

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Davies v. Hsu*,  
2024 BCSC 2119

Date: 20241121  
Docket: M202503  
Registry: Vancouver

Between:

**Danica Jean Davies**

Plaintiff

And

**Shu Ting Hsu and Chih-Chung Jeff Chou**

Defendants

Before: The Honourable Justice Douglas

## Reasons for Judgment

Counsel for Plaintiff:

M.A. Huot  
V.S. Mann  
A.F. Estey

Counsel for Defendants:

E.C. Hughes  
A.L. Glaicar

Place and Date of Trial:

Vancouver, B.C.  
June 3-7,  
June 10-14, 2024

Place and Date of Judgment:

Vancouver, B.C.  
November 21, 2024

## Table of Contents

<b>I. INTRODUCTION .....</b>	<b>4</b>
<b>II. BEFORE THE ACCIDENT .....</b>	<b>4</b>
<b>III. THE ACCIDENT .....</b>	<b>10</b>
<b>IV. AFTER THE ACCIDENT .....</b>	<b>11</b>
A. Immediate Aftermath .....	11
B. Subsequent Course .....	11
C. Current Condition .....	18
<b>V. CREDIBILITY AND RELIABILITY OF EVIDENCE .....</b>	<b>19</b>
<b>VI. EXPERT EVIDENCE .....</b>	<b>22</b>
A. Neck and Shoulder Pain.....	24
B. Concussion or Mild Traumatic Brain Injury.....	26
C. Headache Pain.....	29
D. Balance Issues.....	30
E. Hearing Loss and Tinnitus.....	31
F. Mental Health Conditions .....	34
<b>VII. CAUSATION .....</b>	<b>39</b>
A. Pre-Existing Tinnitus and Hearing Loss .....	40
B. Pre-Existing Mental Health Issues .....	42
C. Pre-Existing Field Hockey Injuries.....	43
D. Summary.....	43
<b>VIII. NON-PECUNIARY DAMAGES .....</b>	<b>44</b>
<b>IX. SPECIAL DAMAGES.....</b>	<b>48</b>
<b>X. INCOME LOSS .....</b>	<b>49</b>
A. Past Loss .....	49
B. Future Loss .....	52
1. What is Ms. Davies' prognosis?.....	54
2. What is Ms. Davies' residual capacity to work? .....	56
3. What could Ms. Davies earn as a dietician? .....	57
4. Analysis and Conclusion.....	58
<b>XI. FUTURE CARE COSTS .....</b>	<b>63</b>
A. Active Rehabilitation/Kinesiology .....	64
B. Psychological Counselling.....	64

C. Hearing Aids and Batteries..... 64

**XII. MITIGATION OF DAMAGES ..... 65**

**XIII. DISPOSITION ..... 66**

**I. INTRODUCTION**

[1] The plaintiff, Danica Jean Davies, was involved in a motor vehicle accident in Coquitlam, BC on October 4, 2018. The defendants, Shu Ting Hsu and Chih-Chung Jeff Chou, admit liability and this action proceeded to trial on damages issues alone.

[2] The parties disagree about the nature and extent of Ms. Davies' accident-related injuries, and their functional impact on her ability to complete her university studies and her capacity to work. Ms. Davies says she sustained serious and permanent injuries which have profoundly affected her life. By contrast, the defendants say Ms. Davies had a significant pre-existing medical history and that her accident-related injuries were minor and are now largely resolved.

[3] The parties' positions produced divergent estimates of damages.

**II. BEFORE THE ACCIDENT**

[4] Ms. Davies was 22 years old at the time of the accident; she was 28 by the date of trial. Her parents separated when she was in grade 9; they are now divorced. At the time of the accident, Ms. Davies was living primarily with her father in Port Coquitlam.

[5] The parties have a different view of Ms. Davies' pre-accident health. Ms. Davies denies having any serious health concerns; by contrast, the defendants describe her as a "crumbling skull" plaintiff.

[6] Ms. Davies was diagnosed with a "cookie bite" hearing loss as a child. She explained this to mean that while she could hear high and low sounds, she had mid-range hearing loss. She admitted her hearing was assessed consistently when she was a child but she denied her hearing loss caused her any pre-accident functional difficulties. She conceded that she relied on lip reading throughout her schooling, especially when people spoke at a low volume, and that she had experienced periodic bilateral tinnitus since childhood.

[7] On Ms. Davies' evidence, as corroborated by her parents, cousin, roommate, and several friends, she was consistently busy, active, and involved in sports before the accident. Ms. Davies said that her parents instilled in her the importance of balancing sports and academics. In high school, she played soccer and field hockey and earned her black belt in Taekwondo.

[8] Ms. Davies ultimately prioritized field hockey and cut back on her other sports. In high school, she played field hockey with both her school team and a women's league, and was a volunteer field hockey coach for a team of players in grades 8 - 12. In grade 12, she was captain of her high school field hockey team. She also volunteered her time at an after-school children's program and did some occasional babysitting.

[9] On Ms. Davies' evidence, as corroborated by her parents, cousin, and friends, she always prioritized school. She agreed that she put substantial effort into her studies and prided herself on her marks. Because she was involved in so many extra-curricular activities in high school, Ms. Davies admitted she often did her homework late at night.

[10] Math and science courses were not Ms. Davies' forte and she conceded that those courses became increasingly difficult for her, as reflected in her lower marks in those subjects after grade 10. While English was a strength for Ms. Davies, she admitted her provincial examination score in English, when tested against all other Grade 12 students in the province, was substantially lower than her Grade 12 mark in English.

[11] Ms. Davies admitted she struggled with anxiety before the accident but she denied it was either continuous or overwhelming. She agreed that she put a lot of pressure on herself to do well at school and in sports. She admitted she had headaches every few months which she treated with Advil; she described them as situational and associated with anxiety.

[12] Ms. Davies graduated from high school with honours in June 2014, at the age of 18. Thereafter, she secured some entrance scholarships and a bursary based on financial need from the University of Guelph.

[13] Ms. Davies attended the University of Guelph from September 2014 until April 2015. She was then a full-time, first-year student in the Honours Bachelor of Arts program with a major in Psychology. She was also on the University of Guelph's field hockey team; she described the corresponding time commitment as significant.

[14] Ms. Davies conceded that because she was a member of the university field hockey team, her professors were somewhat lenient and they sometimes allowed her to take examinations early to accommodate game schedules. Team players were also given about one month without practices or team activities before final exams to study.

[15] Ms. Davies injured her right hip while playing field hockey during her first year at the University of Guelph in 2014. She recalled having an MRI of her hip in Guelph but could not remember her diagnosis.

[16] Ms. Davies attained an overall B average of 72.5% in her first semester and of 74% in her second semester at the University of Guelph. She received a grade of C in Introductory Psychology in her first term and, for the first time in her life, she received a grade of D in her second term, in Sociology. Ms. Davies conceded that taking four courses while playing field hockey was a lot for her to manage and that her grades "fell short" in her first year of university. She admitted she never received any other scholarships based on academic performance after she left the University of Guelph.

[17] Ms. Davies struggled more with her hearing in the university setting than she did in high school. She admitted there were more students, the lecture halls were bigger, and the environment was louder. This hearing difficulty prompted Ms. Davies to see her audiologist in May 2015, after her first year of university, to have her hearing tested. The clinical notes from her May 4, 2015 visit to her audiologist are in

evidence pursuant to the parties' document agreement. They record Ms. Davies' report that she felt she was not hearing as well at university, especially when talking to friends with soft voices, and that she was missing conversations and doing more lipreading. In addition, the audiologist noted that Ms. Davies reported bilateral, non-life altering, episodic tinnitus that was occurring more frequently than usual and lasting two to three minutes.

[18] Based on these clinical notes, Ms. Davies also complained that she got dizzy if she stood up too quickly; at trial, she thought that this might have been related to low iron. Ms. Davies admitted she had low iron before the accident and had been advised to take an iron supplement. She conceded that things sometimes "went black" when she stood up in the morning due to her low iron.

[19] Ms. Davies did not remember the details of her May 2015 audiology appointment at trial. She said she would have reported tinnitus and that she always had periodic tinnitus which would "come and go" before the accident. She did not recall but accepted, as recorded in the notes of this visit, that she would have discussed tinnitus management strategies and the possibility of hearing magnification with her audiologist in May 2015. She agreed that hearing aids had always been suggested to her as a possibility if her hearing loss became sufficiently severe that it interfered with her daily life.

[20] Ms. Davies did not return to the University of Guelph in September 2015. On her evidence, she decided that she had been prioritizing field hockey over her academic studies. She was also uncertain about whether she wanted to pursue psychology and somewhat confused about her career path. Ultimately, Ms. Davies decided to take a year off school to work, save some money, explore her options, and figure out what she wanted to do. She was then receiving physiotherapy for her right hip field hockey injury.

[21] Ms. Davies admitted she did not play field hockey for one full year after returning home from Guelph and agreed that she was then still rehabilitating her right hip. She accepted as accurate a record from the Restore Sports Medicine clinic

dated August 15, 2016; it described activities that aggravated her hip pain, including running for more than 20 minutes and doing abdominal exercises.

[22] Ms. Davies disputed the suggestion that her right hip injury never healed. She admitted she experienced pain while running due to this injury but said she resumed playing field hockey in 2017, more than one year after returning from Guelph. She disputed the suggestion that her decision not to return to Guelph was related to her right hip injury and said she had instead decided to focus on her career. She noted that she played at a national university field hockey tournament in November 2014, despite having right hip pain.

[23] Ms. Davies secured two part-time minimum wage jobs in Port Coquitlam in 2015: one as an assistant manager at a frozen yogurt shop; the other at a kennel, where she cleaned stalls, prepared food, and looked after dogs. She denied having any difficulties doing this work. Ms. Davies admitted she had some pre-accident low mood and felt like she was not where she wanted to be in life in 2015, after taking some time off from university. She agreed that she was saddened when her parents fought and by their divorce but said she had outlets in sports and school.

[24] After working for about one year, Ms. Davies enrolled as a full-time student at Douglas College in September 2016. Her plan was to obtain the general science pre-requisites that she needed to apply for an undergraduate program in Dietetics at UBC. Ms. Davies was a student at Douglas College until the summer 2019 semester; she earned honour roll standing in the Fall 2016 and Summer 2018 semesters. In early 2017, she accepted a job at a bakery, where she prepared food, baked, and cleaned the kitchen. She described this work as physically demanding but denied having any difficulties doing it.

[25] On May 4, 2017, Ms. Davies saw her family doctor with complaints of bloating, gassiness, and gurgling noises in her stomach. Ms. Davies admitted those symptoms were associated with decreased appetite and occasional nausea, and worsened by increased stress and anxiety. Her symptoms were sufficiently severe that they prompted Ms. Davies to consult her doctor about them again in June 2018;



she agreed that they were then bothering her, that she experienced symptoms when she was anxious, and that she was then also having headaches.

[26] Ms. Davies took some courses in the summer of 2017, while coaching field hockey, working at a bakery, and doing some occasional babysitting. She did not play field hockey that summer and said she was instead focused on obtaining the pre-requisites she needed to gain admission to UBC's undergraduate program in Dietetics.

[27] Defence counsel note that, despite Ms. Davies' evidence about how busy she was in the summer of 2017, she admitted she was not then playing field hockey, had quit her job at the frozen yogurt shop, and only coached field hockey from March to June. While Ms. Davies obtained good marks in psychology and nutrition in her second term, defence counsel note she had previously taken equivalent courses at the University of Guelph.

[28] Ms. Davies returned to Douglas College in the fall of 2017. She took three courses, including two second year courses and one basic grade 12 level algebra course. She was a reserve player on a women's field hockey team that fall. She sustained a left knee injury in September 2017, at the beginning of the season. Thereafter, she focused on rehabilitating her left knee. Ms. Davies joined some practices with the women's field hockey team but played no games after September 2017. Ms. Davies conceded that the last time she had played field hockey seriously before the October 4, 2018 car accident was in 2014, at the University of Guelph. She admitted field hockey was a part of her identity, it was difficult and frustrating for her not to be playing field hockey, and she struggled with this significant adjustment.

[29] In the fall of 2017, Ms. Davies applied to UBC's Bachelor of Science program in Food, Nutrition, and Health, with a major in Dietetics, and to General Sciences as a back-up option, for admission in September of 2018. She began volunteering at a private dieticians' practice to gain relevant experience and to make contacts. This work included doing research, writing articles, and managing social media posts. Ms. Davies continued this volunteer work in 2018, while also coaching field hockey.

[30] From January to April of 2018, Ms. Davies took some additional courses at Douglas College. She volunteered with a nutrition study at BC Children's Hospital from March to September 2018, in order to obtain some hospital work experience. This position continued into the fall of 2018, as a work/learn program during the school year. Ms. Davies was paid to work for up to 300 hours from September 2018 to April 2019.

[31] In the late spring of 2018, Ms. Davies learned she had been accepted into UBC's General Sciences program. She did not play field hockey in 2018. She said she prioritized her studies and thought she might try out for UBC's field hockey team the following year. On her evidence, she had seen a sports medicine doctor, was rehabilitating her left knee, and remained able to run and go to the gym.

[32] In the summer of 2018, Ms. Davies re-took three courses (two in chemistry and one in math) in an effort to improve her marks and her chances of gaining admission to UBC's undergraduate program with a major in Dietetics. In September of 2018, she switched to the Faculty of Land and Food Systems and was a full-time Bachelor of Science student at UBC. She was then living with her father and commuting about two hours twice a day from Port Coquitlam to UBC.

### **III. THE ACCIDENT**

[33] The accident occurred at about 7 pm on October 4, 2018 in Coquitlam. Ms. Davies was a front seat passenger in a BMW driven by her former boyfriend, Yazan Aridah.

[34] Ms. Davies recalls the BMW was stopped behind an SUV when she heard a big bang. She could not recall the impact nor how her body then moved. The next thing she remembers is opening her eyes, noting that the BMW's airbags had deployed, seeing what she thought was smoke, and having the sensation that she was in a movie. Emergency personnel attended the accident scene.

**IV. AFTER THE ACCIDENT**

**A. Immediate Aftermath**

[35] Ms. Davies recalls that her cheeks hurt after the accident; she assumed she had hit her face on something. She recalls being confused, having a sore neck, and hearing a high-pitched ringing in her ears. She said Mr. Aridah later found her glasses in the backseat of the BMW. Ms. Davies described seeing the BMW “squished” between two SUVs and that its front and rear ends were both crushed. Her father arrived at the accident scene and drove her to Eagle Ridge Hospital.

[36] Ms. Davies said she spent two or three hours at the hospital the day of the accident. She admitted she was given no medication at the hospital or on discharge. The Eagle Ridge Hospital records are in evidence pursuant to the parties’ document agreement. They indicate that Ms. Davies reported ringing in her right ear, a feeling of dizziness, and pain at the base of her neck. The ER physician’s notes indicate that Ms. Davies was a restrained passenger who “self-extricated”, experienced no loss of consciousness or head injury, and reported delayed onset neck pain. They record a diagnosis of soft tissue injury.

**B. Subsequent Course**

[37] The day after the accident, Ms. Davies remembers having persistent neck pain, ringing in her ears, and feeling “out of it”. She missed a math tutorial but went to university that day. She said her symptoms progressed over time. She stopped working at the private dieticians’ clinic about one week after the accident.

[38] On October 12, 2018, Ms. Davies visited her family doctor. The clinical notes of this visit are in evidence pursuant to the parties’ document agreement. They indicate that Ms. Davies reported her neck pain was then gone, she had attended school and studied that week, experienced a mild headache “off and on” over the weekend, and four to five hours of work on the computer had triggered some headache and dizziness.

[39] Ms. Davies agreed she told her doctor, as recorded, that she was then having no vision problems. She admitted she was then still working and going to school and although she missed a few classes, she had deferred no mid-term examinations. She could not recall if she then had any limitations at home. She reported some gastrointestinal symptoms which Ms. Davies agreed were worse with increased anxiety and longer days and classes. Ms. Davies could not recall this appointment but said her neck pain varied and was not her primary symptom. She testified that, at some indeterminate point after the accident, the ringing in her ears disappeared and later returned when she had headache pain.

[40] Ms. Davies saw her family doctor again on October 26, 2018. The clinical notes from this visit indicate that she reported having developed bilateral tinnitus in mid-October that waxed and waned in severity, was not pulsatile, and was “driving her crazy”. She reported that her headaches seemed to be worse; she described them as feeling like pressure at the back of her head and said they were sometimes worse with exertion and associated with lightheadedness. Ms. Davies described her hearing as stable. It was noted that screen time for school and work flared her symptoms. The results of a screening neurological examination that day were noted to be entirely within normal limits.

[41] On October 29, 2018, Ms. Davies sought assistance from UBC’s Counselling Services. She had three counselling appointments in late 2018 and one in early 2019. According to Ms. Davies, she sought this support because of her concerns about stress, anxiety, related stomach issues, and the pain and uncertainty associated with the accident.

[42] Ms. Davies had her first counselling session on November 8, 2018. The counselling records are in evidence pursuant to the parties’ document agreement. They reference a variety of issues that are unrelated to the accident, including Ms. Davies’ parents’ divorce, the impact on her of their fighting, concerns about her eating habits, and her thoughts in the previous few months of “escaping” due to stress and anxiety. They indicate that Ms. Davies was recently involved in an

accident, sustained a concussion (although there is no record of who made this diagnosis), reported dizziness and ringing in her ears, and was trying to decide whether or not to cut back on her courses.

[43] Ms. Davies continued to attend university after the accident. She said she had ongoing headaches, dizziness, and neck pain, and some corresponding difficulty paying attention in class. On her evidence, she pushed through and slept more than usual. Ms. Davies took a few weeks off work to rest but did not drop any classes. She agreed that, in 2018, she was sometimes getting up at 4:30 a.m. (in order to leave home by 6:00 a.m. and arrive at UBC by 8:00 a.m. for class) and not returning home until about 10:00 p.m.

[44] Ms. Davies admitted she did not do well on her post-accident mid-term examinations. She said she remained off work because screen time was making her dizzy and worsening her headaches, and that she was finding it difficult to concentrate in class and to keep up with her courses.

[45] Ms. Davies was registered in four courses at UBC in September 2018. She withdrew from a calculus course in November 2018. As a consequence, she was unable to take a second term statistics course, a prerequisite for her application to UBC's undergraduate program with a major in Dietetics. This calculus course was not offered in the winter 2019 semester at UBC; accordingly, Ms. Davies took an equivalent calculus course at Douglas College so that she was eligible to register for the statistics course at UBC the following year.

[46] The defendants deny the accident either caused or contributed to Ms. Davies' withdrawal from this calculus course in 2018. They argue that Ms. Davies has a persistent pattern of quitting when she is disappointed or things do not go her way. They say she was never strong in math, had taken the same pre-calculus course twice at Douglas College, and that she was taking a heavier than usual course load, working ten hours per week at BC Children's Hospital, and commuting four hours per day from Port Coquitlam to UBC in the fall of 2018. They describe Ms. Davies as

an average university student who worked very hard for her marks before the accident.

[47] Ms. Davies attended another counselling session at UBC on November 14, 2018. The counselling notes from this visit indicate that she was then following a vegan diet, generally skipping lunch if she ate breakfast, not taking iron supplements as recommended, getting up at 4:30 a.m. to make a two-hour commute to campus for early classes, and that she had low energy, decreased concentration, and was sometimes sleeping for 12 – 14 hours. They also indicate that Ms. Davies had dropped one course and reported ringing in her ears, dizziness, and constant headaches which were worse when she was on screens. Ms. Davies stopped working at BC Children’s Hospital in November 2018. She said she also stopped running, going to the gym, and volunteering at the dieticians’ clinic after the accident.

[48] Ms. Davies had another UBC counselling session on December 4, 2018. She accepted as accurate references in the clinical notes from this visit to her reported ongoing concerns about: body image; constant thoughts about food; worry about what was fattening; her perfectionism; and her fear of making the wrong choice about her academic program and career, which was contributing to anxiety and worry about family, stress, and triggers over the holidays. These notes indicate that Ms. Davies reported worsened headaches, discontinuation of her vegan diet, and that she was then taking iron supplements. Under the heading for “interventions”, there is reference to an “exploration of perfectionism”.

[49] In December of 2018, Ms. Davies registered with UBC’s Accessibility Services; doing so allowed her accommodations in all her classes, including time and a half to write examinations, permission to do so in professors’ offices, and leniency regarding assignment deadlines. She registered for, but later dropped, four courses in December 2018; because she did so before the deadline, those withdrawals are not recorded on her transcript. Ms. Davies said she was unable to keep up with her school work due to her symptoms and that commuting on public transit made her dizzy.

[50] On December 21, 2018, Ms. Davies saw her family doctor again. The clinical notes from this visit indicate that she reported her neck and back pain had resolved but that it felt to her as if her headache was then all around her head. Ms. Davies did not recall this appointment but admitted her neck pain was better on some days than on others. On her evidence, she reported her neck pain to be resolved if it was not then “bugging her”; she denied this meant that it had resolved completely. The subsequent clinical notes of Ms. Davies’ family doctor in evidence make no reference to complaints of neck pain.

[51] According to Ms. Davies, her accident-related psychological issues intensified over time. The only other UBC counselling record in evidence is dated January 31, 2019. It references the accident and Ms. Davies’ recorded complaints of headaches, dizziness, and ringing in her ears. It indicates that she had reduced her course load, stopped working, and made significant changes to her lifestyle (as compared to when she was working, volunteering, and attending school).

[52] In the fall of 2019, Ms. Davies was a full-time Bachelor of Science student at UBC. She initially enrolled in four courses and later dropped a biology course. On February 7, 2019, Ms. Davies visited her family doctor who noted that Ms. Davies thought it was possible that her hearing loss had progressed. Ms. Davies did not recall this visit but guessed this is the first time she mentioned this problem to her family doctor after the accident. This clinical note indicates that Ms. Davies described her symptoms as more tolerable when she was at home and not doing much and her headaches as “much the same”.

[53] Ms. Davies’ hearing was tested in 2019, and she was fitted for hearing aids. She said she agreed to wear hearing aids because she was finding it difficult to distinguish what individuals were saying and therefore to pay attention in class. She also said she found it necessary to read lips more often than usual and to use subtitles on television, something she denied was necessary before the accident.

[54] Ms. Davies did not work in 2019, or from January to April 2020. From May to August 2020, she had a summer job working at the front desk of UBC’s Student

Recreation Centre. She said her two-hour commute from home to the UBC campus and climbing stairs at work increased her headache pain.

[55] From January to April 2020, Ms. Davies completed four courses at UBC. On her evidence, her symptoms were then aggravated because she had moved off campus, had a longer commute to university, and COVID-19 increased her screen time. She also worked two to three shifts per week (of one to four hours) at UBC's Student Recreation Centre. In the summer of 2020, Ms. Davies took two online psychology courses. In about September of 2020, she began volunteering at a private dieticians' practice. She said she began giving up shifts at the UBC Student Recreation Centre in December of 2020.

[56] Ms. Davies took two courses at UBC in the 2020 fall term. She decided to switch to a Bachelor of Science program in Food, Nutrition, and Health, and to reapply for admission to UBC's undergraduate program in Dietetics. She had initially registered for four courses and later dropped two; thereafter, she remained registered in biochemistry and a Land, Food, and Community course. Ms. Davies failed the biochemistry course and received a grade of A in the second course. Ms. Davies admitted she submitted her biochemistry mid-term examination without finishing it; she said she did so because she then had a headache. She failed her final examination in the biochemistry course. According to Ms. Davies, her headaches made it difficult for her to concentrate and do her school work, especially during final examinations when more studying was necessary.

[57] From January to April 2021, Ms. Davies took two courses at UBC. She reapplied in early 2021 to UBC's undergraduate program in Dietetics; her application was unsuccessful. She was not told why her application was declined. Ms. Davies conceded that she was crushed and heartbroken when she received this news and that Dietetics has always been her dream. She admitted Dietetics is a very competitive program. Based on the UBC informational brochure in evidence, Ms. Davies understands that UBC accepted 34 to 36 students (or about 30% of the applicants) into this program in 2024.



[58] In January of 2021, Ms. Davies stopped volunteering at the private dieticians' practice. She also stopped working at UBC's Student Recreation Centre. She said she was then having uncontrollable headaches and that she could not manage the demands of work and school. Ms. Davies took no university courses in the summer of 2021. She also took the fall 2021 semester off; she denied her decision to do so was related to her unsuccessful application to the UBC undergraduate program in Dietetics. According to Ms. Davies, her symptoms had not improved and so she took another semester off to consult new health practitioners and to focus on different therapies, including counselling and occupational therapy.

[59] Ms. Davies testified that she experienced some post-accident driving anxiety that worsened over time. On her evidence, she spoke to her family doctor about it in April 2021, because it had progressed by then to the point where she needed help. She also reported lightheadedness at this visit. Ms. Davies' family doctor referred her to counselling and restarted her on an iron supplement.

[60] Ms. Davies saw her family doctor again on April 7, 2021. She admitted she probably reported, as noted in the clinical notes from this visit, that her headaches were then mild most days and not disabling. At trial, Ms. Davies testified that the severity of her headaches fluctuated a lot and that her headaches worsened when she increased her activities.

[61] Ms. Davies agreed that her family doctor recommended she take medication for her headaches in November of 2021. Ms. Davies admitted she told her doctor that she preferred to avoid medication. She said she had a previous bad experience with Nortriptyline, and that she had also tried Meloxicam and Botox. Ms. Davies confirmed her understanding, based on what her doctors have told her, that there are other available headache medications she could try.

[62] From January to April of 2022, Ms. Davies took one course at UBC. She continued to receive the same accommodations. She did not work or volunteer that year. She began jogging again, tried a new headache medication, consulted an otolaryngologist, and attempted trigger point injections (which she described as

painful and unhelpful). This otolaryngologist did not testify at trial; their clinical records are not in evidence. Ms. Davies said she worked with a physiotherapist in 2022 to increase her running. She conceded that she enjoyed some success and that she was able to run for 30 – 40 minutes by May 30, 2022.

[63] From January to April of 2023, Ms. Davies took two courses at UBC. She took two summer courses that year and registered for, but later dropped, two other summer courses. She did not work in 2023. Ms. Davies began volunteering with another private dieticians' practice in the early summer of 2023, working variable shifts of up to three hours per week.

[64] In the 2023-2024 academic year, Ms. Davies took two courses at UBC in each of the first and second semesters. She graduated with a Bachelor of Science degree in Food, Nutrition, and Health that year. Ms. Davies has been accepted into UBC's full-time, 28-month, Master of Nutrition and Dietetics program commencing in September of 2024. She said it remains her dream to become a dietician.

**C. Current Condition**

[65] Ms. Davies reports the following ongoing complaints:

- a) Ongoing neck pain at the base of her skull and into her trapezius area;
- b) Daily headache pain of variable intensity;
- c) Constant ringing in her ears, of a different pitch than before the accident and intensified by worsening headache pain;
- d) Worsened post-accident hearing loss;
- e) Dizziness when she stands up, climbs stairs, and walks up hills;
- f) An inability to raise her left eyebrow when she has bad headache pain, something she first noticed in about April 2021, two and a half years after the accident; and

- g) An adjustment disorder, characterized by symptoms of post-traumatic stress, episodic low mood, and anxiety.

[66] Ms. Davies' primary physical complaint is her headache pain. She complains about having to lie in bed or sleep for long periods in order to cope with this pain. She described her headaches as being characterized by pain in her nose area and behind her eyes. She likened them to the feeling of having an ice pick in her brain. She also reported pain at the base of her skull, which she likened to a band that tightens as her pain worsens. She said commuting by bus can cause headaches associated with dizziness, and that any kind of exertion, screen time, activity requiring concentration, and busy, loud, and bright environments, aggravate her headaches.

[67] Ms. Davies now wears bilateral hearing aids daily. Because they amplify everything if she turns them up, she said she sometimes has difficulty hearing in busy environments. She reported being anxious and worried about her future.

## V. CREDIBILITY AND RELIABILITY OF EVIDENCE

[68] The defendants challenge the credibility of Ms. Davies and the lay witnesses she called.

[69] There is a difference between credibility and reliability; courts must assess both. Credibility is concerned with a witness' veracity (i.e., speaking the truth); reliability is concerned with a witness' ability to observe, recall, and recount the events in issue accurately: *Ford v. Lin*, 2022 BCCA 179 at para. 104.

[70] In assessing credibility, the evidence of a witness must be assessed for its harmony with the preponderance of the probabilities which a practical and informed person would readily recognise as reasonable in that place and in those conditions: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.).

[71] Courts must be very careful when assessing a plaintiff's credibility if there is little or no objective evidence of continuing injury and complaints of pain that persist

beyond the normal or usual recovery: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (B.C.S.C.), cited with approval in *McGlue v. Girvan*, 2024 BCCA 208 at para. 48. If a plaintiff's account is not convincing, the hypothesis upon which the medical evidence is based may be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at para. 44.

[72] Ms. Davies testified at trial over three days. She was an articulate witness who had no apparent difficulty concentrating, understanding, or responding to questions. While I found Ms. Davies to be a generally straightforward witness, she appears to remain very focused on the accident of almost six years ago and her related ongoing symptoms. I accept the opinion of psychiatrist expert, Dr. Stephen Wiseman, that psychiatric factors likely influence Ms. Davies' experience of pain.

[73] Ms. Davies was somewhat vague about when she first noticed what she thought was a possible increase in her pre-existing hearing loss, and when she started using subtitles when watching television after the accident. When confronted with her own recorded description of her hearing as "stable" on October 26, 2018, Ms. Davies admitted she did not immediately notice an increased post-accident hearing loss.

[74] There were significant omissions in the history Ms. Davies provided to some of her experts. She told neither Dr. Neil Longridge, otolaryngologist, nor psychiatrist, Dr. Stephen Wiseman, that she had experienced worsened tinnitus and hearing loss before the accident that was sufficiently severe it prompted her to see an audiologist in May of 2015. Ms. Davies' evidence about when her post-accident tinnitus recurred (after she said it disappeared within a few days of the accident) was also unclear.

[75] There were some inconsistencies in the evidence about the history of Ms. Davies' hearing complaints. Based on the information Ms. Davies provided to Dr. Longridge, her otolaryngologist expert, she reported being excessively sensitive to loud noises after the accident, in a way Ms. Davies did not feel was true before the accident. Notably, the May 2015 records of Ms. Davies' pre-accident audiology assessment reference her report (under the heading "description of problem") about

being “scared of loud noises”. Dr. Longridge noted that Ms. Davies reported no pre-accident balance issues, a history that is inconsistent with Ms. Davies’ recorded reports to her family doctor. Ultimately, while I found Ms. Davies to be a reasonably credible witness, I have concerns about the reliability of some of her evidence.

[76] I found the lay witnesses, including Ms. Davies’ friends Sarah Moy, Anna Wong, Lauren Corrado, Taylor Yonge; her parents, Alison and Brad Davies; her cousin, Sarah Dunn; and dietician, Marilee Pumple, to be generally credible.

[77] Some of Ms. Davies’ friends no longer see her regularly and their ability to comment on her condition over time was therefore limited. Many of them had difficulty recalling specific dates. Ms. Wong was only 16 years old when she and Ms. Davies worked together at a frozen yogurt shop about a decade ago; their lives have changed significantly since then. Ms. Moy first saw Ms. Davies after the accident in 2020; since then, she has seen Ms. Davies only two or three times a year. Based on Ms. Moy’s observations, she did not think that Ms. Davies would be able to jog; on Ms. Davies’ own evidence, she was running for 30 – 40 minutes at a time by May of 2022. Ms. Yonge admitted she did not think that she saw Ms. Davies much in the months immediately following the accident; she has been a full-time student in Scotland since September of 2022.

[78] Ms. Davies’ father was often unable to recall material dates and timelines. Ms. Davies was living primarily with him after the accident. He recalled that she had some difficulty hearing people talk and began turning up the volume on the television after the accident, but he was imprecise about when those things occurred. He said nothing about Ms. Davies using subtitles when she watched television. Ms. Davies’ mother could not recall where her daughter was living at the time of the accident. Some of her evidence was unresponsive and not specific to Ms. Davies. Ultimately, the evidence of Ms. Davies’ parents was unclear about precisely when she began using subtitles on television after the accident.

[79] While I accept that the lay witnesses all answered questions to the best of their ability, I conclude that, apart from Ms. Pumple, none was either independent or

disinterested. Ms. Pumple was a clear and candid witness whose evidence I accept without difficulty.

[80] I found the medical experts to be generally credible. I have some concerns about the factual foundation for Dr. Longridge's opinions. There were notable gaps in the history he obtained from Ms. Davies about her pre-accident tinnitus and hearing loss that undermined his causation opinions.

[81] Dr. Longridge is no longer engaged in active clinical practice. Since 2017, he has restricted his practice to mostly medical legal assessments, predominantly for plaintiffs. Dr. Longridge was occasionally argumentative, defensive, and not consistently responsive in his answers to questions on cross-examination. He made some assumptions that were unsupported by the trial evidence, offered unsolicited comments that were not specific to Ms. Davies, and often provided extraneous details. Those observations gave rise to questions about his objectivity and undermined my confidence in his opinions.

## **VI. EXPERT EVIDENCE**

[82] The plaintiff called four medical experts at trial:

- a) Psychiatrist, Dr. Gillian Simonett;
- b) Neurologist, Dr. Donald Cameron;
- c) Otolaryngologist, Dr. Neil Longridge; and
- d) Psychiatrist, Dr. Stephen Wiseman.

[83] Dr. Simonett has been a specialist in physical medicine and rehabilitation since 2011. She has expertise in the diagnosis, medical management, and rehabilitation of persons with complex trauma, spinal cord injury, acquired brain injury, neurological and general medical disorders, soft tissue injuries, and musculoskeletal pain syndromes. She was qualified as an expert in psychiatry, able to give opinion evidence about diagnosis, causation, treatment, prognosis, and

disability related to mild traumatic brain injury, headache, musculoskeletal injuries, and to comment on chronic pain from her perspective as a physiatrist.

[84] Dr. Cameron has been a neurologist since 1990. He has a neurology practice and privileges at Lions Gate Hospital. He was qualified as an expert in neurology, able to offer opinion evidence regarding diagnosis, causation, treatment, prognosis, and disability relating to neurological conditions, including mild traumatic brain injury, post-concussion syndrome, and headache, and to comment on musculoskeletal injury and chronic pain from his perspective as a neurologist.

[85] Dr. Longridge resigned his license with the College of Physicians and Surgeons of BC in 2021; he no longer sees patients or practices clinical otolaryngology. He stopped operating in 2012. Thereafter, he performed dizziness evaluations and medical-legal assessments until about 2019, when he stopped seeing a substantial number of patients. Since about 2017, Dr. Longridge's practice has been mostly confined to medical legal assessments; about 85% of this work is for plaintiffs. He no longer provides opinions or recommendations regarding the medical management of patients. Dr. Longridge was qualified as an expert in otolaryngology, able to provide opinion evidence about diagnosis, causation, treatment, prognosis, and disability regarding tinnitus, hearing loss, dizziness, and balance issues due to vestibular and cochlear injury.

[86] Dr. Wiseman has been a psychiatrist in active clinical practice since 1996. He has extensive experience as a general psychiatrist in the hospital setting, as an occupational psychiatrist working as an internal medical consultant for an insurer, and, since 2009, as a psychiatrist working almost exclusively with patients who have chronic and complex pain-related conditions. He was qualified as an expert in psychiatry, able to offer opinion evidence regarding diagnosis, causation, treatment, prognosis, and disability related to psychiatric conditions and to comment on chronic pain from his perspective as a psychiatrist.

[87] The defendants called no evidence at trial.

### A. Neck and Shoulder Pain

[88] I conclude that Dr. Simonett is the expert best qualified to comment on Ms. Davies' musculoskeletal complaints. She assessed Ms. Davies on August 9, 2022, and January 16, 2024, and authored a report dated January 24, 2024. Ms. Davies reported ongoing, intermittent, localized, and activity-dependent neck and shoulder pain which had improved but not resolved. On January 16, 2024, Ms. Davies described this pain as typically 3/10 in intensity and said it could increase to 5/10 in severity with aggravating activities like carrying a backpack.

[89] Dr. Simonett identified a specific area of consistently reproducible, localized pain in the left occipital region and the left upper facet joint. Ms. Davies reported more generalized discomfort on palpation of the musculature of her left cervical paraspinal muscles, and soreness in the bilateral trapezius region.

[90] Dr. Simonett offered the following uncontroverted opinions:

- a) Ms. Davies' presentation is most consistent with mechanical neck pain (i.e., pain arising from the muscles, ligaments, and joints of the neck and upper back, exacerbated by postures and activities that mechanically load the spine) in the left upper neck/occipital region; and
- b) Given the chronic nature of her neck pain, her spontaneous recovery has likely plateaued.

[91] Defence counsel submit that discrete entries in the hospital records from Ms. Davies' attendance the day of the accident, and in her family doctor's chart, undermine Dr. Simonett's opinions. They underscore that:

- a) The Eagle Ridge Hospital records from the day of the accident reference Ms. Davies' complaint of pain at the "base" of her neck, and not the occipital region (i.e., the back of the head), contrary to what Dr. Simonett described at trial; and
- b) The clinical notes of Ms. Davies' family doctor indicate:



- i. Ms. Davies reported that her neck pain was “gone” on October 12, 2018; and
- ii. Ms. Davies reported that her neck and back pain had “resolved” on December 21, 2018.

[92] Defence counsel highlight Dr. Simonett’s evidence that injury to the muscles and fibres of the neck generally resolves within six weeks to three months; they say that is precisely what occurred here. They note the absence of any reference to neck pain in the records of Ms. Davies’ family doctor between December 21, 2018 and December 14, 2021; they deny Ms. Davies’ complaints of ongoing neck pain are attributable to the accident.

[93] The medical records of Ms. Davies’ family doctor are not in evidence for their truth. This physician did not testify at trial. I am not persuaded on the trial evidence that there is a material discrepancy between reference to pain at the base of the neck versus pain at the back of the head. It is unclear whether Ms. Davies’ family doctor meant to convey that Ms. Davies’ complaints of neck pain were simply absent on October 12 and December 21, 2018, or whether those complaints had completely resolved. Accepting the defendants’ submission that Ms. Davies’ neck pain was fully resolved by late 2018, would require me to reject Ms. Davies’ evidence that she continued to have ongoing neck pain thereafter. I am not inclined to do so. I also note that the absence of an entry in a clinical record is not, in itself, evidence of anything. The absence of reference to a symptom in a clinical record of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom: *Edmondson v. Payer*, 2011 BCSC 118 at para. 36, aff’d 2012 BCCA 114.

[94] I find that Ms. Davies has ongoing, intermittent, mild to moderate, post-accident neck pain. I find that it has improved but not fully resolved.

**B. Concussion or Mild Traumatic Brain Injury**

[95] The parties disagree about whether Ms. Davies sustained a concussion or mild traumatic brain injury in the accident. Three medical experts offered competing opinions on this issue:

- a) Neurologist, Dr. Cameron;
- b) Psychiatrist, Dr. Simonett; and
- c) Psychiatrist, Dr. Wiseman.

[96] Dr. Cameron assessed Ms. Davies on February 10, 2022. He reviewed various documents and authored a report dated March 12, 2022, based heavily on Ms. Davies' subjective history. In his opinion:

- a) Ms. Davies probably experienced a brief loss of consciousness or altered state of consciousness at the time of the accident;
- b) Although she recalls the sound on impact, she has an incomplete recollection of subsequent events until she became aware that airbags had deployed;
- c) She probably had some post-traumatic amnesia for a few hours after the accident; and
- d) Accordingly, she meets the criteria for the diagnosis of a mild traumatic brain injury.

[97] By extension, Dr. Cameron concluded that Ms. Davies developed symptoms (which had improved but not resolved by the date of his assessment) of a post-traumatic brain injury syndrome. In his view, her chronic pain and daily post-traumatic headaches have probably aggravated her post-accident cognitive problems.

[98] Dr. Cameron agreed that, taken in isolation, fatigue, irritability, light-headedness, and perceived memory loss are all common in the general population and could be due to low iron. He acknowledged that symptoms must be considered in context. He agreed that the three cardinal features of mild traumatic brain injury include: 1) a loss of consciousness (or time); 2) confusion; and 3) a period of amnesia up to 24 hours after the traumatic event. He conceded that:

- a) Patients can suffer soft tissue injury without a mild traumatic brain injury;
- b) Most patients who are diagnosed with concussion do not develop post-concussion syndrome; and
- c) Post-concussion symptoms are usually at their worst in the days or weeks following the traumatic event and, if they develop later than this, they are not due to brain injury.

[99] Dr. Cameron admitted an accurate and reliable patient history is critical when diagnosing mild traumatic brain injury. He agreed that he prompted Ms. Davies at his assessment to ensure she had exhausted her memory. Notably, Ms. Davies testified at trial that she recalled many events shortly after the accident that she either did not relay to Dr. Cameron, or he did not record (in either his handwritten notes or his expert report).

[100] Dr. Cameron admitted there is nothing in the Eagle Ridge Hospital chart to suggest that Ms. Davies sustained a concussion in the accident. He downplayed the significance of these hospital records and said concussion is not usually diagnosed in the ER. These hospital records reference neither a query nor a diagnosis of concussion or mild traumatic brain injury. Notably, they also make no reference to any reports or stated concerns about any of the three cardinal features of concussion that Dr. Cameron described at trial.

[101] Dr. Simonett also concluded that Ms. Davies sustained a concussion in the accident. On her evidence, a diagnosis of concussion or mild traumatic brain injury requires specific neurological changes to be present at the time of the traumatic

event: namely, a loss of consciousness, amnesia, or confusion. She described concussion as a one-time diagnosis: either the evidence is present to support it or it is not. In my view, this statement underscores the importance of the hospital records from the day of the accident.

[102] Dr. Simonett interpreted Ms. Davies' statement that she felt like she was in a movie immediately after the accident to mean that she had some immediate post-accident confusion. In her opinion, this confusion and an absent memory about some aspects of the accident meet the diagnostic criteria for concussion. Notably, Ms. Davies did not mention to Dr. Simonett many of the immediate post-accident details that she said she recalled at trial.

[103] In Dr. Wiseman's opinion, Ms. Davies probably did not sustain a mild traumatic brain injury in the accident. In his view, at most, she described a few seconds of less than full visual awareness of her circumstances in the immediate aftermath of the accident. He noted that she retains a good and organized recollection of many of her thoughts, feelings, and perceptions once she regained an awareness after the accident. Importantly, from his perspective, she did not have a sense of being dazed, drowsy, or disorganized for any appreciable amount of time after the accident.

[104] Dr. Wiseman noted that Ms. Davies described being "in shock" after the accident and that she recalled perceiving a detachment from her surroundings, feeling like she was in a movie, and having a sense that what she saw around her was somehow "false". He confirmed that these are classic descriptions of dissociation, a psychological process that typically arises in situations of intense emotional distress or trauma. In his view, Ms. Davies developed significant symptoms of post-traumatic stress as a result of her involvement in the accident.

[105] In Dr. Wiseman's opinion, Ms. Davies' pattern of post-accident symptoms is not typical for concussion; he noted that concussion patients are usually maximally symptomatic in the hours or days to several weeks after the injury, before gradually improving. He agreed that it is unnecessary for someone to sustain a concussion in

order to experience a wide range of pain-related and other somatic symptoms, including headaches, marked sensitivity to light and sound, balance difficulties, hearing complaints, and problems with sustained attention, focus, and concentration.

[106] On January 23, 2019, Ms. Davies had an MRI scan of her brain; it was normal. A subsequent MRI of her brain, with contrast, on November 30, 2021, was also reported as normal. Accordingly, there is no objective evidence that Ms. Davies sustained any accident-related structural brain damage.

[107] Ms. Davies demonstrated no apparent difficulties with concentration, word-finding, or memory issues at trial. There is no objective evidence that she has any accident-related cognitive deficits. None of the experts expressed any concern about her ability to provide a clear and coherent history at their assessments. Dr. Cameron admitted she had no overt difficulties with memory, word-finding, or processing information. Dr. Wiseman noted no observable signs of pain during his interview of more than two hours; he agreed that Ms. Davies provided an organised history at the university level and demonstrated no apparent issues with her cognitive function.

[108] Having regard to the trial evidence as a whole, I am not persuaded that Ms. Davies sustained a concussion or mild traumatic brain injury in the accident. In my view, it is at least equally plausible, and more probable, that she experienced a brief period of post-accident dissociation due to post-traumatic stress.

### **C. Headache Pain**

[109] In Dr. Cameron's opinion, Ms. Davies developed post-traumatic headaches following a mild traumatic brain injury sustained in the accident, probably intermixed with post-traumatic musculoskeletal headaches and possible migraine headaches. He agreed that headache is a common complaint in the general population and one that has many potential causes.

[110] Ms. Davies told Dr. Simonett that she has ongoing, daily, post-accident headaches which fluctuate in intensity, typically range from 4-5/10 in intensity, and worsen with prolonged screen use, reading, notetaking, running, bending, and

climbing stairs. Dr. Simonett understood from Ms. Davies that she had regular random headaches about once every one to two months before the accident.

[111] In Dr. Simonett's opinion, Ms. Davies' report of new onset headaches following accident-related neck pain meets the diagnostic criteria for post-traumatic headaches. In her view, Ms. Davies' pattern of headaches is consistent with cervicogenic headache (i.e., headache arising from neck pain). Like Dr. Simonett, Dr. Wiseman concluded that Ms. Davies' headaches present as a main functional limitation; he understood that she had non-debilitating headaches about once a month before the accident.

[112] The defendants submit that, on Ms. Davies' own evidence, her ongoing headaches fluctuate in severity and are not materially different from those she had before the accident as a result of situational stress and anxiety. They highlight her admission that she told her family doctor on April 4, 2021, that her headaches were then mild and non-debilitating. They argue that Ms. Davies' cervicogenic headaches resolved when her neck pain resolved in late 2018.

[113] I have found that Ms. Davies has ongoing neck pain of variable severity. I find that she has probable post-traumatic cervicogenic headache pain. I do not accept Dr. Cameron's evidence that Ms. Davies has post-traumatic headache pain related to a mild traumatic brain injury. I find that headache pain is now Ms. Davies' most prominent and functionally limiting physical complaint.

#### **D. Balance Issues**

[114] Dr. Cameron defers to an otolaryngologist regarding balance issues.

[115] Ms. Davies told Dr. Simonett that she had developed some post-accident light-headedness, worsened by activities that aggravate her neck pain (including walking up stairs or hills and travelling on the bus) and sometimes associated with standing up from a bent position.

[116] Dr. Longridge noted that Ms. Davies told him she had no pre-accident dizziness; he made no further inquiries. That information is inconsistent with both Ms. Davies' trial evidence and the recorded history in the notes of her May 2015 audiology assessment (recording a past history of vertigo and dizziness if she stood up quickly). Based on the history Ms. Davies gave him, Dr. Longridge understood that she had some light-headedness and dizziness with occasional spinning episodes in the immediate post-accident period, associated with headache, most prominent in the first two years after the accident, and improving by the time of his assessment. The only abnormality Dr. Longridge detected on his own examination of Ms. Davies was some unsteadiness when she walked with her eyes closed. The results of his balance testing were all within the range of normal. Ms. Davies said her balance had improved and was not significantly impaired.

[117] In my view, Ms. Davies' non-specific, post-accident complaints of dizziness and/or light-headedness are poorly explained. Notably, Dr. Longridge was unaware of Ms. Davies' history of dizziness. By her own admission, she had some pre-accident light-headedness that she attributed to low iron; Dr. Cameron confirmed that low iron can cause light-headedness. Ms. Davies reported dizziness in November 2018, at which time the UBC counselling records indicate she was not taking her recommended iron supplements. When Ms. Davies reported light-headedness in April 2021, her family doctor restarted her on an iron supplement.

[118] I conclude that Ms. Davies may have had some mild, intermittent, post-accident light-headedness. On her own evidence, it is now improved and I find that it is not significantly disabling.

#### **E. Hearing Loss and Tinnitus**

[119] Dr. Longridge assessed Ms. Davies on May 27, 2022, and prepared a report dated October 4, 2022. He obtained a history from Ms. Davies, conducted an examination, and reviewed some documents, including her pre-accident hearing test results.

[120] Dr. Longridge acknowledged that Ms. Davies had a well-recognized, often congenital, “bite-type” hearing deficit before the accident, the exact cause of which he agreed is unknown. On his evidence, this kind of hearing deficit does not change significantly until aging takes its toll, a statement he did not clarify. He conceded that, given her pre-accident hearing loss, Ms. Davies would likely have needed hearing aids at some point in her life. He admitted most people could benefit from a hearing aid by age 75.

[121] According to Dr. Longridge, it is very rare for a childhood ear infection to damage the vestibular system, except in cases of obvious acute illness. For reasons that are unclear, he concluded that Ms. Davies had a “relatively normal” childhood ear infection, the meaning of which he did not explain. The precise cause of Ms. Davies’ pre-accident hearing deficit and tinnitus, and her probable corresponding prognosis, are unclear on the trial evidence.

[122] Dr. Longridge opined that hearing testing demonstrated an objective decline in Ms. Davies’ bilateral hearing level (i.e., a change of more than 10 dB) at one frequency, sometime between 2015 and 2019. On his evidence, the deployment of airbags can cause noise-induced hearing damage; in his opinion, the accident is the probable cause of this deterioration in Ms. Davies’ hearing. He agreed that her hearing assessments in 2019 and 2022 were virtually identical and that her hearing has not declined further since 2019. On that basis, he concluded that her hearing loss is not progressive and is probably post-traumatic. He conceded that both hearing and hearing tests can fluctuate, as demonstrated by some of Ms. Davies’ hearing test results.

[123] Dr. Longridge agreed that patient history is important. Notably, he was unable to confirm whether or not he asked Ms. Davies about her May 2015 hearing assessment. He documented nothing about having done so and could not confirm that he did. He also failed to note when Ms. Davies reported that she began using television subtitles after the accident. He presumed that her pre-accident hearing was adequate to allow her to function without hearing aids.



[124] Ms. Davies testified at trial that she could not remember her pre-accident hearing difficulties, or her increased reliance on lip reading during her first year of university, being “adequate enough” to mention to Dr. Longridge; accordingly, she “guessed” that they did not discuss those matters. This evidence is somewhat surprising given that Ms. Davies was seeing Dr. Longridge for an assessment of her claim for worsened hearing loss and increased tinnitus as a result of the accident. In my view, Ms. Davies, who is clearly an intelligent individual, would have appreciated the importance of providing a complete and accurate history to Dr. Longridge about her pre-accident tinnitus and hearing problems.

[125] Based on her May 2015 hearing assessment, Dr. Longridge accepted that Ms. Davies then reported increasing bilateral tinnitus lasting two to three minutes. He agreed that most people have some tinnitus from time to time and that many people who have not been involved in accidents develop tinnitus.

[126] Dr. Longridge conceded that tinnitus cannot be measured reliably and that assessing it is wholly dependent on a patient’s subjective complaints. In his experience, patients’ estimates and subjective complaints of tinnitus are often reliably unreliable. He said tinnitus cannot be treated medically and that the only method of controlling it is to hide it with other more pleasant sounds. He agreed that tinnitus is usually at its worst when it first presents and that it can be expected to improve for about one year, at which time persistent symptoms are likely permanent.

[127] Dr. Longridge described his own “empiric cut-off” for trauma-related tinnitus. In his opinion, if tinnitus presents within six months of an accident, the accident is a probable cause, in the absence of any other satisfactory explanation. If the tinnitus presents more than six months after the accident, the accident is a possible cause. Dr. Longridge conceded that this cut-off date and causation theory are unsupported by any scientific evidence.

[128] Ms. Davies told Drs. Cameron, Simonett, and Wiseman about her history of childhood hearing loss. They recorded her perception of a worsened hearing loss

after the accident. Ms. Davies told Dr. Simonett that her tinnitus is more problematic when she has increased headache pain.

[129] The defendants argue that Ms. Davies was already experiencing increased hearing loss and tinnitus in May 2015. They rely on Dr. Longridge's admission that it is possible a childhood ear infection can damage the vestibular system, and Ms. Davies' report to her family doctor that her hearing was stable on October 26, 2018.

[130] I accept that Ms. Davies' pre-existing hearing loss worsened at one frequency between 2015 and 2019, that her headache pain aggravates her tinnitus, and that she now perceives her tinnitus and hearing deficit to be worse since the accident.

**F. Mental Health Conditions**

[131] Dr. Wiseman assessed Ms. Davies in person on January 22, 2024, and prepared a report dated January 26, 2024. He conducted a mental status examination based on both his observations and Ms. Davies' reported history. In his opinion, Ms. Davies' pre-accident mental health is accurately described as follows:

- a) She was a driven and performance-focused individual who periodically experienced situational stress and worry;
- b) She had some obsessive-compulsive personality traits and traits of perfectionism;
- c) She experienced situational anxiety and stress-related gastrointestinal symptoms, consistent with some degree of Irritable Bowel Syndrome;
- d) She had friends, played sports, worked, and did well in school and her mental health issues did not appear to impact her function; and
- e) While she had neither sought nor received any mental health treatment before the accident, her personality structure was not well-suited to coping with trauma, injury, or chronic symptoms with associated functional impairment.

[132] Dr. Wiseman described Ms. Davies' post-accident mental health as follows:

- a) She developed significant post-traumatic stress symptoms, including driving-related anxiety, associated avoidance behaviour, and occasional accident-related nightmares (which have subsided since she stopped driving) as a result of the accident;
- b) She described clinically significant symptoms of more generalized anxiety and episodic low mood after the accident;
- c) She would have been diagnosable with an adjustment disorder after the accident;
- d) Her inability to “bounce back” from the severe psychological stressor of the accident has caused her emotional distress, anxiety, low mood, tearfulness, and frustration, typically related to her physical symptoms, associated functional limitations, and concerns about their impact on her future; and
- e) She has an ongoing chronic pain complex and related emotional distress, although the emotional symptoms have stabilized to some degree.

[133] Dr. Wiseman explained that an adjustment disorder is characterized by predominantly emotional symptoms. In theory, if the underlying stressor disappears, the emotional symptoms will resolve without treatment. He concluded that Ms. Davies' case is more complex and involves significant emotional symptoms that are driven by her experience of pain. In his view, her adjustment disorder can be expected to persist as long as she has ongoing pain. He noted that her mood and anxiety are worse when her pain is worse and that the reverse is also true.

[134] Dr. Wiseman defined chronic pain as pain that persists beyond six months. He explained that pain can become a psychiatric phenomenon and that a common cause of chronic pain is central sensitization, a process that occurs when pain signals remain “hyperexcited”, even in the absence of further pain signals. He

testified that there is often a relationship between pain and a person's emotional and psychiatric state. On his evidence, two things occur when individuals become overly anxious or experience depression or an alteration in their mood: 1) a neurochemical change occurs in the brain which impairs the brain's ability to modulate pain signals; and 2) the person focuses on the negative aspects of their life, including their pain. This can result in patient catastrophization, hyperalgesia, and a person's pain becoming overwhelming.

[135] In Dr. Wiseman's opinion, Ms. Davies' symptoms of headache pain suggest clinical evidence of a sensitization process; in his view, it is almost certain that her myofascial head and neck pain, and her migraine headache symptoms and facial pain have become centralized (i.e., hard-wired) into her central nervous system. She told him that moving her left eyebrow resulted in pain that she likened to stretching a tendon behind her eye; he said that is an unusual description of pain.

[136] Dr. Wiseman concluded that Ms. Davies has a separate constellation of post-traumatic stress symptoms (including driving anxiety, distress, avoidance behaviour, nightmares, and accident-related dreams) which do not reach the DSM-5 diagnostic threshold for a post-traumatic stress disorder. He grouped these symptoms together with an adjustment disorder. He agreed that Ms. Davies' anxiety had improved by the time of his assessment; he would describe her ongoing anxiety as situational.

[137] Dr. Wiseman agreed that patient history is an important part of his clinical diagnosis. Defence counsel highlight what they describe as significant gaps in the information Dr. Wiseman had before he authored his report: namely, Ms. Davies' pre-accident grades; her participation in varsity level field hockey; the hip and knee injuries she sustained in 2014 and 2017; her corresponding physical limitations; and her reported increased tinnitus and hearing difficulties in 2015. Dr. Wiseman was unaware that Ms. Davies had repeated a basic grade 12 level algebra course in 2017, and thereafter obtained the same grade of B. He was unaware that she had not been accepted into UBC's undergraduate program in Dietetics in February of 2021, or that she had been accepted into UBC's Master's program in Dietetics

commencing in September of 2024. He denied any of this information would have materially altered his opinions, a statement defence counsel describes as advocacy.

[138] Dr. Wiseman understood that Ms. Davies had re-taken some courses at Douglas College before the accident. He said it would be important to know whether she did so because she had failed or done poorly in them, or because her marks did not match the standard she had set for herself. He conceded that perfectionistic traits make it difficult for individuals to accept their limitations. He agreed that university is generally more competitive than high school, that it can be more difficult for students to maintain their marks in university, and that individuals with perfectionistic traits could view a decline in their marks as a failure.

[139] Dr. Wiseman was unaware that Ms. Davies had some thoughts of dying as a way of escaping before the accident. In his view, that speaks to her vulnerability for coping after the accident. He understood that she had some pre-accident mood issues in connection with her parents' separation and divorce in about grade nine and shortly thereafter when in high school, but that her mood had been more stable for some time before the accident. Ms. Davies admitted she had some pre-accident anxiety before examinations which he assumed was transient.

[140] Dr. Wiseman was aware that Ms. Davies had some pre-accident issues with food and eating but noted that disordered eating is not uncommon in young women with Ms. Davies' personality type and traits of perfectionism. He emphasized the importance of correlating this information with function, and noted that a psychiatric diagnosis requires either demonstrated marked distress or significant functional impairment. Based on Ms. Davies' history and the records Dr. Wiseman reviewed, he concluded that she had no psychiatric issues which significantly impaired her function before the accident.

[141] According to Dr. Wiseman, Ms. Davies' personality structure works well when life is good. In his view, she was more prone than the average person to experience distress in situations that deprived her of control. While he conceded that, absent the accident, she would have encountered some bumps in the road and periodically had

some difficulty coping, he opined that her pre-existing personality structure would not have impacted her clinical trajectory, absent some severe trauma or stressor. He admitted she was likely very afraid of failure and of making the wrong life decisions before the accident, and that she probably spent more time “stewing” about those matters than the average person.

[142] Defence counsel argue that Ms. Davies experienced multiple stressors after the accident. They offered the following examples: 1) Mr. Aridah’s unwillingness to tell his parents about their relationship; 2) her field hockey injuries and their impact on her function and ability to play competitively; 3) her parents’ divorce; 4) her pre-existing gastrointestinal issues; 5) her apparent preoccupation with food; 6) her long commute to university and corresponding irregular sleep; and 7) her decision to drop a math class, which made her ineligible to apply to the UBC Dietetics program in January of 2019. Defence counsel suggest that many of these stressors could have triggered an adjustment disorder absent the accident. I disagree. In my view, to the extent those matters qualify as stressors, all fall within Dr. Wiseman’s description of the periodic “bumps in the road” and difficulties coping that Ms. Davies was likely to encounter absent the accident. Notably, this defence theory was unsupported by any expert opinion evidence.

[143] Dr. Simonett assesses mental health and mood issues in her capacity as a psychiatrist. She confirmed that mood dysfunction can negatively impact a person’s ability to manage pain and that ongoing pain can negatively impact mood. Like Dr. Wiseman, she agreed that there is a high correlation between chronic pain and mental health issues. Dr. Cameron testified that there is a significant overlap between neurology and psychiatry; in his experience, patients with sub-acute and chronic disability are often depressed.

[144] I find that Ms. Davies developed an adjustment disorder, with features of anxiety, episodic low mood, and post-traumatic stress, after the accident. I accept Dr. Wiseman’s evidence and conclude that psychiatric issues likely feature prominently in Ms. Davies’ ongoing experience of pain.

## VII. CAUSATION

[145] The basic test for determining causation is the "but for" test. A plaintiff bears the burden of establishing that "but for" the defendant's negligent act or omission, the injury would not have occurred: *Resurface Corp. v. Hanke*, 2007 SCC 7 at para. 21; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–14, 1996 CanLII 183. The "but for" test must be proven on a balance of probabilities: *Athey* at para. 13. The accident need not be the only cause of the plaintiff's injuries but it must have materially contributed to the occurrence of the injury. A contributing factor is material if it falls outside the "*de minimis*" range: *Athey* at para. 15. If a defendant's negligence exacerbates or aggravates an existing condition, the defendant is liable for causing the resulting injury: *Athey* at para. 47.

[146] The most basic principle of tort law is that the plaintiff must be placed in the same position they would have been "but for" the defendant's negligence. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for another person. However, a defendant need not compensate a plaintiff for any debilitating effects of a pre-existing condition that the plaintiff would have experienced anyway: *Athey* at para. 35; *Dorman v. Silva*, 2021 BCCA 228 at paras. 44–45.

[147] Defence counsel argue that Ms. Davies was a "crumbling skull" plaintiff (i.e., someone who was susceptible to the debilitating effects of pre-existing conditions) before the accident because:

- a) She had deteriorating hearing loss and increased tinnitus;
- b) She had pre-existing anxiety and episodic low mood; and
- c) She had not played university level field hockey due to her hip and knee injuries since 2014, and had effectively already lost her identity as an athlete.

[148] I address each point in turn.

### A. Pre-Existing Tinnitus and Hearing Loss

[149] There is no dispute that Ms. Davies had longstanding pre-accident hearing loss and tinnitus. On her own evidence, as corroborated by the May 2015 audiology records in evidence, both either increased before the accident or had a greater functional impact on her life once she entered university. Ms. Davies is now 28; she clearly dislikes wearing hearing aids. In my view, it is reasonable to infer that this would have been at least equally true in May 2015, when Ms. Davies was only 19.

[150] As noted, there are deficiencies in the factual foundation for Dr. Longridge's opinions. He did not record a comprehensive history from Ms. Davies about her pre-accident tinnitus and hearing loss, and could not confirm that he had discussed this matter with Ms. Davies. I did not find his presumptions about what he might have asked Ms. Davies, what she might have said, or why he might not have made a record of any such discussion to be persuasive. Ultimately, Dr. Longridge admitted he could not confirm that he spoke to Ms. Davies about her perceived increased tinnitus and hearing loss in 2015. He described her pre-accident tinnitus as minor, common in the general population, and not a significant problem in her life, despite not having asked Ms. Davies about the specific complaints she reported to an audiologist in 2015, after her first year of university. Dr. Longridge was also unaware, and did not note, when Ms. Davies began using subtitles after the accident. He made assumptions about when this could have occurred and offered unsolicited statements that he was not qualified to make about when individuals might be inclined to watch television while recovering from a motor vehicle accident.

[151] Dr. Longridge testified that "cookie bite" hearing deficits are often congenital. Although he agreed that infection can damage the vestibular system in cases of obvious acute illness, he apparently attributed Ms. Davies' pre-accident hearing loss to a relatively normal childhood ear infection. The source of this information is unclear; this assumption is unsupported by the trial evidence. While Ms. Davies apparently understood that her parents attributed her pre-existing hearing deficit to a childhood ear infection, her parents gave no evidence about this matter. There are no medical records confirming the diagnosis of Ms. Davies' childhood hearing deficit



in evidence. In my view, Dr. Longridge's failure to obtain a complete medical history undermines his causation opinions.

[152] Ms. Davies was unable to identify when she first perceived an increase in her hearing loss after the accident. On her own evidence, she first reported a possible increase in her hearing loss to her family doctor in February 2019. Notably, she made the same complaint of perceived increased functional hearing loss in May 2015; Dr. Longridge was unable to confirm he explored that matter with Ms. Davies.

[153] On Dr. Longridge's evidence, airbag deployment is an extremely loud event and one that can cause noise-induced hearing loss. In his view, this event could be a factor in Ms. Davies' post-accident tinnitus and hearing change. He noted that she had less hearing reserve due to her pre-existing hearing deficit. Based on the results of objective post-accident hearing tests, and Ms. Davies' report of perceived post-accident deterioration in her hearing, Dr. Longridge opined that the accident probably caused this increased hearing deficit.

[154] Ms. Davies' reported increase in hearing loss is supported by objective hearing test results. I accept that airbag deployment is a loud event and consistent with the mechanism of injury that can lead to increased hearing loss, particularly in someone with a diminished hearing reserve. Ultimately, despite its deficiencies, I accept Dr. Longridge's uncontroverted opinion that the accident probably caused an increase at one frequency in Ms. Davies' mid-range hearing loss. While I accept that Ms. Davies dislikes wearing hearing aides, I find that, with them, she has functional hearing in most environments.

[155] Dr. Longridge conceded that tinnitus due to airbag deployment is usually at its worst immediately following this event and gradually improves over time. He agreed that tinnitus sometimes presents weeks after an accident. He suggested that the tinnitus Ms. Davies reported immediately after the accident might have been due to airbag deployment, and that the tinnitus which presented in the context of headache a week or two thereafter, might be due to a cochlear injury. Those statements reflect possibilities, not probabilities.

[156] I acknowledge that Ms. Davies now perceives her tinnitus to be worse, particularly when she has headache pain. I accept Dr. Longridge's evidence that subjective patient reports of tinnitus are reliably unreliable, and Dr. Wiseman's evidence that central sensitization can affect a person's experience of pain and result in hyperalgesia and patient catastrophization.

[157] The onset of Ms. Davies' immediate post-accident tinnitus is consistent with Dr. Longridge's evidence about the usual pattern following trauma. I accept Dr. Wiseman's evidence and find that Ms. Davies' accident-related mental health issues likely impact her experience of headache pain and her associated complaints of tinnitus. I find Ms. Davies faced a real and substantial possibility that her pre-existing tinnitus and hearing deficit would have deteriorated, absent the accident. I consider this history in my assessment of general damages and this negative contingency in my assessment of Ms. Davies' claims for the loss of future earning capacity and future care costs.

### **B. Pre-Existing Mental Health Issues**

[158] I accept Dr. Wiseman's evidence that Ms. Davies had some obsessive-compulsive personality traits and a perfectionistic personality structure before the accident. I acknowledge that Ms. Davies also had some pre-accident episodic low mood and situational anxiety. However, having regard to the trial evidence as a whole, I do not agree that either had a significant impact on her function. I accept Dr. Wiseman's evidence that function is an important measure of disability.

[159] On Dr. Wiseman's uncontroverted evidence, Ms. Davies had a pre-accident vulnerability to the physical and psychological impact of trauma and, given her personality traits and character structure, was less well-equipped than the average person to manage severe life stressors and to cope with perceived failures. Notably, Ms. Davies pursued counselling for the first time in her life shortly after the accident.

[160] I find that the accident caused Ms. Davies to experience an adjustment disorder, characterised by features of post-traumatic stress, anxiety, and episodic low mood and perpetuated by ongoing pain. I find that Ms. Davies has likely

developed central sensitization which affects her experience of pain. I have already addressed the defendants' submission that discrete entries in the clinical records of Ms. Davies' family doctor, taken in isolation, indicate that her neck and headache pain resolved shortly after the accident. I accept Dr. Wiseman's evidence that Ms. Davies' post-accident emotional symptoms have stabilized to some extent and that her anxiety is now mostly situational.

[161] I find Ms. Davies faced a real and substantial possibility that her personality structure, personality traits, and pre-existing mental health issues would have had a functional impact on her life, absent the accident. I have considered those factors in my assessment of general damages and this specific contingency in my assessment of Ms. Davies' claim for the loss of future earning capacity.

### **C. Pre-Existing Field Hockey Injuries**

[162] There is no trial evidence about the precise diagnosis of Ms. Davies' pre-accident hip and knee injuries; her corresponding prognoses are therefore also unclear. I acknowledge that Ms. Davies has not played competitive field hockey seriously since 2014, when she was at the University of Guelph. However, it is unclear on the trial evidence whether this is due to the residual effects of her previous field hockey injuries, or whether she simply prioritized other matters. I am unable to conclude that her pre-accident hip and knee injuries effectively ended her field hockey career; that conclusion is unsupported by any expert opinion evidence.

### **D. Summary**

[163] In summary, I make the following findings on the trial evidence I accept:

- a) The accident caused ongoing mechanical neck and shoulder pain of variable intensity which has improved but not resolved;
- b) Ms. Davies did not sustain a concussion or mild traumatic brain injury in the accident;
- c) The accident probably caused cervicogenic headache pain;

- d) Ms. Davies' chronic myofascial and cervicogenic headache pain has probably developed into a central sensitization process;
- e) The accident possibly aggravated Ms. Davies' complaints of intermittent dizziness, light-headedness, and/or balance issues which have now substantially improved and are not significantly disabling;
- f) The accident probably worsened Ms. Davies' pre-existing mid-range hearing loss;
- g) Ms. Davies' accident-related mental health issues have probably affected her experience of pain and aggravated her pre-existing tinnitus, which she now perceives to be more frequent, of a different pitch, and associated with increased headache pain; and
- h) The accident probably caused Ms. Davies to develop an adjustment disorder with features of anxiety, episodic low mood, and post-traumatic stress.

### VIII. NON-PECUNIARY DAMAGES

[164] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties; fairness is measured against awards made in comparable cases. While helpful, such cases serve only as a rough guide; each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

[165] The Court of Appeal outlined the non-exhaustive factors to be considered when assessing non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. They include: the plaintiff's age; the nature of the injury; the severity and duration of pain, disability, and emotional suffering; the loss or impairment of life; the impairment of family, marital, and social relationships; the impairment of physical

and mental abilities; the loss of lifestyle; and a plaintiff's stoicism, a factor which generally ought not to penalize a plaintiff.

[166] Ms. Davies claims \$285,000 in non-pecuniary damages, a figure which includes about \$15,000 for the loss of housekeeping capacity. She relies on the following authorities:

- a) *Moen v. Grantham*, 2024 BCSC 937 (\$300,000, including loss of housekeeping capacity);
- b) *Zacher v. Prescesky*, 2019 BCSC 500 (\$300,000);
- c) *Bhatti v. Ethier*, 2018 BCSC 1779 (\$200,000);
- d) *Gabor v. Boilard*, 2015 BCSC 1724 (\$200,000); and
- e) *Watkins v. Dormuth*, 2014 BCSC 543 (\$175,000).

[167] If there is a finding that Ms. Davies' current complaints are causally related to the accident, the defendants assess non-pecuniary damages in the range of \$90,000 - \$100,000, subject to a significant (unspecified) deduction on the basis she was a "crumbling skull" plaintiff before the accident. They rely on the following authorities:

- a) *Torrance v. Davies*, 2022 BCSC 1630 (\$110,000);
- b) *Wong v. Campbell*, 2020 BCSC 243 (\$90,000);
- c) *Miller v. Resurreccion*, 2019 BCSC 1719 (\$120,000);
- d) *Klinger v. Lau*, 2019 BCSC 1776 (\$95,000); and
- e) *Karim v. Li*, 2015 BCSC 498 (\$100,000).

[168] While I agree that there are some parallels between the cases counsel cited and the one before me, all are distinguishable on their facts. In my view, the decisions on which Ms. Davies relies generally involved plaintiffs who sustained worse physical and psychological injuries. Some had multiple car accidents, required surgery, and experienced emotional distress that was so severe it prompted them to contemplate suicide. Unlike Ms. Davies, some were found to have significant

cognitive deficits due to mild traumatic brain injury, to be unable to work in any capacity, or to have a bleak prognosis. While some of the cases the defendants cited involved plaintiffs with less serious injuries that had a more limited functional impact on their lives, I conclude that they are generally more analogous than the decisions on which Ms. Davies relies.

[169] I accept Dr. Wiseman's evidence that function is an important measure of disability. Applying that measure here, Ms. Davies was doing well in all aspects of her life before the accident. She was a full-time student, played university-level field hockey, maintained average grades, and made new friends. I conclude that she was a conscientious and focused student who was motivated to work hard on her studies. In my view, that remains true. I conclude that at least some of her post-accident decisions (including, for example, cutting back on sports, focusing her volunteer efforts, repeating certain courses, and reducing her course load) were likely at least partly strategic and designed to maximise her chances of gaining entry to UBC's competitive Dietetics program. I also conclude that some of the lifestyle changes she attributes to the accident are likely explained by the inevitable life transitions that students frequently make after leaving high school and focusing on career planning.

[170] I acknowledge that Ms. Davies' life changed after the accident but I am not persuaded the accident precipitated all of those changes. In my view, given her personality structure, traits of perfectionism, and relative weakness in math and sciences, it is likely that Ms. Davies would have encountered some difficulties transitioning to a more challenging university environment, absent the accident. Ms. Moy testified that she initially thought university would be easy but later discovered it was not; she ultimately decided to take only two to three courses per term. In my view, there is a real and substantial possibility that Ms. Davies would have decided to do the same in order to maintain her personal high standards for good grades, absent the accident.

[171] I appreciate that Ms. Davies mourns the loss of her identity as a competitive athlete. However, by her own admission, at the time of the accident, she had not played competitive field hockey since 2014. I conclude that this significant life change was largely occasioned by her field hockey injuries and her decision to prioritise her academic studies over athletics, before the accident.

[172] I have found that Ms. Davies has chronic myofascial and cervicogenic headache pain of variable intensity which has improved but not resolved. While I accept that Ms. Davies likely has a poor prognosis for a full recovery, the expert evidence supports the conclusion that several untried treatment options remain available to Ms. Davies.

[173] I conclude that Ms. Davies' capacity to study is likely now diminished, especially when she has headache pain. On her evidence, she needs to pace herself when studying: she takes a five-minute break about every 15 minutes, and a longer break after about one hour. At some point, Ms. Davies is unable to concentrate and she has to lie down due to increased headache pain. She focuses on one course at a time when studying. However, her UBC transcript confirms that her marks have consistently remained well above average in all her courses since January 2021. I have found that she has no objective cognitive deficits due to any accident-related brain injury.

[174] On Ms. Davies' evidence, as corroborated by her parents, cousin, friends, and roommate, she is now generally quieter, less engaged, and more noncommittal; she cancels plans more often. I accept that she now misses out more often on family occasions and special events due, at least in part, to her ongoing accident-related symptoms. Ms. Davies said that she finds it difficult to be present in relationships and to plan for the future. The defendants note that she had a three-year relationship after the accident. While Ms. Davies said she now feels behind in both school and in life, I conclude that at least some of her academic delay was occasioned by her own uncertainty and indecision about her preferred career choice.

[175] I accept that Ms. Davies now worries about her future, including whether she will be able to have a family and whether she will be able to manage the Master's program in Dietetics. Given her pre-accident anxiety and perfectionistic personality traits, I conclude that Ms. Davies would likely have worried about all of those things to some extent, absent the accident. I accept that she likely worries more about her future now than she did before the accident. Ms. Davies has some driving anxiety but is not precluded from driving.

[176] Having regard to the trial evidence as a whole, I award non-pecuniary damages of \$130,000. In doing so, I have considered Ms. Davies' limitations and her current need to pace herself when performing household tasks. This award accounts for Ms. Davies' pre-accident hearing loss, tinnitus, situational stress and anxiety, related gastrointestinal symptoms, episodic low mood, previous hip and knee injuries, and corresponding physical limitations.

#### **IX. SPECIAL DAMAGES**

[177] Claims for special damages are generally subject only to the standard of reasonableness. When a claimed expense has been incurred for treatment aimed at promoting a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.

[178] Ms. Davies claims \$2,170.14 in special damages. Based on the schedule of special damages in evidence, these costs include medications, treatments at Back in Motion (from March 1, 2019 to August 26, 2019) and Expert Physio (from April 9, 2021 to May 17, 2024), optometry treatments (from January 16, 2024 to May 13, 2024), physiotherapy and kinesiology treatments at The Physio Shop (from June 30, 2020 to April 15, 2021), counselling sessions (from August 14, 2021 to November 15, 2021), chiropractic treatments (from October 15, 2021 to January 6, 2024), and one registered massage therapy session on May 14, 2024. This figure also includes vitamins and supplements (purchased between March 9, 2019 and April 16, 2021), a



wireless keyboard and mouse, a water-base pillow, hearing aid batteries, lidocaine (for injections), Botox injections (in 2023 and 2024), a desk chair, and standing desk.

[179] While the defendants admit these costs were incurred, they do not agree that all were necessitated by the accident. In closing submissions, they admitted special damages of \$621.45, representing Ms. Davies' costs to December 31, 2019.

[180] I do not accept that Ms. Davies was fully recovered from her accident-related injuries by December 31, 2019. I find she incurred special damages in the amount claimed for treatment of her accident-related symptoms and award \$2,170.14.

## **X. INCOME LOSS**

### **A. Past Loss**

[181] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The burden of proof regarding actual past events is on a balance of probabilities. When courts are assessing past loss of income, they are really assessing lost earning capacity: *Rowe* at para. 30.

[182] An assessment of the loss of past earning capacity involves a consideration of hypothetical events: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. The plaintiff is not required to prove these hypothetical events on a balance of probabilities; a hypothetical possibility will be considered as long as it is a real and substantial possibility and not mere speculation: *Grewal* at para. 48. It is an error to award damages for the loss of earning capacity if the evidence establishes only a speculative loss: *Gao v. Dietrich*, 2018 BCCA 372 at para. 66.

[183] Ms. Davies claims damages for the loss of past earning capacity in the amount of \$85,000. The defendants deny she has sustained any past income loss.

[184] Ms. Davies relies on the report of her economist expert, Sergiy Pivnenko, dated February 26, 2024. Mr. Pivnenko was qualified as an expert, able to offer

opinion evidence as a labour economist in personal injury claims, including applying income multipliers and estimating the present value of past and future income loss claims and future care costs. Mr. Pivnenko estimated Ms. Davies' past income loss based on the assumption that, absent the accident, she would have done one of two things: 1) graduated in 2024 with a Master's degree in Dietetics; or 2) graduated in 2022 with an undergraduate degree in Dietetics.

[185] The first scenario assumes that Ms. Davies would have remained in school up to and beyond the trial date, and her claim for past loss is therefore limited to her alleged loss of part-time employment while in school from the accident date to the date of trial. Mr. Pivnenko estimates this loss as follows:

- a) \$5,421 ( $\$18.07 \times 300$  hours), representing the loss of BC Children's Hospital income from September 1, 2018 – April 30, 2019 (instead of resigning this position in November 2018);
- b) \$22,667 (1,565.70 hours of work at minimum wage from May 1, 2019 – April 30, 2022); and
- c) \$17,613 (1,090 hours at minimum wage from May 1, 2022 – trial)

SUB-TOTAL: \$45,701

LESS actual income earned of \$12,515.51 (based on Ms. Davies' T4 income from UBC in 2018 – 2021 and EI income in 2021)

TOTAL (before tax): \$33,185.49

[186] Plaintiff's counsel estimates gross past income loss in the amount of \$30,000, based on Mr. Pivnenko's first hypothetical scenario.

[187] Mr. Pivnenko's second scenario assumes that Ms. Davies would have graduated in April 2022, with a bachelor's degree in Dietetics. Mr. Pivnenko begins by estimating the loss of past earnings, as set out in his first hypothetical scenario (which plaintiff's counsel rounds up to \$30,000). Mr. Pivnenko then adds \$152,300,

representing two years of lost income working as a dietician at the lower end of his pay scale from May 2022 to the date of trial. These amounts total \$170,300 (which plaintiff's counsel rounds down to \$170,000).

[188] The average of these two estimates (\$30,000 and \$170,000) is \$100,000. Assuming tax of 15% (based on Mr. Pivnenko's report), plaintiff's counsel estimates the net loss of past earning capacity in the amount of \$85,000. Ms. Davies seeks to recover this amount.

[189] Ms. Davies described her pre-accident study and work plans as follows:

- a) If her application to UBC's undergraduate program in Dietetics was accepted, she would have entered this program in September 2019, and completed it in April 2022; and
- b) Thereafter, she would have started working as a temporary dietician immediately and continued doing so for up to one year, while studying for the registered dietician examination (which is offered twice annually in May and November).

[190] On Ms. Davies' own evidence, UBC's undergraduate program in Dietetics is highly competitive and accepts only a small number of applicants. I acknowledge that Ms. Davies was a hard-working, diligent, and focused individual who always prioritized school. She decided that she wanted to pursue an undergraduate program in Dietetics in or about 2017. Although senior high school and university math and science courses were always more challenging for Ms. Davies, she was then contemplating a program with a significant focus on those subjects. She worked hard and achieved good grades in high school. By contrast, her first-year, pre-accident, university grades were only average. I accept that she was then playing university level field hockey but, in my view, the evidence supports the conclusion that she was then no longer able to juggle school and extra-curricular activities as easily as she had when in high school.

[191] The evidence does not permit me to assess the likelihood that Ms. Davies would have been accepted into UBC's undergraduate Dietetics program in 2019, absent the accident. No one affiliated with UBC's Dietetics program testified about the relative strength of Ms. Davies' application as compared to those of successful candidates that year. In my view, it would be unduly speculative to assess damages based on the possibility that, absent the accident, Ms. Davies would have been accepted into UBC's undergraduate program in Dietetics in 2019, and graduated from this program in 2022.

[192] I adopt plaintiff's counsel's estimate of the loss of past earning capacity in the amount of \$30,000, as set out above (before tax). From February 2017 until September 2018, Ms. Davies worked at a bakery while attending Douglas College and then accepted a position with the work/learn program at BC Children's Hospital and worked about 20 hours per week. In my view, it is reasonable to conclude that this pattern of minimum wage work would likely have continued, absent the accident.

[193] In my view, this award is reasonable and fair to all parties.

## **B. Future Loss**

[194] A claim for future loss of earning capacity requires the court to compare the plaintiff's likely future working life if the accident had not happened with the likely one after its occurrence, accounting for negative and positive contingencies: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 33; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

[195] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency: *Rattan v. Li*, 2022 BCSC 648 at para. 147. The court may adjust an

award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91. The burden of proof in establishing that a contingency applies is on the party seeking to assert it: *Lo v. Vos*, 2021 BCCA 421 at para. 39.

[196] Depending on the facts of the case, the loss may be quantified on either an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach is typically used in cases where there is an identifiable loss of income, for example, where the plaintiff has an established work history: *Kringhaug v. Men*, 2022 BCCA 186 at para. 43. The capital asset approach is typically used when this is not the case and the court makes an award for the loss of opportunity.

[197] The Court of Appeal recently clarified the law regarding the assessment of lost future earning capacity in a trilogy of cases: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; *Lo v. Vos*, 2021 BCCA 421. In *Rab* at para. 47, Justice Grauer set out a three-step process for assessing future income loss:

... [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.

[198] The assessment of damages is a matter of judgment and not calculation: *Rosvold* at para. 18. While assessing an award for future loss of income is not a purely mathematical exercise, the court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss and to the extent that they help determine what is fair and reasonable: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 54.

[199] Ms. Davies seeks \$1.6 million to compensate her for a loss of future earning capacity. Plaintiff's counsel submits that this loss should be valued using the earnings approach. He argues that, despite her young age and lack of employment history, Ms. Davies' career path was uniquely well-defined before the accident. The defendants deny Ms. Davies has sustained any loss. Alternatively, they submit that such loss is modest and appropriately assessed using the capital asset approach.

[200] I begin my analysis by considering the expert evidence regarding Ms. Davies' likely prognosis.

### 1. What is Ms. Davies' prognosis?

[201] Dr. Simonett noted that Ms. Davies complains of ongoing neck pain and opined that her spontaneous recovery has likely plateaued. In her view, the prolonged nature of Ms. Davies' symptoms is a poor prognostic indicator for a full recovery. Dr. Simonett identified additional treatment options that Ms. Davies could try to improve the management of her symptoms but she does not expect them to be curative.

[202] Dr. Simonett advised that treatment is often approached in a step-wise manner, starting with the most conservative options and stopping when the desired level of pain management is achieved. Although Ms. Davies reported having one occipital nerve block without benefit, Dr. Simonett recommended that she consider left upper cervical medial branch blocks. She confirmed that Ms. Davies also has additional treatment options for her headache pain, including a trial medial branch block and specialised medications like CGRP inhibitors (which Dr. Simonett does not prescribe). Ms. Davies testified that her neck pain is now typically a 3/10 in intensity.

[203] In Dr. Cameron's opinion, Ms. Davies' chronic pain, post-traumatic musculoskeletal headaches (i.e., cervicogenic headaches), and ongoing cognitive problems will be permanent. In his view, while treatment initiated two years after the onset of symptoms might improve a patient's condition, it is unlikely to resolve them. He agreed that medicine is continually evolving and that new treatment options are always becoming available. Dr. Cameron's opinions are premised on the assumption

that Ms. Davies sustained a mild traumatic brain injury in the accident, a finding I have not made.

[204] Dr. Cameron opined that Ms. Davies would be a candidate for alternate prophylactic headache medications like gabapentin, Lyrica, amitriptyline, or topiramate. He noted that she is also a candidate for botulinum toxin injection therapy for post-traumatic musculoskeletal headaches and possible post-traumatic migraine headaches. He recommended that she be referred to a neurologist for an assessment.

[205] Neither Dr. Cameron nor Dr. Simonett are headache specialists. In my view, Ms. Davies would benefit from a referral to a neurologist with specialized expertise in managing headache pain for a review of available treatment options. On Ms. Davies' own evidence, she took less than 10 of the Sumatriptan tablets she was prescribed for her headache pain, and she took Meloxicam for only a few months. She admitted she would be willing to try other medications.

[206] In Dr. Wiseman's opinion, treatment with different medication, combined with counselling, could improve Ms. Davies' overall symptomatic distress. He highlighted the distinction between impairment (the body's ability to function) and disability (the application of a patient's impairment to their specific circumstances). He explained that assessing disability involves reviewing how a person functions in the various domains of their life and the sustainability of what they are doing. On his evidence, treating patients with central sensitization focuses on helping them improve their function within the confines of their chronic pain.

[207] Dr. Wiseman noted that it is important for Ms. Davies to maintain an adequate iron level to optimize her mental state, energy level, and pain experience. He recommended a trial of an SNRI medication which he said could modulate her anxiety and emotional state and dampen central nervous system pain signals.

[208] Ms. Yonge, Ms. Davies' friend, is scheduled to graduate with a Master's degree in occupational therapy this summer. She observed that Ms. Davies is

beginning to adapt to her limitations. In my view, it is reasonable to conclude that, with time, Ms. Davies will learn strategies to better manage her symptoms.

[209] Based on all the evidence, I conclude that there are several untried treatment options that Ms. Davies could explore. While I accept that Ms. Davies' prognosis for a full recovery might be guarded, I conclude there is a significant real and substantial possibility that she could improve her current condition with different treatment.

## **2. What is Ms. Davies' residual capacity to work?**

[210] The parties have a fundamentally different view of Ms. Davies' residual capacity to work. Plaintiff's counsel argues that Ms. Davies can, at best, work at only 50% capacity. He notes that, since the accident, she has been taking half of a full university course load, while being extensively accommodated, not working, and not playing sports. Defence counsel deny Ms. Davies has suffered any loss of future earning capacity.

[211] Dr. Simonett candidly conceded that she is unable to comment on Ms. Davies' competitiveness for the UBC Master's program in Dietetics. In her view, it is too early to determine Ms. Davies' long-term work disability. She opined that Ms. Davies' ongoing symptoms, despite a reduced course load, is a poor prognostic factor for increasing her workload to that expected of a Master's program, and for full-time competitive work (which she clarified to mean an ability to perform full job requirements at a competitive level).

[212] In Dr. Cameron's opinion, Ms. Davies likely has a permanent partial disability. In his view, she will probably be able to work, either as a dietician or in an alternate part-time position. He concluded it is unlikely that she will be able to sustain full-time future employment due to the residual adverse effects of her accident-related physical injuries. As noted, he attributes some of Ms. Davies' residual symptoms to a mild traumatic brain injury, a finding I have not made.

[213] In Dr. Wiseman's opinion, neither Ms. Davies' personality traits nor any other psychiatric issue would have prevented her from reaching any of her personal,



academic, or professional goals in life, absent the accident. In his view, it is now unlikely that she will be able to complete a full course load in her university program or work full-time in her chosen profession in the future.

[214] Ms. Davies testified that she does not think she will be able to manage the UBC Master's program in Dietetics. On her uncorroborated evidence, she must pursue this program on a full-time basis; she denied she will be able to do so with accommodations. Ms. Davies said she has recently been taking only two courses at a time in an effort to manage her symptoms, that there is a full-time work component to this Master's program, and that she currently struggles to work part-time hours. Ms. Davies has, nonetheless, registered for this Master's program. On her evidence, it has always been her dream to work as a dietician and she does not know what else to do.

[215] Ms. Pumple, a dietician, provided Ms. Davies with a positive reference letter to support her application to UBC's Master's program in Dietetics. Ms. Pumple agreed that she effectively staked her own reputation on this favourable reference and that she would not have misled anyone about Ms. Davies' ability to work as a dietician.

### **3. What could Ms. Davies earn as a dietician?**

[216] Mr. Pivnenko provided information in his report about the average annual earnings of BC females with bachelor's degrees employed as dieticians and nutritionists. Based on this information, he projects these average earnings to be about \$74,000 (in current dollars) in 2025, and about \$99,000 by 2053. He estimated overall average earnings in this group between 2025 and 2066 to be about \$90,000.

[217] Ms. Pumple is an experienced registered dietician who currently works 21 hours a week in a 0.6 full-time equivalent position for the Government of BC, earning about \$48,000 per year doing so, excluding overtime. This roughly equates to an annual income of about \$80,000 for a comparable full-time position.

[218] On Ms. Pumple's evidence, she charges \$175/hour for her private practice work (as compared to her public sector hourly rate of \$44.00). She anticipates that her 2024 gross private practice billings will be in the range of \$140,000 - \$150,000. Her income tax returns are not in evidence and her business expenses are unknown; it is therefore not possible to determine her likely net private practice earnings for 2024. Plaintiff's counsel argues this information supports the conclusion that dietitians in private practice can earn substantially more than the average dietitian.

[219] On Ms. Davies' evidence, she has always wanted to have her own business once she gained some work experience in the public sector. She said doing so was part of her pre-accident career plan. Plaintiff's counsel submits that an annual income of more than \$100,000 was realistic for Ms. Davies, absent the accident.

#### **4. Analysis and Conclusion**

[220] Mr. Pivnenko estimates Ms. Davies' future income loss based on four hypothetical without-accident scenarios.

[221] Mr. Pivnenko's first and second without-accident scenarios are based on the average lifetime earnings of a dietitian, reduced by various contingencies. Scenario one assumes that Ms. Davies would have started working as a dietitian in 2022, after completing a bachelor's degree. Scenario two assumes that she would have started working as a dietitian in 2025, after completing a Master's degree.

[222] Mr. Pivnenko's third and fourth without-accident scenarios are based on the same factual foundation as his first two scenarios, but they also assume that Ms. Davies would have transitioned to full-time work in her own business at age 40 and thereafter earned significantly more money than the average dietitian. All of Mr. Pivnenko's without-accident scenarios assume that Ms. Davies would have taken two one-year maternity leaves and worked part-time for five years after the birth of both children. These without-accident scenarios result in estimated lifetime earnings in the range of \$2,154,500 to \$3,158,900; an average of these figures is \$2,656,700.

[223] Mr. Pivnenko estimates Ms. Davies' with-accident income based on two hypothetical scenarios: 1) Ms. Davies will complete her Master's degree in Dietetics and begin working as a dietician in January 2027, earning 50% of the full-time income of someone graduating with this degree to age 65; and 2) Ms. Davies will be unable to complete her Master's degree and will begin working in January 2027 and earning 50% of the full-time income of someone with a bachelor's of science degree in food, nutrition, and health and working as a nutritionist to age 65.

[224] Both of these with-accident scenarios assume that Ms. Davies will: 1) have two children; 2) will not work at all for five years after they are born; and 3) will resume part-time work once her children turn five. Based on these assumptions, Mr. Pivnenko's with-accident scenarios estimate future lifetime earnings in the range of \$829,800 - \$962,600; an average of these figures is \$896,200.

[225] The difference between the average of the highest and lowest without-accident scenarios (\$2,656,700) and the two with-accident scenarios (\$896,200) is \$1,760,500. These figures differ slightly from the ones plaintiff's counsel referenced in his closing submissions but they do not produce a materially different result. Plaintiff's counsel then reduces this average figure by 10% to reflect the real and substantial possibility that Ms. Davies will learn to better manage her chronic pain over time. He does not accept there is any real and substantial possibility that her condition will improve. In the result, he estimates a loss of future earning capacity in the amount of \$1.6 million. Ms. Davies seeks to recover this amount.

[226] Before the accident, Ms. Davies was a focused, motivated, and hard-working student who, with significant effort, achieved consistently good marks in high school while playing sports, doing some volunteer work, and occasionally babysitting. However, on the trial evidence, she struggled to maintain the same balance after she started university. Her first-year university marks dropped, she received a grade of D in one course for the first time in her life, and her overall pre-accident grades were average. In my view, there is a real and substantial possibility that Ms. Davies would have struggled with the transition to university, particularly in math and

science courses, absent the accident, a conclusion that is supported by Ms. Davies' high school and first-year university transcripts.

[227] I have found that the evidence establishes Ms. Davies has chronic neck and shoulder pain that has improved but not resolved, cervicogenic headaches of variable intensity which impact her experience of tinnitus, a probable increased hearing deficit, and an adjustment disorder with features of anxiety, episodic low mood, and post-traumatic stress, as a result of the accident. I conclude that the first two steps in *Rab* are met. In my view, the evidence discloses a potential future event that could lead to a loss of capacity, and a real and substantial possibility that this event will give rise to a future pecuniary loss. The challenge is to value the future loss, a task that is made more difficult given Ms. Davies' young age and lack of employment history.

[228] As noted, there is no objective evidence that Ms. Davies has any cognitive deficits as a result of the accident. She remains an intelligent, motivated, and focused individual. She was a thoughtful and articulate witness who testified with no apparent difficulty at trial. Ms. Davies' UBC grades have consistently exceeded the class average in all of her courses since January 2021.

[229] I agree with plaintiff's counsel that, once Ms. Davies had decided what she wanted to do with her future, she worked hard and was determined to make it happen. In my view, that remains true. I conclude that, while it might now take Ms. Davies longer to achieve her goal of becoming a dietician, she is likely to do so. Alternatively, she might decide to make another change to her career plans and to pursue a different, less competitive, program that would generate comparable future earnings. I am not persuaded on the trial evidence that Ms. Davies will be unable to secure the same accommodations she has had at UBC to date during her Master's program in Dietetics.

[230] I conclude that assessing Ms. Davies' loss of future earning capacity based on Ms. Pumble's private practice hourly rate, or assumed gross annual earnings in the arbitrary amount of \$170,000, would be unduly speculative. In my view, this case

is distinguishable on its facts from *Fletcher v. Biu*, 2020 BCSC 1304, where the plaintiff was approximately one decade older than Ms. Davies at the time of trial, had an established pre-accident work history, and on the trial evidence, appeared destined to have a stellar career as an occupational therapist. I am unable to make comparable findings on the evidence in this case.

[231] Ms. Pumple testified that work as a dietician is associated with both high stress and a high burn-out rate. Given Ms. Davies' personality profile, pre-accident anxiety, and corresponding mental health vulnerabilities, I conclude there is a real and substantial possibility that she might not have persisted as a dietician, absent the accident. She was only 22 years old at the time of the accident and, like many students, had changed her mind several times about what she wanted to do with her future. It is unknown whether Ms. Davies would have had children absent the accident, and whether she will do so now.

[232] In my view, there are many parallels between this case and *Bhatti v. Ethier*, 2018 BCSC 1779. I conclude that, like the plaintiff in *Bhatti*, Ms. Davies was a bright, industrious, and motivated student before the accident. However, as Justice Verhoeven noted in *Bhatti*, many young persons do not go on to achieve the career aspirations they have in mind when they are young for many reasons, and it is not unusual for students who do well in high school to find that they struggle at university where the demands are greater and the environment is less supportive: *Bhatti* at para. 102. Post-secondary students often reassess their career plans in light of their academic experience and evolving interests: *Bhatti* at para. 102. Those comments are analogous here. Like the plaintiff in *Bhatti*, Ms. Davies is also perfectionistic by nature and I conclude it is plausible that some other academic or other obstacle in life could have disturbed her path, absent the accident: *Bhatti* at para. 102.

[233] The circumstances of this case make it impossible to predict Ms. Davies' future earning trajectory with certainty. Doing my best on the available evidence, I assess her future loss of earning capacity in the amount of \$320,000.

[234] This figure is roughly based on the present value of a future income stream in the annual amount of approximately \$70,000, a figure that falls at the lower end of Mr. Pivnenko's estimated range for dieticians and nutritionists, for the first ten years of her working life. Thereafter, it assumes increased annual earnings in the amount of about \$85,000 to age 62, the rough equivalent of applying Mr. Pivnenko's labour market contingencies. The present value of this future income stream is about \$2,000,000, before applying any contingencies.

[235] I have discounted this figure by approximately 20% to reflect negative contingencies that would have impacted Ms. Davies' future earnings, absent the accident, including, in particular, the following real and substantial possibilities: 1) her pre-existing hearing deficit and tinnitus would have progressively deteriorated, with a corresponding increased functional impact on her life; and 2) her pre-existing anxiety, episodic low mood, personality structure, perfectionistic tendencies, inability to cope well in situations where she lacks control, and corresponding mental health vulnerabilities, would have impaired her ability to manage severe life stressors. I conclude that Ms. Davies would have been subject to the usual general contingencies in life, including sickness, injury, lay-offs, and other labour market fluctuations.

[236] I have also considered positive contingencies, including, in particular, the real and substantial possibility that Ms. Davies' condition will improve with different treatment, that her mental health will improve with better management of her physical symptoms, and that she will learn to manage her symptoms better over time.

[237] The net effect of applying a discount of about 20% to reflect specific contingencies reduces estimated future without-accident earnings to about \$1.6 million. I assess Ms. Davies' accident-related loss of future earning capacity to be about 20%.

[238] I have not applied Mr. Pivnenko's customized labour market contingencies as I do not accept the assumptions on which they are based. I am not persuaded that

Ms. Davies will only ever be able to work at 50% capacity because she has recently opted to take a reduced course load at university. As noted, she has many viable, untried treatment options including medication, medial branch blocks, a referral to a neurologist with expertise in the management of headache pain, the prescription of CGRP and other specialised headache medications, and the kind of counselling that Dr. Wiseman recommends. While I accept that Ms. Davies' prognosis for a full recovery may be guarded, I find there is a significant real and substantial possibility that different treatment will improve her condition.

[239] In my view, this award is reasonable and fair to all parties.

## **XI. FUTURE CARE COSTS**

[240] Justice Kent conveniently summarized the governing principles regarding an assessment of future care costs in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244. I have applied those principles here.

[241] An assessment of future care costs is not a precise accounting exercise. The rule that damages must be assessed once and for all at the time of trial requires courts to peer into the future and to fix damages for future care as best they can: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. The court must identify the specific amount awarded for each item claimed: *Sunner v. Rana*, 2015 BCCA 406 at para. 50. The cost of each particular item is an important consideration in assessing whether it meets the test of reasonableness: *Elzinga v. Sharpe*, 2019 BCSC 314 at para. 210. The plaintiff must prove there is a real and substantial possibility that the cost will be incurred: *Owen v. Folster*, 2018 BCSC 143 at para. 314. A court may decline to award future care costs for items or services that a plaintiff is unlikely to use: *Liu v. Bipinchandra*, 2016 BCSC 283 at para. 163.

[242] Ms. Davies claims \$50,000 to fund future care costs including:

- a) \$2,640 to fund 30 sessions of active rehabilitation/kinesiology treatment, as recommended by Dr. Simonett;

- b) \$4,000 to fund 30 additional counselling sessions, as recommended by Dr. Wiseman;
- c) \$32,067 to fund the cost of her current hearing aids (\$6,160) plus nine replacement hearing aides over her lifetime, discounted to present value; and
- d) \$9,898 to fund the cost of hearing aid batteries (\$12.45 every two weeks to age 75), discounted to present value.

TOTAL: \$48,605 (rounded up to \$50,000).

[243] The defendants deny Ms. Davies is entitled to any award for future care costs.

#### **A. Active Rehabilitation/Kinesiology**

[244] Dr. Simonett recommends that Ms. Davies progress her exercise regime with a focus on posture and gradually increase her cardiovascular fitness. I accept that Ms. Davies would benefit from the kind of active rehabilitation support she seeks to facilitate a transition to a more active lifestyle, in accordance with Dr. Simonett's recommendation. I award \$2,640 to cover the cost of 30 sessions, based on the past cost of \$88/session.

#### **B. Psychological Counselling**

[245] Dr. Wiseman opines that Ms. Davies will require the services of a counsellor for the foreseeable future. In his view, she will require at least 30 further counselling sessions. I award \$4,000 to fund 30 additional counselling sessions at a cost of \$133.35 per session (based on the costs of the counselling Ms. Davies has received in the past) for a total of \$4,000.

#### **C. Hearing Aids and Batteries**

[246] Ms. Davies claims \$41,965 to cover the cost of her current and replacement hearing aids for life, plus the cost to replace hearing aid batteries at present value



until age 75. Plaintiff's counsel concedes that it would be appropriate to discount this claim by 20% to reflect the real and substantial possibility that Ms. Davies would have needed hearing aids at some point in her life, absent the accident. Doing so reduces this claim by \$8,393 to \$33,572. Dr. Longridge opines that Ms. Davies will require regular changes to her hearing aids and different hearing aids later in life.

[247] Given my causation findings, Ms. Davies is entitled to a portion of her hearing aid and battery costs. I conclude on the evidence of Dr. Longridge that Ms. Davies' pre-existing hearing deficit would have progressed as she aged and that she would have required hearing aids at some point in her life, absent the accident. Ms. Davies was already reporting increased functional hearing difficulties after her first year of university, and discussing the possibility of hearing magnification with hearing aids. Doing my best on the available evidence, I discount Ms. Davies' claim for the cost of hearing aids and batteries by about one-third to \$28,000, to reflect expenses she would likely have incurred in any event, absent the accident.

[248] In summary, I award future care costs as follows:

- a) Active Rehabilitation/Kinesiology - \$2,640
- b) Psychological Counselling - \$4,000
- c) Hearing Aids and Batteries - \$28,000

TOTAL: \$34,640.

## **XII. MITIGATION OF DAMAGES**

[249] A plaintiff in a personal injury action has a duty to take reasonable steps to mitigate their loss. A defendant bears the burden of proving: (1) the plaintiff acted unreasonably in eschewing the recommended treatment; and (2) the extent to which the plaintiff's loss would have been reduced had they acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Haug v. Funk*, 2023 BCCA 110 at para. 22.

[250] The defendants submit that, if there is a finding that the accident caused Ms. Davies to develop an adjustment disorder, she failed to mitigate her loss by not pursuing counselling. They say her damages ought to be discounted by 15% to reflect this alleged failure to mitigate.

[251] Dr. Wiseman opined in his October 4, 2022 report that Ms. Davies would have been diagnosable with an adjustment disorder after the accident. He was cross-examined about whether Ms. Davies' symptoms would have been less significant, and her recovery faster and better, if she had continued to attend counselling in 2018. On Dr. Wiseman's uncontroverted evidence, counselling at that point would not have fundamentally changed Ms. Davies' outcome. Although he accepted that she might have been less distressed if she had received this kind of support, he was not persuaded that regular counselling alone would have made a significant difference.

[252] The defence theory that Ms. Davies failed to mitigate her damages is not supported by any expert evidence. I conclude that the defendants have not met their burden of proving that Ms. Davies failed to mitigate her loss.

**XIII. DISPOSITION**

[253] In summary, I award damages as follows:

- a) Non-Pecuniary Damages (including loss of housekeeping capacity) - \$130,000
- b) Special Damages - \$2,170.14
- c) Gross Loss of Past Earning Capacity - \$30,000
- d) Loss of Future Earning Capacity - \$320,000
- e) Future Care Costs - \$34,640

TOTAL: \$516,810.14

[254] Absent information of which I am unaware, Ms. Davies is entitled to costs on the ordinary scale. If there are any costs issues arising from these reasons, the parties are at liberty to apply to Supreme Court Scheduling to speak to them within 30 days.

“Douglas J.”