

CANADA / JUDGMENT

Caney v. Caney

2025 BCSC 2006

COURT

Supreme Court of British Columbia

DECIDED

10 October 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 2006 Caney v. Caney

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Caney v. Caney,

2025 BCSC 2006

Date: 20251010

Docket: M188425

Registry: Vancouver

Between:

Dacia Holley Caney

Plaintiff

And

Stefan Vahid Caney, Caryn Lee Fischer,

Derek Caney and Hertz Canada (N.S.) Company

Defendants

Before: The Honourable Justice Giltrow

Reasons for Judgment

Counsel for Claimant:

J. Small

Counsel for the Defendant, C.L. Fischer:

M. von Antal

Counsel for the Defendants, D. Caney and Hertz Canada:

D.J. Sinnott

Place and Dates of Trial:

Vancouver, B.C.

January 27-31, February 3-7, 10-14 and 24-25, 2025

Place and Date of Judgment:

Vancouver, B.C.

October 10, 2025

Table of Contents

Overview.. 3

Issues. 3

The plaintiff. 4

Evidence at trial. 4

Lay witnesses for plaintiff 4

Lay witness for defendants. 5

Expert witnesses. 5

Issue 1: What symptoms & injuries are impacting the plaintiff?. 6

Ruling on voir dire: Dr. Mallinson.. 9

Responsive report 10

Expert qualification. 12

Issue 2: Did the accident cause these symptoms and injuries?. 16

Neck pain and associated headaches. 16

Vestibular symptoms with associated migraines. 17

Adjustment disorder with anxiety features. 17

Conclusion on causation. 18

Issue #3: What losses does the plaintiff face as a result of the symptoms and injuries caused by the accident?. 18

Impact of injuries.	19
Plaintiff's prognosis.	20
Has the plaintiff met her duty to mitigate.	25
Non-pecuniary damages.	27
Income loss.	29
Past income loss.	37
Future income loss.	42
Special damages.	53
Cost of future care and assistance.	55
Medications.	57
Therapy.	58
Housekeeping capacity.	59
Transportation.	61
Aids to daily living and ergonomic equipment	62
Conclusion..	63
Overview	

- [1] The plaintiff Dacia Zavitz (formerly Dacia Caney) claims damages for injuries suffered in a motor vehicle accident August 1, 2016.
- [2] A deer ran in front of the car in which she was a passenger. That car stopped without collision. However, the car behind the plaintiff's hit them. This was followed by a second collision when a third car hit the second, and then the second hit the car the plaintiff was in. With both collisions the plaintiff's head accelerated to the front of the car and then back to hit the headrest. The first occurred as she was facing forward, and the second with her head turned to the left, as she had already turned back to check on her children in the back seat.
- [3] The present action was discontinued against Stefan Caney, who was Ms. Zavitz's husband at the time, and the driver of the car she was in.
- [4] Liability is admitted by the remaining defendants. Causation and damages are denied.
- [5] Derek Caney was the driver of the second car, which he had rented from Hertz Canada while he was visiting the plaintiff's family on vacation. Caryn Lee Fischer was the driver of the third car which struck the second. At trial the defendants Mr. Caney and Hertz Canada were represented by separate counsel but made joint submissions with counsel for Ms. Fischer.

Issues

[6] The issues for trial are:

- a) What symptoms and injuries are impacting the plaintiff?
- b) Did the accident cause these symptoms and injuries?
- c) What losses does the plaintiff face as a result of the symptoms and injuries caused by the accident?

The plaintiff

- [7] Ms. Zavitz is a 43-year-old physiotherapist, and mother of two. She and her children live with her second husband, Michael Temaino, and his children in Vancouver in a house on the same property as that upon which Mr. Temaino's mother lives.
- [8] Ms. Zavitz described the symptoms she has experienced since the accident, including vestibular (balance related) symptoms, limits to her range of motion, headaches and migraines, and cognitive difficulties. She also described the impact of these symptoms on her life, including on her clinical practice, and the determinations she has made about how much activity she can sustain without being debilitated by her symptoms.
- [9] In any personal injury claim, the plaintiff's testimony is of particular importance. In this case, Ms. Zavitz, was a credible and reliable witness.
- [10] I reject counsel for the defendants' submission that Ms. Zavitz's evidence must be treated with "caution", as he put it, because Ms. Zavitz would, as a physiotherapist, know what ranges of motion indicate disability. When pressed, counsel said that he was "not going so far as" to suggest Ms. Zavitz had falsified her symptoms in the physical exams performed on her, and he pointed to no evidence in support of such a suggestion. No medical expert opined that Ms. Zavitz was exaggerating her symptoms, in fact the expert medical evidence was to the contrary. Counsel's suggestion that, merely because of Ms. Zavitz's medical training and professional qualification, her evidence must be treated with particular caution is without merit, and is a groundless attack on Ms. Zavitz's integrity as a party, a witness, and a physiotherapist.

Evidence at trial

[11] I provide a brief summary here of the witnesses at trial:

Lay witnesses for plaintiff

- a) Michael Temaino - plaintiff's husband
- b) Dr. Jagdeepak Kaliray - plaintiff's family physician since 2019
- c) Leah Turman - physiotherapist and co-worker/employee of plaintiff

- d) Teryn Buna - physiotherapist and co-worker/employee of plaintiff
- e) Kate Kennedy - former co-worker, instructor and treating physiotherapist to plaintiff
- f) Guido Wisotski - physiotherapist, former mentor and co-worker of plaintiff
- g) John Oldham - retired physiotherapist, former mentor and co-worker of plaintiff
- h) Rena Chen - patient of plaintiff
- i) Marianne Anderson - patient of plaintiff
- j) Chris Ozeroff - friend of plaintiff

Lay witness for defendants

- k) Andrea Burton - CEO of the Physiotherapy Association of B.C.

Expert witnesses

- l) Neuro-Ophthalmology and Neurophysiology - Dr. Salina Teja and Dr. Art Mallinson for the plaintiff, and Dr. Briar Sexton for the defendants
- m) Physical Medicine and Rehabilitation - Dr. Gillian Simonett for the plaintiff and Dr. William Craig for the defendants
- n) Neurology - Dr. Donald Cameron for the plaintiff and Dr. Meera Gupta for the defendants
- o) Psychiatry - Dr. Shao-Hua Lu for the plaintiff
- p) Family Medicine - Dr. Henry King for the plaintiff
- q) Occupational Therapy - Simone Szarkiewicz for the plaintiff and Matt Gregson for the defendants
- r) Economists - Darren Benning for the plaintiff and Doug Hildebrand for the defendants
- s) Forensic Accounting - Stephen Graff for the defendants

Issue 1: What symptoms and injuries are impacting the plaintiff?

- [12] Ms. Zavitz suffers vestibular symptoms with secondary migraine headaches. This means that her vestibular symptoms--which include dizziness, imbalance, nausea and disorientation--will come on first, and then sometimes be followed by a migraine headache. The vestibular symptoms are also accompanied by a cognitive fatigue. The vestibular symptoms themselves are sometimes debilitating, requiring Ms. Zavitz to stop all activity and rest for several hours in a room with no light or sound. The migraines are often debilitating if Ms. Zavitz is unable to prevent them when she feels them coming on. Both the vestibular symptoms and the migraines are a constant presence for Ms. Zavitz in the sense that she must always avoid their triggers, or the symptoms will be activated and can become debilitating. The triggers are too much light and sound stimulation--such as in a grocery store or watching television--

and movement, such as riding in a car. She has eliminated driving a car, having found that to be virtually impossible since the accident because of the nausea it induces. Even as a passenger she must sometimes recline the seat and close her eyes to avoid overstimulation. She also finds that she develops significant cognitive fatigue after short periods, even in environments that are not otherwise triggering of her symptoms. Ms. Zavitz has had no change or improvement to these symptoms since 2018.

- [13] Ms. Zavitz also suffers neck pain with associated intermittent cervicogenic headaches. These headaches are different from the migraine headaches, and are described by Ms. Zavitz as tension headaches. She describes her neck pain as constant, with pain that radiates into her back and occasional tingling into her right arm and fingers. She describes the headaches as frequent but not debilitating.
- [14] Ms. Zavitz has also been diagnosed with "chronic adjustment disorder with anxiety features." Dr. Shao-Hua Lu, who was qualified to give expert psychiatric opinion evidence at trial on behalf of the plaintiff, assessed Ms. Zavitz on April 4, 2019 and determined that the chronicity of Ms. Zavitz's pain and diminished functional capability have impacted her psychological coping. Dr. Lu's evidence, which was uncontroverted on this point, is that the pain Ms. Zavitz experiences is inherently involved in her health anxiety and adjustment disorder, stating in his report: "Her pain, physical condition and headache play a direct and contributing role in her psychiatric experience". Dr. Lu also observed, however, that it is significant that even with the chronic pain Ms. Zavitz has suffered since the accident, she did not have a relapse of the major depression she had suffered post-partum. He described this as a "positive indicator of her mental health status." The adjustment disorder is not debilitating for Ms. Zavitz. There was no evidence that it prevents her from carrying out the activities in her life. Rather, it is something she experiences while she carries out these activities.
- [15] The conditions I have described above are those the plaintiff says were caused by the accident.
- [16] Ms. Zavitz has experienced a number of other symptoms and health-related events in her life. The defendants emphasized these in support of the argument that to the extent Ms. Zavitz faces any impairment and constraints on her ability to work now, she may have faced such impairment and constraint even without the accident, because of these other health conditions and events. However, as I will explain, I find there is no evidence to support finding a real and substantial possibility that these health conditions or events will recur or become symptomatic such that they will cause Ms. Zavitz future disability.
- [17] The physical conditions to which the defendants point arose after the accident. There are no relevant pre-existing physical conditions.

- [18] One of these events was a peroneal nerve injury in her ankle from a fall in March 2018. Ms. Zavitz was unable to walk for a period after this and could not work. She does not claim wage loss for the period during which she suffered this injury. She has no residual impacts from this injury.
- [19] Another condition that has had a significant impact on Ms. Zavitz in the past is arthritis. The pain from this arthritis started to come on in the summer of 2021, and Ms. Zavitz experienced the peak of this pain from about November 2021 to February 2022. She was diagnosed with rheumatoid arthritis, and as a precaution to preserve her joints, was in a wheelchair for a period of time. She could not see patients during this time, and does not seek compensation for wage loss during the period she was affected by arthritis. At trial Ms. Zavitz described this as a very difficult period in which she felt very discouraged in facing yet another adversity. However, she also describes the helpful perspective this period gave her--in being forced to slow down completely, she found her cognitive fatigue and confusion abated, and felt she could think more clearly again.
- [20] Dr. Ohata, a rheumatologist who examined Ms. Zavitz late in 2022, prescribed a trial of a new medication, biologics. Ms. Zavitz testified that she began to feel significant relief from her arthritis pain almost immediately, and by summer 2023 her arthritis symptoms had subsided, as they remained by the time of trial.
- [21] Ms. Zavitz suffered two other health related events after the accident--one was complications arising from a pregnancy in 2020, and the other was an elbow infection in 2023. There was no suggestion by the defendants that either presented ongoing symptoms by the time of trial.
- [22] The defendants do point to the depression and anxiety Ms. Zavitz has suffered in the past, which did precede the accident, beginning with the post-partum period after her first child was born in 2010. Ms. Zavitz had not, before this, suffered any mental health disorder. Ms. Zavitz sought treatment and was feeling much better within about a year. However, when she became pregnant with her second child in 2012, she experienced peripartum depression and another decline in her mood. Her depression was more severe after the birth of her second child. She was under the care of a psychiatrist for approximately two years, and on that doctor's recommendation Ms. Zavitz started taking Effexor, which she continues to take.
- [23] By the time of the accident in 2016, Ms. Zavitz's mental health was stable. She was taking Effexor and had prescriptions for Ativan for use with increased anxiety and Zopiclone to help with sleep, as needed.
- [24] Dr. Lu, attested that because of Ms. Zavitz's experience of major depressive disorder related to her pregnancies, she was at risk of deteriorating mental health and increased depression, in the absence of the accident. However, Dr. Lu observed that Ms. Zavitz's major depression was in remission in April 2016, and she had not had a relapse of major depression by the time he saw her in May 2018. Dr. Lu said this was remarkable given everything Ms. Zavitz had gone through, and was a positive indicator of her mental health status. As Dr. Lu noted,

by the time he examined her in May 2018, Ms. Zavitz had suffered not only the accident in August 2016, but other stressors as well. In October 2016 she had left her husband, taking the children with her to a women's shelter, where they stayed for about two months.

- [25] I find Ms. Zavitz is not suffering symptoms of major depressive disorder, despite her past history of doing so.
- [26] Accordingly, the symptoms and injuries Ms. Zavitz is suffering are a) the vestibular symptoms with associated migraines, b) neck pain with radiating pain into her back and associated headaches and c) adjustment disorder with anxiety features.
- [27] Before addressing whether the accident caused these symptoms and injuries I will address my ruling on the admissibility of the only expert report to which there was objection at trial.

Ruling on voir dire: Dr. Mallinson

- [28] The defendants objected to the admissibility of the report of one of the experts called by the plaintiff at trial, Dr. Mallinson. After a voir dire, I ruled Dr. Mallinson's opinion evidence admissible with reasons to follow. I give these reasons here.
- [29] The three salient bases for the defendants' objection to admissibility were:
- a) It is not a responsive opinion under the Rules, but is instead a late filed original opinion under the guise of a responsive one;
 - b) Dr. Mallinson is not a properly qualified expert under the Mohan criteria because he is not a physician, and has demonstrated himself to be an advocate for the plaintiff; and
 - c) Dr. Mallinson's opinion is of no assistance to the Court under the Mohan criteria because he is not a physician and can provide no diagnosis.

Responsive report

- [30] The defendants argued that Dr. Mallinson's report is not a proper responding report under Rule 11-6(4) on two bases:
- a) First, while Dr. Mallinson does discuss the defendants' expert, Dr. Sexton's report, he does not discuss the plaintiff's expert, Dr. Teja's report to which Dr. Sexton had been asked to respond.
 - b) Second, unlike Dr. Sexton and Dr. Teja, who are both neuro-ophthalmologists, Dr. Mallinson is a neurophysiologist. Because Dr. Mallinson's area of specialty lies in a different discipline, the defendants say that his report cannot be considered a responding report to Dr. Sexton.
- [31] I would not accede to either of these positions.
- [32] The instructions given to Dr. Mallinson were to respond to the opinions set out at page 8 of Dr. Sexton's report. Dr. Sexton expresses four opinions there:

- a) The headaches the plaintiff developed in close proximity to the accident "have a component of disequilibrium consistent with vestibular migraine. Vestibular mismatch can be a symptom of vestibular migraine and not a stand-alone diagnosis."
 - b) "Ms. [Zavitz] also has a secondary headache which is likely related to neck pain."
 - c) "Ms. [Zavitz] has a normal neuro-ophthalmic exam. She has no visual disorder requiring vision therapy or therapeutic lenses."
 - d) "She does not meet the American Congress of Rehabilitation Medicine diagnostic criteria for mild traumatic brain injury."
- [33] Despite being asked to respond to Dr. Sexton's expressed opinions, Dr. Mallinson responds only to the first of these in his report. His report responds to Dr. Sexton's diagnosis of vestibular migraine. Dr. Mallinson's opinion is that Ms. Zavitz's complaints do not meet the diagnostic criteria for vestibular migraine or probable vestibular migraine, and he explains why not.
- [34] The defendants argue both that Dr. Mallinson's report is improper because he does not mention Dr. Teja's report to which Dr. Sexton was responding, and at the same time, argue that Dr. Mallinson's report is an improper bolstering of Dr. Teja's opinion.
- [35] I am not persuaded that Dr. Mallinson was bound to discuss or assess Dr. Teja's report in his response to Dr. Sexton's report. In fact, had he done so, his report may have been vulnerable to arguments more persuasive than those before me that it was improperly bolstering Dr. Teja's original report.
- [36] I am also not persuaded that only another neuro-ophthalmologist could respond to Dr. Sexton's opinion about visual migraine and visual vestibular mismatch. Dr. Mallinson is a clinical neurophysiologist whose PhD thesis was entitled "Visual Vestibular Mismatch: A poorly understood presentation of balance system disease." While he is not a physician, physicians regularly refer patients with vestibular symptoms to him to seek information to assist the physicians in diagnosis. Dr. Mallinson's opinion was based upon his own interview of the plaintiff, a review of records from the two neurologists who assessed the plaintiff, Drs. Gupta and Cameron, and a literature review.
- [37] In my view, as long as Dr. Mallinson is properly qualified to give the opinion he purports to give in this report, no rule or principle requires that he be trained in the same discipline as the expert to whom he is responding.
- [38] I would not accede to either of the defendants' arguments that Dr. Mallinson's report is not properly a responding report to that of Dr. Sexton. I will next address the defendants' arguments about Dr. Mallinson's qualifications.

Expert qualification

Experience

- [39] The plaintiff sought to qualify Dr. Mallinson as an expert in neurophysiology qualified to give opinion evidence on "vestibular disorders including visual migraines and visual vestibular mismatch based on history taking."
- [40] The defendant argues against this qualification because Dr. Mallinson is not a physician.
- [41] Relying on *Meghji v. Lee*, 2009 BCSC 1542, the defendants say that the Court should exclude Dr. Mallinson's opinion because he is not a registrant of the College of Physicians and Surgeons of British Columbia, and accordingly is not permitted to provide the service of "medicine" in British Columbia, under s. 4 of the Medical Practitioners Regulation, BC Reg 416/2008 under the Health Professions Act. Under s. 1 of the Regulation "Medicine" includes the

assessment and management of the physical or mental condition of an individual

- [42] The defendants argue that because Dr. Mallinson, as a PhD neurophysiologist, is not licenced to practice medicine in B.C., which includes assessment of individuals, he is not permitted or qualified to diagnose an individual. The next step in the defendants' argument is that because Dr. Mallinson is not permitted to diagnose an individual, he cannot admissibly attest to an opinion on diagnosis. The defendants further argue, in relation to the second of the Mohan criteria, that an expert opinion is only "helpful to the court" if a diagnosis is provided. It is not sufficient to provide a responsive critique to a diagnosis opined by another expert.
- [43] The plaintiff objected to the late raising of this argument by the defendants. A trial management order issued December 20, 2024, required all parties to express the basis for any objections to expert reports by January 13, 2025, yet the defendants did not notify the plaintiff they would be advancing an objection to Dr. Mallinson's report on this basis. The trial management order specifically required:

By January 13, 2025, the parties will provide written particulars of all objections to expert reports, including any authorities relied upon in their objections, along with suggested redactions. The particulars must address whether the entirety of the report or specific passages are objected to.

- [44] I agree that it is prejudicial to the plaintiff for the defendants to be advancing this objection at this late stage without notice, despite the trial management order. I was provided no explanation as to why the defendants did not comply with the trial management order.
- [45] In any event, beyond this procedural prejudice, I would not accede to this basis for the defendants' objection for substantive reasons.

- [46] In *Meghji*, Justice Johnston reviewed the regulations governing the practice of medicine in B.C. that I have described above, as well as the Psychologists Regulation made pursuant to the Health Professions Act under which the proposed expert he was considering was governed.
- [47] I do not take *Meghji* to stand for the proposition that only those who are registered members of the College of Physicians and Surgeons may be qualified to give expert opinion at trial with respect to diagnosis of symptoms. Justice Johnston said:
- [26] This statutory regime, while providing helpful guidance, is not determinative of the question I have to answer. That is because the statutes regulate what Dr. Malcolm may do in his practice, not on how far he may go in the opinions or ready-made inferences he may advance in evidence in this trial. So I want to be clear that my ruling on how far Dr. Malcolm may go in his evidence in this trial is confined to that and does not purport to speak to what Dr. Malcolm may or may not do in his practice as a neuropsychologist.
- [48] The question to be asked in each case is: is the proposed expert qualified to provide the opinion the party seeks to tender in evidence. This is a question of fact in each case, which relies upon the Court's assessment of the expert's experience, training, education and qualifications.
- [49] In this case I have no hesitation in finding Dr. Mallinson is qualified to provide expert opinion evidence on vestibular disorders.
- [50] I need not determine whether the regulatory regime in British Columbia prohibits Dr. Mallinson from diagnosing patients, as the defendants argue, because Dr. Mallinson himself testified that his clinical practice is to provide information, assistance and advice to physicians whose role it is to diagnose and treat patients.
- [51] While he does not diagnose individuals, Dr. Mallinson's expertise is relied upon by physicians in making diagnoses relating to vestibular disorders. This is so both based on Dr. Mallinson's peer reviewed publications, and also based on referrals of patients to him by physicians.
- [52] Dr. Mallinson explained that history taking is the most important tool in assessing vestibular symptoms, because vestibular symptoms present as a "change" to an individual's usual sense of balance. I note that this was consistent with Dr. Teja's evidence that 90% of her assessment of the plaintiff was history taking, and 10% physical examination.
- [53] Dr. Mallinson takes detailed histories of patients to identify symptoms, when changes to the vestibular system occurred, and other proximate events. He then provides information and his opinion to the referring physicians. Dr. Mallinson also teaches medical students about vestibular disorders. His expertise in this specific specialized area is well-established.

Is a diagnosis required for the opinion to be helpful?

- [54] In my view Dr. Mallinson's report is helpful in this case, regardless of whether he is permitted by statute to make diagnoses, which I need not decide. A key issue at trial is whether Ms. Zavitz suffers visual migraines, as Dr. Sexton opined in her report, or visual vestibular mismatch as Dr. Teja opines. The diagnosis bears upon prognosis.
- [55] Dr. Mallinson is qualified to, and does, provide an opinion on what aspects of Ms. Zavitz's history do or do not accord with a diagnosis of vestibular migraine and visual vestibular mismatch.
- [56] In discussing Dr. Sexton's diagnosis of vestibular migraine, Dr. Mallinson sets out the diagnostic criteria for vestibular migraine, which Dr. Sexton does not do in her report. Dr. Mallinson then points out aspects of Ms. Zavitz's history of symptoms that do not accord with these criteria, including that constant imbalance--as Ms. Zavitz experiences--instead of episodic vertigo, is not suggestive of a diagnosis of vestibular migraines.
- [57] The diagnostic criteria for vestibular migraine also require ruling out other vestibular or headache disorders that better account for the symptoms. Dr. Mallinson states that "the literature strongly supports the fact that her symptoms do in fact "suggest another disorder: a post traumatic decelerative injury to her vestibular system." In my view, for the purpose of determining whether Dr. Mallinson's report is of assistance to the Court, nothing turns on whether this statement is a "diagnosis" by Dr. Mallinson, or a critique by him of Dr. Sexton's application of the diagnostic criteria to Ms. Zavitz's symptoms because of Dr. Sexton's failure to rule out another disorder that may better account for Ms. Zavitz's symptoms.
- [58] Whether or not it is a diagnosis, it is "scientific information which is likely to be outside the experience or knowledge" of the trier of fact, and it is "necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature": R. v. Mohan, [1994] 2 S.C.R. 9 at paras. 21-22, citing R. v. Abbey, [1982] 2 S.C.R. 24. Dr. Mallinson's report meets this threshold.

Advocacy

- [59] Nor do I accept the defendants' argument that Dr. Mallinson demonstrated partiality in his report because he used "bolded" font in some places. This argument is entirely without merit. Dr. Mallinson's use of bold is clearly for formatting purposes, and not for emphasis. The only places Dr. Mallinson uses bold are as headings or to identify quoted text. These quotes are drawn from the reports of Dr. Sexton, Dr. Gupta and Dr. Cameron (experts for the defendants and the plaintiff), and from the diagnostic criteria published by the International Headache Society.

Conclusion on voir dire

[60] For the reasons I have articulated I accepted Dr. Mallinson's qualifications to provide opinion evidence on "vestibular disorders including visual migraines and visual vestibular mismatch based on history taking." On receiving my ruling, the defendants asked that the record be clear that Dr. Mallinson is not a medical doctor, which is noted.

Issue 2: Did the accident cause these symptoms and injuries?

[61] The evidence overwhelmingly establishes the accident caused the symptoms and injuries that I have found Ms. Zavitz is suffering.

Neck pain and associated headaches

[62] There is no suggestion in the evidence that Ms. Zavitz suffered neck pain before the accident.

[63] Dr. Cameron was qualified at trial as an expert able to provide opinion evidence within the field of neurology in relation to post-traumatic headaches, post-traumatic common migraine headaches and musculoskeletal injuries. Dr. Cameron diagnosed Ms. Zavitz with musculoskeletal injuries resulting from the accident. There was no challenge to this evidence.

Vestibular symptoms with associated migraines

[64] There is no credible suggestion that Ms. Zavitz suffered vestibular symptoms before the accident. While they disagree on diagnosis, both neuro-ophthalmology experts, Dr. Teja for the plaintiff and Dr. Sexton for the defendants, were of the opinion that the accident was the cause of Ms. Zavitz's vestibular symptoms and migraines.

[65] Ms. Zavitz testified that even before she left the scene of the accident she felt something was different with her vision. She also had a headache, and felt neck pain along with tingling in her arms and legs. When she was discharged from hospital that day, after imaging and the prescription of pain medications, she felt, upon returning to the vacation house the family had rented, that she was unsteady on her feet. Her pain increased over the day and the next.

[66] Dr. Mallinson explained that the way in which Ms. Zavitz described her body moving during the first and second impact in the accident is consistent with the vestibular symptoms she experiences. The deceleration of the head from 100km/hr to 0km/hr causes the otoliths--small hairs that orient us in space and to gravity--to bend and break, causing otolithic damage. Vestibular symptoms result. This explanation was not challenged in cross-examination.

Adjustment disorder with anxiety features

- [67] The only psychiatry expert qualified to testify at trial was Dr. Lu. As I have explained, Dr. Lu diagnosed Ms. Zavitz with an adjustment disorder with anxiety features. Dr. Lu is of the opinion that the accident was a significant cause of this disorder because of the pain and diminished physical and cognitive function Ms. Zavitz has experienced as a result of the accident.
- [68] As I have explained, Ms. Zavitz did experience major depressive symptoms associated with pregnancy and the birth of her children, but those symptoms had resolved by the time of the accident. As Dr. Lu notes, it is significant that Ms. Zavitz has not experienced a recurrence of major depressive disorder since the accident in light of the pain and difficulties in functioning she has experienced. The evidence does not establish that Ms. Zavitz's previous post-partum depression is a cause of her present adjustment disorder with anxiety features.
- [69] As Dr. Lu explained, the chronic pain Ms. Zavitz experiences is inherently bound up in the adjustment disorder and anxiety she now suffers. The plaintiff has established that the accident is the cause of her psychiatric and cognitive symptoms.

Conclusion on causation

- [70] I find the accident was the cause of all three of the injuries the plaintiff suffers. The accident was the sole cause of Ms. Zavitz's vestibular symptoms and neck pain, and the migraines and headaches associated with those. These vestibular symptoms, the neck pain and the associated headaches in turn contribute very significantly to the adjustment disorder Ms. Zavitz suffers--indeed they may be the sole cause of the disorder. It is not necessary for me to determine this, as "defendants remain liable for all injuries caused or contributed to by their negligence": *Athey v. Leonati*, [1996] 3 S.C.R. 458 para. 17
- [71] But for the defendants' negligence, Ms. Zavitz would not be suffering these symptoms and injuries. She is therefore entitled to damages to compensate her for the losses arising from these injuries.

Issue #3: What losses does the plaintiff face as a result of the symptoms and injuries caused by the accident?

- [72] The plaintiff is entitled to be put back in the position she would have been in but for the defendants' negligence. In this case the plaintiff claims:
- a) Non-pecuniary damages including past loss of housekeeping capacity;
 - b) Past loss of earning capacity;
 - c) Future loss of earning capacity;
 - d) Future care costs, including future loss of housekeeping capacity; and

e) Special damages

Impact of injuries

- [73] The injuries Ms. Zavitz suffered in the accident have had a significant impact on her life.
- [74] Before the accident, Ms. Zavitz had a full life, albeit in the context a difficult marriage. She worked as a physiotherapist before the birth of her first child. She was responsible for the vast majority of the household tasks, and was able to drive and be the primary parent for her children, while her former husband was in school and working. She enjoyed bike riding, skiing, tennis and watching movies with friends.
- [75] By contrast, when Ms. Zavitz returned to her regular grocery store a couple of weeks after the accident, she found the task of driving there difficult, went the wrong way inside the store several times, despite her familiarity with it, and felt disoriented and nauseated. She felt like her brain could not "sort out" the items on the shelves, and she had trouble figuring out how to pay at the parking meter, despite having done so many times before. This sense of disorientation began almost immediately after the accident.
- [76] Unfortunately, this level of impairment did not abate with time, and has continued to affect not only her family and personal life, but her professional life. Ms. Zavitz testified that the most pronounced impact she suffers is the cognitive impairment and fatigue she experiences. She can not sustain thinking clearly for very long, and she struggles with short term memory. This impacts every aspect of her life. All of the relevant expert evidence at trial supports this being associated with the vestibular symptoms Ms. Zavitz experiences.
- [77] Beyond the cognitive impacts, the vestibular symptoms themselves have a direct impact on Ms. Zavitz's functioning. She experiences a constant sense of imbalance, and intermittent nausea. She becomes overwhelmed by visual and auditory stimulation, so she can no longer do things like grocery shopping. She cannot drive anymore, because she is overcome by the stimuli and the nausea that results. She often has to recline the seat and close her eyes when she is the passenger in a car for longer rides.
- [78] Ms. Zavitz also experiences migraine headaches associated with her vestibular symptoms, which she manages by taking a medication called Cambia, and resting in a dark room until her symptoms have subsided. This recovery can take many hours.
- [79] She experiences constant neck pain, and gets intermittent cervicogenic "tension" headaches associated with that pain.
- [80] This pain and functional limitation have in turn caused Ms. Zavitz to suffer low mood and heightened anxiety.

Plaintiff's prognosis

Vestibular symptoms

- [81] Assessing future loss requires determining Ms. Zavitz's prognosis, as this will have a significant impact on the degree to which she is impaired in the future.
- [82] While both neuro-ophthalmology experts at trial, Dr. Teja for the plaintiff and Dr. Sexton for the defendants, agreed that Ms. Zavitz's vestibular symptoms are caused by the accident, they did not agree about Ms. Zavitz's diagnosis and prognosis. Dr. Teja diagnosed Ms. Zavitz with visual vestibular mismatch, whereas in her expert report Dr. Sexton expressed the opinion that Ms. Zavitz's headaches "have a component of disequilibrium consistent with vestibular migraine. Visual vestibular mismatch can be a symptom of vestibular migraine and is not a stand-alone diagnosis." The significance of the difference between visual vestibular mismatch and visual migraine lies in prognosis.
- [83] Visual vestibular mismatch is the result of damage to the otoliths, structures in the ear responsible for orienting to gravity. Dr. Teja is of the opinion that the plaintiff has suffered such injury, and will not see future improvement of her symptoms. By contrast, Dr. Sexton suggested that vitamin supplementation or analgesics might be options to reduce migraine headaches and reduce Ms. Zavitz's overall headache burden, respectively.
- [84] I found Dr. Sexton's evidence on diagnosis unreliable. In her report, she did not articulate the diagnostic criteria for vestibular migraine, nor discuss how Ms. Zavitz's symptoms correspond to those criteria. On cross-examination, it became apparent that Dr. Sexton had applied criteria for acute migraine, although she readily admitted "clearly she doesn't have episodes, she feels unwell all the time", and sought in testimony to change her opinion to chronic migraine. However, Dr. Sexton also said in testimony "there aren't currently good diagnostic criteria for chronic vestibular migraine." I find this to be a weak foundation for Dr. Sexton's diagnosis of vestibular migraine.
- [85] The foundation of Dr. Sexton's opinion is further weakened in my view because she did not test Ms. Zavitz's vestibular control of her eyes. This was despite Dr. Sexton noting in her report that Dr. Teja reported finding on examination that Ms. Zavitz's vestibular control of her eyes was "significantly impaired", and that Dr. Sexton had been asked to respond to Dr. Teja's report. Dr. Teja's finding was based on an objective test, yet Dr. Sexton chose not to repeat that test, nor test for impairment of vestibular control at all, nor to accept Dr. Teja's result. If Dr. Sexton did implicitly accept the result, she offered no explanation about how she reconciled that result with her rejection of Dr. Teja's diagnosis of visual vestibular mismatch.
- [86] As Dr. Teja's evidence demonstrates, understanding the role of the vestibular symptoms is important to diagnosis, because if they are arising as the result of visual vestibular mismatch, rather than as secondary to a migraine, Ms. Zavitz's prognosis then likely derives from visual vestibular mismatch.

[87] Dr. Sexton's failure to test for objective measures of vestibular impairment is also significant because Dr. Sexton recognized in her report that Ms. Zavitz's headaches are preceded by vestibular symptoms of nausea and unsteadiness, not followed by them, suggesting they may be a cause rather than result of migraines. Dr. Sexton admitted on cross-examination that testing for vestibular control would have been helpful to diagnosis.

[88] Dr. Teja, on the other hand, upon examination of Ms. Zavitz, explained that Ms. Zavitz has excellent measures of visual acuity and normal healthy ocular anatomy, but that the measures of vestibular control of her eyes (keeping them stable and working together under provocative conditions) were significantly impaired. She explained that this was a presentation of visual vestibular mismatch (also known as benign postural dizziness), which can arise from the forceful back and forth mechanism of whiplash. Dr. Teja explained:

This is not an eye injury, as each individual eye is intact and functioning well. Rather, it is a problem with the processing of sensory information in the brain in order to control the movements of the eyes and keep the perception of the world around us stable. Typical symptoms include being overwhelmed by any activity that demands quick eye movements or is a visually complex scene: busy environments like malls or grocery stores, scrolling on screens, reading at a normal pace, driving or being in a moving vehicle. When individuals with this condition are exposed to this, symptoms including dizziness, nausea, disorientation and fatigue are common. Prolonged recovery is a common feature which is related to how much exposure occurred.

[89] Dr. Sexton's opinion does not meaningfully engage the role of the vestibular symptoms Ms. Zavitz experiences, and fails to inquire into or establish whether the vestibular symptoms may be causative of the migraines, addressing the disequilibrium only as a component of the headaches.

[90] I accept Dr. Teja's opinion that Ms. Zavitz suffers visual vestibular mismatch as a result of the accident.

[91] Unfortunately, the prognosis accompanying a diagnosis of visual vestibular mismatch is not good news for Ms. Zavitz. Dr. Teja's evidence was:

Significant and meaningful recovery is usually within the first year after an injury like [Ms. Zavitz's]. She describes her recovery as plateauing around the 1-2 year mark after her [accident]. I would not expect meaningful improvement at this juncture, and her limitations are likely going to be permanent.

[92] Future events must be shown to be real and substantial possibilities on the evidence, rather than proven on a balance of probabilities: Athey, para. 27.

[93] The evidence does not demonstrate a real and substantial possibility Ms. Zavitz will face any significant improvement in either her vestibular or pain symptoms in the future. Dr. Teja, whose evidence I accept, is of the opinion that no further improvement in Ms. Zavitz's vestibular symptoms is to be expected. Dr. Simonette, physiatrist, testified that in her opinion Ms. Zavitz's "spontaneous" neck recovery has ended, and prognosis for full recovery

is poor. I accept based upon this evidence that Ms. Zavitz's physical pain in her neck and upper back is likely permanent.

[94] I am unable to accept the countervailing opinion of Dr. Craig, physiatrist, who was asked by the defendants to conduct an independent medical examination of Ms. Zavitz and provide his opinion on diagnosis or prognosis. I found Dr. Craig's opinion of limited assistance for several reasons:

- a) Dr. Craig did not account for Ms. Zavitz's vestibular symptoms in his report. These are significantly debilitating symptoms.
- b) Dr. Craig stated:

While she states that her joint symptoms, or inflammatory arthritis, are presently well-controlled, she would still have some risk of flaring symptoms with full-time work. Even without her neck symptoms, it would likely be difficult for her to do full-time work as a physical therapist doing manual therapy.

However, on cross-examination it became apparent that in offering this opinion, Dr. Craig had not reviewed the medical records relating to management of Ms. Zavitz's arthritis symptoms after June 17, 2022, including the records of Ms. Zavitz's general practitioner Dr. Kaliray, and the rheumatologist Ms. Zavitz had seen for a second opinion on her arthritis, Dr. Ohata. This is significant because it was Dr. Ohata who had prescribed the biologics medication that Ms. Zavitz described as having resolved her arthritis symptoms. I also note that Dr. Craig stated in testimony he would defer to a specialist in rheumatology about prognosis for arthritis. Dr. Ohata continued to follow Ms. Zavitz's response to this medication up to the time of Dr. Craig's independent medical examination and report. Dr. Craig agreed on cross-examination that in his assessment of Ms. Zavitz he found no signs of active arthritis in Ms. Zavitz's joints. Given the continued resolution of Ms. Zavitz's arthritis symptoms, and in the absence of any explanation in Dr. Craig's report for his opinion that she was at risk of future flare ups, and without him having reviewed the rheumatological records from the time after which she responded to the prescribed medications, I am unable to find Dr. Craig's opinion on this point to be other than speculative.

- c) Dr. Craig also states in his report: "With respect to her neck, there are a number of good treatment options available to her and I do not feel that she has reached her point of maximum medical improvement. With further treatment, I feel it is reasonable to expect that she should be able to increase the number of patients she sees per week." As I have already noted, Dr. Craig did not account for Ms. Zavitz's vestibular symptoms, which are debilitating. Accordingly, this statement of opinion is of limited assistance for that reason in itself. However, even if one were to focus attention only on Ms. Zavitz's neck, Dr. Craig's statement is not supported. The only treatment options he points to in his report are 1) trigger point injections and 2) a medial branch block. However, in testimony Dr. Craig said branch blocks are "really for diagnostic purposes", distinguishing this from treatment. Dr. Craig also confirmed that trigger point injections require referral by a physician. There is no evidence that any physician has prescribed trigger point injections for Ms. Zavitz.

Has the plaintiff met her duty to mitigate

- [95] A plaintiff has an obligation to take all reasonable measures to reduce her damages, including undergoing treatment to alleviate or cure injuries. The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of their loss: *Rhodes v. Surrey (City)*, 2018 BCCA 281 as set out in *Chiu v. Chiu*, 2002 BCCA 618.
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.
- [96] The defendants submit that the plaintiff has failed to mitigate her symptoms, and as a result 50% should be deducted from any income loss (past or future) the plaintiff is found to have suffered as a result of the accident. In particular, the defendants argue that the plaintiff should undergo botox and cervical injections.
- [97] I am not persuaded that the plaintiff has failed to mitigate her damages by not having attempted either of these interventions. I note first that there was no evidence of one of Ms. Zavitz's treating physicians recommending either injection and Ms. Zavitz declining it. The prospect of injectible interventions arose only in the context of independent medical examinations prepared for trial. The defendants argue that botox was recommended by Drs. Cameron and Simonette and cervical injections by Drs. Craig and Simonette. However, a review of the evidence demonstrates that none of these were opinions that these injectible interventions would likely lead to successful treatment of Ms. Zavitz. Dr. Simonette's evidence was that injectible interventions were ultimately contra-indicated for Ms. Zavitz. Dr. Cameron and Dr. Craig's recommendations were made with respect to assessment, as distinct from treatment.
- [98] Dr. Simonette expressly stated in her report that these "interventional treatments" were contra-indicated because Ms. Zavitz was too anxious to pursue them. Dr. Simonette explained in cross-examination she regularly sees people who "have no interest in putting a needle next to their nerve", the injections are "not totally without risk", and it is contra-indicated to pursue such treatment where a competent patient does not wish to pursue it.
- [99] Dr. Cameron's opinion that Ms. Zavitz would be a candidate for botox was stated in his report to be for assessment, as distinct from treatment, stating: "This will allow a more adequate assessment regarding the possible relief of her headaches following this accident." As I have stated, in testimony Dr. Craig explained that the cervical injections require referral by a physician, and the branch blocks he recommends are really for diagnostic purposes. Neither of these opinions is sufficient, in my view, to meet the threshold required to reduce an award for damages. The fact that a treatment might afford some relief is not sufficient: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 (B.C. C.A.) at paras 56-58.

- [100] I am not persuaded on the evidence that any treating physician or independent medical examiner has identified a reasonable likelihood of successful treatment from any injectible intervention, much less explained any such likelihood to Ms. Zavitz. In the absence of any evidence of one of Ms. Zavitz's treating physicians recommending any of these interventions, I am unable to find that Ms. Zavitz has unreasonably eschewed recommended treatments or failed to mitigate her damages by not having pursued them.
- [101] In my view the evidence readily demonstrates that the plaintiff has taken all reasonable measures to seek and follow recommended treatment, and to mitigate her damages. As Dr. Teja explained, Ms. Zavitz is taking the highest dose of Effexor recommended for treatment of visual vestibular mismatch. Dr. Kaliray testified that he considers Ms. Zavitz's migraines to be managed appropriately with Cambia. Ms. Zavitz has pursued extensive physiotherapy since the accident, with no evidence that she has failed to undertake any recommended physical treatment.
- [102] Moreover, beyond Ms. Zavitz's efforts to alleviate her symptoms and pain, she has made every reasonable effort to work and carry out her functions within her family to the extent possible without triggering and exacerbating her symptoms. I find she has mitigated her losses by working 25% of a full schedule as opposed to not working at all.
- [103] I would not accede to the defendants' argument that the plaintiff has failed to mitigate her damages, and would make no deduction from the damages I address below.

Non-pecuniary damages

- [104] The plaintiff claims non-pecuniary damages of \$180,000 to \$210,000 to compensate her for the pain, suffering and impairment to her life she has experienced because of accident. The plaintiff submits past loss of housekeeping capacity should be considered in this non-pecuniary damages award. The defendants argue that a range of \$90,000 to \$130,000 appropriately compensates the plaintiff for non-pecuniary damages. Both parties agree that the Bank of Canada's inflation calendar may be used for the consumer price index when considering awards of non-pecuniary damages made in comparable cases: *McNabb v. Rogerson*, 2022 BCSC 1514.
- [105] Before the accident the plaintiff had no physical limitations, nor any mental health limitations, as she had recovered from her post-partum depression. She was an active and busy mother who enjoyed biking, skiing, tennis and watching movies with friends. She felt a strong engagement with and sense of identity from her career, and was looking forward to returning to physiotherapy practice as her children were approaching school age.
- [106] By contrast, her life changed significantly because of the accident. She has had to make adaptations to almost every significant aspect of her life because of the impacts of her accident injuries. She suffers from constant neck pain, as well as a constant sense of imbalance. Each of these constant conditions also brings frequent related effects: the neck pain leads to intermittent headaches at the back of her head; the vestibular symptoms

bring intermittent nausea, migrainous headaches, and cognitive fatigue. She finds the cognitive fatigue most disabling, and the cluster of these symptoms requires her to rest frequently throughout her days. She is dependent on others, particularly her husband, because she cannot drive and cannot be in busy overstimulating environments like grocery stores. She cannot watch movies or shows with friends or at all anymore, as the screen and the lights trigger her symptoms.

- [107] I accept that she has suffered, and continues to suffer the losses I have described above. However, I am not persuaded that Ms. Zavitz has suffered the further loss she describes--that is, the loss of enjoyment of, or ability to thrive in, her career. As I discuss below in relation to income loss, I do accept that Ms. Zavitz is only able to work a portion of the schedule she would have worked without accident. However, while that does lead to pecuniary loss, it does not necessarily lead to non-pecuniary loss. Ms. Zavitz has, admirably, managed through adaptations, to continue to build her physiotherapy practice despite her injuries. She has, since the accident, opened her own clinic, expanded her skills to the point that she has developed an eponymous physiotherapy technique, created and maintained a mentoring program whereby she teaches other physiotherapists in her clinic, and developed a loyal and satisfied patient base, with people willing to pay a premium for Ms. Zavitz's services. Despite the diminished hours Ms. Zavitz must work because of her injuries, I do not find that she has suffered non-pecuniary loss related to her work and career because of the accident.
- [108] The defendants cite the following cases as guidance for the range of non-pecuniary damages that have been awarded in similar circumstances: *Reimer v. Bischoff*, 2015 BCSC 1876, *Hall v. Lyall*, 2023 BCSC 260, *Mandra v. Lu*, 2014 BCSC 2199, *Sparks v. Keller*, 2022 BCSC 231, *Abraha v. Suri*, 2019 BCSC 1855, *Ingram v. Munroe*, 2019 BCSC 234. The plaintiff cites *Kijowski v. Scott*, 2015 BCSC 2335 and *Blackburn v. Lattimore*, 2021 BCSC 1417.
- [109] *Blackburn* lies at the upper end of the range proposed by the plaintiff, and has several similarities with the case before me, including life changing impacts of visual vestibular mismatch for a 35-year-old plaintiff. However, in that case the plaintiff was largely restricted to her home as a result of the constellation of injuries from the accident. Fortunately, Ms. Zavitz does not suffer impairment to the same degree, and continues, with adaptation, to have an engaging life outside her home, particularly through her work, albeit during limited hours.
- [110] *Reimer* also shows significant similarities to the case at bar. The plaintiff was 55 years old and suffered from headaches, chronic dizziness and imbalance, trouble concentrating, chronic neck pain, low mood, and anxiety. He had no significant pre-existing medical history or any intervening injuries. While the Court anticipated some improvement with some of the plaintiff's symptoms, the prognosis for the balance, dizziness and memory difficulties was poor. The plaintiff had to work longer hours to keep his business going and no longer had the same enjoyment in work. Non-pecuniary damages were awarded at \$100,000 (adjusted to \$129,766.69 in 2025).

- [111] Considering the non-exhaustive list of factors articulated by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, I find the plaintiff's age relative to the plaintiff in *Reimer* and her degree of impairment relative to the plaintiff's impairment in *Hall*, both warrant awards higher than those awarded in those cases.
- [112] In my view \$155,000 is an appropriate award to compensate Ms. Zavitz, as best as a monetary award can, for non-pecuniary damages arising from the accident.

Income loss

- [113] The plaintiff claims both past and future lost income. She claims compensation for past lost income arguing but for the accident she would have begun working full time June 1, 2017, and would have continued to do so until trial except, as I will explain below, for the period between September 1, 2019 to December 31, 2023. She claims compensation for lost future income because rather than working full time, as she says she would do but for the accident, she can only work 25% of a full-time schedule without becoming debilitated by the injuries she suffered in the accident.
- [114] In 2021, the British Columbia Court of Appeal issued a trilogy of judgments clarifying the three-step process for considering claims for future loss of earning capacity which is set out in *Rab v. Prescott*, 2021 BCCA 345:
- [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras 93-95.
- [115] In *Meckic v. Chan*, 2022 BCSC 182, Justice Kent reviewed the legal principles governing the assessment of damages in personal injury cases, including the analytic framework endorsed by the trilogy of decisions decided by our Court of Appeal:

A. The "Simple Probability" Standard of Proof

- [109] The assessment of damages in a personal injury case necessarily deals not only with past events but also with hypothetical and future events. The standard of proof for past events is, of course, the balance of probabilities and, once proven, such matters are treated as certainties. Hypothetical or future events, on the other hand, need not be proved on a balance of probabilities standard; instead, future or hypothetical possibilities are taken into account so long as they are "real and substantial possibilities and not mere speculation, and they are given weight according to their relative likelihood": *Athey v. Leonati*, [1996] 3 SCR

458, paras. 27-29; Grewal v. Naumann, 2017 BCCA 158, paras. 44-49.

[110] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absence of the defendant's negligence. This is the plaintiff's "original" or "without-accident" position. This is then compared with the plaintiff's "injured" or "with-accident" position and the difference between the two represents the plaintiff's loss: Athey, para. 32.

[111] There are thus four scenarios which the Court is required to assess:

1. What actually happened to the plaintiff in the past to the date of trial, a determination that includes life events between the accident and the trial, all of which, once proven on a balance of probabilities, is treated as a certainty;
2. What would have occurred to the plaintiff between the date of the accident and the trial, had the accident not occurred (a past hypothetical "without-accident" scenario);
3. How would the plaintiff's life have proceeded in the future if the accident had not occurred (a future hypothetical "without-accident" scenario); and,
4. How will the plaintiff's life proceed in the future now that the accident and resultant injury has occurred (the future hypothetical "injured" or "with-accident" scenario).

[112] Scenarios 2 to 4 above involve past or future hypothetical possibilities which, as noted, will be taken into consideration so long as they are "real and substantial possibilities" as opposed to "mere speculation". This of course begs the question: how does one determine the difference between the two and, once the former is established, how does it apply to the quantification of damages?

[113] The leading text on personal injury damages in Canada is Ken Cooper-Stephenson & Elizabeth Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed (Toronto: Carswell, 2018). Chapter 2 of that text addresses "Proof of Damages" and discusses the "simple probability" standard of proof and its application to the assessment of damages contingent upon chance. The word "probability" is used in its statistical sense, i.e. denoting any degree of chance.

[Emphasis added by Kent J.]

[114] Some of the substantive principles set out in the text include the following (citations omitted):

- The "simple probability" standard of proof evaluates the degree of probability that any sequence of events will occur or would have occurred, and therefore the degree of probability that the plaintiff will suffer or would have suffered the material loss. It then awards damages for the material loss proportionate to the established degree of probability;

- The Court thus estimates what are the chances that a particular event will or would have happened, usually expressed as a percentage, and reflects those chances in the amount of damages which it awards;
- All contingencies, positive or negative, that are established on the evidence as realistic as opposed to merely speculative possibilities must be given effect;
- However, there comes a point when a chance or probability is so small that it might be characterized as "speculative", or "too remote" and thus excluded from consideration; and,
- The plaintiff recovers damages in proportion to the likelihood that the event and its consequences might have or may occur; this is done by scaling the award downwards or upwards in accordance with the percentage likelihood.

[115] In *Athey* the example of the simple probability standard being applied was:

if there is a 30% chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30% of the anticipated extra damages to reflect that risk (para. 27).

B. The BCCA Trilogy

[116] In 2021, the BC Court of Appeal issued a trilogy of judgments clarifying the above principles and illustrating their application to the assessment of damages in personal injury cases. The cases include *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345 and *Lo v. Vos*, 2021 BCCA 421. They involved hypotheticals and contingencies related to pre-existing injuries, past and future loss of earning capacity, future care costs, as well as non-pecuniary general damages for past and future pain and suffering.

[117] In *Dornan*, the Court noted in para. 92 that contingencies fall into two categories namely,

- "general contingencies" which simply as a matter of human experience are likely to be experienced by everyone and which are often "not readily susceptible to evidentiary proof" but which "may be considered in the absence of such evidence" nonetheless; and,
- "specific contingencies", ones peculiar to the particular plaintiff which must be supported by evidence that their occurrence is actually realistic as opposed to simply a speculative possibility.

[118] Insofar as general contingencies are concerned, the Court must be mindful that they can be positive as well as negative i.e. that everyone's life has "ups" as well as "downs" and that any allowance premised only on general contingencies "should be modest".

[119] Insofar as specific contingencies are concerned, however, whether positive or negative in nature, the Court must go beyond a determination of their existence to also analyze the evidence and decide the relative likelihood of their occurrence and their consequences.

[120] *Dornan* explains the difference between a contingency that is a real and substantial possibility as opposed to mere speculation:

A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable (para. 63).

[Emphasis added by Kent J.]

[121] Elsewhere in the judgment, the Court stated that,

the risks commonly encountered on this rather dangerous planet [e.g. car accidents, tripping and falling, etc.] will not suffice to establish a real and substantial possibility..... such events can happen to anyone but....are not predictable..... [and thus] would not give rise to a measurable risk (para. 77).

[Emphasis added by Kent J.]

[122] In Dornan, the trial Court applied a 30% reduction to the awards for non-pecuniary damages, past wage loss, loss of future earning capacity and future care costs to reflect the negative contingency that, given his lifestyle and history, the plaintiff was at risk of suffering a concussion with serious consequences in any event. The Court of Appeal upheld the finding that a further without-accident concussion was a real and substantial possibility for the plaintiff, however reduced the contingency deduction from 30% to 15% for future losses (and to only 10% for past losses) based on its own analysis of the second step in the process, namely determining the relative likelihood that the real and substantial possibility would actually materialize (an analysis that the Court of Appeal said the trial judge did not actually undertake: "in this case, the judgment addresses the real and substantial possibility analysis only implicitly, and is silent on the relative likelihood", para. 135).

[123] The Court of Appeal acknowledged that the task confronting the trial judge was "not easy":

By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence, not to averages and approximations based on imprecise evidence (para. 134).

[Emphasis added by Kent J.]

[124] The "right process" insofar as specific contingencies is concerned (in Dornan, the possibility of the plaintiff incurring a serious concussion injury regardless of the accident) is:

- Step one: determine with reference to the evidence whether the hypothetical future event is a real and substantial possibility (i.e. a measurable or predictable risk as opposed to mere speculation), and if so,
- Step two: determine, again with reference to the evidence, the relative likelihood [i.e. the chances] of that event actually occurring in order to arrive at an appropriate contingency deduction (Dornan, para. 113, emphasis added by Kent J.).

- [125] *Lo v. Vos* is another case where the trial judge applied an "across-the-board" 20% contingency deduction to the awards for nonpecuniary damages, future care costs and loss of future earning capacity on account of the plaintiff's pre-existing back conditions. The trial judge found that the accident caused physical injuries that contributed to chronic pain, which in turn lead to depression, anxiety and post-traumatic stress disorders rendering her totally disabled from working. However, the trial judge also concluded there was a "measurable risk" the plaintiff would have developed a major depressive disorder consequent on pre-existing lower back pain and leading to a level of pain and disability similar to the sort experienced at trial. Hence the 20% contingency deduction.
- [126] The Court of Appeal set aside the contingency deduction on the basis that the evidence at trial did not establish any contingent risk that was a real and substantial possibility, as opposed to simply an impermissible speculative possibility. There was no expert evidence that, absent the accident, the plaintiff had any inherent vulnerability to, or any risk of developing mental health problems because of her pre-accident conditions. While it was essential for the trial judge to consider the plaintiff's pre-existing state in the assessment of damages, whether that original state gave rise to a measurable risk of her developing, mental health problems in any event (a future hypothetical event) was "a different question requiring additional evidence" (paras. 74-78, emphasis added by Kent J.).

Would the plaintiff have worked full time but for the accident?

- [116] An initial question to be addressed in assessing income loss is how much the plaintiff would have worked but for the accident.
- [117] The plaintiff says that she would work full time if she could, but she is unable to because of the impacts of the accident.
- [118] As I understand the defendants' argument, the Court should not accept that Ms. Zavitz would have worked full-time but for the accident because she was not doing so before the accident. The trouble with this argument is that it fails to recognize the particular stage in life Ms. Zavitz was at when the accident happened. Her children were young, and she was taking time away from work to raise them. The evidence does not support the defendants' theory that this should be extrapolated to the future.
- [119] Ms. Zavitz claims wage loss starting June 1, 2017. By that time her children were about four and seven years old.
- [120] I am satisfied that Ms. Zavitz would have returned to work on a full-time basis, as she had done since she began work in 2004 until her first child was born in 2010. In the months before the accident Ms. Zavitz had taken steps to re-register as a physiotherapist, and I accept her evidence that she intended to re-commence working as a physiotherapist by the end of 2016. I also accept that she would have sought to work full time upon returning to work.

- [121] Ms. Zavitz is a highly motivated person, who has worked hard as a physiotherapist even under adverse conditions. She did in fact return to working as a physiotherapist by December 2016, even after she was suffering the effects of the August 2016 accident, and after she left her husband in October 2016, living with her children in a transition house for several months. In interviewing for her job at Balance Physiotherapy in 2016, Ms. Zavitz told the owner about the limitations she was experiencing from her vestibular symptoms and her neck pain. The owner was supportive, and Ms. Zavitz began working part time again as a physiotherapist. She tried working full time when she took another job at Kerrisdale Physiotherapy in 2017 to learn a specialized functional technique from a senior and well-respected physiotherapist, John Oldham, who testified at trial. Ms. Zavitz was unable to sustain a full-time schedule due to her symptoms. She saw 100-150 patients a month during this period from mid-2017 to mid-2018; described this as a "gruelling time" during which she really struggled. She also said she tried driving to work a few times during this period, but had to pull over from nausea and could not come in to work. She described this as a "crash and burn" cycle, where she would try to meet her responsibilities but would become overwhelmed by her symptoms and have to stop working for a few days before she could return and start trying again. She returned to part-time work in 2018 at Balance Physiotherapy. It is evidence of Ms. Zavitz's willingness and propensity to work full time that she tried to do so after the accident, even to her detriment.
- [122] Ms. Zavitz clearly identifies strongly with her work, and takes pride in satisfaction in the quality of her work and that she can successfully treat patients efficiently. At her own clinic now, she identifies with her role as a mentor, and reserves some of her limited clinical time for meeting with and teaching other physiotherapists in the clinic.
- [123] If Ms. Zavitz were able to work full time, I find she would likely do so. Ms. Zavitz is working the most she is able to right now, faced with the limitations of her injuries. The limitation on her ability to work full time arises entirely from the injuries she suffered in the accident.
- [124] Ms. Zavitz returned to work in December 2016, despite the accident. I find that there is a real and substantial possibility, and indeed it is more likely than not, that Ms. Zavitz would have been working full time within about six months of doing so, but for the accident. This finding does not apply to the period September 1, 2019 to December 31, 2023 for which Ms. Zavitz does not claim income loss.
- [125] Ms. Zavitz submits that full-time for her would be about 200 patients a month for 30-minute appointments. I find this estimate is reasonably supported on the evidence. This would be an average of 10 patients a day, at five clinical hours a day. By comparison, for instance, at the "high volume" clinic Ms. Zavitz started at in 2004, she was seeing 20-24 patients a day, working full time, and she saw 100-150 patients a month during the period from mid-2017 to mid-2018 while she was trying unsuccessfully to work full-time after the accident.

[126] As I discuss below, however, my finding that Ms. Zavitz would have worked full time at 200 patients a month for 30-minute appointments, is distinct from the question of how many patients Ms. Zavitz could attract at the hourly rate she charges.

How much is the plaintiff able to work now

[127] Ms. Zavitz has been unable to successfully work full time since the accident. While she tried for a period in 2017 and 2018 while she was at Kerrisdale Physiotherapy she did not succeed at doing so. She found that when she tried to meet a schedule that was close to full time she struggled with her vestibular symptoms, and her neck and upper back pain. She described this as a "crash and burn cycle", in which she would try to work a fuller case load, she would become overwhelmed with her symptoms, function at a lower level as a clinician, and need to take a series of days off to "regroup and start again." She continued to try to increase her patient load in 2020 and 2021 after she opened Physiostop.

[128] Ultimately, by experimenting with her schedule and her symptoms at Physiostop, Ms. Zavitz has determined she can work 25% of a full-time schedule without triggering her symptoms, and be able to provide quality care to her patients.

[129] I accept this is the limit Ms. Zavitz is able to work without becoming overwhelmed by her symptoms. She was not challenged on this in cross-examination. However, in closing argument the defendants argue that if the plaintiff were to pursue further treatment there is a substantial possibility she would not have to miss significant time from work "aside from possibly missing the odd shift." This is, however, not supported by the evidence.

[130] As I have found, the evidence demonstrates that Ms. Zavitz suffers visual vestibular mismatch, and she is not likely to demonstrate meaningful improvement of her symptoms in the future. She will have to live under the symptom management regime she has developed for the long term. While this management involves some treatment, there is no real and substantial possibility that that treatment will lead to improvement in Ms. Zavitz's symptoms, rather it is to maintain the level of function she now has.

[131] I accept that Ms. Zavitz will be able to work at 25% of a full-time schedule until she retires. There is no evidence to support applying a contingency adjustment either way.

Past income loss

[132] Ms. Zavitz claims compensation for past income loss from:

- a) June 1, 2017, when she would have begun working full time but for the accident to March 1, 2018 when she suffered the peroneal nerve injury and had to stop working entirely for three months;
- b) June 1, 2018 when she was able to resume working after the peroneal nerve injury to September 1, 2019, when she opened Physiostop; and then from

c) January 1, 2024 to the date of trial.

[133] Ms. Zavitz claims no wage loss for the period September 1, 2019 to December 31, 2023, as she concedes that:

- a) during the early period after which Physiostop opened and she and Mr. Temaino were developing the business, she would not have worked full time;
- b) the clinic was closed for three months in 2020 due to the Covid-19 pandemic;
- c) she was also affected by an unplanned pregnancy in 2020, which affected her ability to work; and
- d) she would have been unable to work full time during the period in which her arthritis symptoms developed until they were in remission, from summer 2021 to October 2023.

[134] Darren Benning was the economist called and qualified by the plaintiff to provide expert evidence on past and future wage loss at trial. The plaintiff asked Mr. Benning to assume she would have returned to work January 1, 2025; however, the plaintiff submits that based on the evidence at trial there is a real and substantial possibility she would have been able to return to work full time but for the accident a year earlier than that, by January 1, 2024.

[135] I am not persuaded by the defendants' submission that the instructions given to the plaintiff's expert Mr. Benning are an admission by the plaintiff that she suffered no income loss in 2024 and therefore her claim to income loss in 2024 is not supported. That was an assumption Mr. Benning was asked to make. If the evidence at trial supports a finding that Ms. Zavitz would have returned to work in 2024 but for the accident, I must consider it along with the whole of the evidence.

[136] The defendants say that the plaintiff has not proven any past income loss, because she has not produced a record of patients who tried to see her but could not because of her reduced work capacity. Accordingly, the defendants say, the plaintiff should be granted no award to compensate her for past earnings loss, or in the alternative only a nominal amount.

[137] The defendants also argue that the plaintiff's wage loss claim includes a period when she was in fact working, and this should weigh against her claim for past income loss. This position fails to address the plaintiff's claim that she would have been working full time instead of part time during this period, but for the accident. As I have said, I accept that the plaintiff would have worked full time by June 2017 but for the accident.

[138] I accept that without the accident, Ms. Zavitz would have worked full-time from June 1, 2017 onward, except for the periods during which she could not work for reasons unrelated to the accident: March 31, 2018 to May 31, 2018 and September 1, 2019 to January 1, 2024.

[139] I accept the evidence of Ms. Zavitz that by the fall of 2023 she was no longer experiencing symptoms of arthritis. Ms. Zavitz testified that the medication she had begun in 2022 for arthritis was very effective, and that by 2023 she was no longer experiencing pain from

arthritis. This evidence was not contradicted. I note that Dr. Craig, expert physiatrist called by the defendants, confirmed in cross-examination that in his independent medical examination of Ms. Zavitz in August 2023 he found no signs of active arthritis on examination of Ms. Zavitz's joints. The arthritis having been treated and by then asymptomatic, the evidence showed no impediments to Ms. Zavitz resuming work in 2024. Indeed, she did so. She was, however, only able to work part time. This was because of the symptoms resulting from the accident, unrelated to arthritis.

[140] Mr. Benning calculated the plaintiff's past income loss between June 1, 2017 and September 1, 2019 (except for March 31, 2018 to May 31, 2018) based upon the rate Ms. Zavitz was charging during that period--\$90 per half hour, at a 50% commission rate--which was the rate she earned during that period as a contractor working at Balance Physiotherapy. Mr. Benning calculated this income loss on the basis that the plaintiff would have seen 200 patients a month for half hour sessions, but for the accident. As I have said, I find this is the amount the plaintiff would have worked, but for the accident. Mr. Benning deducted the amount the plaintiff actually earned during this period. The assumptions underlying Mr. Benning's calculation were established as facts at trial, and I therefore accept his calculation of past lost earning capacity of \$123,000 for the period June 1, 2017 to September 1, 2019 (except for March 1, 2018 to June 1, 2018).

[141] Calculating lost earning capacity from January 1 to December 1, 2024 may be done on the basis that Ms. Zavitz would have seen 200 patients a month for half hour appointments but for the accident. Ms. Zavitz had begun charging \$250 to new patients for half hour appointments in early 2023, while existing patients were grandfathered in at her previous rate of \$125 for a half hour. Mr. Tomaino calculated that Ms. Zavitz's actual average revenue per patient in 2024 was \$194.85 per appointment. While the evidence did not demonstrate how many of Ms. Zavitz's 2024 appointments were for a period other than a half hour, I am satisfied that regardless of whether some were less or more than a half hour it is appropriate to rely upon the average revenue per appointment. Even at a full time schedule whose average was five clinical hours a day based on 200 patients at half hour appointments, Ms. Zavitz would have capacity to see some patients for less than and some for more than half an hour. On the basis of this evidence I am persuaded that there is a real and substantial possibility that Ms. Zavitz would have earned the same average revenue of \$194.85 per appointment had she been able to work full time in 2024.

[142] Accordingly, Ms. Zavitz's revenue earning capacity in 2024 but for the accident can be calculated based on:

- 200 patient appointments per month
- 2024 average revenue per patient appointment = \$194.85
- 200 patient appointments x 12 months = 2,400 patient appointments in 2024

· 2,400 patient appointments in 2024 x \$194.85 average revenue per patient appointment in 2024 totals \$467,640.00

[143] The next question is what commission rate Ms. Zavitz would have received had she worked full time in 2024. Physiostop did not pay Ms. Zavitz a commission on the actual revenue she earned in 2024. Instead, starting in 2021 she was paid a \$45,000 annual salary. This continued until December 31, 2024. Beginning January 1, 2025, Ms. Zavitz and Mr. Temaino decided to have Physiostop begin paying Ms. Zavitz a commission based on her revenues, as it does with the other physiotherapists employed by the clinic. However, they decided to pay Ms. Zavitz a higher commission percentage than they do the other physiotherapists because, based on Ms. Zavitz's higher billing rate, the clinic can earn the same absolute revenue as it does from other physiotherapists while retaining a lower percentage of Ms. Zavitz's revenue.

[144] I am satisfied there is a real and substantial possibility that, had Ms. Zavitz worked full time in 2024, Physiostop would have paid her the same commission rate it determined to pay her in 2025. The 73% commission Physiostop began paying Ms. Zavitz in January 2025 is high compared to the 50% commission she earned throughout her time working at other physiotherapy clinics in which she did not have an ownership stake. However, Physiostop is paying its other physiotherapists 50-65% commission, and Ms. Zavitz testified that it is harder to recruit physiotherapists than she had anticipated. In trying to recruit physiotherapists to Physiostop, her experience has been that there is a high demand for physiotherapists, and some clinics are offering 70% and higher commissions. At the time of trial, one of Physiostop's physiotherapists was leaving the clinic, and had told Ms. Zavitz he would be receiving 70% commission at the clinic to which he was moving. I accept that Ms. Zavitz and Mr. Temaino considered this information, as well as the absolute revenue Ms. Zavitz could generate for the clinic, in determining the commission percentage to pay Ms. Zavitz.

[145] This factors in to calculating the lost earning capacity in 2024 as:

· \$467,640.00 x 73% commission rate = \$341,377.20.

[146] I accept the plaintiff's submission based on Mr. Benning's evidence that a deduction of 45% should be applied to this earning, to account for income taxes. This results in an after-tax income of \$187,757.46 for 2024. When taking into account the \$45,000 income Ms. Zavitz was paid in 2024, allowing a 20% reduction for income tax, resulting in \$36,000 after tax income earned, this leaves a net income loss of \$151,757.46 for 2024 because of the accident.

[147] I would accordingly award a total of \$274,757 for past income loss, being the sum of \$123,000 lost for the period June 1, 2017 to September 1, 2019, and \$151,757 lost in 2024.

Future income loss

What rate would the plaintiff charge if working full time?

- [148] Having determined that Ms. Zavitz would have returned to working full time by June 2017 but for the accident, I must determine what rate Ms. Zavitz would have charged patients were she to have worked full time in a without accident scenario.
- [149] The plaintiff has charged various rates for her physiotherapy services over time, with an increasing trend. Since February 2023, she has been charging new patients \$500 an hour, pro-rated for appointments less than an hour. She seeks to have her future income loss claim determined on the basis of being able to charge that in the future.
- [150] The defendants, by contrast, say that \$500 an hour lacks an air of reality when compared to rates charged by other physiotherapists.
- [151] \$500 an hour is high when compared to other physiotherapists' rates, however it does not lack an air of reality, because Ms. Zavitz is charging that rate now, and new patients are willing to pay it. Ms. Zavitz is able to do so with a 25% schedule. The question is, could she charge \$500 an hour and fill a full-time schedule of 200 patients a month? Are there that many patients willing to pay that much to fill a full-time physiotherapist schedule for the long-term?
- [152] The evidence readily establishes that Ms. Zavitz is a very skilled physiotherapist. She has always had an interest in practicing in health care. She was a top student in high school; earned the Dean's Medal in Rehabilitative Medicine in obtaining her Bachelor of Science in Physical Therapy in 2004, and was accepted to medical school at McMaster University in 2009. Ms. Zavitz did not accept the offer to medical school because her then husband asked that she focus on starting a family and raising their children while he attended dentistry school.
- [153] When the children were older and Ms. Zavitz had left her husband, her new husband Mr. Temaino raised again the possibility of Ms. Zavitz going to medical school. However, by then Ms. Zavitz had suffered the impacts of the accident, and felt unable to sustain her function at a level required for medical school. She did not apply again to medical school, and continued her work as a physiotherapist.
- [154] Ms. Zavitz is drawn to specialized techniques in physiotherapy: first in "manual physiotherapy", which she began to learn in 2005, eventually becoming a fellow of the Canadian Academy of Manipulative Physiotherapists in 2008, and then learning the "functional technique" from Mr. Oldham, who was, before his retirement in 2018, recognized as a pioneer and well-respected practitioner of this technique. Mr. Oldham was the inaugural president of the orthopaedic division of the Canadian physiotherapy association, and of the Canadian association of manipulative physiotherapists. He was involved in setting the standards for manual physiotherapy in Canada, and was an examiner for the FCAMPT examinations.

- [155] By the time Mr. Oldham worked with Ms. Zavitz in 2017, she had passed her FCAMPT examinations and post-graduate examinations in orthopaedic physiotherapy.
- [156] In his testimony, Mr. Oldham said that in his experience few physiotherapists are able to perform the functional technique effectively, but that Ms. Zavitz caught on quickly and was able to do it the same way as he did. When he retired, Ms. Zavitz was one of the two physiotherapists to whom he felt he could, and did, refer his 50-70 patients because she would be able to manage them effectively.
- [157] Ms. Zavitz has since refined these skills and developed a method that she says distinguishes her treatment skills and clinic from other physiotherapists. She calls it the Zavitz Method. I need not assess the particular characteristics of this method. For the purposes of determining the issues before me, I consider only the evidence of Ms. Zavitz's historical ability to fill her schedule, the rates she has charged, and the testimony of her patients and other physiotherapists who are familiar with her work. I also consider evidence of rates charged by other physiotherapists.
- [158] The evidence is that throughout Ms. Zavitz's time working as a physiotherapist, she has had no trouble filling her available schedule with patients. Starting in May 2004 she worked full-time at a clinic seeing 20-24 patients a day. She continued to work at other clinics full-time until the birth of her first child in 2010. Since returning to work in 2016, the evidence is that the limitations on Ms. Zavitz's patient load have arisen because of her own limitations from the effects of the accident, and not from any difficulty in attracting clients.
- [159] In 2019, Ms. Zavitz opened her own clinic called Physiostop. She did this with her new husband, Mr. Temaino. They began by working out of extra space in Mr. Temaino's mother's dance studio, but were, before long, able to expand the clinic to its own independent space in the same complex as the dance studio.
- [160] Ms. Zavitz's role at the clinic is as a practitioner, while Mr. Temaino manages the clinic. The only management role Ms. Zavitz participates in actively is interviewing and hiring other physiotherapists. Ms. Zavitz also plays a significant role in mentoring the other physiotherapists at the clinic, some of whom testified.
- [161] Some of Ms. Zavitz's patients also testified at trial. The evidence revealed a pattern: patients who have had recurring or intractable injuries, and who have seen other physiotherapists without significant or lasting relief, found that Ms. Zavitz was able to efficiently and successfully treat their symptoms. One, Ms. Chen, is a lawyer who has suffered foot and knee issues as well as TMJ pain for a number of years. Ms. Chen had seen at least 10 other physiotherapists in the 15 years before she saw Ms. Zavitz in the fall of 2024. Ms. Chen attested that after six sessions her symptoms were effectively treated by Ms. Zavitz, and she does not need to go back. She has referred 10 people to Ms. Zavitz, and was herself strongly referred to Ms. Zavitz by family and friends who had been treated by her. She said Ms. Zavitz is very efficient, and has very strong skill and intuition compared to other practitioners she has seen. Ms. Chen was charged the pro-rated \$250 per half hour rate for

45 minute sessions, which was submitted directly to her insurer. Ms. Chen was not cross-examined, and there was no evidence about whether her insurer paid the full cost. Ms. Chen had three years earlier paid \$100 for 30 minutes to another physiotherapist, and \$250 for 45 minutes to a physiotherapist specializing in TMJ pain.

- [162] Another patient, Ms. Anderson, who works as an analyst with Service Canada, has seen Ms. Zavitz for several years, when Ms. Anderson gets injured from time to time from weight-lifting. As Ms. Anderson put it, she has "followed" Ms. Zavitz between clinics. Before that Ms. Anderson had seen other physiotherapists for neck and herniated disc issues. She has found Ms. Zavitz to be highly effective at treating her, and has recommended her widely to others. Ms. Anderson has been willing to pay out of pocket for Ms. Zavitz's services when her insurance maximums were reached, although she ultimately did not have to because catastrophic coverage was available to her. Ms. Anderson is grandfathered in at the \$250/hour rate Ms. Zavitz charged before February 2023.
- [163] As the evidence shows, Ms. Zavitz has increased the rate she charges over the years. Her ability to determine the rate she charges was enhanced significantly by the independence that came with owning her own clinic. In the early years of her practice she charged the rates set by the clinics at which she worked. At her own clinic, she began in September 2019 by charging \$125 for a 30-minute session. In about February 2023 she and Mr. Temaino decided to increase the fee to \$250 for a half hour appointment for new patients, while grandfathering in existing patients at the previous rate.
- [164] Mr. Temaino explained that he and Ms. Zavitz were of the view that now that Ms. Zavitz was operating "at her best", she was consistently showing she could successfully treat patients twice as fast as other physiotherapists. Being at her best required Ms. Zavitz to limit her clinical time to 25% of a full-time schedule.
- [165] Physiotherapy fees are not regulated. The Physiotherapy Association of B.C., an association that advocates for physiotherapists, publishes the surveyed results of the fees charged by physiotherapists in British Columbia "to provide fee guidelines to help physiotherapists, patients and third-party payers understand fair and reasonable billing for physiotherapy services" as the report states. This report was updated just before trial in February 2025, not having previously been updated since 2019. The revised report was attested to by the executive director of the association, Andrea Burton, who was called to testify by the defendants.
- [166] Ms. Burton attested that the physiotherapy association is presently of the view that physiotherapists are undercharging for the value of their services relative to other health care professionals and has recommended to physiotherapists that they charge more. The association states in the 2025 report:

We firmly believe that physiotherapists are not compensated fairly for their services, and that physiotherapists are falling behind other skilled professions in the BC Labour force.

As a result, the 2025 Fee Guideline includes two categories:

1. Current State (2025). The average fees being charged in BC as compiled and analyzed by a third-party surveyor.
2. Suggested 2025 Increase. Where we see the fees needing to be increased in order to achieve reasonable and fair billing for physiotherapy services.

[167] The fee schedule also says:

Physiotherapists often have additional training, certification and/or expertise that enables them to provide a variety of services that are beyond the education and skill of an entry-level physiotherapist. These services vary greatly among practising physiotherapists and may be subject to higher fees outside the recommended range to account for additional training, certification, equipment, or risk associated with the service.

[168] In discussing rates for "specialty" practices, which are higher than for standard practice, the association also states in its report:

Like standard physiotherapy, any clinic or physiotherapist can choose to levy whatever fees they feel are appropriate based on their expertise, education, specialty knowledge, the market or other factors.

[169] The listed categories of "specialty" practices are concussion, neuro, pelvic health, TMJ, and vestibular. Ms. Burton explained that physiotherapists are not required to have formal credentials to practice in these specialty areas. The specialized rates are charged based on what the patient needs, rather than formal credentialing by the regulator. Ms. Burton testified that the association categorizes manual physiotherapy as standard.

[170] The current average rate charged by physiotherapists in B.C. for standard physiotherapy is \$60-\$75 per 15-minute unit. Current rates charged by B.C. physiotherapists for specialized services range from \$63-\$80 per 15-minute unit.

[171] The association recommends that physiotherapists increase these fees by 2% in addition to a consumer price index increase, currently 2.8%, each year starting in 2025 until 2030. The association's recommended average fee in five years after the recommended increases would be approximately \$95 per 15 minutes for standard physiotherapy and approximately \$100 for 15 minutes for specialized services.

[172] Ms. Zavitz is currently charging new patients \$125 per 15 minutes and grandfathered patients \$62.50 per 15-minute increment. That is, she is currently charging new patients 56% more than the current highest end of the specialized physiotherapy services.

[173] I do not give any weight to the fact that Ms. Zavitz does not specialize in the areas listed as specialty areas by the association. As Ms. Burton explained specialized practice is conducted based on patient needs, not formal licencing. I also note that Ms. Chen said that Ms. Zavitz was able to treat her TMJ pain efficiently and effectively. This is so even though

Ms. Zavitz does not identify as a TMJ specialist. Ms. Zavitz's method of practice may be considered as specialized by some; really what matters is what patients are willing to pay based upon the practitioner's skill and patient's needs.

[174] Ms. Zavitz has been successful in charging well above the average physiotherapy rate since early 2023. This may be evidence that the market can bear higher rates for physiotherapists in B.C. The evidence at trial demonstrates that the market will bear higher rates than the average for Ms. Zavitz's physiotherapy services in particular, as some of her patients have been paying the higher rate. The evidence supports a finding that Ms. Zavitz's particular skill as a physiotherapist is a factor contributing to this.

[175] Another factor that may be contributing to Ms. Zavitz's success in charging higher rates is the limited "supply" of Ms. Zavitz's clinical time. She is only able to work 25% of a regular clinical schedule. The evidence establishes that there have been since March 2023 new patients willing to pay \$500/hour, and those, combined with her existing "grandfathered" patients paying her previous rate of \$250/hour are sufficient to fill this 25% schedule. However, this \$500 rate is so much higher than the average that I must ask whether there would be enough patients over the long term willing to pay this amount to fill a 100% clinical schedule if Ms. Zavitz were able to work that much.

[176] The defendants argue that it is because Ms. Zavitz sees fewer patients that she is able to charge the higher rate and therefore it cannot be applied to the hypothetical of her seeing more patients. However, the defendants' argument misconstrues the evidence on this point. It is true that this was the testimony of both Ms. Zavitz and Mr. Temaino. However, neither witness was referring to the "supply/demand" issue when saying this. What they testified was that, once Ms. Zavitz determined how much she needed to scale back to not have her well-being and clinical performance negatively impacted by her symptoms, she was able to perform her work at her highest skill level. At that skill level, she is able to charge \$500/hour. The trouble with the defendants' argument is that it fails to address the fact that but for the accident, Ms. Zavitz would not need to scale back from full time to avoid the impacts of her symptoms.

[177] I accept there is a real and substantial possibility that Ms. Zavitz will be able to continue to charge a fee of \$500/ hour to new patients, prorated for appointment time, and that this will come to be the very substantial majority of her patients as her existing "grandfathered" patients eventually need little or no further treatment.

[178] I must allow however for the realistic possibility that Ms. Zavitz may not be able to fill a 100% schedule at that rate for the long term. The rate is 56% above the highest end of the average rates currently charged by physiotherapists for specialized services. While Ms. Zavitz has successfully charged that rate to new patients since early 2023, this has currently risen to only about half of her patient load as compared to patients grandfathered in at her lower rate, and that is itself only at 25% of a full-time patient load. This history is not sufficient in my view to displace the realistic possibility that Ms. Zavitz may not succeed in

filling a full-time patient load at this high rate. In my assessment, a 30% negative specific contingency should be applied to the real and substantial possibility that Ms. Zavitz will be able to fill a full-time schedule of 200 patients a month for the long term at the rate of \$250 per half hour appointment.

Business income offset

- [179] The defendants argue that because Ms. Zavitz's business has other physiotherapists working for her, those physiotherapists can see the patients she cannot. As I understand the defendants' argument, they say that Ms. Zavitz accordingly suffers no loss because those patients are being seen, and the clinic receives the revenue for that. The defendants say that it is only when the clinic must turn patients away that there is a loss.
- [180] This submission does not account for the loss of Ms. Zavitz's labour, for which she will not get paid. The other physiotherapists would still be working and earning revenue for the clinic even if Ms. Zavitz were working more often along side them. Her loss of labour is a loss she does not get paid for. The defendant has not established any evidentiary foundation for the proposition that the approximately 35%-50% commission Physiostop gets from the revenues earned by the other physiotherapists replaces any of the personal revenue Ms. Zavitz would receive if she could also work full-time as a physiotherapist at the clinic. For instance, the defendants have not established a real and substantial possibility that the other physiotherapists would see fewer patients than they do if Ms. Zavitz were working more often, or that they are seeing more patients because Ms. Zavitz sees fewer, or that Ms. Zavitz has personally received any revenue that derives from the work of the other physiotherapists. The evidence shows that the clinic has not yet earned a profit.
- [181] I do not accept the defendants' argument that some deduction must be made because Ms. Zavitz owns the physiotherapy clinic at which she works. This has no bearing on what she would earn as a practicing physiotherapist but for the accident.

Arthritis

- [182] The defendants argue that even without the accident there is a real and substantial possibility Ms. Zavitz will be debilitated in the future to some extent by arthritis. However, the only evidence in support of this proposition came from Dr. Craig, physiatrist called by the defendants, who stated in his report that there is "some risk" that Ms. Zavitz would face flaring arthritic symptoms with full time work in the future. As I have explained, I find Dr. Craig's evidence on this point to be speculation. While a party need not prove a future hypothetical possibility to the civil standard of proof, the lesser "real and substantial possibility" standard must nevertheless be supported by some evidence and not speculative: *Athey* at para. 27.

[183] The evidence in this case is that the biologics medication Ms. Zavitz began taking in 2022, after she sought a second opinion from rheumatologist Dr. Ohata, has been very effective in managing Ms. Zavitz's arthritic pain. There is no evidence, beyond Dr. Craig's speculative assertion, that this effect is expected to change. Absent such evidence, I find no basis upon which to find a real and substantial possibility that Ms. Zavitz's arthritis will become symptomatic again such that it will cause her functional or vocational disability.

Depression

[184] Ms. Zavitz is not suffering symptoms of major depressive disorder, despite her past history of doing so. She is currently treated with Effexor, and while she may decide to stop this medication in the future under medical advice, there is no evidence that this would result in a return of symptoms of major depressive disorder, or any impacts upon her functioning. I would accordingly attribute no negative contingency to this.

Calculation of future income loss

[185] Ms. Zavitz submits that there is a real and substantial possibility she would be charging an average of \$187.50 per 30 minute appointment in 2025 as she continues to treat grandfathered patients, but that from January 1, 2026 onward she would be charging \$250 per half hour appointment to all patients. I accept this for the reasons I have explained above, subject to the 30% specific contingency deduction I have determined should be applied.

[186] Mr. Benning calculated the estimates of Ms. Zavitz future loss of earning capacity. Mr. Benning used Ms. Zavitz's 43rd birthday, February 7, 2025 as a convenient reference date to separate out past and future income loss, given its close proximity to the trial start date, January 27, 2025. I accept this is a sensible date to use, and apply it here.

[187] I also accept that it is appropriate to assess Ms. Zavitz's future loss of earning capacity based on a projected retirement age of 65 rather than 60 in both a with and without accident scenario. Ms. Zavitz is a motivated worker, who identifies strongly with her role as a physiotherapist, and takes pride in her professional skill and her ability to treat patients efficiently and effectively. In my view this supports a real and substantial possibility Ms. Zavitz would choose to work to 65.

[188] I do not accept the assumption Mr. Benning was asked by the plaintiff to apply to Ms. Zavitz's with-accident future income. For that assessment he applied the assumption that Ms. Zavitz would see 45 patients a month for 30 minutes, and that 45% of these would be billed at \$250 per half hour, whereas 55% would be billed at \$125 per half hour. This does not accord with my finding that there is a real and substantial possibility that Ms. Zavitz will be able to fill a full-time schedule charging \$250 a half hour. If this is so for a 100% schedule, it is at least as strong a possibility for a 25% schedule. I find that the assumption Mr. Benning applied would undervalue Ms. Zavitz's with accident income, and overvalue

her future earning capacity loss.

[189] However, if one applies an 80% commission to the with accident assumed patient/rate distribution Mr. Benning applied, instead of a 73% commission it leads to an annual income of \$78,300 in a with-accident scenario. As this is higher than the \$71,448 annual income that would derive from billing 100% of the patients at the \$250/half hour rate, it is of no prejudice to the defendants, and I accordingly accept the plaintiff's submission that this alternative calculation may be relied upon.

[190] Ms. Zavitz's without-accident earnings to age 65 would be \$4,711,840, which includes the 30% specific contingency reduction I have determined should be applied from the \$6,731,200 future earnings calculated by Mr. Benning. Ms. Zavitz's with accident future earnings are \$1,222,033. Accordingly, I find Ms. Zavitz has suffered a loss of future earning capacity of \$3,489,807.

Special damages

[191] The plaintiff seeks special damages of \$21,332 to compensate her for expenses incurred in relation to prescriptions, therapy fees and other expenses relating to her accident injuries. As I explain below, I accept the plaintiff has established that this sum represents out-of-pocket expenses she has incurred as a result of the accident, and I would award the full amount.

- a) Medications: I would award compensation for all the medications for which the plaintiff seeks compensation. These are: Venlafaxine (Effexor), Zopiclone, Cambia, Diclofenac, Tramadol, Cyclobenzaprine, and Naproxen. The defendant takes no issue with compensation for Cambia, Diclofenac or Naproxen, but argues that the plaintiff was taking Venlafaxine and Zopiclone before the accident and that "there was no evidence the accident materially contributed to the need for these medications" accordingly the plaintiff should not be compensated for their expense. I do not agree with the defendants' statement of the evidence. Dr. Teja testified that while Effexor was originally prescribed for mental health, it is also medication recommended to assist with symptoms of visual vestibular mismatch, and were Ms. Zavitz not taking Effexor already, she would prescribe it for her vestibular symptoms, at the dose Ms. Zavitz is taking. Furthermore, Dr. Lu stated in his report: "Her pain has psychological dimensions. Her pain, physical condition and headache play a direct contributing role in her psychiatric symptoms" and "The chronicity of her physical health symptoms and the changes in her functional capability have had a negative impact on her general psychological coping." I accept that the accident has materially contributed to Ms. Zavitz's need to continue to take Effexor. I would award the total claimed for prescription medication: \$2,527.80
- b) Therapy: Of the therapeutic treatments listed below, the defendants take issue only with the claim for reflexology and with those physiotherapy appointments which were conducted at Physiostop as distinct from other physiotherapy clinics. With respect to the former, the

defendants say the plaintiff has not established the treatments were incurred because of the accident. However, Ms. Zavitz testified that these were manual manipulations that helped manage the pain resulting from her accident injuries. With respect to the latter, the defendants argue that Ms. Zavitz was not sure if she paid the amounts to Physiostop, and in any event these would be gross revenues of Ms. Zavitz's own business. However, review of the defendants' cross examination does not reveal that Ms. Zavitz confirmed she was not sure she had paid these amounts; her evidence was that she had. Moreover, I am not persuaded that these payments being part of the gross revenue of Physiostop exempts them from being recoverable special damages if they are otherwise eligible. The physiotherapist must be paid their commission for performing the therapy, and the evidence was that Physiostop had, by the time of trial, earned no profit. No revenue from treatments on Ms. Zavitz has returned to Ms. Zavitz. I would accordingly award the full amount of \$6,224.06 for therapeutic sessions relating to the accident.

§ Massage therapy - 10 sessions

§ Physiotherapy - 142 sessions

§ Reflexology - 10 sessions

§ Active rehabilitation - 31 sessions

§ Acupuncture - 4 sessions

§ Chiropractic treatment - 2 sessions

§ Counseling - 21 sessions

§ Occupational therapy - 45 sessions

- c) Housekeeping: I accept the plaintiff's evidence that her neck, back and arm pain as well as her balance and vision difficulties have been barriers to her ability to perform housekeeping tasks. While the defendants argue that a portion of the period for which Ms. Zavitz claims housekeeping expenses was the period in which she also experienced arthritic pain, I do not accept that this leads to dismissing the claim for compensation for housekeeping expenses as the defendants suggest. The evidence establishes that Ms. Zavitz's accident injuries led to the need for housekeeping assistance, and these injuries persisted throughout the period she suffered arthritis pain, at the very least materially contributing to her need for housekeeping assistance during that period, if not remaining the dominant cause of that need throughout the period she has employed housekeeping assistance. I would accordingly award the full amount claimed for housekeeping costs of \$11,458.00.
- d) Vision care: I accept the plaintiff's evidence that she saw Dr. Mawani for a vision assessment in relation to her vestibular symptoms and that she recommended a pair of glasses which she purchased totaling \$442.00.

- e) VGH and BCEHS: She also testified that she paid the ambulance bill and the invoice relating to her visit to the emergency room of Victoria General Hospital on the day of the MVA totaling \$680.00.

Cost of future care and assistance

[192] The plaintiff seeks damages to compensate her for anticipated costs of future care and assistance in daily life she will need as a result of the injuries she sustained in the accident. In particular she seeks damages in respect of medications, occupational therapy, physiotherapy and active rehabilitation, psychological treatment, aids to daily living and ergonomic equipment, household cleaning and yard care, and transportation.

[193] The plaintiff claims \$599,050 for all of these items. The defendants by contrast argue the plaintiff should be awarded only a nominal award of \$7,500 for cost of future care. As I explain, I am persuaded that the plaintiff has established that an award of \$386,798 is appropriate for the cost of her future care resulting from the accident.

[194] As the Court of Appeal said in *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58:

Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss.

[195] There must be a medical justification for claims for cost of future care, and the claims must be reasonable: *McGuigan Estate v. Pevach*, 2024 BCCA 106. Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff.

[196] Two occupational therapists were qualified to give expert opinion evidence at trial about functional capacity assessment and cost of future care: Simone Szarkiewicz for the plaintiff and Matt Gregson for the defendant.

[197] Ms. Szarkiewicz performed a functional capacity evaluation of Ms. Zavitz on June 29, 2023 and a cost of future care analysis on July 21, 2023. This included a seven-hour assessment at Ms. Szarkiewicz's clinic and then a one-and-a-half hour assessment at Ms. Zavitz's home, as well as interviewing Mr. Temaino and reviewing clinical records and reports. Ms. Szarkiewicz sets out her recommendations for future care, as well as the bases for these recommendations, including recommendations made by other physicians, and costs of care in her report.

[198] Mr. Gregson prepared a responsive report dated December 5, 2024 to Ms. Szarkiewicz's report on behalf of the defendants. He did not assess Ms. Zavitz in person, and confirmed in evidence that he is unable to comment on Ms. Zavitz's functional ability.

Medications

- [199] The plaintiff advances a claim for compensation for future costs of medication in relation to only a portion of the medications that were recommended in evidence. In particular, despite Dr. Cameron's recommendations for Gabapentin, Amitriptyline, Nortriptyline or Topiramate for headaches, the plaintiff testified that she only relies on Cambia for headaches, which she finds effective. This was confirmed by Dr. Kaliray.
- [200] The plaintiff seeks only the future costs of Cambia, Effexor, Ativan, Zopiclone and Tylenol which Ms. Szarkiewicz estimates to be approximately \$16,300. I accept the plaintiff has established that her accident-related injuries materially contribute to her need to take these medications, and that she is likely to continue taking them. For example, even though she was taking Effexor before the accident, she was under medical advice that she could consider ceasing to take it during a stable period in her life. Since the accident, and the repercussions of it, she has not identified a stable period. Meantime, as I have explained, Effexor is now a medication that is recommended for treatment of the vestibular symptoms Ms. Zavitz suffers from the accident. She continues to take it. Similarly, Ativan for anxiety, is justified in respect of the chronic adjustment disorder with anxiety features diagnosed by Dr. Lu--and which I have found is caused by the accident. Similarly, Dr. Lu attested that chronic pain of the nature suffered by Ms. Zavitz can be expected to disrupt sleep. I accept the claim for Zopiclone to help with sleep is justified and needed by Ms. Zavitz.
- [201] Accordingly, I award \$16,300 for the future cost of medications.

Therapy

- [202] The plaintiff seeks damages to compensate for the future cost of occupational therapy, physiotherapy and active rehabilitation. She does not seek compensation for future vestibular therapy, as she has tried that and feels she has derived the available benefit from it.
- [203] The defendants argue that Ms. Zavitz has not attended occupational therapy since 2018, active rehabilitation since 2022, and physiotherapy since May 2024, and accordingly she has "not pursued these supports" and therefore she is not likely to need them in the future. The defendants further argue that if she did need these therapies "she can likely access them without any cost to herself." The evidence does not, however, support this latter argument. There is no evidence that clinicians at Physiostop are willing to work without compensation to treat Ms. Zavitz, which I take to be the implicit suggestion in the defendants' argument.
- [204] Nor am I persuaded that the time since Ms. Zavitz has attended physiotherapy or active rehabilitation suggests she will not undertake these therapies in the future. Ms. Zavitz attested to the utility of both physiotherapy and active rehabilitation in the ongoing management of her pain; her history demonstrates a greater reliance on the former than the latter, but a reliance on the latter nevertheless. I am not persuaded, however, that Ms.

Zavitz has established she is likely to rely on occupational therapy in the future. Based on Ms. Zavitz's historical frequency of physiotherapy, I would reduce the number of physiotherapy sessions recommended by Ms. Szarkiewicz by 50%. I would award \$20,434 for future physiotherapy and \$10,394 for active rehabilitation, based upon Ms. Szarkiewicz's and Mr. Benning's evidence.

- [205] The plaintiff also seeks an award to cover the costs of future psychological interventions. Ms. Zavitz has not attended counselling since November 2018. Dr. Lu's opinion was: "It is important that [Ms. Zavitz] has periodic monitoring of her mood and mental status. [Ms. Zavitz] is trying to do more. She may benefit from a course of psychological treatment to reinforce her coping skills." This is particularly to avoid risk of relapse of major depression arising from the effects of her accident-related injuries, including pain and limitations on her way of life. Ms. Szarkiewicz's recommendations provided for 12 initial sessions of psychological interventions, and six to eight sessions annually thereafter. The plaintiff reasonably acknowledges in argument that the evidence does not support the likelihood that Ms. Zavitz would use that many sessions, and suggests reducing this estimate by half. In my view a more reasonable assessment of this future cost based on the evidence would reduce it by 75%. I note again Dr. Lu's evidence that the fact that Ms. Zavitz did not experience a relapse of major depressive disorder despite the very significant impact of this accident on her life bodes well for her future mental health. An award that would provide for 25% of the sessions estimated by Ms. Szarkiewicz would reasonably allow for the periodic monitoring and reinforcement of coping skills recommended by Dr. Lu. I would accordingly award \$12,000 for future psychological interventions.
- [206] Accordingly, I award a total of \$42,828 for future physiotherapy, active rehabilitation and psychological interventions.

Housekeeping capacity

- [207] I do not accept the defendants' submission that "there is no clear and cogent evidence that the plaintiff has suffered a loss of housekeeping capacity due to the Accident" or the defendants' submission that "[t]here is also no evidence that any loss of housekeeping capacity would result in actual expenditures or of family members or friends routinely undertaking functions that would otherwise have to be paid for."
- [208] Both Ms. Zavitz's testimony and the evidence of Ms. Szarkiewicz demonstrate that Ms. Zavitz has suffered a loss of housekeeping capacity. This evidence was not undermined on cross-examination. Ms. Zavitz is significantly constrained by the pain in her neck and shoulder. Under Ms. Szarkiewicz's assessment Ms. Zavitz experienced pain after only a few minutes of basic household tasks, including sweeping, scrubbing and reaching to a cupboard. Ms. Zavitz also testified that her vestibular symptoms lead her to feel overwhelmed when she tries housekeeping, causing her to need to stop. This is consistent with Ms. Szarkiewicz's assessment, including her observation that Ms. Zavitz demonstrated increased pain and decreased concentration and verbal responses and needed instructions

repeated to her during what is understood to be a relatively simple waist to overhead reach assessment. Ms. Zavitz has had to rely on her husband and a paid cleaner consistently for housekeeping.

- [209] The plaintiff claims future housekeeping costs based on Ms. Szarkiewicz's estimate of \$50-80 an hour for cleaning services, which was then applied by Mr. Benning. In response, Mr. Hildebrand observes that Ms. Szarkiewicz appears to have made her estimate based upon professional cleaning services. This is true. Ms. Szarkiewicz's report indicates that the source for this hourly cost is a particular, named, cleaning company. Anticipation of reliance on a professional company is reasonable in this case, as it is reasonable to expect that the person who has been assisting with housekeeping will not do so indefinitely and her services will need to be replaced.
- [210] Mr. Hildebrand suggests this hourly rate is high citing two bases for this opinion: first that in his experience economists typically estimate the replacement cost of household services at approximately \$25/hour and second, that in a recent different case, Mr. Benning used a rate of \$24/hour. Neither of these assists in evaluating the evidence in Ms. Szarkiewicz's report, which was based on a fee estimate from a cleaning services company. The fact that economists typically estimate \$25/hour does not provide any information as to how long this has been typical, and whether it is up to date in current market conditions. Nor is it of assistance to know Mr. Benning applied a different rate in a different case, without knowing the facts of that case, and without cross-examination of Mr. Benning on that point. Without evidence to the contrary, I am left with the evidence of Ms. Szarkiewicz and would allow an award for housekeeping services based upon a replacement rate of \$50/hour. This is 23% lower than the mid-range between \$50-\$80 an hour used by Mr. Benning in his calculation.
- [211] I accept Ms. Szarkiewicz's recommendation that Ms. Zavitz will require housekeeping assistance four hours per week through to retirement and for two hours per week from retirement to age 80, which is based upon the American Time Use Survey. This is approximately the amount Ms. Zavitz has been requiring housekeeping services; she testified that over the last three months she has been getting approximately three hours a week in housekeeping assistance. While allowing for the amount of time recommended by Ms. Szarkiewicz may exceed the hours required for regular cleaning before retirement, this additional time may be applied to deep seasonal cleaning and outdoor yard maintenance. I would accordingly award the amount of \$191,000 sought by the plaintiff for the cost of regular household cleaning to age 65 and of \$40,000 for regular household cleaning from age 65 to 80, but would decline to make the additional separate awards requested by the plaintiff for seasonal cleaning and outdoor yard care.

Transportation

- [212] Beyond housekeeping, Ms. Zavitz relies on her husband completely for driving, which she can no longer do due to vestibular symptoms and headaches. I do not find, as the defendants urge, that Ms. Zavitz drove her mother-in-law a number of times after the

accident. The evidence was that Ms. Zavitz did so once, due to urgency, and that this did not go well. While Ms. Zavitz may have mentioned this incident more than once, I find it was an isolated incident in 2023. Ms. Zavitz's capacity to drive was severely impaired by the accident, and has not improved. She is confined to riding as a passenger, and even that she does with difficulty, at times needing to lower her seat and close her eyes to avoid visual stimuli.

- [213] I do accept that in the particular circumstances of this case, in which Ms. Zavitz and her husband live and work together, full compensation for replacement transportation services is not justified, as the parties would reasonably be expected to commute together some of the time. However, I do not accept, as the defendants appear to argue, that this eliminates the need to compensate for any replacement transportation services. Maintaining Ms. Zavitz's complete dependence on her husband for transportation is not what the law requires. The estimate of replacement transportation services advanced by the plaintiff is based on Ms. Szarkiewicz's assessment that Ms. Zavitz requires transportation five times a week to her clinic and back, as well as 15 additional kilometres a week for transportation other than to work, at a cost of \$1.93/km based on taxi service in Vancouver: estimated annual amount \$5,519. Mr. Benning assumed that Ms. Zavitz would incur these costs throughout her lifetime, as she would replace her trips to work with other activities after retirement. This assumption was not undermined on cross-examination, and I find it is a reasonable assumption. However, in my view it is also reasonable to expect that after retirement, as before, some of Ms. Zavitz's transportation needs would have been met by travelling with her husband, even without the accident. Accordingly, I would deduct a global amount of 40% from the estimated travel replacement cost advanced by the plaintiff based upon the evidence of Ms. Szarkiewicz and Mr. Benning, to account for the reasonable expectation that Ms. Zavitz would be transported by her husband some of the time, even without the accident.
- [214] The plaintiff seeks a taxi account of \$156,118.00. I would award a taxi account of \$93,670 in recognition of the deduction I have explained above.

Aids to daily living and ergonomic equipment

- [215] I decline to award the damages sought for the list of aids to daily living and ergonomic equipment sought by the plaintiff. Some of these are items that would be redundant to the housekeeping costs award I have already made, as they are for adaptive cleaning supplies; others are individually of a de minimus value, furthermore I am not persuaded that replacement as frequently as Ms. Szarkiewicz recommends is reasonable. For example, I am not persuaded that a laptop stand or document holder reasonably requires replacement every three years. As cost of future care is an assessment and not a precise mathematical calculation, I am satisfied that a global damages award of \$3,000 is appropriate for the future costs of aids to daily living and ergonomic equipment.

Conclusion

[216] In sum, I make the following award of damages to the plaintiff for losses suffered from the accident:

- a) Non-pecuniary damages: \$155,000
- b) Past loss of earning capacity: \$274,757
- c) Future loss of earning capacity: \$3,489,807
- d) Future care costs: \$386,798, being the sum of:
 - i. Medication: \$16,300
 - ii. Therapies: \$42,828
 - iii. Housekeeping capacity: \$231,000
 - iv. Transportation: \$93,670
- v. Aids to daily living and ergonomic equipment: \$3,000
- e) Special damages: \$21,332, being the sum of:
 - a. Medication: \$2,528
 - b. Therapy: \$6,224
 - c. Housekeeping: \$11,458
 - d. Vision Care: \$442
 - e. Hospital and ambulance expenses: \$680

[217] Should anything have occurred between the parties that might affect any award of costs in this case and which cannot be settled between them, the parties may within 30 days of this judgment apply for a hearing before me. Otherwise, costs will follow the event and are awarded to the plaintiff to be assessed on Scale B of Appendix B of the Supreme Court Civil Rules.

"Giltrow J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/20/2025BCSC2006.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/caney-v-caney-2025>

Prepared on 29 October 2026 · Esheria