behavioural Therapy (TF-CBT)" for treatment of her PTSD symptoms. Counsel for Ms. Liu relies on Dr. Leung's expert report which states a "market rate" of \$225 per hour for the 2018-2019 calendar year, and recommends consulting with the College of Psychologists of BC and the BC Psychological Association for an up-to-date estimate of individual psychotherapy sessions. Counsel for Ms. Liu submits the cost of this future care treatment to be \$2,250 based on \$225 per hour for 10 sessions.

(iv) Also based on Dr. Leung's recommendation, Ms. Liu claims the additional cost of 10 sessions of group CBT therapy in the event that she has not recovered and returned back to her pre-Accident mental status following her course of individual CBT psychotherapy. Counsel for Ms. Liu asserts the fee of \$56.25 per hour, with a cost of \$84.36 per group session, based on Dr. Leung's evidence. He suggests an award of \$843.68 representing the cost of 10 group therapy sessions.

[239] In total, the cost of future care claimed by Ms. Liu is \$19,301.76.

2. Position of the Defendants on the Cost of Future Care

[240] The defendants agree that the future care recommendations made by the experts are to promote mental and physical health. They submit, however, that some of the recommendations are not reasonable. Counsel describes Dr. Leung's recommendations as "overly robust and aggressive", and not medically required or justified. They also submit that Ms. Liu has had "ample passive treatment beyond what is required."

[241] Counsel for the defendants point out that while Ms. Liu's expert reports were prepared in early 2021, she had not complied with the majority of her expert's recommendations. Ms. Liu has not advanced all of the experts' recommendations as part of her cost of future claim award; accordingly, I will not address the recommendations that have not been pursued by Ms. Liu.

[242] Based on their general submissions on this head of damages, counsel for the defendants submit that the appropriate award for cost of future care is \$7,500, noting that this figure "includes some passive therapy, active rehabilitation, psychotherapy and medications." They did not elaborate further in this regard.

3. Findings on Cost of Future Care

- [243] Because Ms. Liu has not fully recovered and has some continuing symptoms, which the experts agree warrant further treatment, I am of the view that certain costs of future care are not only medically justified but also reasonable and fair to both parties. Further, I am of the view, consistent with the expert evidence, that the benefit of passive treatments such as physiotherapy is more effective when accompanied with a course of active rehabilitative exercise and psychological treatment. I also accept the expert evidence that Ms. Liu's remaining physical pain and psychological conditions arising from the Accident will be most effectively treated with a combination of therapies conducted concurrently.
- [244] With regard to cost of future passive therapies, I find that Ms. Liu's claim is somewhat inflated. While I have found that her physical pain has not completely resolved, I have not found her evidence regarding the frequency, severity or duration of her pain symptoms to be entirely reliable. I am unable to conclude there is a real and substantial possibility that the amount and duration of passive therapy sessions Ms. Liu claims is medically justified, reasonable or fair. Further, in light of Dr. Smith's evidence, I find that, with a combination of therapies, there is a reasonable and substantial possibility that Ms. Liu's symptoms are likely to be substantially resolved within a year's time such that further therapy of this nature beyond this time is not medically justified. As such, I find that the amount of \$3,168, representing one year of weekly treatment is medically justified, reasonable, and fair to both parties.
- [245] There is relatively sparse evidence before me regarding the cost of an active therapy program. Accordingly, counsel for Ms. Liu's proposed "holistic" figure of \$15,000 is difficult to assess and accept. Counsel for the defendants suggests that the cost of a gym pass for one year is appropriate. I am of the view that without proper direction from a kinesiologist, Ms. Liu will not have the active treatment she needs to maximize her treatment goals: see, for example, Dr. Palak's recommendation regarding the benefit of assistance from a kinesiologist. As noted earlier in these Reasons, counsel for Ms. Liu presented Schedule 3.1 of B.C. Reg 447/83, entitled "Health Care Services, Fee Limits and Pre-authorized Treatments." Counsel referenced the fee limits in that table, one of which deals with the cost of Kinesiology services. While better information may be available, it is the best evidence regarding the cost of a kinesiologist that is before the Court.
- [246] The fee limit for a kinesiology assessment visit and report is \$135. The fee limit for a standard treatment is \$78. Based on the evidence before me, I am of the view that an active treatment program for a one-year period would suffice. An initial assessment visit, coupled with one standard treatment per week for one year, would total \$3,879 (that is, 4 x \$78 x 12 + 135).
- [247] Ms. Liu testified that she did some exercises at home. It is not surprising, given her modest financial means, that she did not engage a kinesiologist. A negative contingency deduction would not be fair or reasonable in the context. Ms. Liu is entitled to a cost of future care award for these services in the amount of \$3,879.

- [248] Ms. Liu's claims for an initial psychiatric assessment and nine half-hour treatments at the cost of \$107.42 for a total of \$1,207 are reasonable and medically justified in light of her continuing diagnosis of depression and other symptoms. However, she previously declined to follow her family doctor's advice to seek treatment for her depression and testified that she chose to do deal with these issues on her own. I find there is a real and substantial possibility that she will not seek such treatment in the future and that the likelihood of her choosing to decline such treatment is high. Accordingly, I am of the view that a 50% negative contingency is warranted. The cost of future care award for this treatment will be set at \$604.
- [249] I accept that Ms. Liu will benefit from CBT treatment as recommended by Dr. Leung. However, I am also concerned that there is real and substantial possibility that she will not choose to attend such therapy in the future. Ms. Liu has claimed \$2,250 for this cost of future care. Accordingly, I am of the view that a 50% negative contingency is warranted. The cost of future care award for this treatment will be set at \$1,125.
- [250] In regard to Ms. Liu's claim for the cost of group therapy, it is important to consider the contingent nature of Dr. Leung's recommendation. Dr. Leung recommended this additional treatment if Ms. Liu "has not recovered to her pre-2016 MVA status after engaging with the courses of individual CBT." In this light, there are two negative contingencies evident: first, Ms. Liu may choose not to pursue group therapy treatments and, second, her individual, one-on-one CBT treatment may be sufficient. While difficult to accurately assess the combined effect of these negative contingencies, I am of the view that a 65% negative contingency is in order. As such, Ms. Liu's claimed amount for this item of \$843.80 is reduced to \$295.33.
- [251] In the result, Ms. Liu is entitled to a total of \$9071.33 for her cost of future care.

F. Mitigation Regarding Medical Treatment

- [252] Counsel for the defendants argue that Ms. Liu failed to mitigate her damages. They rely on the decision in *Chiu (Guardian ad litem of) v. Chiu*, 2002 BCCA 618, acknowledging that the onus is on them to prove that Ms. Liu could have avoided all or a portion of her loss. They refer to the following passage in *Chui*, which sets out the applicable legal test:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[253] In assessing whether a plaintiff has failed to mitigate, the plaintiff is not held to a high standard of conduct; that is, where the Court finds that a plaintiff takes steps that a reasonable person would take to reduce the loss, a failure to mitigate will not be made out: *Middleton v. Morcke*, 2007 BCSC 804 at para. 37; see also *Alden v. Spooner et al*, 2002 BCCA 592 at paras. 23-24, leave to appeal ref'd, [2002] S.C.C.A. No. 535; *Rahimi v. Ma*, 2014 BCSC 710 at para. 41.

[254] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56, Garson J.A., for the Court, clarified that the legal test is part subjective and part objective, reasoning that the court is to consider "whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment."

1. Position of the Defendants on Mitigation

[255] Counsel for defendants argue that Ms. Liu was aware that Dr. Palak, Dr. Leung, Dr. Smith and Dr. Zaki had authored reports for the purposes of this litigation in early 2021. They note that each doctor made specific recommendations within each report with regards to Ms. Liu's treatment. Counsel further submits that her inaction in pursuing the recommended treatment is unreasonable. They submit that the "expert opinion is fairly aligned, suggesting that proper treatment will significantly improve the plaintiff's functionality."

[256] Counsel for the defendants submit that any ambiguity with regard to Ms. Liu's prognosis "is due to her failure to review the expert reports." They underscore Ms. Liu's evidence that she did not review the expert reports until shortly before the trial and that she provided no explanation for why this was the case. They add:

The plaintiff should have reviewed the reports, discussed the treatment recommendations with her family physician and engaged in the treatment program.

[257] Counsel for the defendants also rely on the decision in *Rahimi*, where the failure of the plaintiff to apprise herself of the advice available to her was deemed unreasonable.

[258] The defendants assert that Ms. Liu's non-pecuniary damages and her past loss of earning award should be reduced by 10%, and that her future loss of earning capacity should be reduced by 20%.

2. Position of Ms. Liu on Mitigation

[259] Counsel for Ms. Liu submits that the defendants have not satisfied their burden of proving that she acted unreasonably by eschewing recommended treatment; further, counsel submits the defendants have also failed to prove the extent, if any, to which her damages would be reduced had she acted reasonably. He notes that the defendants purport to blame Ms. Liu for an alleged failure to follow the treatment recommendations in expert reports that were authored in early 2021, some five years after the Accident. He emphasizes that during this period, Ms. Liu went to a large number of treatment sessions.

- [260] Counsel for Ms. Liu submits that the decision in *Rahimi* has been effectively overturned, citing the decision in *Thomasson v. Moeller*, 2016 BCCA 14. In *Thomasson*, the plaintiff who was injured in a January 2011 accident. On May 25, 2011, at the request of Ms. Thomasson's counsel, Dr. Corney conducted a medical-legal assessment and recommended CBT treatment. During the summer of 2011 to December 2011, the plaintiff received counselling from a psychologist, Dr. Jones. There was no firm evidence as to whether Dr. Jones knew of Dr. Corney's recommendation regarding CBT. Ms. Thomasson was unsure whether she provided a copy of Dr. Corney's report to Dr. Jones. She believed that Dr. Jones had a copy but did not recall giving it to her. The trial judge concluded that Dr. Jones likely did not receive this report. The trial judge also found that there was no evidence that Ms. Thomasson ever received CBT from Dr. Jones. Ms. Thomasson then took treatment from another psychologist, Dr. Tessier. Ms. Thomasson was re-assessed by Dr. Corney on March 22, 2013. At the request of counsel, two psychiatrists, Dr. Semrau (for the defendant) and Dr. O'Breasail (for the plaintiff), conducted independent medical examinations of Ms. Thomasson in October and November 2013. The Court of Appeal noted the trial judge appeared to have misapprehended the evidence as to whether Ms. Thomasson received CBT from Dr. Tessier. Dr. Semrau stated in his November 2013 report, it "sounded" to him that Dr. Tessier had treated Ms. Thomasson with CBT. Dr. O'Breasail recommended that "if possible a cognitive/behavioural technique should be used to specifically address "her chronic pain, her depression and anxiety, and the link therein"; he acknowledged under cross-examination that Dr. Corney had recommended CBT in 2011, but noted that Ms. Thomasson had received an array of psychological treatments.
- [261] On appeal, the defendant argued that Ms. Thomasson had failed to commence CBT at an early opportunity, thus delaying her own recovery. The defendant submitted that Dr. Jones did not provide CBT because she was unaware of Dr. Corney's recommendation (para. 36). The Court of Appeal reasoned that the plaintiff was not obliged to follow the recommendations of the doctor retained for the medical-legal report:
- [39] It is also, in my opinion, a leap in logic in these circumstances to ask the court to infer that Dr. Jones did not provide CBT because she did not receive Dr. Corney's report. This proposition rests, in part, on the implication that it was Ms. Thomasson's obligation (or her counsel's) to ensure that Dr. Jones received Dr. Corney's report. In my opinion, such an implication should not be sustained. Dr. Corney was retained by plaintiff's counsel to provide a medical-legal report. He was not a treating physician whose recommendations Ms. Thomasson was obliged to follow, nor was she obliged to tell her treating psychologist, Dr. Jones, of Dr. Corney's recommendation for CBT.
- [262] Counsel for Ms. Liu points out that while the trial judge was mistaken that Ms. Thomassen did not undergo any CBT treatments, the Court of Appeal reasoned, at para. 47, that this was a harmless error in the circumstances because the trial judge: "was persuaded that Ms. Thomasson was highly motivated to recover her health and, as the defendant's witness, Dr. Semrau, observed, she had undertaken generally appropriate mental health treatment."

[263] Counsel for Ms. Liu argues that in light of our Court of Appeal's decision in Thomassen, "it would appear that the law is that there is no positive duty upon a plaintiff to take the treatment recommendations formulated by the doctor retained for medical-legal reports"; as such, the defendants' mitigation argument about Ms. Liu must fail.

3. Findings on the issue of Mitigation

[264] Having carefully reviewed the evidence on this issue, I am not persuaded that Ms. Liu failed to mitigate her damages in regard to her medical treatment. She pursued treatment for both her physical injuries and her mental health difficulties. She went to numerous appointments to see her family doctors in Vancouver and Prince George and her family doctors addressed both her physical and mental health problems. Further, Ms. Liu was prescribed medications for her physical and psychological symptom, which she took. She also did some exercises at home, even though the evidence suggests she did not like to do them.

[265] In regard to counseling or psychiatric treatment for her mental health challenges, Dr. Ting did referred Ms. Liu, which Ms. Liu did not appear to oppose, to the Rapid Access Psychiatry Clinic. However, Dr. Ting stated that Ms. Liu was not considered eligible for the clinic's services and commented in this regard that the "system was broken." When Dr. Ting was asked whether she referred Ms. Liu to anyone else for psychiatric treatment, she responded "No, I treated her myself." I am not inclined in these circumstances to find Ms. Liu's decision to rely on her family physician to treat her depression to be unreasonable; this included multiple visits with Dr. Ting and taking prescribed depression medication from her family doctor in Vancouver and also her family doctor in Prince George. Overall, she did not eschew treatment but, rather, pursued it.

[266] Furthermore, Ms. Liu testified as to how her depression affected her in a way where she did not want to leave the house, interact with people, or talk about her depression. To the extent that Ms. Liu's depression affected her ability to seek and obtain treatment, she ought not be held to blame. The law is clear that a defendant is not entitled to complain of a failure to mitigate that is caused, or materially contributed to, by the defendant's own negligence: *Pearson v. Savage*, 2020 BCCA 133 at para. 77; *2438667 Manitoba Ltd. et al. v. Husky Oil Limited et al.*, 2007 MBCA 77 at para. 18, cited with approval in *The Owners, Strata Plan K855. v Big White Mountain Mart Ltd.*, 2017 BCCA 438 at para. 67.

[267] I also note that Ms. Liu and her husband acknowledged that her psychological condition improved over time. I have found that by the time the expert reports were issued in January 2021, Ms. Liu's physical and mental symptoms, including her depression, had improved considerably. Furthermore, I am not persuaded on the evidence before me that any treatment choices Ms. Liu could have made in February or March 2021 when Dr. Palak and Dr. Leung released their expert reports, or her apparent failure to apprise herself of their treatment recommendations at that time, would have made any significant difference to her state of health by the time the trial started later that year.

[268] Also, the factual circumstances in Rahimi are very different than those before me. In Rahimi, Justice Voith (as he then was) noted at para. 42 that the plaintiff in that case sought little medical advice or assistance from the time of the accident to the time of trial. The facts of the case before me are very different. As noted earlier in these Reasons, Ms. Liu sought treatment for her physical and mental health symptoms from her family doctor shortly after the Accident and continued to receive treatment regularly in Vancouver and Prince George. I also find the reasoning in Thomasson apposite in the context of this case. The expert witnesses in this case were retained for the purposes of this litigation and issued their reports not long before trial. Furthermore, they were not Ms. Liu's treating physicians whose recommendations Ms. Thomasson was obliged to follow.

[269] Given the evidence before me I find that the defendants have not provided either the first or second branch of the legal test for mitigation as set out in Chiu.

G. Special Damages

[270] The parties are agreed that the special damages award in this case is established at \$4,754. I so order.

V. Disposition

[271] Ms. Liu is entitled the following damage awards:

No.

Item

Amount

1.

Non-pecuniary Damages:

\$110,000.00

2.

Loss of Past Earning Capacity:

33,402.20

3.

Loss of Future Earning Capacity:

30,000.00

4.

Cost of Future Care:

9,071.33

5.

Special Damages:

4,754.00

TOTAL:

\$187,227.533

[272] Subject to any submissions, the parties may wish to make on the question of costs, and absent any circumstances of which I am unaware, Ms. Liu is entitled to his costs at Scale B.

"MORELLATO J."

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