

CANADA / JUDGMENT

Lo v. Hughes

2020 BCSC 840

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Supreme Court of British Columbia

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2020 BCSC 840 Lo v. Hughes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lo v. Hughes,

2020 BCSC 840

Date: 20200605

Docket: M157326

Registry: Vancouver

Between:

Amber Candice Lo

Plaintiff

And

Fariborz Daneshavaran

Defendants

- and -

Docket: M189903

Registry: Vancouver

Between:

Amber Candice Lo

Plaintiff

And

Kaitlyn Morgan Hearn, ARI Financial Services Inc. Services,

Financiers ARI Inc. and B.C.A.A. Holdings Ltd.

Defendants

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

November 25-29, 2019; and

December 2-6, 2019

Place and Date of Judgment:

Vancouver, B.C.

June 5, 2020

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Introduction

- [1] In these two actions, the plaintiff Amber Lo seeks damages for injuries resulting from motor vehicle accidents on February 7, 2015 (the "First Accident") and November 20, 2017 (the "Second Accident"). The defendant in the first action admits his negligence caused the First Accident. The defendants in the second action take the position the Second Accident was caused by the negligence of both the defendant Kaitlyn Hearn and Ms. Lo.
- [2] Ms. Lo alleges the accidents resulted in injuries that include concussions, mild traumatic brain injuries (mTBI), persistent post-concussion syndrome, post-traumatic chronic debilitating headaches with migraine features, chronic pain to her neck, back and shoulders, right-sided temporomandibular joint (TMJ) disorder, depression, anxiety, driving anxiety, concentration problems and sleep disturbance.

- [3] Called to the Bar in September 2013, Ms. Lo was in her second year of practice and working as a solicitor with her mother Charlotte Wong at Kerfoot Burroughs ("Kerfoot"), when the First Accident occurred. Soon after, Ms. Lo took a full-time paralegal position with the Law Society as an intake officer. Asserting her injuries and symptoms prevented her from working as a lawyer, Ms. Lo said she intended to return to practicing law once she recovered from the First Accident.
- [4] Ms. Lo was still working as an intake officer when the Second Accident occurred, causing a reinjury to her neck, a new soft tissue injury to her low back, and she asserts, a second concussion and mTBI, resulting in significantly aggravated pain symptoms and headaches. Ms. Lo also asserts the Second Accident caused right sided jaw symptoms and overtime, reactive depression and anxiety. Absent from work at the Law Society for approximately three months, in February 2018, Ms. Lo returned part-time. After increasing her work schedule slightly, in February 2019 she took an extended medical leave and was not working by the time of the trial.
- [5] Ms. Lo's claim for damages includes non-pecuniary damages, past and future loss of earning capacity, cost of future care, future loss of housekeeping capacity and special damages. She claims \$3.2 million for her future loss of earning capacity, based on the assertion she has no residual earning capacity and lost future employment earnings as a lawyer to the age of retirement.
- [6] In addition to arguing Ms. Lo should be found partially liable for the Second Accident, the defendants take the position she did not suffer a concussion or brain injury in either accident, she had ongoing headaches and neck pain before the First Accident, and she failed to mitigate her losses by delaying the start of counselling for depression and anxiety and refusing to try prescription medications recommended by multiple doctors. They also argue she suffered no wage loss prior to the Second Accident, choosing to leave her position as a solicitor at Kerfoot for a paralegal job with the Law Society. Acknowledging Ms. Lo's future earning capacity has been impaired to some degree, the defendants argue she remains capable of practicing law and her loss should be assessed using a capital asset approach. They propose an award of \$300,000 to \$500,000.
- [7] In support of her claim for damages Ms. Lo relied on the testimony of several witnesses in addition to herself, including her mother, her husband, a close friend, a former employer, a colleague, and her physiotherapist. Ms. Lo and the defendants also relied on multiple medical experts all of whom testified, in addition to some documentary evidence. Further, Ms. Lo's claim for loss of earning capacity is supported by the opinion evidence of an economist.
- [8] The evidence related to liability for the Second Accident included the testimony of Ms. Lo, Ms. Hearn, former defendant Alona Ben-Yacov, and Heather Sharon an independent witness, as well as some photographs.

Background

- [9] Born in February 1986, Ms. Lo has always lived in Vancouver. She is married to Simon Lee, a civil engineer. Both are only children. The two became friends in high school. They began dating during their first year at UBC and lived together for several years before marrying in 2014. Ms. Lo and Mr. Lee described a very happy, close relationship. They made it clear they discuss, strategically plan and make all of their decisions together. Before the accidents, their lifestyle involved significant travel, lots of physical and outdoor activity, such as biking and hiking on the weekends, more adventurous activities, and a busy socially calendar. Mr. Lee, who suffers from a serious heart condition, has always placed an especially high value of being fit and enjoying everything life has to offer.
- [10] Before the accidents Ms. Lo was by all accounts a positive, enthusiastic, and achievement oriented person.
- [11] Always a very good student, Ms. Lo completed a BA in 2008, majoring in cognitive systems. Towards the end of her degree she worked at an infant studies centre designing and conducting a research study. Although she considered an academic career, she said she had always been interested in her mother's work as a lawyer. In September 2009 Ms. Lo began law school at UBC, graduating in the spring of 2012. During the summer between second and third year she worked as a paralegal for the Public Guardian and Trustee ("PGT").
- [12] Interested in practicing as a solicitor, Ms. Lo articulated from September 2012 until August 2013 at Farris LLP where she was exposed to litigation as well as solicitor's work. Ms. Lo testified to really enjoying her articling year, although it was tough and often involved very long hours. Towards the end, she was told she would not be offered an associate position, which she attributed to the firm not having anything available for a solicitor.
- [13] Ludmila Herbst, Q.C., a partner and litigator at Farris, testified to meeting Ms. Lo while the firm was recruiting students in 2011 and viewing her as an excellent candidate. Ms. Herbst described the limited work Ms. Lo completed for her during her articles, as very helpful and meticulous. Ms. Herbst also described Ms. Lo as having a very positive attitude, an excellent grasp of legal concepts, and being very eager to learn. However, the one solicitor's position the firm had available was offered to another articulated student. Eager to support Ms. Lo, Ms. Herbst provided her with a very positive reference letter, and said she remains entirely willing to continue recommending Ms. Lo for lawyer positions.
- [14] Ms. Lo testified that after learning she would not be staying on as an associate at Farris, at first she was not sure what she wanted to do. Although she could have applied to other firms, she decided to work with her mother Ms. Wong who had a solicitor's practice, describing the practice as a mix of residential and corporate real estate. Ms. Lo indicated her mother was thinking of retiring in a few years, so there was an opportunity to learn from her, develop her own solicitor's practice and take over her mother's practice or "book of business".

- [15] Aside from describing her practice as more of a general solicitor's practice, Ms. Wong gave similar evidence, referring to Ms. Lo as her succession plan. Ms. Wong also explained that she had been the primary caregiver to her aging parents. Her mother died in 2012 and her father in 2016. Before the death of her father, at the end of 2012 or early 2013, Ms. Wong learned the lawyer she relied on at Kerfoot when she had to be away from work was going to retire.
- [16] Like Ms. Wong, Ms. Lo became an independent contractor or associate counsel with Kerfoot. She said she understood she would not make much in the first year and it would be two or three years before she would earn a normal salary. Ms. Lo and Mr. Lee testified that he was in full support.
- [17] In cross-examination, Ms. Lo agreed she worked roughly 30 to 50 hours per week at Kerfoot. In 2014 she earned only \$3,600. Denying it was a problem, she said she and Mr. Lee had planned for this. At her examination for discovery, however, Ms. Lo testified that not making a lot in the beginning was hard on her family life.
- [18] Acknowledging Ms. Lo made "next to nothing" in her first year, Ms. Wong testified she viewed that period as a chance for Ms. Lo to immerse herself in the files and shadow her, which did not translate into much billable time. Ms. Wong also gave evidence Ms. Lo could "conceivably" have earned \$150,000 or more by her third year, if she continued on the same trajectory. The basis for her prediction was not well explained apart from stating her long term clients really liked Ms. Lo, they were very pleased with the "succession plan", and there were other contacts that were eager to refer work to Ms. Lo, who was a quick study and taking on more and more responsibility. Ms. Wong also said she encouraged Ms. Lo to look at other opportunities and was open to the idea of her taking a position at another firm. Ms. Wong provided no evidence about her own income, billable hours, hourly rate, or when specifically she planned to retire.
- [19] Similar to Ms. Wong, Ms. Lo said by the time of the First Accident, she was learning a lot and hopeful about her practice and future as a lawyer. She described some involvement in real estate transactions, doing some corporate work and starting to build a wills and estates practice, a particular area of interest for her, indicating there was one notary looking to refer wills work to her, but gave no evidence about her rate(s) or billable hours in early 2015. Ms. Lo also said although she was not actively looking for another job, she was open to other options, received postings about lawyer positions and had applied for a few here and there. Apart from turning down an opportunity to join a wills' lawyer with a mobile practice, however, she recalled applying to Work Safe BC and perhaps the PGT, but not any law firms. She also stated she thought she applied for lawyer jobs before the First Accident and then looked for something "9-5" after.

- [20] Ms. Lo described herself as in good health before the accidents. She did not recall having previous neck pain or ongoing headaches. She denied any prior migraine headaches although she testified to being asked by a locum doctor in December 2014 about migraines when she had the flu and was experiencing "head twinges", something she said she often had with colds and flu. She recalled the doctor giving her a migraine medication sample, which she did not take.
- [21] In cross-examination, Ms. Lo was taken to her family physician Dr. Michelle Yeun's clinical record dated February 13, 2015, which included: "Seeing PT (physiotherapist) prn [when required] for neck pain from sitting in last 2-3 yrs." Ms. Lo agreed she must have told Dr. Yeun this, but stated that any prior neck pain was transient. She also agreed she had previous headaches for the first day or two of her menstrual cycle, but did not recall headaches and neck pain coinciding and emphasized that neither ever interfered with her functioning.
- [22] From 2012 onward, Ms. Lo attended regular appointments with physiotherapist David Kwan, after her mother-in-law highly recommended him. Ms. Lo and Mr. Lee referred to Mr. Kwan's treatments as maintenance, helping with minor aches and pain, and part of their routine. Ms. Lo's pre-accident physiotherapy records, which begin August 10, 2012, show seven visits in the last five months of that year; 19 in 2013; 14 in 2014; and three in January and February 2015 before the First Accident.
- [23] Cross-examined about references to headaches throughout the records (August 10, 15 and 22, 2012, September 28, 2012, January 5, 2013, February 2, 2013, March 9, 2013, July 5, 2013, August 16, 2013, October 13, 2013, and January 23, 2015), Ms. Lo did not dispute their accuracy, or that headaches referred to during three consecutive appointments spanning 12 days in August 2012, were unlikely to be associated with her menstrual cycle.
- [24] Despite the number of appointments and consistent references to her cervical spine and headache symptoms, Ms. Lo denied recalling a problem with either, maintained her symptoms were transient and continued to emphasize they never interfered with her functioning.
- [25] Mr. Kwan testified as a fact witness for Ms. Lo. In addition to clarifying his handwritten clinical records, he recalled Ms. Lo starting treatment because of injuries from playing golf. Reviewing the initial assessment form he completed, Mr. Kwan indicated she reported striking the ground and immediately feeling neck issues, including stiffness with movement that were manageable at first with stretching. He also recalled Ms. Lo describing headaches related to tension in her neck from the golfing injury which improved with treatment. However, in March and April 2013, he treated her quite frequently. Mr. Kwan testified that at that point she was experiencing a lot of tension and symptoms in her neck and back because of an increased workload and computer work, coinciding, I note, with her articles.

- [26] Mr. Kwan clarified his record for April 20, 2013 stated Ms. Lo reported her cervical spine was better that week, but she was still having stiffness in her spine. A reduction in the number of appointments from late May 2013 to February 2014, he said, indicated improvement. Asked about the records for December 20, 2014 prepared by his colleague Leonard Chong, Mr. Kwan stated Ms. Lo reported right sided cervical spine stiffness, "increased C2 and C3", resulting in headache, and anterior shoulder pain. Mr. Kwan also gave evidence about treating Ms. Lo's C2 and C3 to address headaches, prior to the accidents. He explained his record for January 17, 2015 which described her cervical spine being better afterwards, meant better after the previous treatment.

The First Accident

- [27] On February 7, 2015 around 6:00 p.m., Ms. Lo and Mr. Lee were passengers in the back seat of an older BMW driven by a friend. They were travelling east on Highway 1 in Vancouver planning to turn off at the First Avenue exit. A line of cars was stopped at the exit. Ms. Lo said that after the BMW came to a stop, she heard a crash, which was the sound of the car behind them being hit by the car behind it. As she turned to look out the back of the BMW, there was a jolt as the BMW was also hit from behind. Mr. Lee described the impact as a violent hit, although the rear bumper remained attached.
- [28] Ms. Lo testified to being a "little hazy" on the details after the accident. She said she "believed" they exited the vehicle and stood on the side of the highway. Asked in cross-examination to confirm no emergency vehicles attended the scene, Ms. Lo expressed being unsure about whether they may have attended for a vehicle behind them that may have been "undriveable". Mr. Lee also gave evidence that he could not recall if emergency vehicles came to assist other vehicles.
- [29] Ms. Lo had no difficulty remembering, however, that almost immediately after the accident her neck and back began to stiffen and became painful and she developed a headache with dizziness. Mr. Lee's evidence was that her headache came on that evening.
- [30] Ms. Lo testified to experiencing the same symptoms over the next few days. The headache worsened, becoming severe. She described associated nausea and dizziness, often accompanied by sensitivity to light and sound. Ms. Lo also described interrelated neck, shoulder and upper and mid back pain and headaches behind her eyes that grew and circled around her head.
- [31] Soon after the First Accident, on February 11, 2015, Ms. Lo attended an appointment with Mr. Kwan. Consistent with her testimony, his record for that day refers to a headache "immediately after", as well as headache "still there" but less intense "now". Ms. Lo's first appointment with Dr. Yuen was a few days later on February 15, 2015. She recommended continuing with physiotherapy and taking over the counter pain medication.

[32] Ms. Lo was asked in cross-examination about Dr. Yuen's record for that appointment regarding her symptoms which reads in part:

h/a immediately. nausea within half an hour. neck pain and then shoulders and back in next hour ongoing neck and shoulder/back pain. some h/a radiates from neck . Able to sleep through night. working at home cause didn't feel well. N energy. sx worse by end of day

[33] Ms. Lo did not deny its accuracy and agreed she accurately reported her symptoms to her health care providers. But she also stated migraine features were missing from the description of her headache, adding at some point she told Dr. Yuen about light and sound sensitivity.

[34] Mr. Lee testified to expecting Ms. Lo to have neck and back pain, which he too experienced after the First Accident, but not the ongoing headaches. He also observed she was nervous driving. Mr. Lee referred to Ms. Lo as "destroyed" at the end of the workday and taking Tylenol and Advil to manage. He stated "we don't like" to take medication, explaining that because of his heart condition, he grew up in hospitals and there are medications he has to take for the rest of his life. Mr. Lee said he was a little worried by how much pain medication Ms. Lo was taking, and he would ask her if she really needed it.

[35] In direct examination, Ms. Lo testified that initially her headaches were daily. Months later they gradually got a little bit better, until she was experiencing them about once a week or less, if she was lucky. Over several months and with regular physiotherapy, she said, her neck pain also improved although she was left with constant stiffness and some pain.

[36] Asked to compare Ms. Lo's headache symptoms after the First Accident to before, Mr. Kwan recalled them presenting more consistently and Ms. Lo experiencing more pain and stiffness on the left side of her neck. In direct examination he was taken to his record for May 6, 2015. He clarified "recent headache plus plus" meant it was pretty severe. In addition, Ms. Lo reported feeling it more on the right side, up behind the ears, and behind the right eye.

[37] In cross-examination he agreed there was a pattern of improvement in Ms. Lo's symptoms by in or about April 2015. He also agreed he continued to see a pattern of improvement leading up to the Second Accident.

[38] Ms. Lo testified to carrying on with physiotherapy once or twice a week, but the clinical records show two appointments in one week for the first week after the First Accident, then weekly appointments until March 12, 2015 when they reduced to every two or three weeks. Mr. Kwan indicated this reduction was consistent with his usual practice when things improve.

- [39] Although Ms. Lo described struggling with headaches, back and neck pain, being very distracted, finding it hard to concentrate due to pain and headaches, not processing things as quickly, and never having felt so exhausted, she did not take any time off from work after the First Accident.
- [40] Ms. Wong testified to noticing right away that Ms. Lo did not "look right", describing her as pale, appearing to be in pain, not walking normally, not concentrating, being very distracted and having trouble remembering details. Asked whether her work hours changed, Ms. Wong indicated she allowed Ms. Lo to work at home, and they had to put their plans on hold.
- [41] About one month after the First Accident, Ms. Lo applied for a job as an intake worker at the Law Society, a paralegal position that involves screening complaints about lawyers. Ms. Lo testified to feeling she was letting her mother down and becoming increasingly worried and disappointed about her symptoms. Deciding to accept the Law Society job, she said, was really difficult but something she needed to do in fairness to her mother and her husband, indicating she was still not making very much money. At the same time, Ms. Lo, Ms. Wong and Mr. Lee characterized the move as a short-term strategy that would allow her to remain connected to the legal community, work "9-5" hours, and rest in the evenings and on weekends while she recovered.
- [42] Ms. Lo's salary as an intake officer started at almost \$71,000, plus benefits and increased "a little" each year. There was some overtime. Starting in April 2016, Ms. Lo began working one half hour longer each day for a "flex day". She acknowledged not missing any time due to her accident related symptoms, other than "maybe a couple times".
- [43] Ms. Lo testified to having many discussions with managers at the Law Society about the importance of keeping her practicing status. However, she did not apply for any lawyer jobs before the Second Accident and gave no evidence about considering a return to Kerfoot. Instead, Ms. Lo said she continued to feel unable to do the high level, cognitively challenging tasks required of a lawyer, emphasizing her job as an intake worker was much less intellectually demanding, although the work was fast paced and high volume. Ms. Lo also stated she had some difficulty keeping up as an intake worker, indicating she was slower and less productive than before the First Accident. Acknowledging her managers were happy with her work and her performance reviews were very positive, she suggested her performance goals were modest.
- [44] In the late summer of 2017, Ms. Lo and Mr. Lee moved from their downtown condo to his mother's house in East Vancouver and she moved to their condo because she was having trouble managing on her own.
- [45] Ms. Lo testified to some improvement in her neck and back pain over time. Stating the pain would come and go depending on what she was doing, Ms. Lo said that shortly before the Second Accident, she started the day with some stiffness and sometimes pain, but was able to manage the pain when working. In general, she felt tired and drained by the end of the

workday. Weekly or biweekly headaches were her most problematic ongoing symptom. Ms. Lo also said she was hopeful about eventually getting back to the way she was before the First Accident. In direct examination Mr. Lee indicated, somewhat more positively, they had clawed their way back to the way she was and she had gone to one or two Parkour lessons, an activity he had been doing without her up to that point.

The Second Accident

- [46] The Second Accident occurred on November 20, 2017 around 6:00 p.m. while Ms. Lo was driving home from work. Discussed in more detail below, Ms. Lo testified she was driving her Honda Fit east along East 12th Avenue, when a black Evo car driven by Ms. Hearn suddenly appeared in front of her attempting to turn left from Sophia Street onto East 12th Avenue. After slamming on her brakes and turning the steering hard to the right to avoid a T-bone collision with the black Evo car, Ms. Lo hit a Nissan Rogue that had been stopped behind the black Evo on Sophia Street instead.
- [47] Ms. Lo described the impact as a strong jolt and recalled sitting in her car afterwards, feeling very shaken up and incredibly frightened before getting out and checking on the driver of the Nissan Rogue, Ms. Ben-Yacov. Ms. Hearn returned to the scene. Ms. Lo took photographs and spoke with Ms. Sharon, a pedestrian witness. Ms. Lo's car was "totalled" and along with Ms. Ben-Yacov's, had to be towed.
- [48] Asked about her memory of the circumstances, Ms. Lo said there were somethings she was not completely clear about, indicating at first she remembered the police attending and then she did not. In addition to feeling incredibly frightened, she recalled feeling a headache, neck, back, and new lower back pain coming on at the scene.
- [49] After Mr. Lee arrived, they drove to her parents'. By the time she got home, she said her pain and headache symptoms were worse.
- [50] The next morning Ms. Lo took the Skytrain to work, but lasted about 15 minutes due to the pain and stiffness in her whole back and neck.
- [51] Ms. Lo saw Dr. Yuen on November 23, 2017 who recommended continuing with physiotherapy and massage as needed, and one week off from work. Ms. Lo testified that when she went back to work one week later, she was still in excruciating pain. She tried working from home before taking a medical leave. A brief attempt to return in January 2018 was also unsuccessful.

Ongoing Symptoms

- [52] Ms. Lo described her neck, upper and mid back pain as a lot more intense and consistent after the Second Accident. In addition, she described right sided low back pain that would travel to the left when it got worse. Her headaches also became much worse and much more frequent, meaning daily, she said, with the pain increasing faster and including migraine

features more often. Describing her neck pain as radiating down into both shoulders primarily on the right side, Ms. Lo also indicated the pain in her neck, shoulders and back felt interrelated. Anything that caused neck and back symptoms, she said, brought on headaches and she found she could not turn them off without taking drugs.

- [53] Ms. Lo testified to being unable to concentrate during headaches, and afterwards there being a foggy in her head, as well as waking up with a cloudiness behind her eyes and Mr. Lee having to repeat things to her. He gave similar evidence about Ms. Lo missing things sometimes when he is talking to her.
- [54] Both Ms. Lo and Mr. Lee stated she has experienced sleep difficulties since the Second Accident. Ms. Lo identified having difficulty falling asleep sometimes, waking up once or twice each night due to pain or driving anxiety and feeling exhausted.
- [55] Ms. Lo testified that a few months after the Second Accident, she began to notice a "stickiness" when opening her jaw that progressed to locking and not being able to release it without pushing on it.
- [56] In cross-examination, Ms. Lo said her driving anxiety gradually worsened after the Second Accident, although she drove to and from work three days per week from February 2018 until February 2019. She indicated an incident involving a cyclist without a helmet who swerved right in front of her vehicle also had an impact. Ms. Lo said she tries to avoid driving, relying on her parents and Mr. Lee to take her to appointments when available, and using the bus once in a while.
- [57] Ms. Lo also gave evidence about the development of other psychological symptoms, after she returned to working part-time, in response to pain and headaches and her failure to recover. Indicating her mood really deteriorated and she began feeling helpless, Ms. Lo emphasized it took a long time to admit to herself that she was really struggling emotionally as well as physically.
- [58] Mr. Lee gave similar, although more stark evidence about this. He stated Ms. Lo's whole demeanour changed, she was not the same person, having become nervous and scared, and it was as though her "light had gone out a bit".

Return to Work

- [59] On February 14, 2018, Ms. Lo began a gradual return to the Law Society working three half days on Mondays, Wednesdays and Fridays, indicating ergonomic adjustments had been made to her workstation by then. Ms. Lo described not accomplishing much and feeling a lot of pain in her neck and back after sitting for 30 to 60 minutes. According to Ms. Lo, she took frequent breaks to stretch and walk around but headaches still came on every day she worked, sometimes seeping into the next day, unless she was "lucky" and just experienced foggy.

- [60] In June 2018, Ms. Lo changed para-legal positions at the Law Society, becoming an investigative legal analyst, which she indicated her managers viewed as a better fit for her. No longer dealing with daily deadlines and high volume, she worked instead on bigger projects. In cross-examination she acknowledged the work was more varied, there was also more potential for applying her legal training, and the position was a possible stepping stone to becoming a staff lawyer. Ms. Lo agreed she enjoyed the job and the work was interesting, although she also said her work performance remained compromised by her symptoms.
- [61] Leah Enhsing, an executive assistant at the Law Society who worked in close proximity to Ms. Lo, described her sitting for long periods and working through breaks before the Second Accident, but after, moving around a lot and taking more breaks, although not more than the allotted number (one in the morning and one in the afternoon, as well as lunch). Ms. Enhsing also noticed Ms. Lo adjusting her position more, and was aware of her missing work and leaving early. Asked in direct examination about the legal community's culture regarding mental health issues, Ms. Enhsing gave some inadmissible opinion evidence that I have simply ignored.
- [62] In August 2018, Ms. Lo added another half day to her schedule, resulting in a full day on Wednesdays and two half days on Mondays and Fridays. Ms. Lo testified to struggling more after the increase, stating her pain increased significantly and she was having headaches every day, which I understood was already the case. She referred to things "crashing down" at the end of August, when her rehabilitation therapist told her she would have expected more improvement by then. Ms. Lo spoke to Dr. Yuen about her worsened symptoms but carried on with the increased schedule, until the Christmas break when, she said, she started seriously questioning her ability to work. Ms. Lo indicated there was a turning point when she woke up with a searing headache after trying to play board games with friends the night before.
- [63] Ms. Lo said she decided to take an extended medical leave in consultation with her medical team, consisting of her rehabilitation therapist, physiotherapist and Dr. Yuen, stating they agreed there was a chance it would lead to recovery. Asked in cross-examination why she did not return to working three half days instead, Ms. Lo said she was told and had hoped her body would get used to the increase, but instead she became a physical and emotional wreck.
- [64] She also acknowledged that after she returned to working part-time and before her extended leave that she was managing her symptoms with over the counter pain medication once or twice a week. Emphasizing she tried to take as little as possible, she specified she would maybe take one if she had a splitting headache and wanted to cry. Without disputing the accuracy of Dr. Yuen's clinical record for June 8, 2018 which referred to Ms. Lo taking medication less than 15 days per month, Ms. Lo maintained she tried not to take medication unless she was screaming in pain.

- [65] Asked to agree that typically she did not experience tension headaches until after work, Ms. Lo equivocated, stating it depended and if she was lucky, it was not until toward the end of the day. She added the moment she let her shoulders drop down or relax, she would feel everything and a headache would come on full force. Ms. Lo also testified her headaches started with neck pain. If she did not stop what she was doing and address the neck pain, migraine features would develop.
- [66] Ms. Lo began an extended medical leave in February 2019. Both Ms. Lo and Mr. Lee indicated that until then, apart from going to work, she spent her time in pain and recovering. She testified somewhat vaguely about how her symptoms changed during her leave, indicating there has been some improvement and she has days without headaches which she attributes to being able to avoid positions that bring on symptoms. She also testified that walking, jogging, exercises, and analgesics, the last of which she continues to avoid unless absolutely necessary, help.
- [67] At some point in 2019, Ms. Lo gave up her status as a practicing lawyer. She described being devastated by the decision, but resigned to being unable to practice law and work long hours due to her symptoms. Ms. Lo identified significant feelings of loss and shame associated with recognizing she was not going to work as a lawyer anymore.
- [68] Asked to describe herself now, Ms. Lo testified her happy, optimistic self has been slowly eroding away. Stating she remains in pain everyday, she said she does not like how she lives, relying on her parents for example to drive her, missing out on important events with friends, not being able to plan for the future, and worrying this is her new normal. Now when she sits for more than one hour her right lower back starts to hurt. As the pain gets worse it still travels to the left.

Effect on Marriage and Lifestyle

- [69] Ms. Lo and Mr. Lee described all aspects of their relationship as significantly impacted by her ongoing symptoms and limitations. They avoid sexual intimacy. Mr. Lee said his whole life has become focused on trying to minimizing tasks for Ms. Lo that might cause a flare-up in symptoms.
- [70] Asked about plans to have children, Ms. Lo testified that they had always remained unclear and she was never very sure. Both she and Mr. Lee testified to really enjoying their lives without children before the accidents and being apprehensive about the change that comes with having a child. Mr. Lee noted their friends with children did not seem to be having a lot of fun. He also gave evidence that it was extremely important to him that Ms. Lo continue to work and remain able to support herself, should something happen to him due to his heart condition.

- [71] Ms. Lo indicated she was even less excited about having a child when, after the Second Accident, Dr. Yuen told her she would probably have more pain during pregnancy. However, she and Mr. Lee proceeded with genetic testing because of his heart defect, and having children remained a possibility.
- [72] In cross-examination, Mr. Lee denied they ever got to the point of trying to conceive, although he acknowledged in 2016 they were concerned Ms. Lo may have contracted the Zika virus while travelling in Asia, because they were told it remains in the body for up to one year. Somewhat reluctantly, he also acknowledged he and Ms. Lo attended an appointment with Dr. Yuen in 2017 to discuss family planning. Further, he agreed Ms. Lo was taking prenatal vitamins in 2018, stating they wanted to have the option and understood she had to take them for three to six months before trying to conceive.
- [73] Both Ms. Lo and Mr. Lee testified that their involvement in social and physical activities has changed significantly since the accidents. They do not go out as much with friends. Their hobbies had included playing video games and board games together and with friends. Ms. Lo indicated that since the accidents looking down and using the controller makes her neck and back seize up, and after 30 minutes of a video game, she has neck pain and a headache, although there are some games she can play for longer. Mr. Lee described Ms. Lo as "demolished" after an evening playing board games with friends.
- [74] Ms. Lo's close friend Pearl Lau gave evidence there has been a change in how they spend their time together but not how much. She described Ms. Lo watching rather than participating during certain activities, the two of them going to movies in a theatre with appropriate seating, and reminding Ms. Lo to get up and move around when they do play board games together. Asked about Ms. Lo's psychological symptoms, Ms. Lau equivocated although she said she did observe Ms. Lo becoming very anxious when they drove past the location of the Second Accident.
- [75] In cross-examination, Ms. Lo acknowledged skiing since the First Accident, emphasizing it has not been often and after a really bad first day at Whistler she spent the rest of the trip in the rental accommodation. Ms. Lo also acknowledged that she remains able to jog and does so regularly, agreeing jogging typically helps with her symptoms unless the weather is really cold. Surprisingly Mr. Lee denied that Ms. Lo had been jogging, testifying he has asked her to jog with him, but it is a struggle to get her to go. Ms. Lo also referred to the use of an elliptical and a stationary bike at the gym but testified that cycling outdoors causes pain and on a couple of occasions, she could not make it home from a bike ride due to low energy. After the Second Accident, her father bought her an e-bike, which has allowed her to travel further. Ms. Lo testified to not using it very often and needing a few days to recuperate when she does.

- [76] Ms. Lo and Mr. Lee described frequent travel before the accidents that often included one big trip and one smaller one each year. Since the accidents they have continued to take trips, although fewer. In 2015, they spent two weeks in Japan and Hong Kong and in 2016 two weeks in Malaysia and Thailand. In cross-examination, Ms. Lo acknowledged jet skiing on one of these trips, also commenting on how much pain she experienced afterwards.
- [77] Ms. Lo also testified that she and Mr. Lee attempted a short road trip to the United States in March 2018, but she was miserable due to increasingly agonizing pain. She described a similar experience during a short trip to the Okanagan, which they drove to over two days due to her symptoms. During Ms. Lo's extended leave, in October 2019, they travelled to Europe for three weeks. Indicating their trips used to involve non-stop activity from early in the morning until late at night, Ms. Lo said they did far less, her especially. She expressed that some days were better than others, she experienced a lot of pain and significant headaches at times despite taking over the counter pain medication, and travel days were hard. Mr. Lee gave very similar evidence.

Housekeeping

- [78] Before the First Accident, Ms. Lo and Mr. Lee shared housework. He enjoyed cooking; she focused on cleaning and was primarily responsible for the laundry. Both testified her cleaning standards were higher than his and she took pride in having a tidy home. After the First Accident, Mr. Lee took on more of the housework. Ms. Lo said she avoided it in order to preserve herself for work.
- [79] Since the Second Accident, she has found housework much harder. Chores such as vacuuming increase her pain significantly and cause really bad headaches, and certain cooking tasks, such as chopping carrots, also cause an increase in symptoms. Without estimating the time involved, both testified Mr. Lee does as much as he can, including batch cooking on weekends. Mr. Lee indicated Ms. Lo feels guilty and sometimes he catches her washing dishes after dinner. Her mother helps with some cooking and some cleaning tasks, such as stripping the bed, which Ms. Lo finds particularly difficult. At some point after the Second Accident, Ms. Lo was approved for two hours per week of housekeeping support.

Treatment

- [80] Before returning to the Law Society part-time in February 2018, Ms. Lo was participating in active rehabilitation three times a week that began with exercising in the pool and then moved to the gym. Once she returned to work, she continued twice a week. Ms. Lo also attended physiotherapy with Mr. Kwan. In response to his suggestion, she tried another physiotherapist who treated her with intramuscular stimulation (IMS), but she did not find it helpful. In August 2019, she began a different kind of physiotherapy that involves fascial manipulation, twice per week, which she indicated is very painful and led to reducing the frequency of her active rehabilitation. Ms. Lo also received chiropractic treatments for about five months. In addition, the chiropractor fitted her with an insert that provides neck

support while sitting. In addition she obtained a footrest.

- [81] Asked in direct examination if any of her treatments resulted in strange sensations, Ms. Lo stated that once with fascial manipulation, she felt the fingers of her left hand go numb; the same thing happened with Mr. Kwan; and even in the few days prior to the trial she had experienced this with some of the fingers of her right hand.
- [82] Referred by Dr. Yuen, Ms. Lo has attended CHANGEpain Clinic, a chronic pain clinic since February 2019, where she has been treated by a Dr. Goddard. During eight group sessions there, Ms. Lo learned about "pain science" and was exposed to a holistic view that addresses the emotional and mental side of chronic pain. She said she found the sessions really helped her to understand her own experience. Dr. Goddard also provided her with trigger point injections that did not result in improvement.
- [83] Ms. Lo testified that physiotherapy and chiropractic treatments have provided her with temporary relief. She felt as though active rehabilitation had resulted in more actual change, although she often experiences pain after doing the exercises.
- [84] In September 2019, Ms. Lo began cognitive behavioural therapy with psychologist Judy Lapage. Ms. Lo gave some evidence about the process of finding a suitable psychologist, as opposed to a clinical counsellor, seeking funding, and being on waitlists, before attending CHANGEpain Clinic. Dr. Lapage, who has experience treating chronic pain is listed on their website. Ms. Lo spoke favourably about her sessions with Dr. Lapage, but did not indicate they had started addressing pain management or specific psychological issues such as driving anxiety.

Recommended Treatment

- [85] The reports and testimony of Dr. Yuen and the independent medical specialists retained to provide expert opinion evidence in this case, including their recommendations, are discussed below.
- [86] In direct examination Ms. Lo was asked about Botox injections which some of the medical experts had recommended for headaches although not unreservedly. She said she reviewed and discussed each expert's report and recommendations with Dr. Yuen and Dr. Goddard. According to Ms. Lo, neither were in favour of her using Botox.
- [87] In cross-examination she was asked about other recommendations including various prescription medications, as well as a delay in starting counselling or therapy, which Dr. Yuen began recommending in June 2018.
- [88] Ms. Lo did not dispute the timing of Dr. Yuen's recommendations and acknowledged her occupational therapist also recommended counselling in the fall of 2018. Asked why she delayed until September 2019, Ms. Lo emphasized that her symptoms of depression and anxiety came on gradually, and she was slow to recognize them due to her Asian upbringing, indicating her family was not comfortable discussing or displaying emotion. Mr. Lee said

much the same thing, stating Chinese culture makes it difficult even for the two of them to talk about mood. Ms. Lo also suggested she feared being judged by the legal community, stating if a lawyer's mental health is compromised, it can be bad for their future, although she was aware she could access confidential free counselling through the Lawyers Assistance Program.

- [89] In cross-examination Ms. Lo acknowledged that more than once Dr. Yuen also recommended Cymbalta or duloxetine, an anti-depressant medication used to treat chronic pain and mood issues, and she explained its potential benefits. Dr. Yuen told her it could clarify her thinking in response to Ms. Lo's concern about its impact on cognition. According to Ms. Lo, Dr. Yuen presented duloxetine as offering at best a 50/50 chance of reducing her pain and improving her mood and agreed it was also appropriate for her to continue with more natural means, although Dr. Yuen did not give this evidence.
- [90] When questioned about other recommended medications, including other anti-depressants such as Elavil, used to treat pain and headaches as well as depression, Ms. Lo could not recall if Dr. Yuen or the recommending experts discussed its particular benefits with her. She indicated Dr. Goddard told her about each medication and to research them herself which she did. Ms. Lo stated he also expressed the view they offered a 50/50 chance of improvement, and some were toxic for a person as young as she was, or had side effects.
- [91] There is no direct evidence regarding the treatment or advice Dr. Goddard provided. Of course, Ms. Lo's testimony about what he told her is admissible for the fact, not the truth of what he said. Asked whether she accepted his opinion over everyone else's, including Dr. Yuen, Ms. Lo was somewhat unresponsive. Instead she stated she felt as though she had done so much; the psychiatrist she retained (Dr. Mitchell Spivak), told her cognitive behavioural therapy may be even more beneficial than anti-depressant medication; and she would consider medication as a last resort. Ms. Lo emphasized she preferred not to take drugs that would affect her brain chemistry.
- [92] Pressed about whether now was the time to try medication, given she had not been working for nine months and her long term participation in a range of physical therapies, Ms. Lo disagreed, referring again to her preference for natural treatments.
- [93] Mr. Lee gave very similar evidence, when asked in cross-examination if he was discouraging Ms. Lo from using prescription medication. He testified that while none of the recommended drugs were "off the table", none have been presented as a miracle cure, and they have received mixed advice about some, with one doctor describing a particular medication as toxic and not to be taken long term. Like Ms. Lo, he said he wanted to make sure she had exhausted natural options before taking medications that will simply cover her symptoms, adding he wants her not to be in pain because nothing is causing her to be in pain.

Medical Evidence

[94] As I have said, Ms. Lo and the defendants rely upon multiple medical experts all of whom testified. Five of the expert witnesses provided multiple reports, some of which were responsive, making for a somewhat unwieldy record of expert opinion evidence. In an effort to discuss their evidence coherently and efficiently, I begin with the only treating physician, Dr. Yuen, followed by psychiatrist Dr. Spivak, both of whom were retained by Ms. Lo and prepared single reports. After that, I consider together the "competing" evidence of physiatrist Dr. Zeeshan Waseem, retained by Ms. Lo, and orthopedic surgeon Dr. Stephen Sohmer, retained by the defendants; followed by occupational therapist Theresa Wong retained by Ms. Lo and functional capacity evaluator Ralph Kowalik retained by the defendants; and lastly neurologist Dr. Manu Mehdiratta and neurosurgeon Dr. Navraj Heran, retained by Ms. Lo and the defendants respectively.

Dr. Michelle Yuen

[95] In her report dated August 18, 2019, Dr. Yuen expressed the opinion that Ms. Lo suffered a soft tissue injury to her neck attributable to the First Accident and the Second Accident caused a re-injury to her neck, along with new soft tissue injuries to her mid and lower back. Dr. Yuen also diagnosed Ms. Lo with accident-related chronic myofascial neck, upper and lower back pain; tension headaches secondary to myofascial neck pain; and depressive symptoms. She concluded a further diagnosis of right-sided TMJ was only possibly attributable to the accidents.

[96] Dr. Yuen's report includes "notes" derived from her clinical records and occasionally those of other physicians at her medical clinic regarding Ms. Lo's accident related appointments. As part of Dr. Yuen's evidence, Ms. Lo relies on the notes. The notes, like the underlying clinical records that are also in evidence, to the extent they record what Ms. Lo reported or stated are subject to the common law regarding hearsay evidence. Typically considered "business records" the admissibility of clinical records is also governed by s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124.

[97] In *Sahota v. Slupskyy*, 2019 BCSC 2215, Justice Kent recently discussed some of the principles governing the admission and use of clinical records at para. 64:

- clinical records are admissible evidence of the fact that the plaintiff attended upon the medical professional on the date indicated and received the treatment recorded;
- any recorded observations, diagnosis and administered treatment are admissible to prove the fact of their occurrence;
- any opinions, including diagnoses, recorded in the clinical records by the health professional are admissible for the fact that they were made at the time but not for their truth or correctness in the absence of any other properly admissible opinion evidence to that effect;

- any statements of the plaintiff recorded in the clinical records are admissible to prove the fact that such statements were made but not for the truth of their contents, unless the statements constitute an admission against the plaintiff's interests or the plaintiff otherwise adopts at trial the statements as being true; and
- the plaintiff's statements recorded in clinical records may also be used as evidence of a prior inconsistent statement on the part of a plaintiff provided the cross examiner complies with the impeachment requirements of the Evidence Act.

[Emphasis added.]

- [98] Regarding the admissions exception to the hearsay rule, in *Firman v. Asadi*, 2018 BCSC 2437 at para. 29, Justice Verhoeven clarified: "[w]ith respect to clinical records, if I am satisfied that the plaintiff made a statement, and if I am satisfied that it proves an admission against her interest, or the plaintiff adopts as true the statement at this trial, then the statement can be admitted for proof of its contents".
- [99] Earlier, Justice N. Smith, in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, considered in some detail the specific issues surrounding plaintiff's statements in clinical records, after reciting the principles summarized in *McTavish v. MacGillivray* (1997), 38 B.C.L.R. (3d) 306 at 311-12 which included:
8. Statements made by parties or by experts which are recorded in the usual and ordinary course of business but which lie outside the exception to the hearsay rule are hearsay and will not be admitted into evidence unless they can be brought within Section 14 of the Evidence Act which allows for the admissibility of such statements if it can be shown that they are proof of a prior inconsistent statement.
- [100] Justice Smith observed the last point referred to the procedure for cross-examining a witness on a prior inconsistent statement. Noting that prior inconsistent statements of a party may also be treated as admissions and accepted for the truth of their content, he outlined "important qualifications" that apply to statements in clinical records regardless of how they are used, observing they are brief summaries or a paraphrase of what or part of what the plaintiff actually said, which she is unlikely to recollect. Justice Smith went on to consider one, the absence of a reference to a symptom in a clinical record; and two, the complete absence of a record. Regarding the first, he concluded the absence of a reference to a symptom in the record for a particular visit cannot be the sole basis for the inference about the existence or non-existence of that symptom. Regarding the second, while acknowledging that there may be cases where the plaintiff's description of symptoms is inconsistent with a failure to seek medical attention, he concluded that otherwise the same reasoning applies.

- [101] The Court of Appeal's decision in Edmondson, clarified that these "propositions" do not amount to legal principles applicable in every case. Nonetheless, I accept that Smith J.'s cautious approach to the use of a party's statements contained in clinical record remains instructive.
- [102] I also note that regarding "medical records", the parties' document agreement provides at para. 4 that they agree "the history was taken as recorded". At para. 5 however the agreement states that: "pursuant to *Samuels v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431, no party shall attempt to tender clinical records into evidence unless the party first identifies the specific purpose for which the specific portion of the clinical record is being tendered". I do not recall there being any specific discussion and certainly no objection to the admission of the clinical records that are in evidence. Paragraph 6 allows any party, including the tendering party, to attack the truth of a document or contradict it in any way.
- [103] As I have indicated, Ms. Lo did not dispute the accuracy of the particular clinical records of Dr. Yuen (or Mr. Kwan) that were put to her during cross-examination. Ms. Lo gave no evidence regarding the content of Dr. Yuen's report. In other words, Ms. Lo did not "attack the truth of" or resile from Dr. Yuen's account of what she reported, portions of which are inconsistent with Ms. Lo's evidence. In my view, although it is open to me to consider them as admissions, given Ms. Lo's unqualified reliance on Dr. Yuen's evidence, I will instead focus on the inconsistencies between Ms. Lo's testimony and the notes as well as the accounts of other medical experts on whose evidence Ms. Lo relies in assessing her credibility.
- [104] Returning to Dr. Yuen's notes, they confirm that Ms. Lo's second accident-related appointment occurred on June 22, 2015, over four months after the first. Bearing in mind Smith J.'s comments and well aware that Ms. Lo attended physiotherapy during this period, I consider the absence of any appointments with Dr. Yuen for that length of time inconsistent with her testimony about how significant if not severe her neck pain and headaches were after the First Accident, especially initially. At the second appointment, Ms. Lo told Dr. Yuen her neck and upper back pain was improved, her headaches were "1-2x per month" and she had some constant neck stiffness, much less significant and frequent symptoms than she suggested in her evidence.
- [105] According to Dr. Yuen's notes, Ms. Lo's symptoms remained comparatively mild for a time. On February 5, 2016, Ms. Lo attended for ongoing neck, shoulder and upper back stiffness and pain, and secondary headaches two or three times a month at the base of her "occiput" and occasionally behind her left eye. On April 22, 2016, Ms. Lo had "no new symptoms". She reported she was still experiencing headaches every two weeks that were mild but would last a few days.

- [106] The notes for the first few months of 2017 indicate Ms. Lo reported worse or increased symptoms, inconsistent with the trajectory she described in her testimony. For example, on March 3, 2017, Ms. Lo reported that she was "now" experiencing "daily neck pain with associated headaches".
- [107] The notes then go on to indicate improvement. For example, on May 26, 2017, Ms. Lo reported improvement in the severity of her pain with physiotherapy and jogging or walking regularly, along with baseline pain of "2-5/10". Similarly, on July 7, 2017, Ms. Lo reported her neck pain was improving with longer periods of relief after physiotherapy. Her headaches were occurring once or twice every one to two weeks and would resolve in a day with analgesics.
- [108] The notes regarding her next appointment, a few days after the Second Accident on November 23, 2017, provide that Ms. Lo reported feeling immediate neck pain and stiffness and her back stiffen the next day at work. She was very sore on November 22, 2017 and had current symptoms that included right neck pain radiating down to her lower back. The notes do not refer to headaches after the Second Accident until January 9, 2018, Dr. Yuen wrote that Ms. Lo attended an appointment that day with a headache and neck pain that had been continuous for a few days, and required her to take ibuprofen a few times within the week.
- [109] Dr. Yuen's more recent notes also demonstrate that Ms. Lo reported earlier and more improvement in her symptoms after her extended leave began in February 2019, than she did in her evidence. On March 22, 2019, Ms. Lo reported her headaches were improved, triggered by specific activities like computer use and "[s]he was able to go several days without a bad headache". Similarly on May 22, 2019, she reported her headaches overall had been better since being off work, but they were triggered by specific activities. Dr. Yuen also wrote Ms. Lo felt less fear of triggering a flare in pain when going out with friends, and she was able to do more overall, as long as the activity did not require sitting. At the next appointment on June 26, 2019, Ms. Lo reported feeling better overall. The notes for the last appointment referred to in Dr. Yuen's report, July 22, 2019, again referred to Ms. Lo feeling she was improving overall, less stressed, able to recognize early signs before pain really flared, as well as trying to do more such as bike riding.
- [110] Regarding treatment for psychological symptoms, Dr. Yuen's notes state that on June 8, 2018, she advised Ms. Lo to consider counselling, also stating her diagnoses "remained" chronic soft tissue injuries of the neck and back, and "reactive depression". On October 29, 2018, Ms. Lo told Dr. Yuen an occupational therapist had recommended counselling, and she was experiencing increased emotional difficulties but she was still considering counselling, apparently worried about the extra time involved. Dr. Yuen described Ms. Lo as presenting with a "slightly depressed affect" and having some difficulties with her marriage, but remaining motivated with good insight.

- [111] On February 5, 2019, Dr. Yuen again advised Ms. Lo to seek counselling both individually and with her husband, "as they are grieving a loss with lifestyle changes and family goals". On February 20, 2019, Ms. Lo told Dr. Yuen she had received funding for counselling. On May 22, 2019, Dr. Yuen discussed with Ms. Lo trying an antidepressant like duloxetine (Cymbalta), also used to treat chronic pain, but she was not ready to try any medication yet. On June 26, 2019, Ms. Lo relayed to Dr. Yuen that a psychiatrist (Dr. Spivak) felt there was some urgency to her seeing a psychologist, which alarmed her. She was on a waitlist through ICBC. That same day, although tearful, Ms. Lo stated she was feeling better overall and her emotional lows were directly related to her physical condition. She and Dr. Yuen again discussed a medication trial, but Ms. Lo was still not ready.
- [112] In cross-examination, Dr. Yuen agreed that counselling can help a person cope with pain. She clarified that she suggested duloxetine when she did because by then Ms. Lo had been experiencing pain for a number of years and was presenting with symptoms of depression. Dr. Yuen believed that duloxetine could help with both, and although there are risks with any medication, viewed it as relatively safe overall. She confirmed she explained duloxetine could clarify her thinking when Ms. Lo indicated she was worried about side effects and in particular cognitive side effects. Dr. Yuen agreed that if it worked for Ms. Lo, duloxetine could both decrease her pain and increase her functioning.
- [113] In discussing Ms. Lo's pre-accident condition, Dr. Yuen wrote she presented once with a severe headache that may have been a migraine, which coincided with a viral upper respiratory illness, and Ms. Lo often experienced mild headaches with her menstrual cycle. In cross-examination, Dr. Yuen confirmed the severe headache was in December 2014.
- [114] Referring to "periodic" physiotherapy for neck pain related to sitting in the two to three years before the First Accident, and some periodic neck pain that resolved with physiotherapy treatment, Dr. Yuen wrote that she did not view previous neck pain as a factor in the injuries caused by the accidents. During cross-examination it was clarified Dr. Yuen had not received the pre-accident physiotherapy records before preparing her report. Taken to them, she agreed Ms. Lo's pre-accident neck pain would be a contributing factor. Asked about headache references in those records that spanned 12 days, Dr. Yuen also agreed they were not consistent with a menstrual headache, further expressing the view Ms. Lo's menstrual headaches likely would have continued after the accidents.
- [115] Writing that Ms. Lo has suffered "significant" functional impairment due to her injuries, Dr. Yuen described her as unable to return to full-time work after the Second Accident. She also described Ms. Lo as impaired from doing heavy household chores and simple tasks such as meal preparation, recreationally and socially, due to the aggravation of her symptoms that results from prolonged standing and sitting.

- [116] Dr. Yuen's report discussed Ms. Lo taking a long-term medical leave in the hope that it would allow her symptoms to improve. Asked in direct examination whether Ms. Lo did improve, Dr. Yuen testified that Ms. Lo reported her headaches became less severe and prolonged, but she still could not sit for extended periods. In cross-examination, Dr. Yuen agreed the leave was Ms. Lo's idea, which she supported, and its length was based on what the Law Society would allow.
- [117] In her report, Dr. Yuen identified Ms. Lo's prognosis as poor for full recovery from all symptoms, and for returning to work that requires prolonged sitting or standing, "given the duration she has been off work and the lack of progress to returning to her regular 'IADLs'", or independent activities of daily living. In direct examination she testified that if Ms. Lo cannot do the sitting and standing required for IADLs, it is not likely she can work a full day.
- [118] Addressing future treatment, Dr. Yuen specified Ms. Lo will likely need to continue with active rehabilitation which has been most beneficial, until she improves to a new baseline. Dr. Yuen also predicted Ms. Lo would likely require periodic physiotherapy, massage therapy, and active rehabilitation in the future based on the risk of flares in her neck and back pain.

Dr. Mitchell Spivak

- [119] Dr. Spivak is a psychiatrist who has been in private practice since 2013. His private practice includes outpatient consultations and independent medical examinations.
- [120] He interviewed Ms. Lo on June 22, 2019 and prepared a report dated the following day. Dr. Spivak's opinions are based primarily on the interview. Ms. Lo told him that in mid-2018 after the Second Accident, she developed depressive symptoms which she viewed as a by-product of struggling at work with headaches that became more severe when she pushed herself. Ms. Lo identified passive suicidal thoughts, very much at odds with her previous functioning, and significant anxiety related to driving. Dr. Spivak noted she did not describe cognitive challenges without headaches, instead reporting difficulty focusing and completing tasks effectively when she was experiencing them. Ms. Lo outlined conflict in her marriage related to her condition, which had improved since her medical leave, as well as being quite devastated first by having to accept she would not be a lawyer temporarily, followed by not being able to work full-time and finally, not being able to work.
- [121] Dr. Spivak's report indicates Ms. Lo was off work at the suggestion of Dr. Yuen. At odds with her rather vague evidence on this point, Ms. Lo told him her emotional functioning along with her experience of pain had improved significantly since the start of her leave. He wrote: "she now recognizes the importance of moving around throughout the day, and avoiding a still posture, reading or looking at the computer screen for prolonged periods of time". Ms. Lo advised Dr. Spivak, Dr. Yuen had recently recommended psychotropic medication but she would prefer not to take it.

- [122] His assessment included a mental status exam. He described Ms. Lo as presenting well. Her insight and judgment appeared intact. Similarly, her cognition appeared grossly intact, although he did no formal testing. He also noted her thought process was goal oriented.
- [123] Dr. Spivak diagnosed Ms. Lo with a major depressive disorder with anxious distress, and somatic symptom disorder with predominant pain, caused by the accidents, and more specifically her issues with pain. He commented that although her symptoms and experience of pain had improved significantly since her leave, she continued to struggle with negative cognitions, feelings of failure and a great deal of anticipatory anxiety about returning to work and "failing" again. Referring to Ms. Lo as highly pain focused, he wrote that she seemed to be in a cycle where her emotional experience and her chronic pain affected each other. In cross-examination he testified her pain was driving everything. If her pain went away, her function would improve and she would feel better.
- [124] Dr. Spivak recommended 10 to 20 sessions of cognitive behavioural therapy "on a fairly urgent basis" also stating more may be required, but the need should be evaluated once she completes the first course. In his report, he expressed an optimistic view regarding the effect of cognitive behavioural therapy on Ms. Lo's depressive symptoms and pain. He also described her prognosis as guarded, however, due to the uncertainty arising from the lack of treatment so far, and conversely, Ms. Lo's future orientation and previous psychological resilience.
- [125] Dr. Spivak also recommended an antidepressant as potentially beneficial, suggesting a trial of medication such as duloxetine was reasonable, because of its effects in managing myofascial pain. In direct examination, Dr. Spivak testified he was not recommending medication as a first line of treatment for depression because Ms. Lo was not disposed to it, and her mood symptoms were not severe. He also gave evidence it is not atypical for patients averse to anti-depressants to have bad side effects, based on his own anecdotal experience and that of other psychiatrists. This is hearsay evidence as it relates to the experiences of other psychiatrists, but even as it relates to Dr. Spivak, I view it as less than sufficiently reliable and am therefore not prepared to accept it.
- [126] In cross-examination, Dr. Spivak emphasized the universal placebo effect of 30%, but also testified that 60% of patients improve with anti-depressants. He acknowledged that duloxetine is widely used, well-studied and by reducing their experience of pain, helpful for people with chronic pain. Further, he agreed it can be a first line of treatment for those with moderate depression and he has prescribed it many times.

Ms. Theresa Wong and Mr. Ralph Kowalik

- [127] Mr. Kowalik, retained by the defendants, evaluated Ms. Lo's functional capacity on September 13, 2017, shortly before the Second Accident. In his report dated October 11, 2017 he concluded, based on objective testing, that Ms. Lo met and exceeded the physical demands of an intake officer. Noting her subjective report that headaches in particular, but

also neck and upper back pain, made her less competitive as a lawyer, and unable to continue as associate counsel working long hours, Mr. Kowalik wrote that physically the job demands of a paralegal position and a lawyer are very similar. In direct examination he testified that both are classified in the same category sedentary, under the National Occupational Classification 2016.

- [128] Regarding body position tolerances, Mr. Kowalik found Ms. Lo's tolerance for sitting unrestricted, noting she sat for a total of 180 minutes, which included sustained sitting for one hour and 22 minutes. But she did report increased neck and upper back pain and the need to stretch her neck. He also found her standing unrestricted, noting she stood for a total of 95 minutes, and sustained standing for 26 minutes. But again she reported increased neck and upper back pain and the need to stretch her neck.
- [129] In cross-examination he agreed there was no objective testing for headaches.
- [130] Ms. Wong's Supplementary Report dated September 12, 2019 discussed her functional screening assessment of Ms. Lo conducted in her home, which unlike Mr. Kowalik's evaluation, did not include objective measures or validity testing.
- [131] Ms. Lo reported experiencing headaches on a regular basis related to her activity levels, neck pain, and pain in the upper back, right scapular region, mid back and low back on the right side. Ms. Wong wrote that Ms. Lo's numeric pain ratings were between 3-4/10.
- [132] Based on her observations, Ms. Wong estimated some limitations in Ms. Lo's range of motion, some of which she corrected during cross-examination.
- [133] Regarding Ms. Lo's physical capacity, Ms. Wong wrote that Ms. Lo had some limitations with lifting, carrying, reaching, stooping and sitting tolerance, but no functional implications with standing tolerance, walking, stair climbing, grip strength, activity tolerance or balance. Ms. Wong identified Ms. Lo's limitations aside from sitting as affecting her participation in housekeeping or yard care activities. Only her sitting tolerance of "approximately 50 minutes" was identified as affecting Ms. Lo's participation in work activities. In assessing Ms. Lo's activity tolerance Ms. Wong noted Ms. Lo did not request any breaks during the two hour assessment.
- [134] Ms. Wong's report referred specifically to "demonstrated" continuous sitting and standing tolerances of approximately 50 and 20 minutes respectively. Cross-examined about how she determined Ms. Lo's sitting tolerance, Ms. Wong said she simply made a note of when she sat and stood.
- [135] I discuss Ms. Wong's Occupational Therapy - Cost Report below.

Dr. Zeeshan Waseem and Dr. Stephen Sohmer

- [136] Dr. Waseem, a physiatrist retained by Ms. Lo, prepared four reports dated January 16, 2017, August 10, 2018, and September 9, 2019 ("Responsive and Addendum Reports"). Dr. Sohmer, an orthopedic surgeon retained by the defendants, prepared two dated May 29, 2017 and August 9, 2019.
- [137] In his first report, Dr. Waseem expressed the opinion the First Accident caused sprain/strain soft tissue injuries of Ms. Lo's cervical and thoracic spine, resulting in chronic myofascial pain syndrome, with associated cervicogenic headaches with migraine features. During his physical examination of Ms. Lo's cervical and thoracic spine he noted pain with palpation and increased muscle tone, spasms, taut bands and trigger points in the suboccipital, cervical paraspinals, upper fibers of the trapezius, levator scapula, scalene and splenius capitis/cervicis muscles bilaterally. He recorded much the same regarding the upper thoracic multifidus and paraspinal muscles bilaterally.
- [138] Identifying headaches as her primary complaint, Dr. Waseem wrote that Ms. Lo reported no change in the headaches she had experienced since the First Accident, inconsistent with her evidence, Dr. Yuen's report and Mr. Kwan's evidence. She also reported her "current" headaches were more frequent than before the First Accident, but she was unsure to what extent they differed. In addition to neck and upper back symptoms, he noted sitting and standing tolerances of a few hours.
- [139] Dr. Waseem opined that Ms. Lo's prognosis for "full symptomatic recovery" was poor given the duration of her symptoms and "minimal" improvement since the First Accident, despite appropriate treatment. Although she was working full-time as an intake officer, he also expressed the opinion that pain and headaches "will" prevent her from her chosen profession as a lawyer and place her in jeopardy of relinquishing her qualifications to practice law in the future.
- [140] In his second report, Dr. Waseem opined that Ms. Lo re-injured her cervical and thoracic spine aggravating her neck/upper back pain and headaches, and also suffered a new sprain/strain soft tissue injury of the lumbar spine due to the Second Accident. Similar to his first report, he wrote these injuries had resulted in chronic aggravated myofascial pain of the cervical, thoracic and lumbar spine with associated cervicogenic headaches with migraine features. His central examination findings regarding her cervical and thoracic spine were virtually identical to those set out in his first report. He also used precisely the same language to describe his findings regarding her lumbar spine, other than noting no pain to palpation.
- [141] Again identifying headaches as her primary complaint, Dr. Waseem recorded the same current headache symptoms set out in his first report plus: "felt once daily lasting several hours to up to an entire day at intensity 2-7 of 10"; "no recovery" between the First and Second Accidents, inconsistent with Ms. Lo's evidence and Dr. Yuen's notes; and "worsened after the Second Accident and symptoms have not resolved to prior baseline". He also

recorded a change in Ms. Lo's reported sitting and standing tolerances to one hour and 30 minutes respectively.

- [142] Regarding her neck and upper back pain, Ms. Lo reported only 25% recovery before the Second Accident, again inconsistent with her evidence.
- [143] Regarding Ms. Lo's current functional status, Dr. Waseem wrote that Ms. Lo reported being completely unable to perform normal housekeeping for a few weeks after the Second Accident, but then resuming them at a reduced frequency, slower pace, taking breaks and with pain.
- [144] Despite a poor prognosis for full symptomatic recovery, from a "strictly physical perspective", Dr. Waseem predicted that over the next one to two years Ms. Lo would be able to return to working full-time/full capacity with the Law Society, provided she was accommodated to work at her own pace and take breaks as needed. Although he again expressed the view that her pain and headaches "will" prevent her from returning to law, in cross-examination, he agreed Ms. Lo could also practice law working "normal" full-time hours, with the same accommodations, testifying the opinion to the contrary was based on what she told him at the time.
- [145] In Dr. Sohmer's first report, he diagnosed Ms. Lo with soft tissue injuries to her neck, upper back, and trapezius area and associated headaches. Referring to his examination findings as consistent with a grade 2 whiplash associated disorder (WAD), he noted she had pain and tenderness in the paracervical and upper trapezius muscles on both sides, the lower trapezius muscles and the rhomboid area, and some limitations in her range of motion. Dr. Sohmer's prognosis for further as opposed to complete recovery of Ms. Lo's "soft tissue injuries" was good. Expressing the view she had not obtained appropriate treatment, he opined it was highly probable that she would notice improvement over time with guided active rehabilitation, which he viewed as "absolutely critical".
- [146] Regarding Ms. Lo's ability to work, Dr. Sohmer observed that while she reported ongoing intermittent symptoms she had been able to work full-time at her current position, without missing any time. Assuming the physical demands of paralegal and legal work were the same, he could see no reason why she could not return to working as a lawyer.
- [147] Dr. Sohmer's second report, completed after Ms. Lo was on her extended leave, again diagnosed her with a grade 2 WAD, associated headaches, as well as a soft tissue injury to her low back all due to the Second Accident. His examination findings are the same as those set out in his first report, which he characterized as subjective pain complaints without any significant objective findings.
- [148] Dr. Sohmer also discussed x-rays of Ms. Lo's cervical, thoracic, and lumbar spine and sacroiliac joint from June 14, 2018, opining she has mild osteo-arthritis in the cervical spine that was pre-existing and not caused by the accidents. Noting her pre-accident history of neck symptoms, he wrote:

In the absence of the accident, it is possible that this condition would have become symptomatic, but not necessarily so. I do not believe the accident has led to any material worsening of this underlying condition. I do not believe there is a risk of any future condition (i.e. arthritis) that could result from the injuries she sustained in this accident. Nor do I believe that this injury will make her more susceptible to further injury in the future. The question to ask is how much of her residual symptoms are due to the accident-related injuries, versus how much of her residual symptoms are due to her age related degenerative condition. The answer is difficult, and I believe that her ongoing symptoms may be due to a combination of both the soft tissue injuries and the underlying condition. It is difficult in this case to say which of these is the more prominent factor, as her reported symptoms are unusually severe in light of the injury and the degree of severity of her underlying OA [osteoarthritis] (i.e. mild).

- [149] Dr. Sohmer's prognosis for further recovery of Ms. Lo's soft tissue injuries again was good. Commenting she had noticed improvement in the previous six months, he wrote it was highly probable she would notice further improvement with time, as well as treatment and exercise and would be left with ongoing, mild residual symptoms over the long term. He commented her treatment, namely active rehabilitation, was reasonable but not optimal and recommended increasing the frequency and extent of her home exercises. Describing Ms. Lo as remaining pain focused, he also stated she needed to learn to work through her pain and the difference between pain and hurt.
- [150] Addressing her work capacity, Dr. Sohmer expressed the view Ms. Lo's extended leave was not medically justified "from an orthopedic point of view". In his opinion, she was not at all disabled from sedentary work. On the contrary, he regarded her as physically able to work full-time as a lawyer. The issue, according to Dr. Sohmer, was Ms. Lo needed to believe this herself. He also wrote he could see no reason why she could not consider a return to work plan and it was not in her best interest to continue on "this current path". During cross-examination he agreed his opinion about her ability to work was not based on her headaches, pain or psychological symptoms. He also agreed he would defer to a neurologist regarding the diagnosis and treatment of headaches.
- [151] Addressing Dr. Sohmer's second report, Dr. Waseem's Responsive Report included: it is not possible to predict when degenerative changes might become symptomatic; Dr. Sohmer did not appear to consider Ms. Lo's sitting tolerance; and it is unclear how he would define "significant" objective findings. Dr. Waseem disagreed with Dr. Sohmer's opinion that Ms. Lo's injuries will not have a significant negative effect on her ability to work in the future, given the limits she described and the chronicity of her condition (pain, headaches and reduced sitting tolerances).
- [152] Dr. Waseem also wrote that he largely agreed with the "comments" and recommendations of Dr. Heran discussed below, including there is no medical contraindication to Ms. Lo working in a sedentary capacity. However, he "reiterate[d] her symptoms have caused her to experience limitations in this regard".

[153] I refer to Dr. Waseem's Addendum Report, which reviews Ms. Wong's Cost of Future Care Report below.

Dr. Manu Mehdiratta and Dr. Navraj Heran

[154] Dr. Mehdiratta, a neurologist retained by Ms. Lo, prepared reports dated October 26, 2017, July 18, 2019, and October 4, 2019 ("Addendum and Responsive Reports"). Dr. Heran, a neurosurgeon retained by the defendants, prepared reports dated October 27, 2017, August 12, 2019, September 3, 2019 ("Addendum Report") and October 17, 2019 ("Addendum Report - MRI").

[155] In his first report, Dr. Mehdiratta diagnosed Ms. Lo with "a head injury with post-concussion syndrome", chronic migraines and medication over use headaches, as a result of the First Accident. His diagnosis of head injury with post concussion syndrome was based on factual assumptions that included Ms. Lo's report of poor memory immediately following the First Accident, dizziness, nausea, and a headache at the scene, and a score of 26 out of 30 on the Montreal Cognitive Assessment ("MOCA"), a cognitive screening tool. He specified that Ms. Lo lost points for orientation and poor recall. Based on her score he recommended a neuro-psychological assessment.

[156] Dr. Mehdiratta was cross-examined at some length about the significance of the MOCA score. He testified that 26 was abnormally low for someone of Ms. Lo's age and intelligence.

[157] Regarding her ongoing symptoms, Dr. Mehdiratta's first report described Ms. Lo experiencing one to four headaches per week, lasting a few hours and occasionally two days, located behind the eyes and then radiating to her entire head, with "photophobia, phonophobia, nausea, and intermittent dizziness, and an intensity of 3-8 out of 10", worse symptoms if taken together and more frequent, than those recorded by other experts. Ms. Lo also told him she had decreased concentration with headache pain, and bilateral neck pain.

[158] With respect to his opinion about medication overuse, to my surprise, Dr. Mehdiratta testified this becomes a concern when Advil or Tylenol are used more than twice per week. Ms. Lo reported taking Tylenol twice per week and Advil one to four times.

[159] Dr. Mehdiratta recommended a trial of Elavil or Botox injections, in conjunction with decreased use of Advil to better manage her "chronic migraines". He testified that Elavil, a tricyclic antidepressant that reduces subjective pain symptoms, is often a first line agent for migraine prevention and was reasonable to try, particularly for someone like Ms. Lo who was experiencing sleep difficulties, noting side effects can include drowsiness and weight gain. In cross-examination he indicated nearly half of his patients responded well to Elavil and "put up" with side effects, also suggesting Ms. Lo would likely have side effects. He agreed that some side effects such as dry mouth decrease over time, and with improved sleep, headaches tend to improve as well.

- [160] Dr. Mehdiratta's second report, dated more than 18 months after the Second Accident, noted that Ms. Lo reported that most of her symptoms from the First Accident had resolved by the time of the Second Accident, to the point she could function at "70% of normal".
- [161] In terms of her current symptoms, Ms. Lo complained of headaches one to five days per week, or at least 15 days per month, at an intensity of five to eight out of 10; upper, mid, and low back pain; a decrease in memory and concentration; depression, low mood, anxiety and irritability; and poor sleep, along with some other symptoms.
- [162] Dr. Mehdiratta recorded a score of 27 out of 30 on her MOCA test "suggesting cognitive deficits" and a score of 13 on the "PHQ-9" "suggesting moderate depression".
- [163] His second report set out his diagnoses as follows:
- Mild traumatic brain injury (mTBI) (February 7, 2015 accident)
 - Persistent post-concussion syndrome (February 7, 2015 accident)
 - Post traumatic, migraine type headaches (Both accidents)
 - Mood disturbance (Both accidents)
 - Possible cervical myelopathy given positive Hoffman's sign bilaterally
- [164] Dr. Mehdiratta also expressed the view that Ms. Lo's ongoing low mood, headaches and poor sleep were exacerbating her subjective cognitive complaints.
- [165] In direct examination he testified he meant to write that both accidents caused mTBI and concussion.
- [166] In his second report, he identified the clinical signs of concussion immediately following an injury as including any of the following:
1. Any period of loss of or a decreased level of consciousness less than 30 min.
 2. Any lack of memory of events immediately before or after an injury (post-traumatic amnesia) less than 24 hours.
 3. Any alteration in mental state at the time of the injury (e.g. confusion, disorientation, slowed thinking, alteration of consciousness/mental state).
 4. Physical symptoms (e.g. vestibular, headache, weakness, loss of balance, change in vision, auditory sensitivity, dizziness).
 5. Note: No evidence of intracranial lesion on standard imaging (if present suggestive of more severe brain injury).

- [167] At para. 310, he described Ms. Lo as "clearly endorsing a period of confusion and disorientation" following the First Accident. Concluding Ms. Lo's "collision-related impairments" were directly related to the "indexed" collision, Dr. Mehdiratta also wrote that Ms. Lo had concussive symptoms when she saw her family doctor three days after each accident.
- [168] In cross-examination he said the reference to confusion and disorientation following the First Accident should have read Second Accident. He also said that the mTBI from the Second Accident was more severe based on her confusion and disorientation. Agreeing Ms. Lo's description of the Second Accident was more detailed and she actually reported to Dr. Yuen that she was shaken up not confused, he testified this did not mean she remembered everything or that she was not confused. Regarding the First Accident, he denied her memory was quite detailed, and stated given it was a traumatic event he would expect her to remember all the details. After persistent questioning, he agreed it was Ms. Lo who told him she experienced a poor memory right after the First Accident.
- [169] Dr. Mehdiratta was somewhat unresponsive to the suggestion Dr. Yuen's clinical record for November 23, 2017, Ms. Lo's first visit after the Second Accident, demonstrated she had a clear recollection of what happened and she did not report immediate symptoms of nausea, headache or dizziness. Asked if he stood by the assertion Ms. Lo described concussive symptoms to her family doctor during that visit, Dr. Mehdiratta commented that she described them to him and emphasized his diagnosis of concussion in relation to the First Accident was based on her immediate symptoms at the scene. He also testified Dr. Yuen may not have asked the appropriate questions and her records indicated she seemed focused on Ms. Lo's neck instead of her head. He gave similar evidence when confronted with Dr. Yuen's clinical records for December 7, 2017, which made no reference to headaches, and February 13, 2015, the first appointment after the First Accident, which made no reference to ongoing dizziness or nausea.
- [170] Taken to factual errors in the first draft of his second report, Dr. Mehdiratta acknowledged one but not another, and denied a lack of care had any impact on the accuracy of his opinions.
- [171] In his first report, Dr. Heran diagnosed Ms. Lo with myofascial injuries to the neck and upper torso, and cervicogenic headaches, due to the First Accident. He also diagnosed her with tension and migraine type headaches unrelated to the First Accident, based on the history she provided and his review of the pre and post-accident clinical records of Dr. Yuen and Salus Physiotherapy (Mr. Kwan).
- [172] Noting references to headaches arising from muscle tension and migraines in the records of both, he also wrote the pre-accident physiotherapy visits did not appear to be "well visits".
- [173] In direct examination Dr. Heran pointed out the first physiotherapy record from 2012 discretely outlined symptoms in the neck and upper torso, and associating headaches. Subsequent pre-accident records referred to Ms. Lo having difficulty lifting her head off the

pillow at one stage, as well as what he identified as a pattern of a localized source of symptoms, despite fluctuating symptoms. Dr. Heran added the pre-accident physiotherapy records described headaches stemming from the back of Ms. Lo's head, not migraine headaches. Although objected to as a new opinion, he clarified, in my view, that menstrual headaches including those Ms. Lo experienced before the First Accident, were migraines being vascular in nature, an opinion he expressed again in cross-examination.

- [174] Asked to agree Dr. Yuen's records for December 14 and 18, 2014 contain the only references to a migraine headache, Dr. Heran testified the reference to "usually experiences one-sided headache during cold" (emphasis added) was not typical and made him think of a headache disorder or predisposition. In support of his view, he also highlighted references to "usually gets headache with periods" (emphasis added), the headache in December 2014 being worse with light and sound, the sample of Cambia provided by the locum doctor, and her advice to consider trying triptan, and "discuss further migraine treatment and OCP use with individuals with migraines" absent improvement. Explaining Cambia and triptan are abortive medications used for multiple (migraine) events, Dr. Heran stated the treatment described was not for a singular event.
- [175] Returning to his first report, Dr. Heran wrote that Ms. Lo's mental status exam was normal and a detailed cognitive exam was not performed. In cross-examination he testified that she completed either a MOCA or a mini-mental status examination, which is part of his standard practice, although he did not discuss this in his report.
- [176] His report noted there was nothing to suggest Ms. Lo had any pain arising from structural spinal elements, such as facet joints or discs. Her pattern of pain not being consistent, he opined she was not at risk for developing accelerated arthritis but she was at risk for exacerbations or aggravations of her persistent symptoms with further trauma, an opinion he expressed again in his second report.
- [177] With respect to Ms. Lo's ongoing symptoms, Dr. Heran wrote that although she experienced some improvement, she had persistent neck pain extending to the back of her head, resulting in more generalized headaches that occurred sporadically. More "prominent" headaches, which interfered with her ability to function, occurred once every week or two. More "common" headaches occurred every couple of days and lasting sometimes for one to three days. His report went on:

When the headaches do become quite troublesome for her, they become associated with nausea, photophobia and what appears to be more typical migraine-type headache. They can be unilateral at times. These headaches are unrelated to the subject accident. Otherwise, her symptoms are typically exacerbated or aggravated by physical endeavours involving her upper torso, neck and head movements. These symptoms pre-date the subject accident, particularly the upper torso/neck symptoms and tension/migraine type headaches. Some worsening following the subject accident is likely contributing.

- [178] In cross-examination, Dr. Heran agreed he was describing migraine headaches occurring with the other type of headaches, or other type of headaches when severe progressing to migraine headaches, explaining there is a continuum. He also testified that given the headaches outlined in the pre-accident physiotherapy records were typical of a cervicogenic headache, his opinion more accurately stated, was that Ms. Lo's whiplash symptoms probably further aggravated her cervicogenic headaches post-accident, which can progress to migraine-type headaches. In addition, she has muscle tension headaches that could be an overlap between a cervicogenic headache and muscle tension. Agreeing that on any given day it is difficult to identify what type of headache Ms. Lo may be experiencing and what is causing it, Dr. Heran emphasized the fact that she had the same types of headaches before and after the First Accident is key. What is "really hard to delineate", he said, is how much worse each type of headache has been since then.
- [179] In addition to recommending a neurology consultation regarding headache management, Dr. Heran also recommended prophylactic medications for headaches and neuromodulating medication for chronic pain if her pain did not settle further in the few months that followed. He added a neurologist may suggest abortive medications for headaches, particularly the migraine-type.
- [180] Regarding Ms. Lo's capacity for work, Dr. Heran wrote that with appropriate breaks, ergonomics and routines for managing stress and other "workplace related" issues, she was capable of practicing law, referring to it as sedentary work like her current position, although whether she could "work the same hours one would typically expect of a lawyer" is "up for debate".
- [181] In his second report, Dr. Heran wrote that Ms. Lo reported being essentially stable before the Second Accident, which was followed by worsened pain in her neck and new pain in her central low back immediately, worsening headaches within days and progressive worsening of her symptoms in general. She described two types of headaches "again": one, headaches arising from the back of her neck, extending to the back of her head and then becoming generalized; and two, headaches that are "more bitemporal, retroorbital in nature", usually triggered by sitting at a computer or prolonged inactivity for more than an hour or so, also reporting nausea, dizziness, light and sound sensitivity at times when the headaches are severe.
- [182] His report specified her neurological examination remained normal. His physical examination findings, different from those in his first report which I have not summarized, included palpation discomfort in Ms. Lo's paracervical region extending to the interscapular region, and in the paraspinal regions of her low back, more on the right, range of motion on rotation in her neck that was 60 to 70% of normal and pain with some maneuvers, but range of motion in her shoulders, hip regions and low back that was full.

[183] In addition to subsequent treatment records, Dr. Heran reviewed all of the expert medical reports in evidence prepared by that date, as well as June 14, 2018 imaging from an MRI scan the results of which he described as:

Degenerative changes are demonstrated in the uncovertebral joints at C4-5 on the right and bilaterally at C5-6 and left-sided C6-7. No foraminal narrowing is demonstrated. Thoracic spine is unremarkable. Lumbar spine is unremarkable. Sacroiliac joint is unremarkable.

[184] Dr. Heran diagnosed Ms. Lo with the following injuries as a consequence of the Second Accident:

1. Aggravation of myofascial injuries involving the neck and upper torso.
2. Aggravation of cervicogenic headaches.
3. Aggravation of tension and migraine type headaches.
4. Myofascial injuries involving the low back.
5. Possible right-sided TMJ symptoms.

[185] Regarding her treatment, condition at the time and his recommendations, he wrote:

Her main limiting factor has been the headaches, which arise as a consequence secondary to the pain generation. These headaches are mixed in origin with lesser dominant source of symptoms being the cervicogenic ones and the most dominant ones being the retroorbital headaches with associated photophobia and phonophobia. Sustained postures seem to worsen these headaches.

Treatments utilized to date for these symptoms have all been reasonable. Most recently, she has had trigger point injections with no benefits established from these as of yet. After six sessions of these, typically benefit would have been established if amendable. This suggests that Botox likely wont not be beneficial either, as temporary benefit from trigger point injections usually is a good marker for Botox being beneficial when soft tissue mediated pain is the source. Botox, however, may still be beneficial for her migraine type headaches. I will defer to the opinion of a well-versed neurologist or another specialist in the field for this aspect.

From a medication perspective, she has been using basic analgesic medications. It is my opinion that she would benefit from a neuromodulating medication such as Lyrica, gabapentin, amitriptyline, nortriptyline, or Cymbalta. Her pain complex is more generalized involving the neck, mid back and low back with the headaches that arise secondarily. She would benefit from a more generalized management protocol with these medications as opposed to more focal treatments up front. If subadequate benefit is established through this route, then one should seriously consider proceeding to the next step of Botox injections. My previously outline opinion about abortive medications with respect to migraine type headaches that she can develop is supported. Similarly with prophylactic medications for headache disorders such as calcium channel blockers, beta-blockers or anticonvulsants such as Topamax.

[186] In direct examination, Dr. Heran identified a number of prophylactic medications geared to preventing a full-blown migraine that overlap with neuromodulating medications such as gabapentin and Lyrica which also manage cervicogenic headaches resulting from myofascial pain, and neurogenic pain that can trigger myofascial pain. He explained these medications assist with chronic pain by "dumbing down" the nerve signals, sometimes allowing a person to not even recognize they are in pain, resume some of their functional abilities, and reduce the need for anti-inflammatory medication and other analgesics. In cross-examination, he acknowledged some patients cannot tolerate some of the medications he recommended or multiple medications, and some neuromodulators such as gabapentin or Lyrica, can effect cognition. However, he also testified a majority of patients do not experience side effects and trying them is the only way to find out.

[187] Addressing Ms. Lo's prognosis and functional capacity, Dr. Heran wrote:

At not quite two years out from the subject [second] motor vehicle accident she still has the potential for further improvement spontaneously as the majority of patients will be plateaued, if not resolved, of the symptoms within two to three years. Obviously with her previous accident related problems, only partial recovery is expected. It is my opinion though that with the benefits established from the above, she should be able to resume her work in the previous capacity of an administrative role with already provided ergonomic work setup and self-directed break taking which she will have to do on a routine basis.

From a functional perspective, aside from being off work initially after the subject accident, then the gradual return with a position change, she has never lost work in a total context until February of this year when her family doctor took her off work. I do not see the reason why she should be off work completely. There are no medical contraindications to her participating in sedentary type work as this job entails, especially in a setting where her symptoms are improving following the accident. My opinion here remains unchanged from my primary report. My overall opinion with respect to functional abilities in other aspects as well remains unchanged. I refer you back to the comments within my initial medical legal report with respect to her functional abilities and one would expect once optimized in her pain management.

[188] Dr. Mehdiratta's Addendum Report reviewed an MRI of Ms. Lo's spine from August 17, 2019 and apparently a report:

As noted in the report at C3-4 there is a posterior disc bulging in a left paracentral fashion. There is mild left neural foraminal narrowing and mild central canal encroachment. At C4-5 there is a broad-based disc herniation posteriorly with mild encroachment upon the cord without abnormal cord signal.

Upon review of the MRI, the T2 axial image 34 of 56 reveals that there is left neural foraminal narrowing seen. This is also seen on image 42 of 56. In both instances, there is a broad-based disc herniation towards the left neural foramina.

This does alter my opinion given that there is evidence of a significant disc protrusion and neural foraminal narrowing which is objectively seen.

[Emphasis added.]

[189] His Responsive Report reviewed Dr. Heran's second report. Among other things, Dr. Mehdiratta noted that Dr. Heran described Ms. Lo's neurological examination as remaining normal, and reiterated aspects of his own including brisk reflexes throughout grade 3+ and a positive Hoffman sign. Based on her ongoing symptoms, headaches and the degenerative changes shown in the MRI, which he referred to as more than would be expected given her age, Dr. Mehdiratta expressed the further opinion Ms. Lo had cervical radiculopathy which was contributing to her headaches and there may also be component of cervical myelopathy (spinal cord lesion) given his exam results. He also wrote: "This is likely an issue caused by the motor vehicle accident since the mechanism of the accident could cause this and would result in changes long-term in terms of muscle function and sensation in the left arm".

[190] In cross-examination, Dr. Mehdiratta testified Ms. Lo did or must have complained of symptoms down her left arm although he did not document them, indicating he would not have recommended an EMG otherwise.

[191] Dr. Heran's Addendum Report reviewed the same MRI scan as well as Dr. Mehdiratta's Addendum and Responsive Report. Regarding the MRI, he wrote:

The MRI scan from August 17, 2019 demonstrates degenerative changes involving the cervical spine as been previously outlined. These are stemming from C3-4 through C6-7. Disc desiccation is identified from C2-3 through 6-7 as well. She has minor osteophyte formation most notable at the C5-6 level eccentric towards the left side, but present bilaterally at C4-5 and C5-6. There is bulging of the discs at C3-4, C4-5 and C5-6, minimal anterior contouring of the spinal cord with no significant cord compression. There is a sliver of CSF anterior to the cord here with really only effacement eccentric to the right side at C4-5. There is ample CSF behind the cervical spinal cord. There is no cord signal change abnormality. The cervical foramina on the axial views, where they are best identified, demonstrate no significant foraminal stenosis or potential for nerve root irritation or impingement at any level except possibly on the left side at C5-6.

[192] Critical of some of Dr. Mehdiratta's findings, Dr. Heran also wrote:

IMAGING REVIEW

The findings that Dr. Mehdiratta has outlined in his examination are not consistent with those that I have identified upon mine. He has demonstrated features of spinal cord compression, also known as myelopathy, manifesting as hyperreflexia in the limbs and the abnormal reflex in the upper extremity referred to as the Hoffman sign. I am very confident in my exam. I did not find such features She has not had any symptoms to suggest nerve root irritation and particularly not on the left side. The rationale for Dr. Mehdiratta's opinion is not supported by my two encounters

with her nor upon review of contemporary clinical records.

OPINION

The findings that he describes are also not supported by the imaging findings. The imaging does not show anything to suggest cord compression of significance and foraminal stenosis would not account for any of the symptoms of myelopathy/spinal cord compression that he describes. The only potential for any neurological issues she could possibly have would be irritation of the left C6 nerve into her left arm, which she does not report. Such a cervical radiculopathy, in any patients would not cause a headache. Headaches in the setting would arise from the arthritic changes in the neck itself. I have already expressed my opinions regarding her headaches in my other medical legal reports

[193] I note that like Dr. Heran, both Dr. Waseem and Dr. Sohmer in their first and second reports described the results of Ms. Lo's neurological examination as normal, including but not limited to normal reflexes. Dr. Waseem's second report expressly noted no upper neural signs, listing among others, the Hoffman's sign.

[194] Asked in direct examination about the difference in their opinions regarding Ms. Lo's MRI scan, Dr. Heran testified that having reviewed tens of thousands of cervical spine MRI's, he was not at all concerned about cord compression, describing the imaging as "absolutely discordant" with compressive myelopathy. He referred to Dr. Mehdiratta as speculating that C6 nerve irritation was contributing to her headaches, stating he had never seen a patient with C6 radiculopathy present with or have associated headaches, adding headaches generally arise from degenerative changes in the neck.

[195] At the same time, Dr. Heran expressed the view the extent of degenerative changes shown was concerning for a young woman. Readily agreeing in cross-examination that Ms. Lo's MRI scan was not normal, he commented it helped to explain why she was seeing a physiotherapist before the First Accident and why she was still having symptoms: "[S]he's got a bad neck". He went on to state, that a structural cause cannot be identified and "everything still seems to be soft tissue".

[196] Asked if he would defer to the diagnosis and treatment recommendations of a neurologist who treats headaches, Dr. Heran said not for all types of headaches, including cervicogenic headaches, which he manages routinely, or post-traumatic headaches, which his patients often get but a neurologist would not manage routinely. He also referred to the significant overlap in the subspecialties, as well as their unique expertise regarding certain aspects of headaches.

Credibility

[197] Before assessing and making findings based on the expert evidence, I turn to assess the credibility of the fact witnesses, most importantly, Ms. Lo.

- [198] Ms. Lo made few submissions about credibility, apart from asserting the court need not engage in detail analysis of her credibility or any of her witnesses. Suggesting none were impeached by the defendants, and she and her family members were forthcoming and honest, she characterized the evidence as a whole as remarkably consistent.
- [199] The defendants also made few direct submissions about the issue of credibility although they asserted and took positions that presuppose Ms. Lo overstated her symptoms and their impact on her functioning, in addition to challenging the accuracy of particular aspects of her evidence.
- [200] Ms. Lo's credibility plays a fundamental role in making findings based on her evidence but also the opinions of the experts, to the extent they rest on what she told them.
- [201] The proper approach to assessing the credibility of any interested witness's testimony was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

- [202] The factors identified in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186 also inform the assessment of whether the evidence of a witness is not only truthful, but accurate or reliable:

- the capacity and opportunity of the witness to observe the events at issue;
- the witness's ability to remember those events;
- the ability of the witness to resist being influenced by their interest in recalling those events;
- inconsistency in the witness's evidence, meaning did their testimony change between direct and cross-examination, or inconsistencies between prior statements, discovery evidence and their evidence at trial;
- whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;
- whether their evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and
- the witness' demeanour, meaning the way they presented while testifying.

- [203] Regarding the last factor, Chorny and other authorities have discussed the dangers of relying on demeanour to determine credibility, recognizing the risk of preferring the testimony of the better actor, and conversely, misinterpreting the poor presentation of an honest witness as deceptive (see e.g. *R. v. Jeng*, 2004 BCCA 464 at para. 54; *R. v. Tyers*, 2015 BCCA 507 at para. 18).
- [204] I begin my assessment by observing that the evidence Ms. Lo and Mr. Lee was for the most part very consistent. Obviously intelligent and very articulate, Ms. Lo and Mr. Lee also presented well. Both were respectful, personable and expressive. However, given the need for caution in relying upon demeanour to assess credibility, the other Stenner factors and the Chorny approach, I was left concerned that material aspects of Ms. Lo's (and Mr. Lee's) testimony reflected the influence of her interest in the litigation. I have determined it is necessary to approach her disputed (and his corroborating) evidence carefully.
- [205] The main reasons for this conclusion are as follows.
- [206] Firstly, there was an inconsistency between Ms. Lo's evidence regarding the severity of her symptoms after the First Accident and the fact that she took no time off from work before and after leaving Kerfoot.
- [207] Significantly, I found the evidence that Ms. Lo's injuries and symptoms were the reason for her decision to leave Kerfoot and take the intake worker position at the Law Society unconvincing if not implausible. Despite Ms. Lo's extremely low earnings in 2014, Ms. Wong and Ms. Lo portrayed the short and medium term prospects for her solicitor's practice very positively, but for the First Accident. Ms. Wong who provided no evidence about her own earnings, predicted, without explaining how that Ms. Lo could "conceivably" earn \$150,000 by her third year. Ms. Wong also expressed the view that Ms. Lo was very well-poised for solicitor positions at other law firms that might arise, although she never applied for any before the First Accident.
- [208] Undermining the emphasis on the duration and magnitude of her symptoms to explain what Ms. Lo and Mr. Lee characterized as the very difficult decision to apply for a full-time paralegal position at the Law Society, is the reality she made the application only one month after the First Accident when her injuries and symptoms were acute if not fresh. By then, Ms. Lo had attended only one appointment with Dr. Yuen and some physiotherapy. She had not received any medical advice suggesting the need for any change to her work.
- [209] Further, despite the significant symptoms she described, other than attempting to work from home, neither Ms. Lo nor Ms. Wong gave any indication they considered modifying or reducing her schedule and carrying on with the plan to practice together until Ms. Wong retired. Similarly, apart from suggesting she could not perform the complex thinking required of a lawyer and was struggling to concentrate, Ms. Wong and Ms. Lo did not address why accommodating her, instead of leaving abruptly for a full-time paralegal position was not an option. Not accepting Dr. Mehdiratta's diagnoses of concussion and mTBI for reasons discussed below, and given Ms. Lo's injuries and symptoms did not

prevent her from working full-time as an intake worker, it strikes me that if Ms. Lo was truly committed to practicing law by developing her own solicitor's practice and eventually taking over her mother's or working elsewhere, staying at Kerfoot would have made far more sense.

[210] Examining the probabilities affecting the case, I am firmly of the view that Ms. Lo's decision to take the paralegal position was not driven by her injuries and symptoms and it strongly undermined her evidence about the depth of her commitment to pursuing a legal career.

[211] Another concern arises from the inconsistency between Ms. Lo's clear recollections of her immediate symptoms after each accident and her testimony she had difficulty remembering some other details, noting also how impaired or incomplete memory aligned with Dr. Mehdiratta's diagnoses of concussions and mTBIs. I formed the same impression of Ms. Lo's brief reference to symptoms of numbness in her fingers. In other words, again this part of her evidence seemed to align too conveniently with his opinion regarding cervical myelopathy, noting also the symptoms she described were not recorded or referred to in any of his reports or in the reports of the other experts, and the attention to detail Ms. Lo displayed throughout her testimony.

[212] I was also concerned that Ms. Lo attempted to minimize the significance of her pre-accident condition. While it is possible she did not remember being treated for neck pain and headaches as reflected in the physiotherapy records, or advising Dr. Yuen shortly after the First Accident that she had receiving physiotherapy "for neck pain from sitting" for the previous two to three years, I am satisfied this is unlikely, given her attention to detail and her good memory generally.

[213] To a certain extent, I was left with a similar concern about Ms. Lo and Mr. Lee's puzzling emphasis on their uncertainty and ambivalence about having a child, in the face of seeking medical advice based on the Zika virus concern, a family planning consultation(s) with Dr. Yuen, genetic testing, and the use of pre-natal vitamins.

[214] More importantly, I noted a significant discrepancy between Ms. Lo and Mr. Lee's evidence regarding the frequency and severity or intensity of her headaches and pain symptoms after the Second Accident and her limited use of over the counter pain medication, even assuming they have a shared belief she ought to avoid its use as much as possible. The same is true regarding the significant opposition they expressed to Ms. Lo even trying any of the recommended prescription medications.

[215] Recognizing the principles that govern the use of statements contained in clinical records already discussed, and accepting that Ms. Lo has experienced more intense and frequent headaches as well as neck and back pain since the accidents, particularly the Second Accident, I was also concerned by the inconsistencies between her testimony and Dr. Yuen's clinical records to the extent they were put to Ms. Lo, the notes contained in her report, and aspects of what she reported to Dr. Waseem and Dr. Spivak.

[216] My assessment of Ms. Lo's credibility was also influenced to some degree by my observations of her in the courtroom. After testifying, Ms. Lo was present for the balance of the trial, an additional eight days. During that time, she would sometimes and perhaps more so over time, adjust her position and stretch, although she mostly sat, sometimes assisted by the portable chair support. Recognizing her right to attend and the possibility she suffered increased symptoms as a result, the fact that Ms. Lo chose to and was able to mostly sit for the duration of each successive court day, is at odds with her evidence and the accounts she provided to the medical experts, about the ongoing impact of sitting on her symptoms, and her limited sitting tolerance.

Assessing the Medical Evidence

[217] Assessing firstly the conflicting opinions of Dr. Mehdiratta and Dr. Heran, it may be clear from my earlier discussion that I have concerns about the accuracy of Dr. Mehdiratta's fact and opinion evidence. In addition to a general concern that arises from the carelessness apparent in his report writing, I was troubled by how he reached and maintained his diagnoses of concussions and mTBIs, his opinions based on the 2019 MRI, and some of his opinions about causation. On this last point, I have in mind his conclusion Ms. Lo had no pre-existing "conditions" that contributed to her current presentation, absent any reference to the pre-accident medical and physiotherapy records, particularly given his intense focus on, if not active search for, post-accident symptomology in the clinical records.

[218] Regarding his diagnoses of concussion and mTBIs, although my assessment of Ms. Lo's credibility plays a role here, it is difficult to understand how Dr. Mehdiratta omitted from his second report the opinion that Ms. Lo suffered another concussion and mTBI in the Second Accident, or why he refused to acknowledge Dr. Yuen's records do not support his assertion that Ms. Lo told her she was confused and disoriented after the Second Accident. In this context, offering the additional opinion the second concussion and mTBI were more severe than the first, further undermined my confidence in his opinions. His neurological examination findings, being starkly different from those of three other experts, did nothing to mitigate this impression.

[219] I should specify that I have also placed less weight on other factors Dr. Mehdiratta considered in diagnosing concussion and mTBI, including the MOCA results. Although, I accept the scores he reported would be less than normal for someone in Ms. Lo's circumstances, I prefer and accept Dr. Heran's evidence that he administered either the MOCA or another cognitive screening tool and actually obtained normal results, along with the evidence of other experts who viewed her cognitive presentation as grossly normal, which aligns with my own impression of Ms. Lo. Obviously intelligent and very articulate as I have said, she was well oriented and displayed a good if not very good memory throughout her testimony, except in particular ways that aligned with her interest. During cross-examination, she displayed strong critical thinking skills, and had no difficulty responding quickly and very coherently. I was never concerned she was having difficulty concentrating

or struggling to think deeply.

- [220] Ultimately, I have concluded that I cannot safely rely on Dr. Mehdiratta's factual or opinion evidence unless and to the extent it is consistent with other evidence that I do accept.
- [221] In contrast, I largely accept the opinion evidence of Dr. Heran, which was not undermined during fairly rigorous cross-examination, subject to the discussion below of Ms. Lo's work capacity.
- [222] Although I am somewhat skeptical of Dr. Waseem's identical physical examination findings, and do not accept the opinion expressed in his first report that Ms. Lo's headaches would prevent her from practicing law, I am persuaded by most of the opinions expressed in his subsequent reports and during his testimony, subject to my assessment of Ms. Lo's evidence. In general, where they differ, I prefer Dr. Waseem's opinions to those of Dr. Sohmer who focused on Ms. Lo's soft tissue injuries to the exclusion of her pain and headache symptoms in providing his diagnoses and prognoses. Regarding his physical examination findings, I was also concerned that Dr. Sohmer was reluctant to acknowledge the presence of objective, as well as subjective findings that were consistent with Ms. Lo's myofascial pain complaints. I have given some weight however to his opinion regarding Ms. Lo's pre-existing mild osteoarthritis in the cervical spine, a condition and causation question that in my view he is well equipped to answer given his expertise and experience as an orthopedic surgeon, and likely unaffected by his focus on soft tissue injuries.
- [223] Turning briefly to the evidence of Mr. Kowalik and Ms. Wong regarding their respective evaluations of Ms. Lo's physical capacity well after the First and Second Accidents, although I do not doubt Ms. Lo made a reasonable effort, some of Ms. Wong's findings are limited by her methodology. Specifically, I do not accept that simply noting when Ms. Lo changed positions from sitting to standing provides a reliable measure of how long she can tolerate sitting or standing.
- [224] The defendants did not challenge Dr. Spivak's diagnoses, prognosis and recommendations regarding Ms. Lo's psychological symptoms. Instead, they emphasized aspects of his testimony in cross-examination regarding duloxetine. Leaving aside his evidence about an apparent correlation between a person's concern about and experience of side effects, and his ambivalence about duloxetine as a first line treatment for Ms. Lo despite her chronic pain, I accept his evidence.
- [225] That leaves the opinion evidence of Dr. Yuen who impressed me as a careful and objective family physician. During her testimony, Dr. Yuen reasonably modified her opinion regarding Ms. Lo's pre-accident condition. Given my assessment of Ms. Lo's evidence however, I have less confidence in Dr. Yuen's opinion about Ms. Lo's work capacity.

The Nature and Extent of Ms. Lo's Accident-Related Injuries

Legal Principles

- [226] The basic legal principles regarding factual causation were articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458. Ms. Lo is required to prove on a balance of probabilities that but for the defendants' negligence, her injuries and loss would not have occurred (*Athey* at para. 14). In other words, she must establish their negligence was a, but not the sole, cause. It is well-established and must be remembered that cause in fact is determined in a "robust common sense fashion". Scientific proof is not required, and inferences drawn from proven facts may suffice: *Clements v. Clements*, 2012 SCC 32 at para. 9; and *Athey* at para. 16.
- [227] Also relevant at this stage is the most fundamental principle of damages. It requires that Ms. Lo be returned, through compensation, to her original position, which is the position she would have been in, absent the negligence of the defendants: *Athey* at para. 32. Simply put, it is the difference between her original position and her position resulting from the accidents that constitutes her loss.
- [228] Both causation and damage principles play a role in the so-called thin skull and crumbling skull rules. The thin skull rule provides a defendant will be liable for the plaintiff's injuries even if they are more severe than expected (*Athey* at para. 34). The crumbling skull rule recognizes a defendant is not required to compensate the plaintiff for the detrimental effects of a pre-existing condition that would have been experienced anyway (*Athey* at para. 35).

Findings

- [229] The defendants do not deny Ms. Lo was injured in both accidents, although they do have a much different view than she does regarding the nature and extent of her injuries and current functioning, and whether a pre-existing condition, namely pre-accident headaches and neck pain have played a role.
- [230] I wish to point out the need for caution regarding Ms. Lo's disputed evidence makes fact finding much more difficult. Simply put, it is often not possible to be very precise. Bearing in mind this limitation, in addition to the findings that I have already made, including those set out in my discussion of the evidence and my assessment of credibility and the expert evidence, I find as follows:
- [231] Given my assessment of Dr. Mehdiratta's evidence and Ms. Lo's I find she did not suffer a concussion or mTBI in either accident.
- [232] Based on Dr. Heran's opinion evidence and my assessment of the fact evidence, I accept that before the First Accident, Ms. Lo had ongoing menstrual headaches that although mild were a type of migraine, headaches with colds and flu including a severe migraine in December 2014, and other headaches related to neck tension until shortly before the First Accident.

- [233] The First Accident caused injuries to the soft tissues of Ms. Lo's neck primarily, but also her upper back area, resulting in pain and stiffness. I accept she experienced a significant, prolonged headache that began shortly after the First Accident, and more consistent headaches related to her neck injury and pain that sometimes involved migraine features such as nausea and or light/sound sensitivity. I do not accept that Ms. Lo's accident related headaches were ever as frequent as she suggested.
- [234] Ms. Lo's early ongoing pain symptoms and headaches were significant enough to interfere with her ability to concentrate and focus at times and cause fatigue, but not severe enough that Ms. Lo required any time off from work before leaving Kerfoot. After beginning her position as an intake officer, although Ms. Lo continued to experience pain symptoms and headaches, again they did not prevent Ms. Lo from working full-time, some overtime, and by April 2016, longer workdays in exchange for a flex day.
- [235] Skeptical of Ms. Lo's evidence on this point, and drawing an inference based on the evidence of Mr. Kwan regarding the decrease in the frequency of physiotherapy treatments and the absence of any appointments with Dr. Yuen during this period, I find that by no later than April 2015 Ms. Lo's accident related pain and headaches had improved. Although she continued to experience neck and upper back pain, stiffness, and worse headaches related to neck pain, all of her symptoms were resolving and reduced. Intense or severe headaches were infrequent.
- [236] Well before the Second Accident, Ms. Lo's pain symptoms had improved substantially, leaving her with some ongoing stiffness and intermittent, less significant pain. Her accident-related headaches were also less frequent, but overall they remained somewhat more consistent and occasionally, but infrequently, worse than they were prior to the First Accident.
- [237] Based on the diagnoses of Dr. Heran primarily but also Dr. Waseem, Dr. Spivak and Dr. Yuen, I find the Second Accident re-injured the soft tissue injuries of Ms. Lo's neck and upper back area, aggravated her headaches and also injured the soft tissues in her lower back, resulting in much worse pain and headaches. In addition, Ms. Lo experienced or developed worse driving anxiety. Her increased pain, headaches and driving anxiety in turn caused disrupted sleep. Although I accept she also experienced right-sided TMJ symptoms some months later, the evidence does not establish it is more likely than not that they were caused by the Second Accident.
- [238] While Ms. Lo's pain symptoms and headaches improved prior to returning to work at the Law Society part-time in February 2018, I accept they worsened to some extent after her return. She also experienced significant fatigue due to pain and disrupted sleep, and difficulty concentrating and focusing when her pain and headaches were intense.
- [239] Although significant and ongoing, I do not accept that Ms. Lo's pain and headaches were as severe as she described.

- [240] Prior to June 2018 when Dr. Yuen first recommended counselling for reactive depression, I accept Ms. Lo developed and was suffering from secondary symptoms of depression and anxiety.
- [241] Based on her decision to increase her work schedule to include a full day following a change in her position from intake worker to investigative legal analyst, I infer that by August 2018 Ms. Lo's accident-related condition was improving. Once she began working a full day, however, I accept her headaches and pain symptoms increased again to a limited degree. I note that Dr. Yuen, who continued to assess and treat Ms. Lo regularly, did not recommend that she return to half days only. Before and after the increase, Ms. Lo continued to manage her headaches with the infrequent use of Tylenol or Advil which I accept she found effective.
- [242] I also accept however that by the end of 2018, with her depression and anxiety untreated and her physical symptoms continuing, Ms. Lo was feeling quite overwhelmed. Her decision to take an extended medical leave was driven at least in part by the hope that not working at all, while engaging in ongoing treatment and active rehabilitation would facilitate a fulsome recovery.
- [243] I am unpersuaded by Ms. Lo's rather vague evidence suggesting limited improvement in her symptoms during her extended leave beginning February 2019, which is, as I have said, inconsistent with the earlier and more significant improvements she reported to Dr. Yuen and Dr. Spivak as set out in their reports. Given my assessment of her credibility and the expert evidence, her continued avoidance of over the counter pain medication and refusal to try recommended prescription medications, as well as the benefit she described from attending CHANGEpain clinic, I am satisfied that by the time of the trial, the severity and frequency of Ms. Lo's pain symptoms and headaches had reduced considerably. She had also learned to better manage or prevent them. In other words, although she continues to experience neck pain that extends downward, low back pain and headaches, triggered by neck pain and other particular circumstances, all of her symptoms have lessened, and her current condition is much better than she and Mr. Lee indicated. I accept however that Ms. Lo remains and will remain vulnerable to flares in her symptoms.
- [244] In making these findings, I have also considered Dr. Waseem's most recent objective and subjective findings of myofascial pain from some time ago, August 10, 2018; the much more recent findings of Dr. Heran, namely discomfort with palpation in some areas and a range of motion limitation in her neck set out in his second report dated August 12, 2019; and to a lesser extent those of Ms. Wong.
- [245] Turning to consider Ms. Lo's current capacity generally, I accept prolonged sitting, static standing and unmodified prolonged computer use remain a problem for her, but I do not accept that her sitting and standing tolerances are nearly as limited as suggested by Ms. Wong or Ms. Lo herself. There is no evidence that suggests the problem with static postures is not mitigated by alternating between sitting and standing, although I accept it remains

necessary for Ms. Lo to also move about fairly regularly to minimize the risk of triggering a flare in her symptoms.

- [246] Both Dr. Waseem, from a physical perspective and Dr. Heran, based also on her headaches, expressed the view that Ms. Lo is capable of working "normal" full-time hours in a sedentary position, with accommodations including an ergonomic set up, working at her own pace, and the flexibility to take breaks as needed. There is no dispute both her paralegal job and that of a lawyer are sedentary. I reject the evidence of Ms. Lo and Mr. Lee that her capacity for thinking is less than it was before the accidents, except when she has trouble concentrating while experiencing a significant headache or pain. I am satisfied that Ms. Lo was and remains cognitively capable of practicing law.
- [247] Dr. Heran's opinion about Ms. Lo's ability to work regular full-time hours appears to rest on in part on the assumption she is benefitting from recommended prescription medications for headaches and pain symptoms which she has refused to take thus far. Based on his evidence, Dr. Yuen's, and Dr. Spivak's specific testimony that 60% of patients improve with anti-depressant medication, I find duloxetine or another anti-depressant with the same profile, offer Ms. Lo a safe and effective treatment for both chronic pain and depression. Similarly, I find the other types of medications Dr. Heran recommended for headaches, particularly prophylactic and abortive medications for migraines, offer Ms. Lo safe and effective treatment for preventing and reducing intense headaches including those with migraine features.
- [248] As mentioned, in assessing the credibility of Ms. Lo and Mr. Lee, I considered a significant discrepancy between their evidence regarding the severity and frequency of her symptoms after the Second Accident and her limited use of over the counter medications, as well as their opposition to her even trying the recommended prescription medications. I should explain that it struck me as almost impossible for Ms. Lo to limit her use of effective over the counter pain medication to the extent she said she did, if her symptoms were as severe and debilitating as she described. The same is true with respect to refusing to try recommended prescription medications that offered the potential to prevent or at least reduce severe and frequent headache symptoms. Part of Ms. Lo's explanation for refusing, that she felt she had done a lot, meaning she had tried hard to get better, ignored the implications of the immediate and profound suffering she depicted. Similarly, I found it difficult to accept that Mr. Lee, who is clearly devoted to Ms. Lo and her well-being, could tolerate let alone encourage her avoidance and refusal in these circumstances.
- [249] To clarify, in addition to affecting my assessment of their credibility, the discrepancy also contributed to my findings regarding Ms. Lo's pain and headache symptoms.
- [250] Although the defendants address Ms. Lo's refusal to take or try recommended prescription medications by arguing she has failed to mitigate, I am confident Ms. Lo will actually take and try them to facilitate further improvement. To be more specific, I am satisfied Ms. Lo will take duloxetine for chronic pain in particular, which Dr. Yuen, her treating physician,

has consistently recommended, as well as abortive and prophylactic headache medications given their potential to prevent and interrupt significant or migraine headache symptoms. I note that both Mr. Lee and Ms. Lo testified, despite their apparent opposition to prescription medications, they had not ruled them out. With the trial at an end, I am convinced Ms. Lo will take all reasonable steps to reduce ongoing pain and headaches and address the risk of flares, certain that she is fully committed to maximizing her functioning and improving her quality of life.

- [251] It is also my view however, given the duration of Ms. Lo's accident-related symptoms, she is not likely to completely recover physically. In contrast, I regard a full recovery from her psychological symptoms as very likely, given her overall improvement during her extended leave, my findings regarding her current condition, the psychological resilience Dr. Spivak identified, and the likelihood she will benefit from her ongoing involvement in cognitive behavioural therapy and future use of duloxetine and some headache medications.
- [252] Turning to the issue of the cause of the degenerative changes identified in the 2018 X-ray and 2019 MRI, based on the opinion evidence of Dr. Heran and to a lesser extent Dr. Sohmer, I do not accept it is more probable than not that the degenerative changes were caused by the accidents.
- [253] Regarding the question of whether Ms. Lo's pre-accident condition contributed to her post-accident neck pain and headaches, or would have worsened in any event, she argues her "periodic visits" to Mr. Kwan prior the accident for intermittent headaches and neck pain are not sufficient to establish a measurable risk that her current "constant" migraine headaches and chronic neck pain would have become manifest and disabling.
- [254] The reality is the visits were regular and sometimes frequent, rather than periodic, and Ms. Lo did not suggest she had constant migraine headaches after the accidents. Further, in cross-examination, based on the pre-accident physiotherapy records, Dr. Yuen agreed Ms. Lo's pre-accident neck pain was a contributing factor.
- [255] There is also the evidence of Dr. Heran attributing Ms. Lo's pre-accident neck pain to the degenerative changes. He stated in addition, however, that a structural cause for her post-accident condition could not be identified and "everything still seems to be soft tissue". Consequently, I am left uncertain about the significance of her pre-accident symptoms and degenerative changes. Even assuming a measurable risk, the medical evidence does not allow me to assess the extent of the chance her pre-existing condition would have resulted in or contributed to the symptoms she experienced after the accidents.
- [256] I am left to conclude therefore that Ms. Lo's pre-accident neck pain and related headaches, as well as ongoing but mild migraine type menstrual headaches and infection related headaches, part of her original position, would have continued.

Liability for the Second Accident

The Evidence

- [257] Ms. Lo takes the position Ms. Hearn is solely responsible for the Second Accident. The defendants argue that liability should be apportioned 75% to Ms. Hearn and 25% to Ms. Lo.
- [258] The Second Accident occurred on Monday November 20, 2017 around 6:00 p.m. close to the intersection of East 12th Avenue and Sophia Street. Dark by then, most of the witnesses described the roads as wet although it was not raining at the time. Driving home from work eastbound along East 12th Avenue in rush hour traffic, Ms. Lo was first in the curb lane, when she stopped for a red light at Main Street.
- [259] The intersection of East 12th Avenue and Sophia Street, located one block east of Main Street, is controlled by a pedestrian cross walk (on the west side), a flashing light for east and west bound traffic on East 12th Avenue, and a stop sign for northbound traffic on Sophia Street. The parties do not dispute the flashing light was green at the time of the Second Accident. Although there are two lanes east and westbound, there is also space for eastbound parking along the curb.
- [260] Ms. Lo described the route east along East 12th Avenue between Main Street and Sophia Street as slightly uphill and to the right. Once the light at Main Street turned green, Ms. Lo continued driving east in the right eastbound lane, next to, she said, parked cars. Accelerating from a stopped position, she estimated her speed at below the speed limit of 50 km/h when she arrived at the area close to the crosswalk on the west side of Sophia Street, and the black Evo car suddenly popped out. Describing it as right in front of her, Ms. Lo said she slammed on her brakes and steered hard to the right to avoid a T-bone collision. As I have said, she collided instead with Ms. Ben-Yacov's vehicle, the Nissan Rogue stopped at the stop sign on Sophia Street.
- [261] In cross-examination, Ms. Lo agreed that as she approached Sophia Street, she had a clear view and was looking ahead. She also agreed she would have been scanning for traffic but she did not see the black Evo waiting at the stop sign or inching out. She added that she has driven there since and when cars are parked in the curb lane, the stop sign is not visible. An aerial photograph of the intersection also shows East 12th veering right or south on the east side of Sophia Street, indicating the stop sign and vehicles stopped there would be less visible to an eastbound driver approaching from the west even without parked cars.
- [262] Ms. Hearn gave evidence she had just picked up the black Evo and was on her way home from shopping just prior to the Second Accident. After pulling out of a parking lot onto Sophia Street, she arrived at the stop line facing north, planning to turn left onto East 12th Avenue. According to Ms. Hearn, there were cars parked on the south side of East 12th Avenue facing eastbound. Consequently, she inched out and stopped again to look for oncoming vehicles before turning left in response to a break in the traffic. Again, based on my view of the aerial photograph this would be necessary in any event. Ms. Hearn stated that as she was completing the turn, she saw Ms. Lo's car for the first time, approaching quickly. Ms. Hearn testified to honking, but denied being concerned Ms. Lo was going to hit

her, stating she uses the horn frequently to "provide awareness" to other drivers. Ms. Hearn also said she did not notice any other traffic. After turning she heard an accident, so she returned to Sophia Street and spoke to Ms. Lo and Ms. Ben-Yacov. Ms. Hearn recalled a local resident telling them 9-1-1 had been called. She gave Ms. Lo her name and phone number. They discussed her driver's license, but Ms. Lo was also "running around" taking photos with her phone.

- [263] Planning to turn right onto East 12th Avenue, Ms. Ben-Yacov testified to stopping behind the black Evo at the stop sign on Sophia Street. When it pulled into the intersection to turn left, she moved her vehicle forward to the stop sign. Ms. Ben-Yacov confirmed the light was flashing green for traffic on East 12th Avenue, which was steady. She stated that as the black Evo was making its way into the intersection, Ms. Lo's car swerved to avoid hitting it and struck her vehicle instead. Ms. Ben-Yacov did not recall if there were vehicles parked on the south west side of the intersection. She did recall Ms. Lo's car being in the crosswalk when it swerved, although at her examination for discovery she gave evidence she was not able to say where it was. In cross-examination she agreed her primary observation was Ms. Lo's car coming toward her. She also agreed the black Evo was well into the intersection before starting its left turn.
- [264] Ms. Sharon, an experienced emergency room nurse on maternity leave at the time of the Second Accident, testified to hearing the screeching of brakes to her left as she was walking east on the south side of East 12th Avenue, near the west side of Sophia Street, pushing her infant daughter in a stroller. She saw Ms. Lo's car swerve onto Sophia Street to miss the black Evo, hitting the car behind it instead. Not able to estimate their speeds or recall their precise locations, Ms. Sharon described Ms. Lo's car and the black Evo as very close to one another when she swerved. Ms. Sharon also expressed the view there was essentially nothing Ms. Lo could have done to avoid a collision, an opinion reflecting, I conclude, her perceptions of the sound of brakes, Ms. Lo swerving in response to the black Evo and the proximity of the two vehicles at the time.
- [265] Like Ms. Ben-Yacov, in direct examination Ms. Sharon said the black Evo stopped at the stop sign before turning left onto East 12th Avenue. In cross-examination she agreed, however, she was not positive about it stopping first. Very familiar with the location, she also said vehicles are not permitted to park on the south side of East 12th Avenue before 6:00 p.m. and she did not recall any being there at the time. After the collision, Ms. Sharon called out to Ms. Lo who got out of her car, seemed okay, and stood next to the stroller while Ms. Sharon went to speak to the other driver. Ms. Sharon did not recall emergency vehicles attending the scene.

Analysis

- [266] The Second Accident, like most, occurred unexpectedly in mere seconds. Ms. Sharon was the only truly independent witness, and apart from Ms. Lo, best situated to observe the circumstances. Very alert, quite precise, willing to acknowledge what she did not observe

or recall, accustomed to dealing with urgent circumstances, very familiar with the area, and direct and straightforward, Ms. Sharon impressed me as particularly credible and reliable. Accepting her testimony and noting it largely corroborates Ms. Lo's, I generally accept Ms. Lo's as well. Although I am confident Ms. Ben-Yacov also testified truthfully, because of her location and focus on turning right, I view her evidence as less reliable. Despite taking a position that acknowledges her own negligence, Ms. Hearn gave evidence that struck me as an attempt to minimize being at fault.

- [267] Given it was dark and rush hour and my concern about Ms. Hearn's credibility and accepting the evidence of Ms. Sharon and Ms. Lo, I reject Ms. Hearn's testimony that she was completing her left turn when she noticed Ms. Lo's vehicle approaching quickly. Based on Ms. Sharon's evidence about parking restrictions before 6:00 p.m., I am left in doubt about the presence of vehicles parked on the south side of 12th Avenue. In any event, I do not accept Ms. Hearn stopped and then inched forward with any degree of care, before pulling into the intersection. Nor do I accept that Ms. Lo was driving any more quickly than she described. I find therefore the speed of her vehicle was at or below the speed limit.
- [268] Acknowledging Ms. Hearn bears most of the responsibility for the Second Accident, the defendants argue had Ms. Lo been paying closer attention and exercised greater caution as she approached the flashing green pedestrian signal at Sophia Street, she would have seen the black Evo, and could have braked without swerving, or swerved less aggressively, so as to avoid or minimize the impact with Ms. Ben-Yacov's vehicle.
- [269] Given the absence of evidence regarding the effect of any street lighting, the change in angle of East 12th Avenue east of Sophia Street, I am not persuaded Ms. Lo had a clear view of the black Evo before Ms. Hearn left the stop line and entered the intersection. I find Ms. Hearn proceeded directly into Ms. Lo's path. Despite slamming on her brakes, the two vehicles were as Ms. Sharon testified, "very close" when Ms. Lo swerved to avoid hitting the black Evo.
- [270] If the defendants' argument she was at fault were to continue in the face of these facts, I do not agree. Motorists have an overarching common law duty to exercise reasonable care, which includes an obligation to keep a proper lookout and exercise reasonable caution in response to apparent potential hazards: *Stewart v. Dueck*, 2012 BCSC 1729 at para. 38. At the same time, it is well settled that a motorist is "entitled to assume, within reason, that the other users of the [road] will obey the law or the rules of the road": *Dueck* at para. 39; *Henry v. Bennett*, 2011 BCSC 1254 at para. 60.
- [271] The common law provides the standard of care is that of a reasonably prudent motorist in all the circumstances. Section 131(5)(a) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, is relevant to the content of the standard here:

Flashing Lights

131(5) When rapid intermittent flashes of green light are exhibited at an intersection or at a place other than an intersection by a traffic control signal,

- (a) the driver of a vehicle approaching the intersection or signal and facing the signal must cause it to approach the intersection or signal in such a manner that he or she is able to cause the vehicle to stop before reaching the signal or any crosswalk in the vicinity of the signal if a stop should become necessary, and must yield the right of way to pedestrians lawfully in a crosswalk in the vicinity of the signal or in the intersection,

[272] Based on my assessment of the evidence and findings regarding the circumstances of the Second Accident, I do not accept Ms. Lo ought to have approached the intersection more cautiously than she did. I have found she was driving at or below the speed limit. With the light flashing green, had she seen the black Evo stopped at the stop sign or even inching forward, I do not accept she would not have been required to slow or anticipate Ms. Hearn would do what she did. Consequently, I do not accept that Ms. Lo breached the standard of care and I find Ms. Hearn 100% liable for the Second Accident.

Damages

Mitigation

- [273] With respect to her claims for non-pecuniary damages and past loss of earning capacity the defendants argue 10-20% should be deducted from both awards because Ms. Lo failed to mitigate, citing the test articulated in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. The two-part test requires a defendant to show the plaintiff acted unreasonably in "eschewing" recommended treatment and the extent to which her damages would have been reduced had she acted reasonably.
- [274] The defendants submit Ms. Lo acted unreasonably by refusing to try prescription medications recommended by multiple doctors and delaying the start of recommended counselling for 15 months.
- [275] In addition to the timing, scope and overlap in the recommendations for prescription medications, the defendants suggest Ms. Lo's refusal to try any of them, must be considered alongside her (limited) use of over the counter medications to manage her physical symptoms, severe enough, she states, that she does not know if she will ever be able to return to work. In reality, Ms. Lo's submissions go farther than that. Her primary position is she has no residual capacity.

- [276] Regarding the second branch of the test, the defendants suggest the evidence is sufficient to establish that taking a neuromodulating medication such as duloxetine would have reduced Ms. Lo's damages to some extent. With respect to counselling, the defendants submit the delay is particularly problematic given Ms. Lo's extended leave was precipitated by a significant emotional low in late 2018.
- [277] Ms. Lo denies any failure to mitigate, relying upon *Gill v. Lai*, 2019 BCCA 103, which considered the role of pre-existing subjective attributes in the objective/subjective test for reasonableness. Rejecting the suggestion the test precluded consideration of a plaintiff's personal circumstances, the Court of Appeal concluded:
- [26] The subjective component of the test does allow a court to look beyond just whether the individual understood, appreciated, and was capable of following the advice given, and to look to their personal circumstances and ability to follow that advice.
- [278] It was in this context that other cases discussing whether a plaintiff's conduct was unreasonable and arbitrary were referenced. To the extent Ms. Lo may be suggesting this, I do not accept *Gill* provides for a broadening of the two part mitigation test to include a requirement to prove arbitrariness. I am reinforced in this view by the Court of Appeal's subsequent decision in *Ueland v. Lynch*, 2019 BCCA 431, where the case law regarding the subjective/objective test including *Gill*, was analyzed without any suggestion that arbitrariness is a criterion. Instead the Court concluded that "personal circumstances", which may include pre-existing health, a psychological thin skull, and family and employment circumstances, should not be interpreted to permit a plaintiff to conduct themselves in a way that is objectively unreasonable (*Ueland* at para. 32).
- [279] I have already found that Ms. Lo will take all reasonable steps to improve her functioning and quality of life. Those steps will include taking duloxetine for chronic pain and depression, and certain types of headache medication to prevent and lessen more significant headache symptoms, if needed. These findings are based on considering her subjectivity, meaning her personal circumstances, beliefs, motivations and approach to life. They also reflect what is objectively reasonable. In other words, I am satisfied Ms. Lo's future approach to recommended prescription medications will be reasonable.
- [280] The question remains however whether by starting cognitive behavioural therapy when she did and refusing to try any of the recommended medications the defendants have shown Ms. Lo failed to mitigate prior to the trial.
- [281] There is no dispute the cognitive behavioural therapy recommended by Dr. Spivak is an effective treatment for depression and chronic pain. Although pre-treatment, his prognosis was guarded, he expressed optimism about the efficacy of cognitive behavioural therapy for Ms. Lo's depressive symptoms and pain.
- [282] There is also no dispute about the timing of Dr. Yuen's ongoing recommendations of counselling and duloxetine, or those of the independent experts.

- [283] Ms. Lo identified Chinese cultural norms to explain her resistance to recognizing or acknowledging her psychological symptoms, which I accept to some extent, and an apparent concern about prejudice towards mental health within the legal profession, which I do not, meaning I do not accept this contributed to her response. She also indicated she had difficulty finding an available psychologist as opposed to clinical counsellor that was conveniently located.
- [284] By the time Ms. Lo began her extended leave in February 2019, Dr. Yuen had been recommending counselling for depression and chronic pain for about eight months. In my view, a reasonable person in Ms. Lo's circumstances would have started counselling by that stage. However, Dr. Spivak did not make the more specific recommendation of cognitive behavioural therapy until late June 2019. Uncertain about the comparative efficacy of counselling per se to address both psychological symptoms and pain, I am not satisfied that Ms. Lo acted unreasonably by starting cognitive behavioural therapy when she did. Nor am I able to determine how much she would have improved through generic counselling had she done so earlier.
- [285] I have reached a similar conclusion regarding her refusal to try recommended prescription medications prior to trial, appreciating that as early as October 2017 Dr. Heran was recommending a range of them for headaches and neuromodulating medication for pain, all of which Ms. Lo said she discussed with Dr. Yuen. My reasons are as follows: Given my findings of fact about the extent to which Ms. Lo improved after the First Accident, I do not accept that she actually required them before the Second Accident. Dr. Heran also recommended Ms. Lo be referred to a neurologist for headache treatment. As I understand his recommendation, he contemplated that a specialist would play a role in formulating or implementing a generalized management protocol. There is no evidence of a referral. Dr. Yuen did not recommend duloxetine until May 2019. After that, Dr. Spivak expressed some ambivalence about a trial of duloxetine as a first line of treatment for Ms. Lo's depression, despite accepting its role in managing myofascial pain. He did so in part due to her concern about side effects and his own view she was therefore more likely to experience them. Although, I rejected this part of his evidence, I recognize Ms. Lo's opposition to trying anti-depressant medication may have been invigorated or reinforced by his perspective.
- [286] In conclusion, I am not persuaded Ms. Lo failed to mitigate.

Non-Pecuniary Damages

Legal Principles

- [287] Non-pecuniary damages are awarded to compensate a plaintiff for the pain and suffering, loss of enjoyment of life and loss of amenities caused by a defendant's negligence. The amount of the award is not determined by the nature or seriousness of the plaintiff's injuries alone. Additional factors include the plaintiff's age; the severity and duration of the

pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle (Stapley v. Hejslet, 2006 BCCA 34 at para. 46). An appreciation of the plaintiff's loss is the key: Lindal v. Lindal, [1981] 2 S.C.R. 629 at 637.

- [288] Compensation for non-pecuniary losses must also be fair and reasonable to both parties. Fairness is measured against awards made in comparable cases, recognizing they offer rough guidance only because the circumstances of each plaintiff are at least to some extent unique: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

Discussion

- [289] Ms. Lo seeks an award of \$225,000, submitting her chronic injuries have had a profound impact on every aspect of her life, including work, social life, recreational activities and her marriage from a young age. The award she proposes is based on a version of the facts that differs from my findings regarding the nature and extent of her injuries and their impact.
- [290] Absent deductions for failing to mitigate or her pre-existing condition, the defendants take the position an award in the range of \$90,000 to \$130,000 would be fair and reasonable.
- [291] Turning to the Stapley factors, although I found Ms. Lo's pain and headache symptoms were not as severe as she alleged, I have accepted they have been significant and at times intense, particularly after the Second Accident. She has also suffered through the distress of an accident and the pain and discomfort of acute injuries twice, again much more so after the Second Accident. Further, after the Second Accident she developed secondary symptoms of depression and anxiety, causing further distress and suffering. Despite the significant improvement in her condition and the likelihood she will benefit from the future use of recommended medications, I have also found the prospect of a complete physical recovery is unlikely. The reality is Ms. Lo will live with some pain and headaches and the risk of flares which will require ongoing treatment, management and forbearance.
- [292] Less so after the First Accident but certainly since the Second Accident, Ms. Lo's injuries and symptoms have interfered with if not undermined all aspects of her life, including her work, her marriage, her social life, hobbies, physical activities and travel, although not as profoundly as she has suggested. Now and in the future, her symptoms will continue to impact her although less significantly. Although able to work and practice law (at less than full capacity as discussed below), Ms. Lo will continue to work with some pain and discomfort. She will always be restrained to an extent by the need to be attentive to the potential impact of an activity or circumstance on her symptoms, and to preserve her energy and function for what is most important.
- [293] Only 28 at the time of the First Accident, Ms. Lo will endure these personal losses for most of her life.

- [294] The parties rely on a number of cases in support of their positions. Most of those provided by Ms. Lo involved plaintiffs who suffered a mTBI, as well as other injuries and symptoms including headaches, chronic pain, psychological symptoms, and an inability to work in their chosen profession. I have found Ms. Lo's injuries do not include an mTBI. It is also my view that any cognitive symptoms, namely difficulty concentrating are secondary to pain, headaches, and psychological symptoms and that her injuries and ongoing symptoms will not prevent her from practicing law.
- [295] The defendants' cases include *Mullens v. Toor*, 2016 BCSC 1645, which did involve very similar circumstances. The plaintiff also young, was 29 at the time of the accident. A high performing junior bank executive, and married with one child, she was enjoying a full, happy, active lifestyle before the accident. Much like Ms. Lo, due to the accident, she developed chronic pain, depression and anxiety and refused and or resisted psychiatric treatment including anti-depressant medication. The plaintiff described debilitating headaches three to four times per week, constant neck and low back pain, and constant anxiety. Concerned about the reliability of her evidence, the trial judge still found she had been profoundly detrimentally affected by her injuries, and she had endured a significant amount of pain, as well as physical treatment that was not effective. Socially isolated, her marriage was severely impacted. Rejecting her evidence she could not return to working at the bank, however, the Court concluded that returning part-time was the worst case scenario. Non-pecuniary damages of \$140,000 were awarded prior to a 50% deduction for failing to mitigate.
- [296] Considering the purpose of a non-pecuniary award and the personal losses Ms. Lo has suffered applying the Stapley factors, and guided by *Mullens*, I conclude \$140,000 is fair and reasonable and award that amount.

Loss of Earning Capacity

Legal Principles

- [297] Ms. Lo seeks damages for loss of past and future earning capacity.
- [298] Claims for past and future loss of earning capacity are subject to many of the same legal principles. Both involve claims for the loss of the value of the work the plaintiff was or will be unable to perform because of the injuries and symptoms caused by the accidents (*Falati v. Smith*, 2010 BCSC 465 at para. 39, *aff'd* 2011 BCCA 45).
- [299] The plaintiff is required to demonstrate that the injuries and symptoms caused by the accident(s) have impaired her capacity to earn income, resulting in a past or future pecuniary loss. While actual past events must be proven on a balance of probabilities and once proven treated as certainties, hypothetical events including what would have happened in the past had the accident not occurred, and what would have and will occur in the future, will be considered where there is a real and substantial possibility they would occur. A hypothetical event is then given weight according to its relative likelihood and

compensation is awarded based on an estimation of the chance the event would have occurred or will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17; *Grewal v. Naumann*, 2017 BCCA 158, at para. 44-48.

- [300] The loss or impairment of a plaintiff's earning capacity may be valued using either the earnings or the capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Both are correct. The earnings approach is viewed as more appropriate where a plaintiff has a history of earnings and the loss is more easily measured. The capital asset approach is typically used when a plaintiff has no clear earnings history, although it is not restricted to this circumstance. Applying the capital asset approach involves considering a number of factors articulated in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at 356 (S.C.), which include whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been available to her, and is less valuable to herself as a person capable of earning income in a competitive labour market. I note that after *Brown*, in *Steward* at para. 18, Justice Donald concluded that an inability to perform an unrealistic alternative occupation is not proof of a future loss.
- [301] Under either approach, the court is required to quantify the financial harm accruing to the plaintiff from the loss or impairment of her earning capacity, taking into account the relevant and realistic contingencies by weighing possibilities and probabilities of future (or past hypothetical) events, relating evidence and findings of fact to the quantification of the loss: *Pett v. Pett*, 2009 BCCA 232 at para. 19; and *Dunbar v. Mendez*, 2016 BCCA 211 at paras. 20-21.
- [302] In *Dunbar*, the Court of Appeal described the task in this way:
- [21] The assessment of future loss requires a court to estimate a pecuniary loss by weighing (even if not assigning specific numeric values to) possibilities and probabilities of future events and relating evidence and findings of fact to the quantification of the loss: *Schenker* at paras. 53, 69; *Ostrikoff v. Oliveira*, 2015 BCCA 351 at para. 29; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 53-55. The usefulness of economic and statistical evidence does not turn an assessment into a calculation. It does, however provide a useful tool to assist in determining what is fair and reasonable in the circumstances: *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

Past Loss of Income/Earning Capacity

- [303] *Smith v. Knudsen*, 2004 BCCA 613 remains the governing authority regarding the burden of proof for past loss of earning capacity. Dealing with a past loss of opportunity specifically, Justice Rowles explained the plaintiff must first establish a causal connection between the accident and the pecuniary loss claimed on a balance of probabilities (at para. 36). In other words, she concluded the plaintiff was required to prove on a balance of probabilities that

the injuries caused by the accident impaired his earning capacity, in that case, his ability to take the steps necessary to make a contract bid.

[304] If the plaintiff meets this threshold, the same principles apply to the assessment of past or future loss of earning capacity.

[305] Ms. Lo argues she sustained a past loss of earning capacity due to her injuries and "there is a real and substantial possibility [she] would have obtained full-time work as a lawyer and reached the typical salaries for Vancouver solicitors within 2 to 3 years (by 2017 or 2018)". She also argues the evidence shows she would have been able to take over mother's practice in about five or six years. In addition, she asserts she should not be penalized for her stoicism in working overtime and through pain at the Law Society, writing:

It is her capital asset as a lawyer and her potential growth in that profession that has been lost as a result of the Accidents, not merely her past wage loss based on her previous earnings at the Law Society or when she was underbilling at Kerfoot.

[306] Ms. Lo calculates her gross loss of past income capacity at \$200,000, estimating her earning capacity at \$50,000 in 2015, \$80,000 in 2016, \$90,000 in 2017, \$100,000 in 2018, and \$110,000 in 2019. From total potential earnings of \$430,000 she deducts her actual earnings of \$256,132.

[307] Ms. Herbst testified that associates at Farris were paid: \$101,000 in year one, \$111,000 in year two, \$121,000 in year three, \$132,000 in year four, \$145,000 in year five, \$155,000 in year six, \$165,000 in year seven. There is no evidence about the salaries earned by lawyers in quasi-public settings such as the PGT or WorkSafeBC.

[308] I note that in his first report dated October 30, 2017, economist Darren Benning, retained by Ms. Lo to provide opinion evidence regarding future loss of employment income, estimated the present value of her earnings as a lawyer working full-time in 2018 and 2019 at \$101,509 and \$109,509 respectively. His estimates assumed employment earnings commensurate with those of the average female Canadian lawyer based on 2011 National Household Survey data, converted from 2010 to 2018 dollar values and using "actual/anticipated changes" in the average weekly wage rate in Canada between 2010 and 2018. In his second report his estimate for 2019 was slightly lower, \$107,268, based on 2016 Census data regarding the average earnings of Canadian females employed as lawyers and adjusted in the same ways.

[309] The defendants take the position Ms. Lo is not entitled to any award for past loss based on the First Accident, suggesting essentially her earning capacity was not impaired. Similar to what I have found, they argue that after the First Accident, she chose to work as an intake officer at the Law Society, influenced by unrelated factors including the very significant increase from earning \$3,600 in 2014, to a salary of \$71,000 with benefits in 2015 that increased to \$81,000 by 2019. The defendants also assert there is no reliable evidence regarding how long it would have taken Ms. Lo to establish herself at Kerfoot, or how much

she would have earned had she done so.

- [310] Without specifically addressing the impact on her injuries on her income earning capacity after the Second Accident, the defendants acknowledge Ms. Lo suffered some past wage loss. They submit her damages should be calculated based on her income as an intake officer and an investigative legal analyst at the Law Society, not a lawyer. Based on her initial three month absence and part-time hours from February 2018 through January 2019 (30% to July 2018 and 40% from August 2018), they calculate her gross income loss during that period at \$72,000. Absent a deduction for failing to mitigate, they calculate her gross loss from February 2019 to the end of November 2019 during the extended leave, at \$67,000. Ms. Lo did not challenge their total gross actual lost income calculation of \$139,000.

Discussion

- [311] I have already found that the injuries and symptoms caused by the First Accident did not contribute to Ms. Lo's decision to leave Kerfoot and take the intake worker position at the Law Society a short time later, a finding of fact about a past event that must be treated as a certainty. To be clear, this also means I am satisfied Ms. Lo would have made the same decision even if the First Accident had not occurred.

First Accident and Past Earning Capacity

- [312] There is no dispute that following the First Accident, despite her injuries and symptoms, Ms. Lo missed no time from work at Kerfoot or as an intake worker at the Law Society prior to the Second Accident. Further, at the Law Society she worked some overtime and by April 2016, longer days in exchange for a flex day.
- [313] Although Ms. Lo did not lose any income from her employment, the question remains: was her capacity to earn income impaired by her accident-related injuries and symptoms. Based on my assessment of the evidence and findings of fact, I am satisfied it was, although only briefly and to a very minor extent. Again it is difficult to be precise in this case, but I accept that for the first few months after the First Accident, Ms. Lo did not have the capacity to work significantly more than regular full-time hours due to neck and upper back pain and intermittent but at times quite intense headaches. At the same time, I do not accept Ms. Lo actually did work more than regular full-time hours at Kerfoot before the First Accident except perhaps infrequently.

Second Accident and Past Earning Capacity

- [314] The defendants do not dispute that Ms. Lo's injuries and symptoms related to the Second Accident impaired her past earning capacity. Having found the Second Accident resulted in a significant worsening of her pain symptoms and headaches, as well as new lower back injury and pain, I am satisfied that her earning capacity, that is her capacity to perform the work of a paralegal or as a lawyer was significantly impaired. Although I found Ms. Lo and

Mr. Lee exaggerated her pain symptoms and headaches and I do not accept that Ms. Lo was incapable of working during her extended leave, Dr. Yuen supported the leave to facilitate Ms. Lo's recovery, and I am satisfied she did improve quite significantly during that time. I accept, in other words, the leave was reasonable and facilitated a meaningful improvement in Ms. Lo's accident-related condition.

Assessing Damages

- [315] Having found Ms. Lo's accident-related injuries and symptoms caused a minor, short-term impairment of her past earning capacity after the First Accident and a much more significant impairment after the Second Accident, I turn to quantify her damages for the loss.
- [316] In my view, the only real and substantial possibilities that I must consider in assessing her past loss arising from both accidents involve Ms. Lo doing what she did, that is remaining in a paralegal position at the Law Society or in another setting, or taking a job as a lawyer, namely as a solicitor.
- [317] There is no question Ms. Lo was a successful law student and performed well during articles at a demanding downtown law firm. After not being "kept on", however, instead of seeking an associate's position at another private law firm, she chose to join her mother, in order to develop her own solicitor's practice and perhaps take over her mother's when she retired at some point in the future. Ms. Lo earned only \$3,600 in 2014, her first and only full year of practice prior to the First Accident. I am satisfied that after she began working at Kerfoot, she did not apply to private firms, but did make one or two applications for lawyer's positions with agencies such as the PGT or WorkSafe BC.
- [318] In addition to finding that Ms. Lo would have left Kerfoot and taken the intake worker position in any event, I found that Ms. Lo's decision to do so strongly undermined her evidence about the depth of her commitment to pursuing a legal career. Consistent with this finding is the absence of any indication Ms. Lo considered returning to Kerfoot after she left. Similarly, I accept that after First Accident and prior to the Second Accident she did not apply for any lawyer positions. Any contrary evidence Ms. Lau and Mr. Lee may have given on this point is hearsay and unsupported by Ms. Lo's testimony. Furthermore, the evidence makes it clear that Ms. Lo and Mr. Lee really valued their active, busy lifestyle, which included significant travel. Although Ms. Lo worked long hours as an articulated student, it is apparent a work-life balance was a significant priority for the two of them. Based on the evidence and the absence of evidence, I do not accept Ms. Lo had any intention of working at a private firm with a significant billable hour requirements or the expectation that its associates would routinely work beyond if not well beyond regular full-time hours. The same is true of jobs for lawyers in other settings. In other words, I do not accept there was a real and substantial possibility that Ms. Lo would have pursued lawyer jobs that required much beyond regular full-time hours.

- [319] Given all of these circumstances, I am entirely satisfied there was no real and possibility Ms. Lo would have returned to practicing law absent the First Accident during the short time that her earning capacity was impaired. Therefore, it follows that Ms. Lo has not established that any damages resulted from the past impairment of her earning capacity prior to the Second Accident.
- [320] Turning to assess damages for her past loss following the Second Accident. Again, required to consider hypothetical events that are a real and substantial possibility and give them weight according to their relative likelihood, doing the best I can in the face of Ms. Lo's uncertain career trajectory, I assess the chance of her returning to practice law, meaning being employed as a lawyer in a position involving for the most part regular full-time hours absent the Second Accident at 20%.
- [321] In assessing damages for her past loss of capacity after the Second Accident, given the defendants' position (absent a deduction for failing to mitigate) and the findings I have made about the impairment of her earning capacity and the reasonableness of her extended medical leave, I base the assessment on Ms. Lo's initial three month absence from work at the Law Society, her part-time hours there up to February 2019 and her extended leave, the difference between her actual income and what she remained capable of earning, and what she would have earned had the accidents not occurred.
- [322] I start by determining what Ms. Lo would have earned had the Second Accident not occurred based on her without accident earning capacity.
- [323] There is no dispute that Ms. Lo would have earned \$167,000 working full-time at the Law Society after the Second Accident. Based on Ms. Lo's estimate of her earning capacity as a lawyer for 2017, 2018 and 2019, I calculate Ms. Lo's maximum without accident earnings as a lawyer from the date of the Second Accident up to the time of the trial at \$215,833.33. Having found there was only a 20% chance she would have returned to practicing law after the Second Accident, based on my calculation I assess her without earning capacity at \$176,766.67.
- [324] Turning to what Ms. Lo actually earned and was capable of earning after the Second Accident until the trial, I calculate her actual earnings at \$39,197.46 (2018 T4 earnings plus estimated actual earnings in early 2019), resulting in gross past wage loss of \$137,569.21. The more difficult question is was Ms. Lo capable of earning more despite the impairment of her earning capacity. I have rejected the suggestion she lacked the cognitive capacity to work as a lawyer due to the accidents, and I accept that working as a lawyer and in a paralegal position involve the same physical demands. This means I also accept Ms. Lo was just as capable of working as a lawyer as she was in her paralegal positions at the Law Society. However given the nature of her injuries, symptoms, the extent to which they impaired her earning capacity after the Second Accident, and her participation in ongoing treatment, in my view, there is very little likelihood Ms. Lo could have successfully secured part-time employment as a lawyer during this time. In other words, I accept for the

purpose of assessing her damages for past loss of earning capacity, her actual earnings following the Second Accident provide a reasonable measure of her with accident earning capacity.

- [325] The difference between Ms. Lo's with accidents capacity and her maximum without accidents capacity is \$137,569.21. Having received no submissions regarding positive and negative contingences, and not concerned they would factor any differently in comparing her without and with accident circumstances, I award that amount in damages for her past loss of earning capacity.

Future Loss of Earning Capacity

- [326] As I have indicated, to establish a loss of future earning capacity, Ms. Lo must prove that there is a real and substantial possibility that a future event will lead to an income loss as a result of her accident related injuries.
- [327] Based on a view of the fact and opinion evidence I have rejected, as mentioned, Ms. Lo takes the position that her injuries have resulted in a profound impairment of her future earning capacity, leaving her with essentially no residual capacity. She seeks an award of \$3,244,691, based on Mr. Benning's calculation of the present value of her future without accident income as a lawyer to retirement age (no later than age 67). Alternatively, Ms. Lo proposes an award of \$2,806,297. This is based on the same calculation, less 25% of \$1,753,584, Mr. Benning's calculation of the present value of her without accident employment income as an investigative analyst to retirement age, and the evidence she struggled to continue working part-time, up to a maximum of 40% before her extended medical leave.
- [328] The defendants do not dispute that Ms. Lo's injuries and ongoing symptoms have impaired her future earning capacity or that there is a real and substantial possibility that she will suffer a future pecuniary loss. They assert however an entirely different view of the extent of her impairment, the resulting loss, and the proper assessment of the loss. Accepting Ms. Lo may not be capable of working the long hours required of some lawyers, and she may experience flare-ups in her symptoms that affect her productivity or result in temporary absences, they take the position Ms. Lo remains capable of practicing law and after another gradual return, working regular full-time hours.
- [329] The defendants also argue that a capital asset, not an earnings approach, should be used in assessing Ms. Lo's damages because she was not established in her career at the time of the First Accident. They submit an award in the range of \$300,000 to \$500,000 is appropriate, based on three or four years of a lawyer's salary, if I accept Ms. Lo always intended to leave the Law Society and return to practicing law.

- [330] Neither party made any submissions regarding realistic negative and positive contingencies I ought to consider. However, Mr. Benning's earning estimates incorporate several reasonable labour market contingencies.

Impairment of future earning capacity

- [331] Similar to the defendants, I accept Ms. Lo's future earning capacity is impaired by her ongoing pain symptoms and headaches and the risk of flare-ups in pain and headache symptoms. Dr. Heran's opinion that Ms. Lo is or will be capable of normal full-time sedentary work strikes me as too optimistic. To be more specific I accept that ongoing pain symptoms, headaches and the risk of flare ups will interfere with her ability to work regular full-time hours consistently and result in occasional short term absences. My findings about the impact of Ms. Lo's use of recommended medications in the future, including the likelihood her ongoing pain and symptoms of depression will be improved by duloxetine, and problematic headache symptoms by other prescriptions medications, involve future events. I am required to consider the strong chance of improvement and the risk some or all of the medications will not result in further improvement or involve unmanageable side effects. I also accept Ms. Lo will require a gradual return to work. Given these considerations, I can be no more precise than to estimate Ms. Lo's current earning capacity is 30% impaired and in approximately one year it will be less impaired at 20% and remain similarly impaired over the long term. I do not distinguish between her capacity to work in her current position or a comparable position from her capacity to work as a lawyer, based on my previous discussion of the kind of employment she would have sought had she returned to practicing law. In my view, the same is true of what she would have pursued in the future.
- [332] It perhaps goes without saying I accept there a real and substantial possibility that the impairment of Ms. Lo's future earning capacity will result in a future pecuniary loss.
- [333] Although I rely heavily on the economic evidence and a mathematical approach to anchor estimates for the value of the loss, I agree with the defendants the capital asset approach is most appropriate. By the time of the First Accident, Ms. Lo had been practicing law for a very short time. Despite her strong abilities and evidence to the contrary, I have found her commitment to pursuing a legal career was not strong.
- [334] Turning to consider Ms. Lo's without accident and residual earnings, I view the real and substantial possibilities for her future career trajectory as the same as those for the past: Ms. Lo would have continued working in her current or a comparable paralegal position, or she would have returned to practicing law.

- [335] Assessing the chance of Ms. Lo returning to the legal profession and remaining there absent the accidents both in the past and the future is a very difficult task. I can see no reason to depart from my assessment of that chance in the past. For reasons already given, therefore, I assess the chance Ms. Lo would have spent the rest of her career working as a lawyer at 20%.
- [336] Relying on Mr. Benning's estimates of the present value future without accident earnings of \$3,244,691 for a lawyer, and \$1,753,584 for a legal analyst at the Law Society, a 20% impairment in future earning capacity equals \$648,938 in lost earnings for a lawyer; and \$350,717 for a paralegal. Applying my estimate of the 20% chance Ms. Lo would have spent her career working as a lawyer and the 80% chance in a paralegal position(s) comparable to her current job at the Law Society, results in \$410,361.08.
- [337] I must also account for the greater loss of earnings over the next year approximately, as Ms. Lo's earning capacity improves from an impairment estimated at 30% to 20%. An additional 10% loss in year one amounts to \$7,803.54.
- [338] In assessing an award for Ms. Lo's loss of future earning capacity based on the capital asset approach, the Brown factors also require some consideration. Accepting the nature of Ms. Lo's impaired future earning capacity, namely her difficulty working regular full-time hours consistently and the need for occasional temporary absences, will reduce her job opportunities and her marketability as a potential employee as a paralegal but more so as a lawyer, I accept she will suffer an additional pecuniary loss. I estimate that loss at approximately 20% or \$80,000. I therefore award Ms. Lo \$500,000 for her future loss of earning capacity.

Loss of Housekeeping Capacity

- [339] An award for loss of housekeeping capacity provides compensation for the value of the housekeeping the plaintiff would have done but was, or will be, incapable of performing because of the injuries caused by the accident. It does not depend on replacement housekeeping costs actually being incurred. Loss of housekeeping capacity reflects the loss of personal capacity, an asset, and is therefore compensable as a pecuniary loss. In some circumstances, however, it can be compensated by a non-pecuniary award.
- [340] Recently in *Kim v. Lin*, 2018 BCCA 77 at paras. 33-34, the Court of Appeal considered how to properly characterize and value a loss of housekeeping claim, concluding:
- [33] Therefore, where a plaintiff suffers an injury, which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's

discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[341] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

[341] Ms. Lo seeks \$101,148.09 (net present value) for her future loss of housekeeping capacity to the age of 65, based on the opinions of Dr. Waseem, Dr. Mehdiratta, and the supplementary report of Ms. Wong. Addressing it as a cost of future care item, the defendants take the position that \$10,000 to \$20,000 is reasonable for both general and seasonal cleaning.

[342] Based on her home assessment, Ms. Wong wrote:

Ms. Lo presents with limitations in repetitive and sustained reaching and stooping which impacts upon her ability to complete housecleaning tasks. She currently relies on her husband, in addition to homemaking assistance, to complete housecleaning tasks. Assistance would be required. Duration of need would depend on her medical prognosis.

[343] In her first report, Ms. Wong considered the opinion of Dr. Yuen:

Ms. Lo has been impaired from doing heavy household chores such as vacuuming, and experiences aggravation of her symptoms with simple tasks such as meal preparation from the prolonged standing"

[344] Consistent with the funding Ms. Lo received for housekeeping support after the Second Accident, Ms. Wong recommended two hours of housekeeping assistance per week and eight hours of seasonal cleaning per year, at an estimated cost of \$38 per hour, or \$3,952 and \$304 per year, respectively.

[345] Relying on the future cost of care multiplier provided by Mr. Benning and an award until age 65, Ms. Lo proposes \$93,923.23 (present value) for housekeeping and \$7,224.86 (present value) for seasonal cleaning.

[346] The hourly rate of \$38 contained in Ms. Wong's supplementary report is based on the cost of an agency called Nurse Next Door. I note that in her first report Ms. Wong estimated the hourly rate as \$30 to \$40. I do not recall any evidence about the rate paid for the funded service.

- [347] The defendants argue Dr. Yuen's opinion that Ms. Lo may require help with the activities of daily living if she does not continue to improve, does not amount to a medical justification for an award for future housekeeping services; and Ms. Lo is able to do housework, although she says it worsens her symptoms, although they acknowledge she has relied on Mr. Lee and her mother particularly since the Second Accident. They also submit there is no pattern to past expenditures that would assist in calculating a fair award.
- [348] Based on my findings with respect to Ms. Lo's current and future condition, and accepting that since the Second Accident, Ms. Lo has and should avoid performing heavy housework to minimize pain, headaches and symptom flares, I accept Ms. Lo's future housekeeping capacity has been impaired resulting in a future pecuniary loss. Specifically, I accept she will remain unable to perform heavy housework and heavy seasonal cleaning; and two hours per week is a reasonable assessment of Ms. Lo's equal share of heavy housework, as is eight hours per year for seasonal cleaning, recognizing she and Mr. Lee live in a house and will continue to do so.
- [349] Aware that the replacement cost should be considered in valuing Ms. Lo's pecuniary loss, it remains her loss of capacity that is being compensated. In my view, an agency rate of \$38 per hour results in an assessment of her loss that is too high. Based on Ms. Wong's original estimate, I consider \$30 per hour to be reasonable and award \$79,833.60, the present value of the amount equal to \$30 per hour for two hours per week plus eight hours per year to the age of 65.

Cost of Future Care

Legal Principles

- [350] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible and to preserve and promote her mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55, *aff'd* 2004 BCCA 290; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [351] The test for assessing an appropriate award is an objective one based on the medical evidence. An item of future care must be medically justified, not medically necessary, and reasonable, to be recoverable: *Milina*. An evidentiary link between a physician's assessment of pain, disability and recommended treatment and the care recommendations of a qualified health care professional is required: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [352] Based on the recommendations of Dr. Waseem, Dr. Mehdiratta and Dr. Spivak and the reports of Ms. Wong, Ms. Lo seeks an award in the range of \$50,549.77 to \$70,374.27 for the following care items and amounts:

CARE ITEM

AMOUNT

Psychological counselling (10-20 times at a one-time cost of \$200 per hour)

\$2,000 to \$4,000

Modalities for pain management such as physiotherapy or massage therapy (4-8 sessions per year at \$80 to \$115 per session)

\$7,605.12 to \$21,864.72*

Active rehabilitation (6-8 times per year)

\$7,129.80 to \$10,694.70*

Driving rehabilitation (10 sessions at \$200 per session)

\$2,000

Gym facility access pass (\$407 per year until age 65)

\$9,672.76*

Free weights of 1-10 pounds (one-time cost of \$162)

\$162

Medications (Ibuprofen, Tylenol and Voltaren Emugel annually - estimated at \$100/year to age 65)

\$2,376.60*

MRI's to monitor cervical spine (twice annually for 10 years)

\$19,603.49*

Prescription Medications

Discretion of the Court

TOTAL:

\$50,549.77 to \$70,374.27

[353] Aside from cleaning costs which have been addressed under loss of housekeeping capacity, the defendants' position is as follows: They agree to the proposed award for counselling. They oppose any award for physiotherapy based on Ms. Lo's evidence she would have continued attending in any event. Regarding active rehabilitation, they propose a one-time cost of \$600 based on eight sessions at \$75 each, and what they say is Dr. Waseem's recommendation for one year only. The defendants agree to the proposed award for driving rehabilitation. They oppose an award for a gym pass, because Ms. Lo testified to attending regularly before the accidents. The defendants also oppose an award for the cost of MRI's,

recommended by Dr. Mehdiratta, based on a view of his evidence that I share. They made no submissions about the balance of the items claimed by Ms. Lo, but did suggest an award of \$2,000 was reasonable for Botox injections, based on Dr. Waseem's opinion and Ms. Lo's evidence that she has not ruled them out.

Cognitive Behavioural Therapy

[354] In my view, the cost of 20 sessions of cognitive behavioural therapy is reasonable and justified. Ms. Lo started attending cognitive behavioural therapy in September 2019. There is no dispute it is an effective treatment for both psychological symptoms and chronic pain. Dr. Spivak recommended 10 to 20 sessions with the caveat that more may be required. Based on \$200 per session, I award \$4,000.

Physiotherapy and Massage Therapy

[355] Dr. Yuen's recommendation satisfies me that an award for periodic physical therapy as a form of pain management is medically justified based on the risk of flares in Ms. Lo's neck and back pain. I say this accepting that Ms. Lo has received the most benefit from active rehabilitation, temporary relief from physical therapy, and she would have continued with some physiotherapy but not massage therapy in any event. Clearly, access to ongoing temporary pain relief is consistent with the cost of future care objective of preserving and promoting a plaintiff's physical and mental health.

[356] Accounting for Ms. Lo's ongoing participation in physiotherapy, viewing the cost of four massage therapy sessions as reasonable, and doing the best I can with Ms. Wong's unspecified cost estimate, I award \$7,000 for this amount.

Active Rehabilitation

[357] Disagreeing with the defendants' interpretation of Dr. Waseem's recommendation, and accepting Dr. Yuen's recommendation that Ms. Lo needs to continue with active rehabilitation until she reaches a new baseline, and she will also require it in the future given the risk of flares (and to ensure she is maximizing the benefit of exercise and fitness as a pain management strategy), I award the cost of the present value of six sessions for the next year (\$75 x 6), and the present value of four sessions for each subsequent year until age 65 which equals \$7,278.30.

Driving Rehabilitation

[358] By consent, I award \$2,000 for driving rehabilitation.

Gym Facility Pass

[359] Accepting Ms. Wong's opinion and Ms. Lo's evidence about the use of the gym for active rehabilitation, and given my decision to award the cost of ongoing active rehabilitation, I also view this item as medically justified. At the same time, I accept Ms. Lo likely would have at least periodically accessed a gym for exercise in any event. Consequently, I assess \$4,500 or roughly one-half of the proposed award as reasonable, and award that amount.

Free Weights

[360] The defendants have not made submissions opposing this item. Accepting Ms. Wong's evidence Ms. Lo would benefit from the use of this equipment at home, and noting the very modest cost estimate, I grant the proposed award of \$162.

Over the Counter Medications

[361] Ms. Lo's proposed award for this item is based on an estimated annual cost of \$100 to age 65. Although I accept her evidence about her ongoing limited use of Tylenol and Advil for pain management, I am left uncertain about the proposed cost. Ms. Wong did not provide an estimate for this item. Further, I have found that Ms. Lo will take and likely benefit from recommended medications, which may reduce her ongoing need for over the counter medications. Accepting some further ongoing use of over the counter medication is medically justified and reasonable, however, I award \$1,000 for this item.

MRI's

[362] Given my assessment of Dr. Mehdiratta's evidence and findings of fact, I do not accept his recommendation of two MRI's per year for 10 years is medically justified, and award no amount for this item.

Prescription Medications

[363] As indicated, Ms. Lo leaves the amount of an award for this item at the court's discretion. Given my findings regarding recommended medications and Ms. Lo's future use of them, it is clear an award is medically justified. Without any cost estimates for any of the recommended medications, however, I am left unable to determine what amount is reasonable. Bearing in mind the defendants' position regarding Botox injections, I can do no better than to award \$2,000 for this item.

[364] In summary, the cost of future care awards are as follows, for a total of \$27,940.3028:

CARE ITEM

AMOUNT

Cognitive Behavioural Therapy

\$4,000

Physiotherapy and Massage Therapy

\$7,000

Active rehabilitation

\$7,278.30

Driving rehabilitation

\$2,000

Gym facility access pass

\$4,500

Free weights

\$162

Medications

\$1,000

MRI's to monitor cervical spine

\$0

Prescription Medications

\$2,000

TOTAL:

\$27,940.30

Special Damages

[365] Ms. Lo claims \$11,257.90 in special damages. The defendants take the position her reasonable accident related out of pocket expenses amount to \$6,202.00.

[366] The disputed expenses include half of the cost of physiotherapy (\$2,814.50); the cost of eye glasses (\$930), which Ms. Lo claims because she says the cost exceeded her health care spending account due to accident related part-time hours; the cost of an MRI (\$995), which the defendants say Ms. Lo did not pay for; and half of the mileage claimed (\$316.40) based on Ms. Lo's evidence her parents often drove her to appointments, she did not keep track of trips or which vehicle was used and her parents would not accept gas money.

- [367] Claims for special damages are subject to a standard of reasonableness in the context of the injuries suffered: *Redl v. Sellin*, 2013 BCSC 581 at para. 55. Medical justification for a treatment related expense aimed at promoting the plaintiff's physical or mental well-being is a factor in determining whether it is reasonable. Subjective factors can also be considered, including whether the plaintiff believes the treatments were medically necessary. With respect to cost, the courts have been prepared to allow claims for expenses at the level of optimum care.
- [368] I agree with the defendants' position regarding the cost of physiotherapy, given Ms. Lo would have continued to attend in any event, the frequency with which she attended before the First Accident, and her original position, and the cost of eye glasses, which I do not accept is a reasonable expense "in the context of the injuries suffered". I disagree however, regarding the cost of the MRI and mileage. An undisputed letter from the MRI provider specifies the cost will become payable when the insurer makes a payment or Ms. Lo's claim is finally determined. There is no indication the insurer has agreed to pay. Regarding mileage, accepting her parents sometimes drove her after the Second Accident, I accept that most of the cost arises from when she or Mr. Lee drove and am satisfied 75% of the mileage claimed (\$474.60) is reasonable.
- [369] Accordingly, I award Ms. Lo \$7,355.20 in special damages.

Conclusion

- [370] The damages award is \$892,698.31 with the appropriate adjustments to be made once counsel calculate the net amount for past loss of income.

HEAD OF DAMAGE

AMOUNT

Non-Pecuniary Damages

\$140,000

Past Loss of Income/Earning Capacity

\$137,569.21 (gross)

Future Loss of Income/Earning Capacity

\$500,000

Loss of Housekeeping Capacity

\$79,833.60

Cost of Future Care

\$27,940.30

Special Damages

\$7,355.20

TOTAL:

\$892,698.31

"Fleming J."

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