COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mariotto v. Rowntree Estate,* 2026 BCCA 215

Date: 20260520
Docket: CA50861

Between:

Kristina Mariotto

Appellant
(Plaintiff)

And

The Estate of Joan Rowntree, Deceased

Respondent
(Defendant)

Before: The Honourable Mr. Justice Butler
The Honourable Justice Winteringham
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated July 18, 2025 (*Mariotto v. Rowntree Estate*, 2025 BCSC 1387, Vancouver Docket M206103).

Counsel for the Appellant:	G. Cameron
Counsel for the Respondent:	R.C. Brun, K.C. J.J.L. Brun, K.C.
Place and Date of Hearing:	Vancouver, British Columbia March 3, 2026
Place and Date of Judgment:	Vancouver, British Columbia May 20, 2026

Written Reasons by:
The Honourable Justice MacNaughton

Concurred in by:
The Honourable Mr. Justice Butler
The Honourable Justice Winteringham

Summary:

The appellant was involved in a minor motor vehicle accident caused by the respondent. As the respondent admitted liability, the trial proceeded on damages alone. The trial judge applied a 75% reduction to the awards for non-pecuniary damages, past wage loss, loss of future earning capacity, future care costs, and special damages. The appellant appeals the trial judge's assessment on the basis that the trial judge erred in assessing a contingency deduction at all, or in the amount of 75%, and in applying the contingency deduction to past wage loss and special damages.

Held: Appeal allowed. The trial judge erred in principle in assessing a contingency deduction at a level that was not supported by the evidence and by applying the contingency deduction to agreed-upon special damages.

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Reasons for Judgment of the Honourable Justice MacNaughton:

Introduction

[1] On July 6, 2018, the appellant, Kristina Mariotto, was injured when her stopped vehicle was struck from behind at low speed by a vehicle driven by the respondent, Joan Rowntree, now represented by her estate (the "accident"). Ms. Mariotto was almost 51 years old on the date of the accident and 57 years old at trial.

[2] The accident was minor, causing almost no damage to either vehicle. The airbags in Ms. Mariotto's vehicle did not deploy.

[3] Liability for the accident was admitted. The central issue at the eight-day trial was the nature and extent of Ms. Mariotto's injuries, her pre-existing health conditions, and the quantum of her damages. At trial, the respondent submitted that the trial judge should apply a negative contingency deduction of 40-50% due to Ms. Mariotto's pre-existing health conditions.

[4] On July 18, 2025, the trial judge issued reasons for judgment indexed at 2025 BCSC 1387 ("RFJ"), in which he awarded Ms. Mariotto net damages of $378,192.98. That amount reflected a 75% negative contingency deduction (the "Deduction") to all heads of damage. The net damages were:

a.	Non-pecuniary damages	$50,000
b.	Past wage loss	$82,040.50
c.	Future loss of income earning capacity	$156,993.00
d.	Cost of future care	$84,749.25
e.	Special Damages	$4,410.23
Total		**$378,192.98**

[5] On appeal, Ms. Mariotto challenges the trial judge's application of the Deduction on the basis that it was not established on the evidence or determined by the application of correct legal principles to the evidence. Ms. Mariotto also submits that the Deduction should not have been applied to all heads of damage.

[6] For the reasons that follow, I would allow the appeal, set aside the trial judge's Deduction, and apply a 25% negative contingency deduction. I would also allow the appeal of the Deduction as it was applied to Ms. Mariotto's past wage loss and special damages.

Background

[7] I will briefly review the background facts and evidence led at trial and, as necessary, will review the evidence in more detail when considering the issues on appeal.

Ms. Mariotto's Personal History

[8] After graduating from high school in North Vancouver, Ms. Mariotto worked in a variety of jobs in both Vancouver and Thunder Bay, Ontario, including as a server, an aesthetician, and in retail and commercial sales. After her return to Vancouver, Ms. Mariotto took, but did not complete, an accounting course. She married in 1997 and, on the date of the accident, continued to live in North Vancouver with her husband.

[9] Ms. Mariotto then trained as a dental receptionist at the British Columbia Institute of Technology. As the top program graduate, she was guaranteed a position and immediately began working at a general dentistry clinic.

[10] In about 2005, Ms. Mariotto started working as a receptionist for Dr. Mah, an orthodontist, in North Burnaby. She helped build his busy practice and was promoted to office manager. She resigned her position as she found the commute to and from Burnaby difficult in rush hour. Dr. Mah persuaded her to return by offering flexible hours that enabled her to avoid travelling in rush hour.

[11] Ms. Mariotto worked for Dr. Mah until early 2018. She left when Dr. Mah was no longer willing to accommodate flexible hours and due to conflicts in the workplace.

[12] In about 2014, Ms. Mariotto also started working for her husband's engineering company, Lexcor Management Inc., on her days off from Dr. Mah's office. She helped with bookkeeping, correspondence, and general office management tasks.

[13] In 2014, after experiencing extreme fatigue and dangerously low blood pressure, Ms. Mariotto was diagnosed with Addison's disease. Addison's is a rare disorder that affects production of the adrenal steroids that regulate the body's metabolism, blood pressure, and responses to stress. Treatment is monitored by endocrinologists, and includes daily varying doses of steroids, taken at different times. Since shortly after her diagnosis, Ms. Mariotto has been under the care of her endocrinologist Dr. David Thompson.

[14] At the time of the accident, Ms. Mariotto had begun working as a receptionist for Dr. Farnad Rezaie, an endodontist, who was opening a new practice located about five minutes from her home in North Vancouver.

[15] Prior to the accident, Ms. Mariotto was physically active. She went to the gym with her husband several times a week, played tennis, dog walked, cycled, golfed, and salsa danced. She liked gardening and working with her husband on home improvements. As a couple, they were socially active.

The Accident and the Injuries

[16] As I have said, the accident was a relatively minor one. Ms. Mariotto did not remember experiencing a whiplashing effect and did not hit her head on any interior appointments in her vehicle. She clearly remembered speaking to Mrs. Rowntree after the accident and expressing concern over her well-being. She drove home and did not immediately seek medical attention, and, when she did so, she complained only of neck and lower back pain.

[17] Thereafter, her condition deteriorated. As the trial judge determined, the "central perplexity" of Ms. Mariotto's case, "amply made out in the evidence", was that Ms. Mariotto's life "substantially unravelled" after the accident and she is now "seriously and demonstrably" incapacitated (RFJ at para. 4).

[18] Hearing Ms. Mariotto's evidence and observing her over two days, the trial judge found that she was not feigning her symptoms and that, post-accident, she:

a. is noticeably scattered and tangential in her thinking and expression;

b. lacks physical stamina and tires quickly;

c. is emotional, upset, frustrated and embarrassed by her inability to focus and properly arrange her thoughts or verbal discourse;

d. is aware that the key people in her life have become exasperated with her; and

e. is anxious about her future and her relationships with her husband and sister, the people most important to her (RFJ at para. 5).

[19] On causation, the trial judge said that, because: none of Ms. Mariotto's current symptoms were evident prior to the accident; the cognitive impairment she had previously experienced in her life "was reasonably minor and ephemeral"; and "in the absence of any other proximal cause"; Ms. Mariotto's mental state immediately after the accident and continuing today had to be at least partially attributable to the accident (RFJ at para. 5).

[20] As set out, the trial judge applied the Deduction to Ms. Mariotto's proven damages. He gave this justification:

> [66] …I accept the defendant's argument that the plaintiff's present-day condition and presentation is multi-factorial, but what cannot be denied is that she was substantially capable in most aspects of her daily functioning before the accident, and immediately after it, she experienced a marked decline in her physical and mental functionality that is substantially debilitating and does not seem to be improving.

[67] …Having considered the matter carefully, I have come to the view, not with supreme confidence, but with confidence enough, that because promptly after the accident the plaintiff's symptoms became more pronounced and debilitating than anything she had experienced before, and her functionality went rapidly and sharply downhill without any other identifiable cause, then the accident, minor though it was, must have acted as some sort of a catalyst to it all. The persistence of these symptoms would seem unusual, but because I have concluded that the plaintiff is not feigning them, and because I accept the testimony of Mr. Mariotto [Ms. Mariotto's husband] and Ms. Welch [Ms. Mariotto's sister] about their everyday exhibition, I have concluded that the likeliest explanation … is Dr. Spivak's somatic symptom disorder with predominant pain diagnosis wherein … she believes in and is committed to her own perception of her post-accident symptoms, whether their cause is real or imagined; and that, in the context of her actual or perceived physical symptoms, she experiences functional impairment that is far greater than would be expected; and that it is difficult to know to what extent her symptoms are being driven by psychological factors versus physical injury.

[68] All of that said, it is inconceivable that the plaintiff's condition today is entirely attributable to the negligence of the late Mrs. Rowntree. To grant her an award of $1.6 million … for a fender bender would be a gross injustice. I am prepared to accept that the accident played some part in producing the serious psychological deficits from which the plaintiff now suffers, but I think it must be judiciously limited. It is my settled opinion, furthermore, that if this minor collision played a role in the production of the sort of outsized present-day symptomology that the plaintiff and her relatives told me about, then there is a very substantial likelihood that she would have ended up in the same place by the occurrence of some other everyday mishap involving a comparatively slight transfer of force to her person.

[69] I repeat the governing principle quoted above from *Blackwater* that the defendant need not put the plaintiff in a better position than before the accident, and cannot be obliged to compensate her for any damages that she would have suffered anyway. I find that the "original position" to which the plaintiff must be restored includes that she was pre-disposed to significant psychological injury by the application of any reasonably minor unexpected physical force or shock to her person, and that there is a high likelihood that she would have ended up in her present condition regardless of Mrs. Rowntree's negligence. Bearing this in mind, and with the ultimate goal of resolving the case in a manner that is fair to both parties, I have reached the conclusion that the extent to which the plaintiff's present condition is attributable to the accident in question must be limited to no more than 25 percent, and accordingly … apply a 75 percent discount ("the contingency discount") across all heads of damages…

[Emphasis added.]

Overview of the Evidence

Lay Witnesses

[21] The trial judge heard from Ms. Mariotto, her husband, Michael Mariotto, and her sister, Julie Welch.

[22] In respect of Mr. Mariotto's evidence, the trial judge found him to be a "sound and honest witness" and his evidence about the negative impact of Ms. Mariotto's current condition on their domestic life as "undeniably genuine": at para. 7. The trial judge accepted Mr. Mariotto's evidence that, for some reason or other, the accident was the catalyst of a "precipitous decline" in Ms. Mariotto's ability to "function normally" in any aspect of their lives together: at para. 7.

[23] In respect of Ms. Welch's evidence, the trial judge found that he had "confidence" in her testimony and "believed what she told [him]" in describing the profound changes in Ms. Mariotto's personality post-accident: at para. 10. He also agreed with Ms. Welch's overall assessment that ongoing physical deficits are not Ms. Mariotto's main difficulty; rather it is the drastic and negative change in her mental and emotional state.

[24] Hettie de Beer, Ms. Mariotto's treating occupational therapist, also testified as a lay witness. While there is limited reference to her evidence in the RFJ, the trial judge said it was corroborative and appeared to accept it.

[25] The respondent called Dr. Farnad Rezaie, Ms. Mariotto's former employer. The trial judge only referred to his evidence tangentially.

Expert Witnesses

[26] Ms. Mariotto called Sandra Hale (Occupational Therapist), Drs. Mitchell Spivak (Psychiatrist) and Lisa Caillier (Physiatrist), and Darren Benning (Economist).

[27] The trial judge said that Ms. Hale's evidence was "not much" challenged in cross-examination and the respondent did not call any responsive evidence: at para. 84.

[28] The trial judge rejected Drs. Spivak and Caillier's opinions that Ms. Mariotto suffered a concussion, or mild traumatic brain injury, in the accident. However, he accepted Dr. Spivak's opinion that the cause of the appellant's symptoms and injuries was "somatic symptom disorder with predominant pain diagnosis", which he understood to be the condition where someone believes in and is committed to her own perception of her symptoms, whether the cause is real or imagined: at para. 45.

[29] The respondent called James Bowler, an engineer with a specialty in collision analysis. The trial judge was not much persuaded by his opinion because he was consulted years after the fact, never inspected either vehicle, and formed his views based on old photographs taken by an adjuster for the Insurance Corporation of British Columbia.

[30] The trial judge accepted Ms. Mariotto's counsel's argument that the primary point of impact was on her vehicle's trailer hitch, and that it was possible that this may have rendered the collision slightly more percussive than if the force had been absorbed by its rear bumper. But the trial judge said that he could not make much of that conclusion.

[31] The respondent also called Dr. Anita Webber, a neurologist. The trial judge said that he preferred her evidence, which was within the realm of her expertise, about whether the appellant had suffered a concussion or a mild traumatic brain injury.

[32] Although the respondent retained two other experts—a biomechanical engineer, and an endocrinologist to conduct an independent medical assessment on behalf of the respondents—neither were called to testify.

[33] Although some of the medical records of Dr. Satake (Ms. Mariotto's treating general practitioner) and Dr. Thompson (her treating endocrinologist) were in evidence, neither was called to testify. There is no suggestion in the record that they were unavailable as witnesses if either party wished to call them.

Work History and Pre-Existing Health Conditions

[34] The trial judge accepted the evidence of Ms. Mariotto's lay witnesses and based on it, found that Ms. Mariotto had a "long, stable and predictable work history" prior to the accident, and but for the accident, was likely to have continued in that steady employment: at para. 80.

[35] Based on Ms. Mariotto's treating physician's clinical records, the trial judge noted that, at various times before the accident, Ms. Mariotto had been under her care for perimenopausal symptomology, severe asthma, episodic migraines, chronic obstructive pulmonary disease, gastroesophageal reflux disease, vitamin B-12 deficiency, hypothyroidism, and Addison's disease.

[36] In cross examination, Ms. Mariotto was asked about the "constellation of symptoms and issues" she had before the accident. She responded, "I was able to do my job and function and carry on and take care of my parents and everything I needed to do."

[37] Ms. Mariotto's husband was cross-examined about his wife's pre-accident list of health conditions. He described them as "occasional" and "manageable". He said he had never seen her having the "mental issues" that she has had since the accident and described them as "completely new symptoms".

[38] In his evidence, Dr. Spivak rejected the respondent's suggestion that Ms. Mariotto's post-accident condition could be attributed to Addison's disease, particularly when she remained under treatment by an endocrinologist who could change that reality (if it were the problem) by altering doses of the medications prescribed for the condition.

[39] With respect to causation, Dr. Spivak opined:

> While Ms. Mariotto has a past history of significant health issues as well as medication sensitivity, there are no other factors that could account for the onset of her symptoms. Ms. Mariotto's symptoms have followed logically and temporally with the indexed accident. Absent the indexed accident, it is difficult to imagine that Ms. Mariotto would have spontaneously developed the

> symptoms that she has continually reported since the time of the indexed accident.

[40] When it was suggested to Dr. Spivak in cross examination that the combination of Addison's disease, menopause, hypothyroidism, and vitamin B-12 deficiency made Ms. Mariotto a complex case, he did not agree. In addition to saying that hypothyroidism is "super common", he cautioned against referring to menopause as a serious medical condition.

[41] Dr. Spivak did not accept defence counsel's suggestion that Addison's could explain Ms. Mariotto's present condition. He understood that Addison's is a condition that is managed in the same way as diabetes, by adjusting medication, which her medical records showed she was doing. He testified that while Addison's could cause fatigue, headaches and cognitive issues, "it does not result in a chronic presentation that mirrors the narrative that Ms. Mariotto has".

[42] Importantly, Dr. Spivak was asked and he responded:

> Q. Well, I -- I don't disagree with you in that, in this. If they're in isolation it would be fine. They -- they can manage it. But now you're putting those on top of Addison's, and so - and it's not just one thing, it's multiple things. So you're already taking Addison's, which you've agreed is a -- is a -- is a complex issue, and you're adding more factors to it. And so what I'm merely suggesting is, when you add those factors on top of the Addison's, you get a pre-accident medical picture that is complex?
>
> A. … [Y]ou're engaging in unrealistic logic here. It's just that from a medical perspective those other problems really wouldn't be something that most physicians would really consider make it that much more complicated. We're talking about some -- like, you know, if we put a number on it, and we say that the person's problematic would add up to 100, the Addisons would be a 99 and all these other things were talking about represents 1.

[43] Dr. Caillier also referred to Ms. Mariotto's pre-existing and past conditions in her report. She deferred to a specialist in psychiatry on mental health conditions (Dr. Spivak was the only psychiatrist to testify). In relation to headaches, which were within Dr. Caillier's expertise, she opined that "in the absence of this accident, she

would likely not have her current and ongoing level of headache complaints nor the difficulties engaging in activities as a result".

[44] In cross examination, Dr. Caillier said that apart from Addison's disease, Ms. Mariotto's other health issues were not complex and were "easily" managed.

[45] Specifically, with respect to Addison's disease, Dr. Caillier said in cross examination:

> ... you know she's taking the medication. She's following up with the endocrinologist, and she herself questioned whether or not -- and as she told me in the history -- is it secondary to my Addison's? Is this what's going on?
>
> But even with taking the medications for it, it wasn't clearing and she wasn't improving. Whereas times with the Addisonian crisis before, she did improve.
>
> Because when you look at the Addisonian crisis it's not like you're carrying on for months and months and months where she's debilitated by the Addison's crisis. She was able to come back from it.
>
> For example, that January 2018, with the stress of her job, she went on medical leave. Her endocrinologist put her on medical leave because of the Addison's, but she was able to come back from that and return to work and she was working at the time of -- of the accident in July. So she's able to come back from that.
>
> And even with treatment of the Addison's after the accident she's not coming back from it. So it can definitely contribute to it depending on what is going on at each point in time.
>
> But there's still other factors, and those -- that car accident, being involved in that with all the symptoms that she had afterwards and the steroid that she takes isn't improving upon that picture.

[46] Dr. Caillier testified that in relation to menopause and Addison's disease, "once treated they're not contributing to what's going on anymore", and that "I've not heard or dealt with any menopausal women where they've had a complete blank-out on something such as that." She opined:

> … but for the motor vehicle collision of July 6, 2018, she would likely not have her current and ongoing fatigue complaints.
>
> Ms. Mariotto continues to have headaches, and, in my opinion, these are post-traumatic in nature and related to the mild traumatic brain injury as well as in part related to her neck symptoms and mental health.
>
> …

> … but for the motor vehicle collision…she would likely not have her current and ongoing headache complaints.
>
> …but for the motor vehicle collision…she would likely not have her current and ongoing pain complaints.
>
> …but for the motor vehicle collision…she would likely not have her current and ongoing level of difficulties with her cognition.

[47] Dr. Webber's report, relied on by the respondent, deferred to physiatry on soft tissue injuries, to psychiatry on any mental illness components, and to endocrinology with respect to Addison's disease. She opined that while a concussion was possible, Ms. Mariotto's current constellation of symptoms "is more likely multifactorial". She did not explain either the quantitative or qualitative contribution of that constellation of symptoms. She further opined that it was "probable" that there was a posttraumatic component to Ms. Mariotto's headaches. In her view, it was "impossible" to determine:

> how much of her headaches are secondary to posttraumatic causes, how much would be pre-existing, and how much is related to medication overuse. With respect to how other factors are contributing to her symptoms, such as soft tissue injuries, possible anxiety or depression and Addison's disease I would defer to my colleagues as I have discussed.

Discussion

[48] A trial judge's damage award is owed significant deference on appeal. Arriving at an award is an assessment, not a calculation, and is largely a fact-finding exercise.

[49] This Court will not interfere lightly with a damage award and will only intervene "where the trial judge [made] a palpable and overriding error of fact, proceeded upon a mistaken or wrong principle, or awarded an amount so inordinately high or low as to constitute a wholly erroneous estimate of the damage": *Lamarque v. Rouse*, 2023 BCCA 392 at para. 27; *Murphy v. Snippa*, 2024 BCCA 30 at para. 43; and *Sharma v. Sagoo*, 2024 BCCA 319 at para. 34.

[50] The principles relevant to this case were set out in *Dornan v. Silva*, 2021 BCCA 228. In *Dornan,* this Court distinguished general contingencies, which apply as a matter of human experience and are likely to be experienced by everyone, from specific contingencies, which are unique to a particular plaintiff (at para. 92, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. CA), [1990] O.J. No. 2314 (QL) at paras. 46–47). A pre-existing medical condition may constitute a specific, negative contingency if, on the evidence, there is a real and substantial possibility that the pre-existing condition would detrimentally affect the plaintiff in the future regardless of the defendant's tortious conduct. If a real and substantial possibility is established, the court must then assess the relative likelihood of that possibility materializing: *Dornan* at paras. 63–64; *Murphy* at para. 76; *Sharma* at para. 36.

[51] The onus of establishing a real and substantial possibility is on the party asserting that possibility: *Lo v. Vos,* 2021 BCCA 421 at para. 39.

[52] Although the trial judge identified the more general principle from *Dornan* that a defendant need not compensate a plaintiff for the consequences of a pre-existing condition that the plaintiff would have experienced anyway (RFJ at para. 55), the respondent conceded that the trial judge did not apply the two-step framework from *Dornan* in arriving at the Deduction.

[53] Referring to *Dornan,* this Court in *Steinlauf v. Deol*, 2022 BCCA 96 identified the question an appellate court must answer in such a case:

> [75] … Where the judge applied a specific contingency deduction but did not articulate the "real and substantial possibility/relative likelihood" analysis, the question is whether the evidence supports the judge's findings.
>
> [Emphasis added.]

[54] In this case, Ms. Mariotto submits that the evidence did not support the application of a specific negative contingency deduction, or at least not one of 75%. The respondent submits that, according to the record, there is a high likelihood that Ms. Mariotto would have ended up in her present condition regardless of the respondent's negligence, and that this Court should defer to the trial judge who was best placed to determine the quantum.

[55] Before the judge, Ms. Mariotto bore the burden of establishing causation and damages, and the respondent bore the burden of establishing a real and substantial possibility that Ms. Mariotto would have ended up in the same position she is in today but-for the tortious conduct.

[56] At trial, Ms. Mariotto pursued her claim based on having suffered a mild traumatic brain injury in the accident that was causative of chronic post-traumatic headaches and cognitive dysfunction. The trial judge did not accept Ms. Mariotto's theory of the case. The defence was primarily based on Ms. Mariotto's complicated medical history, and in particular, her prior diagnosis of Addison's disease, as being causative of her symptoms. The trial judge also did not accept the defendant's theory of the case.

[57] The trial judge was hampered by the lack of evidence from Ms. Mariotto's treating physicians. He expressed frustration that neither party called evidence from any of Ms. Mariotto's treating physicians including her family doctor, her endocrinologist, or her neuropsychologist. This criticism was heightened by the fact that the expert medical witnesses he heard from formed their opinions based on single examinations of Ms. Mariotto, lasting a couple of hours each, and all conducted between three and six years after the accident. He wrote:

> [62] … It must have been obvious from the get-go that the plaintiff's pre-existing Addison's disease would be an important issue to address, and yet neither side thought it advisable to summon up the evidence of an endocrinologist. If Addison's disease impacted the plaintiff's pre-accident functionality as little as she insists, confirmatory evidence from her treating endocrinologist would have come in handy. If, as alleged by defence counsel in argument, all her current problems are attributable to Addison's disease, then surely an independent endocrinological opinion confirming it would have been useful for me to receive. Instead, no medical opinion evidence from either side on the subject.

[58] The trial judge concluded on causation:

> [63] I cannot … simply throw up my hands and claim to be unable to solve this case, and I am not empowered to commission investigations of my own. I must do what I can with the materials provided and limit myself to the evidence adduced. I must use my own common sense in configuring a balanced result that is fair to both parties. My conclusion on the totality of the

> evidence presented is that the dynamics of the motor vehicle accident in question are unlikely to have produced any blow, disturbance or upset to the plaintiff that could have caused a concussion or a mild traumatic brain injury, even if such things may be said to be possible. I am not with Dr. Caillier, the physiatrist, or Dr. Spivak, the psychiatrist, on this point. I am more inclined to the opinion expressed by the defence neurologist, Dr. Webber, that the plaintiff's ongoing symptoms are "multifactorial" and are likely related to her complex medical history and profile, which includes but is by no means limited to the fact that she was involved in a minor motor vehicle collision on July 6, 2018. I cannot accept the main defence theory that the plaintiff's present state of dysfunction must be entirely related to Addison's disease, because I received scant medical evidence to support it and I have no business guessing or speculating about such things.

[59] As observed in *Dornan,* people suffer various misfortunes, injuries, and illnesses every day. Paired with a pre-existing condition, these events do not give rise to a measurable risk warranting a deduction, on a contingency basis or otherwise, absent some "extreme vulnerability":

> [77] …I would observe that the measurable risk must be based on a real and substantial possibility arising from the combination and interaction of the pre-existing condition and the external event. In the vast majority of cases, the risks commonly encountered on this rather dangerous planet will not suffice to establish a real and substantial possibility. People have accidents in cars and riding bicycles, people trip and fall, people are hit by falling branches, and are knocked over by inobservant drivers, pedestrians, skaters and cyclists. People wrench their knees playing recreational sports, and hurt their backs working out in their basements or digging in their gardens. Such events can happen to anyone, but, in the case of most individuals, are not predictable. Any affect they might have on the individual's pre-existing condition would be speculative, not real and substantial possibilities. As such, they would not give rise to a "measurable risk", at least in the absence of being combined with some extreme vulnerability.

[60] The respondent argues that the trial judge implicitly found Ms. Mariotto to fall within the "extreme vulnerability" category.

[61] I agree that, although the trial judge did not say as much, the evidence that he accepted put Ms. Mariotto in the category of someone who had an extreme psychological vulnerability to developing "outsized symptomology" from a very minor accident—i.e., the trial judge's finding as to her present-day condition: at para. 68.

[62] While there is no evidence that Ms. Mariotto possessed an extreme vulnerability due to her Addison's disease or her other physical complaints, the trial judge accepted evidence that Ms. Mariotto's dramatic decline after the accident was most likely explained by somatic symptom disorder (as diagnosed by Dr. Spivak, to whom Dr. Webber deferred, and whose evidence the trial judge accepted). The trial judge understood this condition to be one where Ms. Mariotto believes in and is committed to her own perception of her post-accident symptoms, creating outsized symptomology. This was evidence upon which the trial judge could conclude that Ms. Mariotto had an extreme vulnerability resulting in a high likelihood that she would have ended up in her present condition regardless of Mrs. Rowntree's negligence: at para. 69.

[63] However, the trial judge's quantification of that real and substantial possibility at 75% was untethered to an evidentiary basis for the likelihood of such an event occurring, as required by *Dornan*. The trial judge based this quantum on his intuitive conclusion that if this minor collision played a role in Ms. Mariotto's present-day condition, then she likely would have ended up in the same place from "some other everyday mishap involving a comparatively slight transfer of force to her person" (para. 68). There was nothing in the evidence to support such a strong likelihood.

[64] Although I agree that Ms. Mariotto's psychological vulnerability made for a real and substantial possibility that she would end up in her present condition in any event, I would conclude that such a possibility was relatively unlikely. This is evidenced by the everyday mishaps that Ms. Mariotto suffered and recovered from. For instance, Ms. Mariotto had been in earlier motor vehicle accidents with no comparable consequence. More recently, she fell while walking her dogs which did not lead to the symptoms she currently presents. Ms. Mariotto might well have gone through her life without suffering an event that would have triggered her present condition. Due to this reduced likelihood, I would reduce the contingency deduction to 25%.

[65] In relation to special damages, the evidence and the positions taken at trial establish that Ms. Mariotto's special damages were uncontested. This head of damage reflects past special expenses incurred and should not be affected by the future contingency found by the trial judge: *Bouchard v. Brown Bros. Motor Lease Canada Ltd*., 2012 BCCA 331 at para. 23. As a result, the Deduction from special damages represents an independent error by the trial judge.

[66] However, the same rationale does not apply to future care costs. To the extent that Ms. Mariotto's future care costs are in part as a result of her future risk of ending up in her present condition in any event of the accident, those costs should be subject to the reduced contingency deduction of 25%.

[67] As a result, the Deduction from those heads of damages represents an independent error by the trial judge.

Conclusion

[68] I would allow the appeal, set aside the trial judge's application of a 75% negative contingency deduction, replace it with a 25% deduction and would not apply that deduction to her award for special damages and the costs of future care.

[69] As a result, Ms. Mariotto is entitled to the following damages:

a) Non-pecuniary damages (25% reduction):	$150,000.00
b) Past Wage Loss (25% reduction):	$246,121.50
c) Loss of income earning capacity (25% reduction):	$470,979.00
d) Cost of future care (25% reduction):	$254,247.75
e) Special Damages (no reduction):	$17,640.92
Total:	**$1,138,989.17**

“The Honourable Justice MacNaughton”

I AGREE:

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Justice Winteringham”