
CANADA / JUDGMENT

Juelfs v. McCue

2019 BCSC 1195

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 1195 Juelfs v. McCue

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Juelfs v. McCue,

2019 BCSC 1195

Date: 20190722

Docket: M163153

Registry: Vancouver

Between:

Felicia Keely Juelfs

Plaintiff

And:

Robert McCue and

Courtesy Window Cleaners Ltd.

Defendants

Corrected Judgment: The front page of the judgment was corrected where changes were made on August 8, 2019.

Corrected Judgment: The text of the judgment was corrected at paragraphs 47 and 58 where changes were made on August 8, 2019.

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

February 19-22, 25-27, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 22, 2019

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 - (1) Introduction
 - [1] The plaintiff Felicia Juelfs seeks damages arising from personal injuries sustained in a motor vehicle collision. The collision occurred on 12 May 2014, in Burnaby, when a van owned by the defendant Courtesy Window Cleaners Ltd. and driven by the defendant Robert McCue turned into Ms. Sangha's car in the middle of an intersection. The defendants have admitted liability. These reasons for judgment deal with the nature, extent, and duration of injuries suffered by Ms. Juelfs, and the quantum of her damages.
 - (2) Facts
 - (2.1) Plaintiff's Background
 - [2] Ms. Juelfs is currently 36 years old. She was born and raised in Fort St. John, British Columbia, and moved to the Lower Mainland region of the province when she was in her late 20s.
 - [3] Ms. Juelfs has always been an active person. She played competitive soccer in high school and university. She has been involved in many other sports and recreational pursuits, including downhill skiing, snowboarding, cross-country skiing, squash, rock climbing, water polo, and under water hockey. Since her graduation from university, she has regularly attended a variety of fitness programs, including spin classes, aerobics, and cross-fit

training.

- [4] Ms. Juelfs also chose to pursue a career with a significant component of physical activity, namely wildlife biology. Her work in this area has been made of up a mixture of field work and office work. The field work generally involves the study of wildlife and wildlife habitat, often in remote areas, which can be physically demanding.

(2.2) The Collision

- [5] The collision occurred on 12 May 2014. Ms. Juelfs was the driver and sole occupant in her car, a Volkswagen hatchback. She was wearing her seatbelt. At around 6:30 a.m., Ms. Juelfs was traveling west on Lougheed Highway, in the process of turning south onto Gagliardi Way when a van travelling east on Lougheed entered the intersection and drove into the front of her car. The airbags in Ms. Juelfs' car deployed. The force of the impact caused the car to spin around, and it ended up facing east on Lougheed. Photographs show significant damage to the front of the car.
- [6] Ms. Juelfs was stunned. She got out of her car and started walking along the side of the road. After receiving assistance from a bystander who happened to be a paramedic, Ms. Juelfs was taken to the hospital in an ambulance. She was discharged later that day and got a ride home from a friend.

(2.3) Effects of the Collision

- [7] When asked to describe the immediate physical effects of the collision, Ms. Juelfs recalls that she had pain in the back of her neck, but as of the date of trial she was unable to recall anything more specific. In terms of visible injuries, Ms. Juelfs received a minor contusion on the ring finger of her right hand, and small bruises on her hip and collar bone.
- [8] In the days following the collision Ms. Juelfs began to experience jaw pain, headaches, and pain in her neck and back. In particular:
- a) Ms. Juelfs had sharp pain in her jaw on the day of the collision. The sharp pain went away, but within a few months she started to experience aching or throbbing in her jaw. The jaw pain is brought on by fatigue from eating, chewing gum, or even talking. Ms. Juelfs has been able to manage the jaw pain by wearing a mouth guard at night and, as noted below, the jaw condition is expected to resolve.
 - b) Ms. Juelfs has headaches, on a periodic basis. These headaches normally occur during flare-ups, or when Ms. Juelfs pushes the limits of her physical abilities as discussed below.
 - c) Ms. Juelfs experiences pain in her neck when she keeps it in a fixed position, for example when she looks up in the air for a prolonged period of time. In her testimony, Ms. Juelfs described the pain as a sharp, burning feeling at the base of the neck. It comes on within two to five minutes of holding her neck in a fixed position. It goes away with changes in position, but then returns within a matter of seconds.

- d) Ms. Juelfs has pain in her lower back when leaning backward or sitting for prolonged periods. Ms. Juelfs described this pain as a burning feeling.
- [9] Ms. Juelfs has been able to manage her jaw pain. However, she has continued to suffer from the soft tissue injuries to her neck and back. Ms. Juelfs initially thought these symptoms would disappear, but over time she came to realize that some of them are persistent. Ms. Juelfs testified that if there was any improvement over the first two years, it was slight. Since then, she has realized some further improvement, but now, five years after the collision, her symptoms have plateaued.
- [10] After the collision, Ms. Juelfs sought treatment from her chiropractor, Dr. Shore. Ms. Juelfs has received chiropractic treatment from Dr. Shore at regular intervals since the collision. Ms. Juelfs has also received physiotherapy and massage therapy. Finally, since the collision Ms. Juelfs has continued to lift weights, stretch, and attend cross-fit classes at a gym. She regularly attends four cross-fit classes per week. She finds that keeping up her fitness helps to alleviate some of the pain, particularly in her back.
- [11] As of the date of trial, Ms. Juelfs continues to suffer pain in her neck and back with prolonged sitting or static postures. She also has occasional flare-ups during which she suffers debilitating neck and back pain. When these flare-ups occur, Ms. Juelfs cannot get comfortable and suffers until they pass. She has flare-ups once every six weeks or so. Sometimes she can go as long as two months without a flare-up. However, Ms. Juelfs has found that flare-ups occur with greater frequency when she does too much or exceeds her physical limits.

(2.4) Diagnosis and Treatment of the Plaintiff's Injuries

- [12] The parties tendered opinion evidence from a number of expert witnesses, all of whom were in agreement that Ms. Juelfs suffered whiplash-type soft tissue injuries as a result of the collision. What was really in dispute was the nature, extent and duration of the plaintiff's injuries, and her prognosis for recovery.

(2.4.1) Evidence of Dr. Sudol

- [13] The plaintiff called Dr. Sudol, a physiatrist, as an expert in physical medicine and rehabilitation. I found Dr. Sudol's expert report and testimony to be reliable, objective, and balanced, and she was not shaken on cross-examination. Dr. Sudol examined Ms. Juelfs on 8 October 2015 and again on 20 February 2018. I would summarize Dr. Sudol's expert opinion evidence as follows:
- a) As a result of the collision, Ms. Juelfs suffers from (i) muscoligamentous injuries to the neck, shoulder, and mid-back, (ii) temporomandibular joint ("TMJ") dysfunction, (iii) muscoligamentous injuries to the lumbar region, and (iv) mood disturbance. (I note that Ms. Juelfs is not seeking damages for any psychological injury or mood disturbance, so nothing more needs to be said about this aspect of Dr. Sudol's opinion).

- b) The "jarring forces of the collision" resulted in "injury to the muscles and ligaments of the neck and upper back with persistent tension, pain, and activity limitations". The collision was also the cause of the TMJ injuries and the lumbar injuries.
- c) With regard to the TMJ injuries, Ms. Juelfs was treated by a dental specialist who prescribed a conservative course of treatment, including a mouth guard. Ms. Juelfs has been able to manage her TMJ condition by wearing the mouth guard at night.
- d) With regard to the neck and shoulder injuries, Ms. Juelfs has "improved overall", but (i) she continues to have "lateral neck and upper shoulder tension a few days per week lasting a few hours", (ii) her symptoms are aggravated by neck rotation, static positioning, wide-grip overhead workouts, and pressure over the shoulders, and (iii) the sharp pains in her left upper shoulder occur once every few months.
- e) With regard to the lumbar injuries, Ms. Juelfs experiences low back pain with prolonged sitting and awkward postures. She has week-long bouts of low back tension three or four times per year. The aggravating factors are sitting for more than two hours at a time, and intense gym exercises involving repetitive bending or awkward strains through the low back.
- f) Ms. Juelfs has taken an appropriate approach in managing her symptoms, through therapy, maintaining a regular exercise program, and modification of activities to avoid movements that exacerbate her symptoms.
- g) As of the date of Dr. Sudol's report - written some four years after the collision - the soft tissue injuries to the neck and shoulder "continue[d] to be symptomatic despite a good treatment regime". These neck and shoulder injuries will likely continue to be symptomatic going forward.
- h) With regard to the lumbar injury, Ms. Juelfs should be able to manage the symptoms quite well by avoiding prolonged sitting and intense workouts involving low back strain. The low back injury will continue to be "mildly symptomatic" in the future.
- i) In terms of treatment and future care, Ms. Juelfs should continue with her regular exercise program, and she should continue to modify or adjust her activities to manage her symptoms, by "changing her position regularly, avoiding static awkward neck postures, and reducing weight in her upper shoulders such as wearing a backpack".
- j) The multiple injuries from the collision have made Ms. Juelfs "partially disabled in her occupation" in several ways. First, the "more physical components" of her work are likely to aggravate her symptoms. Second, in the office setting, Ms. Juelfs must manage her symptoms by changing position regularly to avoid prolonged sitting.

- k) The injuries have also impacted Ms. Juelfs in her recreational activities. The impacts were significant in the first year after the collision. Since then, Ms. Juelfs has been able to resume substantially all of her recreational and fitness-related activities, with modifications to avoid carrying heavy loads, lifting heavy weights, or holding awkward positions.

(2.4.2) Evidence of Dr. Shore

- [14] The plaintiff also called Dr. Shore, a chiropractor. Dr. Shore has been treating Ms. Juelfs for an extended period of time and thus testified as a fact witness. Dr. Shore was also qualified as an expert witness to give opinion evidence in relation to musculoskeletal injuries.
- [15] Dr. Shore saw Ms. Juelfs as a treating chiropractor prior to the collision. I am satisfied that all of the pre-collision chiropractic treatments were for minor sports or fitness program-related injuries. With respect to her collision-related injuries, Ms. Juelfs sought treatment from Dr. Shore on 26 May 2014, two weeks after the event. On that date, Ms. Juelfs made a subjective report of pain in the neck and back. Dr. Shore made objective observations of tightness, tenderness, and mild muscle spasms in the neck and mid back. Dr. Shore's assessment was that Ms. Juelfs had a "grade 2" whiplash disorder and acute thoracic joint irritation with myofascial pain. Since then, Dr. Shore has continued to provide chiropractic treatment to Ms. Juelfs, whose chief complaint has been continuing neck and back pain.
- [16] In her expert report, Dr. Shore diagnosed Ms. Juelfs with (a) injuries to the muscles and ligaments of the neck, moderate in severity, (b) injuries to the muscles, ligaments, and joints of the middle and low back, mild in severity, (c) injury to the joint and soft tissues of the jaw, moderate in severity, and (d) chronic pain. Although this diagnosis is not at all inconsistent with that of Dr. Sudol, I nevertheless have serious concerns about the reliability of Dr. Shore's report, owing to discrepancies between the report and her clinic records.
- [17] In particular, under the heading "Examination Findings", Dr. Shore's report states, "[i]n my examination of Ms. Juelfs preceding the writing of this report, I found the following", followed by a list of observations. In cross-examination, Dr. Shore's initial position was that she made the listed observations in the last examination before her report. However, listed observations were not noted in Dr. Shore's clinical records, and some of the observations documented during Dr. Shore's most recent examination of Ms. Juelfs were actually inconsistent with those listed in the expert report. Dr. Shore maintained that the observations in her report were based on a specific entry in her clinical records, but was unable to identify a particular record containing the observations noted in her report. Later in cross-examination, Dr. Shore said the observations in her report reflected the totality of the observations in her clinical notes, and she further confirmed that she reviewed all of her clinical notes before writing the report. This explanation does not fit with either the text of the report, or with Dr. Shore's initial answer in cross-examination. What is more, to the extent that Dr. Shore's report is based on the cumulative effect of her clinical observations, some of the symptoms listed in the report had not been present for two years or more before the report was written. All of this indicates a lack of attention to detail in relation to both the

preparation of the report and answering questions in court.

- [18] I am left with serious questions as to the reliability of Dr. Shore's report. This should not be seen as a criticism of Dr. Shore's honesty or personal integrity. It is, rather, a concern about the reliability of her report, which was lacking in precision and shown to be inaccurate on a key point. In the result, I am unable to give any weight to the opinions expressed in Dr. Shore's report.

(2.4.4) Evidence of Dr. Gharsaa

- [19] The defendants called Dr. Gharsaa, an orthopaedic surgeon. I found Dr. Gharsaa to be an expert qualified to give opinion evidence with respect to orthopaedic injuries.
- [20] Dr. Gharsaa examined Ms. Juelfs on 17 November 2018. Under the heading "Impression" in his expert report, Dr. Gharsaa opined that the symptoms reported by Ms. Juelfs are consistent with a "soft tissue injury which typically should have resolved within three months" of the collision. The report goes on to state that Dr. Gharsaa's examination "failed to identify any radiculopathy or any musculoskeletal pathology or any signs of ongoing objective orthopaedic impairment that can be attributed to the subject motor vehicle accident". The thrust of Dr. Gharsaa's opinion was that, from his perspective as an orthopaedic surgeon, there is little objective indication that Ms. Juelfs suffered any functional impairment as a result of the collision. Dr. Gharsaa diagnosed Ms. Juelfs with strain or sprain of the upper and lower back, and a Grade II whiplash associated disorder in relation to her neck. Dr. Gharsaa's prognosis, "from an orthopaedic point of view", was "very good", provided that Ms. Juelfs pursues the recommendations outlined in Dr. Gharsaa's report.
- [21] I do not find Dr. Gharsaa's opinion helpful in assessing the nature, extent, duration, and effects of the injuries suffered by Ms. Juelfs, for a number of reasons.
- [22] To begin with, Dr. Gharsaa's report fails to set out the facts and assumptions on which his opinion was based. Dr. Gharsaa's report states, "[m]y opinions are based upon the history and physical examination obtained from the patient regarding the circumstances of the injury, her past health and current symptoms", and "my review of the documents provided to me". This is a stock answer. It fails to set out the case-specific facts and assumptions relied upon by Dr. Gharsaa to develop his opinion in this case. Dr. Gharsaa was unable to shed any light on this deficiency in cross-examination. When it was suggested that his report leaves the reader to guess at his underlying facts and assumptions, Dr. Gharsaa's only response was, "I am not really sure what to tell you to be honest". I take this answer to be a tacit acknowledgment that his report failed to comply with Rule 11-6(1)(f)(i) the Supreme Court Civil Rules, B.C. Reg. 168/2009, and the common law principles regarding presentation of expert opinion evidence.

- [23] As explained in *Rowe v. Bobell Express Ltd.*, 2003 BCSC 472 at para. 12, "[t]he facts, known or assumed, should be immediately apparent", and the reader should not have to "cull them" out of the report or supporting documents. This is important because an expert's opinion is only useful insofar as the facts and assumptions on which it is based are established in evidence. Dr. Gharsaa's failure to identify the operative facts and assumptions made his opinions difficult to test through cross-examination, and difficult for the Court to critically evaluate.
- [24] Moreover, Dr. Gharsaa's opinion is expressly limited to the field of orthopaedics. His report notes an absence of "any signs of ongoing objective orthopaedic impairment" [underlining added]. In cross-examination, Dr. Gharsaa acknowledged the "inescapable conclusion" that Ms. Juelfs suffered soft tissue injuries to her neck, back, and jaw, and that her symptoms have persisted. However, Dr. Gharsaa maintained that from a musculoskeletal perspective, pain without objective findings does not amount to an impairment. Dr. Gharsaa agreed that a physiatrist would be more qualified than an orthopaedic surgeon to offer an opinion on the extent to which pain, including chronic pain from a soft tissue injury, can limit a subject's function.
- [25] Finally, some aspects of Dr. Gharsaa's opinion are directly at odds with the post-collision activities and experiences of Ms. Juelfs. In particular, the section of Dr. Gharsaa's report titled "Impression" includes the following two paragraphs:

At this point I would strongly recommend that she work on an active program of exercise to help her with conditioning, allow work on a core strengthening program to help with any residual back pain. She should be strongly encouraged to continue resuming all her pre-accident activity to prevent further deconditioning, understanding that avoiding such activity would be more detrimental to her outcome. She also should be educated about pain and hurt versus pain and harm.

While I do not discount the fact that Ms. Juelfs continues to experience some residual discomfort, she should be reassured that her symptoms are benign as they have not manifested themselves in any overt organic pathology suggestive of any ongoing physical impairment or physical disability that can be attributed to the subject motor vehicle accident. She should be reassured that it is safe to resume her pre-accident activities without any restrictions.

- [26] These recommendations do not fit with the undisputed evidence that Ms. Juelfs has been an active and fit person, both before and after the collision. Post-collision, she maintained her fitness because, as she put it, staying fit helps her to alleviate some of the pain from her injuries. To this end, Ms. Juelfs visits the gym regularly, attending cross-fit training classes four times per week. The thrust of Dr. Gharsaa's remarks is that Ms. Juelfs is hesitant to resume her "pre-accident activities", leading to general unfitness and deconditioning. This is entirely at odds with the evidence of Ms. Juelfs, and other witnesses called by the plaintiff, including Ms. Higginson and Dr. Shore, confirming that Ms. Juelfs continues to be a very active person, interested in maintaining her fitness. As Dr. Sudol put it, Ms. Juelfs has "taken

an appropriate approach with therapy" by "maintaining a very regular exercise program".

- [27] Counsel for the defendants cites the assertion in Ms. Craig's report that Ms. Juelfs has "slight dysfunction in muscle recruitment when under strain in the neck and upper back". However, Ms. Craig made this assertion in support of a recommendation for "exercise sessions with a kinesiologist to work on strengthening, flexibility, and muscle dysfunction". Earlier in her report, Ms. Craig stated that "Ms. Juelfs has participated in a comprehensive and regular exercise program" and "she does not show signs of deconditioning". Thus, Ms. Craig was not recommending an exercise program to address "deconditioning"; she was recommending exercise training with a kinesiologist to target specific muscles or muscle groups in need of particular attention for Ms. Juelfs to cope with her injuries.
- [28] Finally, Dr. Gharsaa's suggestion that it is "safe" for Ms. Juelfs to "resume her pre-accident activities without any restrictions" ignores the first hand experience of Ms. Juelfs. In her testimony, Ms. Juelfs explained that her symptoms are aggravated by certain activities, including carrying a backpack, holding certain postures, and lifting weights beyond her limitations. I find Dr. Gharsaa's opinion that Ms. Juelfs should "resume her pre-accident activities without any restrictions" inapt. I prefer instead Dr. Sudol's opinion that Ms. Juelfs should continue to modify or adjust her activities to manage her symptoms, thereby avoiding flare-ups triggered by exceeding her limits of strength and endurance.

(2.4.5) Evidence of Dr. Saini

- [29] Finally, the defendants tendered the expert report of Dr. Saini, a dental specialist in oral medicine. By the time that Dr. Saini examined Ms. Juelfs on 15 November 2018, she had seen a dental specialist for the treatment of her jaw pain, received treatment, and had been wearing a night guard to manage her TMJ condition. Dr. Saini's opinion, which was not challenged by plaintiff's counsel, is that the jaw pain experienced by Ms. Juelfs is consistent with a "resolving" TMJ dysfunction. In Dr. Saini's opinion, the prognosis for recovery is good.

(2.5) Impact of the Plaintiff's Injuries on Her Employment and Ability to Work

- [30] At the time of the collision, Ms. Juelfs was working as a wildlife biologist at Hatfield Consultants ("Hatfield"), an environmental services business based in North Vancouver. After the collision, Ms. Juelfs continued to work at Hatfield for almost three more years. In February 2018, Ms. Juelfs left Hatfield and took a job as a wildlife biologist at Pinchin Ltd. ("Pinchin"), an environmental services company based in Abbotsford.
- [31] Ms. Juelfs testified that her decision to change jobs was "multi-factorial". She says some of the reasons were tied, directly or indirectly, to the limitations created by her collision-related injuries. She also concedes that there were other reasons for her move, including a belief that the change in employers would be beneficial to her career, and a wish to have a better work-life balance.

- [32] The defendants challenge the extent to which the plaintiff's change in employment was driven by any physical limitations from her collision-related injuries. They say, rather, that Ms. Juelfs was unhappy in her old job at Hatfield, that she was seeking a better work-life balance, that she wanted to do more office work and less field work, and that she basically received a promotion when she accepted a new job at Pinchin.
- [33] I will address the dispute between the parties regarding the plaintiff's change in employment later in these reasons. Before addressing the controversy concerning Ms. Juelfs' change in employment, it is necessary to consider how the plaintiff's collision-related injuries have impacted upon her ability to work in her chosen occupation as a wildlife biologist, which involves a mixture of field work and office work. Ms. Juelfs alleges that her injuries have impacted on both the field component and the office component of her occupation.

(2.5.1) Impact of Plaintiff's Injuries on Her Ability to do Field Work

- [34] Ms. Juelfs testified that the field work component of her occupation is physically demanding. Her field work at Hatfield involved travel to remote locations in small aircraft and in vehicles over rough terrain, carrying clothing, provisions, and survival gear in a backpack, navigating rugged terrain on foot, lugging lab equipment including electrofishers and coolers for samples, operating small boats, fishing nets and other devices, and taking up awkward positions for prolonged periods of time while surveying wildlife.
- [35] After the collision, Ms. Juelfs took three days off from her job at Hatfield. Thereafter, she was on modified duties, with no field assignments until Dr. Shore cleared her to resume field work. In her testimony, Ms. Juelfs had a recollection that this was in early 2015, although her 2014 employee performance review at Hatfield indicates that she was cleared to resume full field work duties in October of 2014.
- [36] Ms. Juelfs testified that when she returned to field assignments, she had difficulty with some aspects of the work due to her injuries. Travelling to sites in vehicles over rough terrain was hard on her lower back. Wearing a backpack for extended periods of time caused pain in her neck. She had difficulty carrying heavy equipment for extended periods of time. She also found it hard to survey birds due to pain from holding her neck in certain positions. The only "work around" was to hold her neck in place with her hands. Ms. Juelfs also testified about how her injuries could be expected to limit her ability to do other aspects of the field work she used to perform, including travelling in and operating a boat, use fishing gear, and carrying certain pieces of equipment.
- [37] In an effort to challenge Ms. Juelfs on the extent to which her injuries have truly limited her ability to do field work, counsel for the defendants questioned Ms. Juelfs on a social media post that included a photograph of Ms. Juelfs apparently hiking. The photograph shows Ms. Juelfs in a wilderness setting, wearing a backpack with a pair of snowshoes tied to the pack. Ms. Juelfs appears to be smiling with no obvious signs of pain or discomfort. In her testimony, Ms. Juelfs recognized the photograph as a "selfie" taken some time in early 2015,

possibly in her first field assignment after her return from modified duties. She could recall the event but could not remember exactly how she was feeling at the time. She had a vague recollection that the show shoes were causing her some discomfort so she had to rig them up to the backpack to get some relief.

- [38] I agree with the observation in the case law that social media evidence tendered to test a plaintiff's credibility in personal injury litigation should be approached with caution. See *Dakin v. Roth*, 2013 BCSC 8 at para. 55-56; *Carlisle v. Vanthof*, 2015 BCSC 2427 at para. 114-118; *Mullens v. Toor*, 2016 BCSC 1645 at para. 61. Photographs posted on social media accounts may have limited utility for a number of reasons. For one thing, a photograph is a snapshot that may not reveal much about a person's level of physical comfort or discomfort over any meaningful interval of time. For another thing, people often try to portray themselves in a positive light in posed photographs, particularly 'selfies' posted on the internet. These are just two of the various reasons why photographs posted on social media sites have to be approached with caution.
- [39] For the sake of balance, I should add that this does not mean photographs posted on social media sites are always given little or no weight. Much depends on the circumstances. A properly identified photograph of a person finishing a triathlon may be strong evidence that the person has the physical ability to swim, bike, and run with a certain degree of proficiency. The evidentiary value of a particular photograph depends on what is actually issue in the litigation, the content of the photograph, and the circumstances in which it was taken.
- [40] In this particular case, I do not find the 'selfie' put to Ms. Juelfs in cross-examination useful in assessing the effect of the collision-related injuries on her ability to do field work as a wildlife biologist. The photograph is a snapshot. It is also a posed picture. The fact that Ms. Juelfs is smiling for the camera offers no reliable insight into her physical state, other than that she was not in any overwhelming degree of pain when she took the picture. The photograph does not impact on the credibility of the plaintiff's testimony regarding the physical limitations she experienced upon her return to field work.
- [41] Ms. Juelfs also agreed in cross-examination that since the collision, she has taken vacations in which she has travelled by plane, including trips to Hawaii, Denver, and Zurich. She has also gone on a fishing trip to Port Hardy, several camping trips to Tofino, and a rather intense two-day hiking excursion to Joffre Lakes Provincial Park. This evidence really goes no farther than to show that despite her injuries Ms. Juelfs is able to travel, go on vacations, and even participate in physically demanding recreational pursuits. It is clear that Ms. Juelfs has tried to remain active. However, it is also clear that her ability to do so has been impacted by pain, fatigue, and discomfort from her collision-related soft tissue injuries.
- [42] The plaintiff also called Mr. Van Rooyen, a wildlife biologist who worked at Hatfield with Ms. Juelfs for several years. Mr. Van Rooyen confirmed the testimony of Ms. Juelfs that the field component of the job was physically demanding. It involved travel to remote locations, and

long days in the field carrying and working with cumbersome equipment. Before the collision, Ms. Juelfs was able to do field work alongside Mr. Van Rooyen with no physical limitations. Mr. Van Rooyen learned about the collision when Ms. Juelfs phoned to tell him about it. The next time he saw her, about two or three weeks later, she was in visible discomfort with apparent pain in her neck and back. When Ms. Juelfs eventually returned to field work, Mr. Van Rooyen observed that she was in apparent discomfort. He was able to recall working with Ms. Juelfs on two specific field assignments in 2017. The first was a bird survey in which Ms. Juelfs was in obvious physical discomfort and Mr. Van Rooyen ended up doing "most of the work". The second was a snow-tracking survey, in which Mr. Van Rooyen once again observed Ms. Juelfs to be in apparent physical discomfort.

(2.5.2) Impact of the Plaintiff's Injuries on Her Ability to do Office Work

- [43] Ms. Juelfs testified that her injuries have also imposed limits on her ability to do office work. In particular, after the collision she has found it difficult to sit at her desk for prolonged periods of time, due to low back pain. Ms. Juelfs now has to change positions and get up and move around frequently to manage the discomfort. She finds that the pain gets worse over the course of the day. She has difficulty concentrating, as a result of which she must sometimes work longer to get the same amount of work done. Often times, by the end of the work day the pain in her lower back makes it difficult for her to drive home. In the result, Ms. Juelfs feels that her lower back pain has made her less productive than she used to be.
- [44] Ms. Juelfs and Mr. Van Rooyen had adjacent work spaces and worked side-by-side for several years at Hatfield. Mr. Van Rooyen was able to recall instances after the collision when Ms. Juelfs was visibly in pain at her work station, to the point where sometimes she was in tears. Mr. Van Rooyen had never seen Ms. Juelfs in such a state prior to the collision, as in his experience she was not an overly emotional or tearful person.
- [45] Ms. Juelfs agreed in cross-examination that at some point during her employment at Hatfield, she had ergonomic assessment of her work space. It is not clear whether the ergonomic assessment led to any workplace modifications, and in particular whether Ms. Juelfs had an adjustable work station at Hatfield.
- [46] As noted, in February of 2018 Ms. Juelfs changed jobs and went to work at Pinchin. When asked about whether she would benefit from having a sit-stand desk in her office, Ms. Juelfs said she would "love to have one", but that she did not raise this with anyone at Pinchin because she did not want to jeopardize her new position while on probation. However, in cross-examination Ms. Juelfs agreed that her probationary period has now ended and has still not asked anyone at Pinchin to set her up with a sit-stand workstation.
- [47] The defendants called Mr. Antsey, the Operations Manager for the Environmental Sciences Group at Pinchin. Mr. Antsey was involved in hiring Ms. Juelfs. When she applied for the job, Ms. Juelfs did not indicate that she had any disability or workplace limitations. Ms. Juelfs was on probation for the first three or six months of her employment, but the probationary term is now over and she now has a permanent full time position. Mr. Antsey sees Ms. Juelfs

in the office on a regular basis, and has seen her exhibit signs of pain. It is not a regular occurrence but he has seen it at least five times over the 12 months that Ms. Juelfs has been working at Pinchin. Mr. Antsey recalled one occasion in which Ms. Juelfs left the office in pain and had to work from home for the following two or three days. Mr. Antsey testified that several of the employees in his office have modified work stations. Ms. Juelfs has never asked for a modified work station, and it never occurred to Mr. Antsey to ask Ms. Juelfs if she requires one.

(2.6) Impact of the Injuries on the Plaintiff's Lifestyle

- [48] Ms. Juelfs testified that her collision-related injuries have affected her activities and lifestyle beyond the workplace. She continues to be an active person, but has experienced a number of limitations due to her injuries.
- [49] Ms. Juelfs continues to attend cross-fit classes, usually four times per week. She also does weightlifting and stretching at the gym. Ms. Juelfs finds that keeping up her fitness and core strength helps to relieve lower back pain. As Ms. Juelfs explained it, movement helps her to feel better. However, Ms. Juelfs has experienced some limits on what she can do at the gym. She can lift weights, but has found that lifting too much can cause a flare-up of her lower back pain.
- [50] Prior to the collision, Ms. Juelfs liked to hike. She testified that she has gone on several hikes since the collision, but not without a certain degree of discomfort. For example, on a trip to Mount Baker, she wore a large backpack and tried to cinch it tight to avoid pain, but as the day went on she found it painful and had to take the backpack off to get relief. On another occasion, on a hike at Joffre Lakes, she tried to wear a full backpack but once again found it painful and had to get others to carry some of her things. She took the backpack off and hiked at the back of the group, taking frequent breaks to manage the pain. In cross-examination, Ms. Juelfs agreed that the Joffre Lakes hike was a multi-day excursion, in which she slept over night on a roll-up camping mattress.
- [51] Ms. Juelfs' roommate, Ms. Higginson, testified that the two of them have gone on hikes together in the past several years. Ms. Higginson referred to instances where Ms. Juelfs was in visible discomfort, and needed Ms. Higginson's help to carry water or a backpack. Although Ms. Juelfs is stubborn and not inclined to ask, Ms. Higginson could tell that she was in pain and needed help. Ms. Higginson knows Ms. Juelfs to be a person who does not complain or show weakness, but sometimes she exceeds her limits and needs assistance.
- [52] Ms. Juelfs testified that before the collision, she was able to run 10k. She now considers running 10k to be unattainable due to her injuries. In June of 2017, Ms. Juelfs and a friend participated in a 13k endurance race at Golden Ears Provincial Park. Ms. Juelfs knew from the start that it would be difficult, and planned to alternate between walking and running. During the event, she experienced pain in her neck. She walked most of the way. She was committed to finish and did so, but went immediately to the on-site physiotherapy tent for treatment. Ms. Juelfs testified that she did the event to test her limits. In retrospect, she

realizes trail racing is beyond her limitations, and she has no plans to do any more of it.

- [53] Ms. Juelfs admitted in cross-examination that since the collision she has gone on vacations, camping trips, and fishing trips. She admitted that while on vacation in Hawaii in 2016, she was able to ride in a power boat, snorkel, paddle board, and go zip lining. This evidence demonstrates that despite her injuries, Ms. Juelfs continues to be an active person who is able to engage in a wide range of physical activities and recreational pursuits. This is not to say that Ms. Juelfs has experienced no difficulties or physical limitations in recreational pursuits due to her injuries.
- [54] Finally, Ms. Juelfs testified that sometimes she has flare-ups or bad days in which she suffers from debilitating neck and back pain. On a bad day, Ms. Juelfs finds it difficult to stand or even sit, and has to lie down for the entire day to cope with the pain. Ms. Juelfs testified that these flare ups are infrequent, occurring about once every six weeks. Sometimes she can go two months without a bad day.
- [55] Ms. Higginson testified that there have been occasions when she has come home to find Ms. Juelfs lying on the couch, in tears, barely able to move. Ms. Higginson referred to a recent occasion when Ms. Juelfs had agreed to accompany her to a wedding, but woke up in pain and had trouble even getting out of bed. Ms. Juelfs made it to the wedding, but was only able to stay for 90 minutes before her discomfort overcame her and she had to go home.

(2.7) Functional Capacity Evaluation

- [56] The plaintiff called Ms. Craig as an expert in physiotherapy, determination of costs of future, and work capacity evaluation. Ms. Craig has a Bachelor of Science degree in physiotherapy and rehabilitation, and a Masters degree in business. She is also a certified functional capacity evaluator and costs of future care specialist. She has performed some 2,500 functional capacity evaluations and testified as an expert more than 50 times.
- [57] Ms. Craig conducted a functional capacity examination of Ms. Juelfs on 29 October 2018. Ms. Craig interviewed Ms. Juelfs, got her to fill out a variety of questionnaires, conducted a physical exam, and then asked her to perform a variety of biomechanical tests. These included basic movements including bending, standing, squatting, and basic physical tasks including pushing, pulling, and lifting. After all this, Ms. Craig prepared a report in which she concluded that:
- a) Ms. Juelfs "does not demonstrate the capacity to meet the full scope of the physical demands of her job" as an environmental specialist. In particular, Ms. Juelfs is limited with respect to: (i) sustained sitting demands in the office setting, and (ii) more strenuous aspects of field work. These limitations "narrow the scope of occupations available to her" in her occupation.

- b) Since the collision, Ms. Juelfs has changed employers and now works in a job that is 90 percent office work and 10 percent field work. The reasons for her change in positions was "multifactorial", although "an element of the decision was based on her limitations at work". (As noted above, there is a dispute between the parties about the true reason(s) for the plaintiff's change in employment. I will address this issue later in the reasons).
 - c) The limitations experienced by Ms. Juelfs in her new job are "related mostly to the postural demands associated with sustained sitting and static positioning of her neck, upper back and lower back" in the office setting. To accommodate these limitations, Ms. Juelfs should employ pacing and breaking strategies, change positions and stretch regularly, and have proper ergonomics in her workspace.
 - d) More generally, Ms. Juelfs has limitations that reduce her ability to work at "more physically demanding jobs". Thus, "the scope of occupations once viable from a physical perspective for Ms. Juelfs is reduced, leaving her with reduced competitive employability".
- [58] During the evaluation process, Ms. Juelfs demonstrated a consistent level of effort which tended to enhance the reliability of Ms. Craig's assessment. Ms. Juelfs had consistent physical performance over the duration of the full-day evaluation, and had consistent test outcomes, with low variance in results of standard grip testing. Ms. Juelfs also showed "competitive test behaviour" and increased heart rates during physical testing, demonstrating good physical effort.
- [59] In cross-examination, counsel for the defendants challenged Ms. Craig on several aspects of the evaluation process.
- [60] First, counsel was critical of the suggestion that Ms. Juelfs over-stated her capacity and under-stated her pain level in self-assessment questionnaires. In Ms. Craig's view, the answers Ms. Juelfs gave in the questionnaires were not consistent with physical limitations observed in testing conducted during the functional capacity evaluation. However, I agree with defence counsel's argument that the answers Ms. Ms. Juelfs gave in the self-assessment questionnaires were in fact consistent with her own testimony regarding the amount of weight she can lift at the gym as part of her regular exercise regimen.
- [61] Second, counsel was critical of Ms. Craig's determination that Ms. Juelfs was unable to perform some of the strength tests administered during functional capacity testing. For a number of the strength tests, Ms. Juelfs was physically able to lift a particular weight, but Ms. Craig stopped the testing because, in her view, Ms. Juelfs' technique was biomechanically unsound. I agree with defence counsel that Ms. Craig stopped Ms. Juelfs from lifting certain weights that Ms. Juelfs herself said she was capable of lifting as part of her regular exercise regimen at the gym.

- [62] Counsel for the defendants suggested to Ms. Craig that her conclusions concerning plaintiff's physical limitations were tainted by bias. Counsel points to billing records put to Ms. Craig in cross-examination, indicating that her firm has hundreds of thousands of dollars in annual billings for law firms representing plaintiffs in personal injury cases, and little or no billings for defendants. Ms. Craig denied any suggestion of bias and understandably took the entire line of questioning as an attack upon her professionalism.
- [63] While I accept counsel's submission that Ms. Craig appears to have stopped some of the strength tests before Ms. Juelfs was at her physical limit, I would not attribute this to bias. Ms. Craig's report was balanced, and her viva voce testimony was forthright and dispassionate. She did not present as an advocate for the plaintiff, but rather as an objective expert charged with critically evaluating the plaintiff's functional capacity.
- [64] I consider Ms. Craig's determination that Ms. Juelfs had reached her biomechanical limits to be a matter of professional judgment. However, while recognizing that Ms. Craig is an expert in discerning biomechanical limitations, on this particular occasion I find that her conclusion regarding the plaintiff's strength capacity to be inconsistent with the plaintiff's own testimony about the amount of weight she is capable of lifting during exercise in a gym setting.
- [65] The functional capacity results that drew criticism from counsel for the defendants were all related to strength testing. This calls into question Ms. Craig's conclusion that Ms. Juelfs has physical limitations in regards to the strength demands of her occupation, such as they are. On all the evidence, I am not satisfied that Ms. Juelfs has any functional limitations pertaining to her overall strength.
- [66] However, this is not the end of the matter. The key conclusions in Ms. Craig's report are that Ms. Juelfs is limited in regards to (i) sustained sitting demands in the office component of her work, and (ii) strenuous activities required in field work, including travelling long distances over rough roads, wearing a heavy backpack for extended periods of time, carrying equipment in the field, and holding certain postures for prolonged periods of time when conducting wildlife surveys. These two key findings are supported by objectively reliable testing of Ms. Juelfs' capacity for prolonged sitting, body position tolerance, and whole body range of motion.
- [67] I am satisfied that the testing underlying Ms. Craig's conclusions with respect to both (i) sustained sitting and (ii) strenuous field work involved objective measurements and indicators, documented in Ms. Craig's report. By way of example, Ms. Craig observed that in prolonged periods of sitting, Ms. Juelfs displayed objective signs of discomfort and pain avoidance. Similarly, in the Matheson Work Bench test, Ms. Juelfs showed an objectively measurable and significant drop in efficiency over the course of the testing. These two tests are merely examples. There were other tests in which Ms. Craig noted similarly reliable objective findings, supporting her conclusion that Ms. Juelfs has functional limitations as described above. I note as well that the results observed in Ms. Craig's testing were entirely

consistent with the other evidence I heard in this trial, including the testimony of Ms. Juelfs, her co-workers, and her roommate.

[68] I will address one other test discussed at length in the trial testimony, namely a strength test in which Ms. Juelfs was required to pick up a 40 pound box and carry it at her waist for a distance of 120 feet. Ms. Juelfs was able to perform this test but Ms. Craig told her to stop without going to the next weight because, in Ms. Craig's view, Ms. Juelfs had reached her biomechanical limit. Ms. Juelfs confirmed in her testimony that she was able to perform the test and could not remember feeling any pain, but that Ms. Craig told her to stop. Ms. Craig volunteered in cross-examination that this test was biomechanically similar to carrying a backpack with a waist strap. Counsel for the defendants relied on all of this evidence to suggest that Ms. Juelfs had the demonstrated ability to wear a backpack, notwithstanding her assertions to the contrary. However, this particular test is characterized as a "horizontal strength test", not an endurance test. It may well be that Ms. Juelfs is capable of carrying or wearing a heavy backpack for 120 feet, but that does not mean she is able to wear a heavy backpack on rough terrain during a full day of field work or on a long hike, at least without considerable discomfort. Ms. Juelfs testified that she was unable to do so, and I accept her evidence on this point, as well as the evidence of Mr. Van Rooyen and Ms. Higginson. The "horizontal strength test" described above does not undermine this evidence.

(2.8) Conclusions as to the Nature, Extent, and Duration of Plaintiff's Injuries

[69] My conclusions with respect to the nature, extent, and duration of the plaintiff's injuries are as follows:

- a) Ms. Juelfs has suffered soft tissue injuries to her neck, upper back, and lower back. She also developed a TMJ dysfunction.
- b) Ms. Juelfs has been able to manage the symptoms from the TMJ dysfunction by wearing a mouth guard at night. The TMJ dysfunction is likely to fully resolve at some point.
- c) The symptoms associated with the soft injuries to the neck, upper back, and lower back have been more persistent, less manageable, and more disruptive to her lifestyle. Almost five years after the collision, these symptoms have not resolved, and I conclude that Ms. Juelfs will continue to experience intermittent neck, upper back, and lower back pain as described herein into the indefinite future.
- d) As a result of these soft tissue injuries, Ms. Juelfs is limited in her occupation in regards to (i) the sustained sitting demands in the office component of her work, and (ii) strenuous activities required in field work, including travelling long distances over rough roads, wearing a heavy backpack for extended periods of time, carrying equipment in the field, and holding certain postures for prolonged periods of time.

- e) The soft tissue injuries have also had an effect on the plaintiff's lifestyle. Ms. Juelfs is restricted in her ability to participate in strenuous physical activities such as weight lifting, hiking, and running. The extent of the restriction is relatively minor, but its impact is by no means trivial for Ms. Juelfs, who was an active person and continues to be active within her limitations.
- f) When Ms. Juelfs exceeds her physical limits, her pain is aggravated and can lead to "flare ups".
- g) Ms. Juelfs suffers flare ups or "bad days" once every six to eight weeks, during which she finds the pain associated with her soft tissue injuries to be debilitating and makes it very difficult for her to do anything.

(2.8) Post-Collision Change in Employment

- [70] Ms. Juelfs worked at Hatfield from some time in 2011 until early 2018. Her official job title was Wildlife Environmental Specialist. Her remuneration consisted of a base salary and overtime pay. In 2012, the first full calendar year in which Ms. Juelfs worked at Hatfield, her base salary was \$48,455, and her total income was \$61,559. In 2017, the last full calendar year in which Ms. Juelfs worked at Hatfield, her base salary was \$59,500, and her total income was \$68,159.
- [71] Ms. Juelfs testified that her decision to leave Hatfield was "multifactorial". Some of the reasons she gave were as follows:
- a) A large proportion of her work at Hatfield was field work. Ms. Juelfs was interested in a job with less emphasis on field work, for a number of reasons. The field work was generally more demanding in that it involved longer days and more hours than office work. Also, after the collision Ms. Juelfs believes she had a limited capacity to do field work due to her injuries. Moreover, many of the field work assignments at Hatfield were in remote locations, and Ms. Juelfs sometimes had to stay in work camps for one to two weeks at a time. Ms. Juelfs was interested in job with a better work-life balance.
 - b) Ms. Juelfs found the commute from her residence in Port Coquitlam to Hatfield's home office in North Vancouver to be very draining. This was especially so after the collision, because she experienced low back pain during the drive home at the end of the day. The commute from Port Coquitlam to the Pinchin office in Abbotsford is less demanding.
 - c) Ms. Juelfs had worked in the same position at Hatfield for six and one-half years and felt it would be a good career move to take a new position. Much of her work at Hatfield had been focused on monitoring of bird populations in the oilsands, and Ms. Juelfs saw no clear path to advancement. The position she obtained at Pinchin was a senior wildlife biologist position. Ms. Juelfs agreed that by comparison to her former position at Hatfield, her new position at Pinchin would be viewed as a promotion.

- [72] It was suggested to Ms. Juelfs in cross-examination that her decision to leave Hatfield was not based on an inability to do the job due to her injuries. With due respect to counsel, I found the premise of this line of questioning somewhat misleading in that Ms. Juelfs did not claim her decision to leave Hatfield was "based on" an inability to do the job due to her injuries. Rather, I understood the plaintiff's position to be that her decision to leave Hatfield was "multifactorial", and that limitations posed by her injuries had some bearing on the decision.
- [73] Ms. Juelfs was cross-examined about the contents of her resignation letter, in which she announced her intention to leave Hatfield effective 9 February 2019, "to pursue other opportunities". Ms. Juelfs explained that she did not lay out all of her reasons for leaving in her resignation letter because she did not want to "burn any bridges". On further cross-examination, Ms. Juelfs agreed that telling her former employer more about her reasons for leaving would not necessarily have burned any bridges. She clarified that her use of the phrase "burning bridges" was a poor choice of words. Ms. Juelfs explained that she did not consider it to be good business to refer to motor vehicle injuries and resulting limitations in a resignation letter.
- [74] It was suggested to Ms. Juelfs that her decision to leave Hatfield was based at least in part on negative feelings about her supervisor's management style. Ms. Juelfs disagreed, protesting that her supervisor's management style was not one of the reasons for leaving Hatfield. Ms. Juelfs acknowledged that she may have told Mr. Van Rooyen that she did not like her supervisor's management style, but maintained this was not one of the reasons for her decision to leave Hatfield. Ms. Juelfs was cross-examined at length about a negative performance review she received from her supervisor in 2013. Although Ms. Juelfs' testimony on this issue was emotional and defensive, I attribute this to a genuine disagreement with her supervisor about work performance, not any effort to overstate her personal injury claim by mis-describing the reasons for leaving Hatfield.
- [75] Considering all the evidence on this issue, I accept the plaintiff's assertion that her decision to leave Hatfield was "multifactorial". Some of her reasons for changing employers were tied, directly or indirectly, to her collision-related injuries, although this was not the principal or predominant basis for her decision.
- [76] The financial implications of Ms. Juelfs' change in employment are not easy to assess. When Ms. Juelfs started to work with Hatfield in 2011 or 2012, her base salary was \$48,455. By the time she left Hatfield in January 2018, her base salary had risen to \$67,000. However, Ms. Juelfs also had the opportunity to earn overtime pay, at either time and one-half, or double time, depending on the nature of the work. On average, overtime pay represented about 24% of Ms. Juelfs' total annual income at Hatfield. Her highest earning year at Hatfield was in 2016, when she earned a total of \$75,990 in base salary and overtime.

[77] In her new position at Pinchin, Ms. Juelfs started with a base salary of \$70,000, which was higher than her base salary at Hatfield. However, the overtime component of her remuneration at Pinchin is not as significant as it was at Hatfield. Ms. Juelfs is expected to work a standard 37.5 hour week at Pinchin, and only receives overtime, at the standard hourly rate, for more than 44 hours in a week.

(3) Causation

[78] To prove causation, the plaintiff must show a "causal link" between his or her injuries and the defendant's tortious conduct. The basic test for determining causation is the "but for" test, under which the plaintiff must show on a balance of probabilities that his or her injuries would not have occurred "but for" the negligence of the defendant: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 13-14; *Resurice Corp. v. Hanke*, 2007 SCC 7 at para. 21, 29. In the case at bar I have no difficulty concluding that but for the negligence of the defendant Mr. McCue, the plaintiff Ms. Juelfs would not have suffered the soft tissue injury-related pain and consequent limitations discussed at paragraph 68 of these reasons.

(4) Damages

[79] Ms. Juelfs claims non-pecuniary damages for pain and suffering, and pecuniary damages for loss of earning capacity, special expenses, and future costs of care. I will deal with each of these in turn.

(4.1) Non-Pecuniary Damages

[80] Non-pecuniary damages are awarded to compensate an injured plaintiff for pain, suffering, and loss of enjoyment of life arising from the defendant's tortious conduct. The reality is that "money cannot provide true restitution", since "what has lost is irreplaceable" and there is no way to place a market value on pain, suffering, and loss of enjoyment of life. In this regard, a damages award is intended to provide "solace", in the sense that "money can be used to make the injured person's life more endurable": *Gilliam v. Wiebe*, 2013 BCSC 565 at para. 68.

[81] The appropriate amount of compensation is not merely a function of the seriousness of the plaintiff's injuries viewed in isolation. Rather, the court must consider the effect of the injuries on the plaintiff's particular circumstances, taking into account factors such as the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, the extent of any disability, the effect on family and social relationships, impairment of the plaintiff's mental and physical abilities, and the impact on the plaintiff's lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45-46. It is therefore necessary for the court to have an "appreciation of the individual's loss".

- [82] The plaintiff seeks \$85,000 in non-pecuniary damages. Plaintiff's counsel cites a number cases involving non-pecuniary damage awards ranging from \$81,000 to \$95,000. See *Clark v. Kouba*, 2012 BCSC 1607, affirmed 2014 BCCA 50 [\$85,000 in non-pecuniary damages, equating to \$95,000 in 2019 dollars], *Larson v. Bahrami*, 2017 BCSC 2308 [\$80,000 in non-pecuniary damages, equating to \$83,700 in 2019 dollars], and *Shinzay v. McKee*, 2014 BCSC 2317 [\$75,000 in non-pecuniary damages, equating to \$81,400 in 2019 dollars].
- [83] The defendants submit that Ms. Juelfs should receive non-pecuniary damages of \$50,000. In support of this position, counsel for the defendants cites *DeVries v. Poltorak*, 2013 BCSC 2527 [\$45,000 in non-pecuniary damages, equating to \$50,000 in 2019 dollars], *Brunelle v. Yoshida*, 2014 BCSC 1006 [\$60,000 in non-pecuniary damages, equating to \$65,000 in 2019 dollars], and *Rollins v. Lovely*, 2007 BCSC 1752 [\$40,000 in non-pecuniary damages, equating to \$48,000 in 2019 dollars].
- [84] I have considered the cases cited by counsel, although I will not review the circumstances of each case. While non-pecuniary damage awards in other cases may be useful in gauging what is reasonable, the case law does not establish a tariff for any particular kind of injury, and the award must always be determined based on an individualized assessment of the plaintiff's loss: *Stapley v. Hejslet* at para. 45, citing *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at p. 637. The cases furnished by counsel certainly help to delineate a relatively narrow range of non-pecuniary damage awards for circumstances that are comparable to the case at bar.
- [85] I consider that Ms. Juelfs is a relatively young woman who, prior to the collision, was healthy and lived a relatively active lifestyle. As a result of the collision, Ms. Juelfs developed a TMJ dysfunction, and suffered soft-tissue injuries to her neck, upper back and lower back. The TJM disorder has caused Ms. Juelfs to suffer sporadic acute jaw pain that has been mitigated through use of a mouth guard and is expected to resolve over time. The soft-tissue injuries have resulted in intermittent neck and back pain that has become chronic. The pain is exacerbated by prolonged sitting, sustained neck postures, and sustained vigorous physical activity such as lifting heavy weights, running, of carrying a backpack for extended periods of time. After the collision, Ms. Juelfs made an effort to return to field work, and has continued to be as active as she can in both her fitness activities and her recreational pursuits. Nonetheless I accept the evidence of Ms. Juelfs, supported by the testimony of the other lay witnesses, that the soft-tissue injury and resulting pain have limited Ms. Juelfs in her ability to do field work in her chosen occupation, and imposed moderate limitations on her lifestyle. In these circumstances, and considering the positions put forward by each of the parties, I conclude that Ms. Juelfs should receive non-pecuniary damages of \$65,000.

(4.2) Loss of Past Earning Capacity

- [86] As stated in *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30, "a claim for what is often described as 'past loss of income' is actually a claim for loss of earning capacity". In other words, it is "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury".

- [87] In *Grewal v. Naumann*, 2017 BCCA 158 at para. 45-48, Goepel J.A. set out the key principles governing a claim of lost earning capacity. I note that while Goepel J.A. was in dissent in *Grewal*, his discussion of the law on this issue was endorsed by the majority, per D. Smith J.A. at para. 66. For ease of reference, I would summarize the legal principles set out in *Grewal* as follows:
- (a) The principles applicable to a claim of past lost earning capacity are the same as the principles applicable to a claim of future lost earning capacity: *Grewal* at para. 46, citing *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.
 - (b) In either case, i.e. a claim of either past or future loss, the plaintiff must establish (i) impairment of earning capacity, and (ii) a real and substantial possibility of an event resulting in a loss: *Grewal* at para. 48.
 - (c) To the extent that the analysis requires a consideration of hypothetical events, the plaintiff is not required to prove these events on a balance of probabilities; what is required is a "real and substantial possibility, and not mere speculation": *Grewal* at para. 46-48, citing *Smith v. Knudsen* at para. 29.
 - (d) Where the court finds both impairment of earning capacity and a real and substantial possibility of an event resulting in loss, damages must then be assessed. The damages are to be valued using either the earnings approach or the capital asset approach: *Grewal* at para. 48.
- [88] In the case at bar, Ms. Juelfs claims damages for lost capacity to earn overtime pay in the 12 months following the collision. She says the bulk of her overtime pay came from field work, and that due to her collision-related injuries, she was unable to perform the same amount of field work in the 12 month period following the collision.
- [89] The defendants say at least some of the reduction in overtime earnings is attributable to the fact that Hatfield did not have any overtime work to be done in January through March of 2015. The defendants rely on the testimony of Ms. Juelfs that there was overtime work to be done on bird surveys in 2014, but no such work available in 2015.
- [90] Ms. Juelfs testified about a number of different sources of overtime work available to her. She was unable to be specific about which overtime projects were available in which years, but I accept her testimony that in general the amount of overtime she worked in the 12 months after the collision was less than the amount she worked in the 12 months preceding the collision, and that this was attributable to her collision-related injuries. I am thus satisfied on the evidence that Ms. Juelfs has established that as a result of the collision, she suffered an impairment of her earning capacity due to limitations on her ability to perform field work, and that there was a real and substantial possibility that Ms. Juelfs lost out in overtime pay as a result of this impairment.

- [91] Having concluded that Ms. Juelfs has established an entitlement to damages for past loss of earning capacity, it is necessary to value the loss. The particular loss suffered by Ms. Juelfs - loss of overtime - is best assessed using the earnings approach. I agree with Ms. Juelfs that the most appropriate way to determine her loss of past earnings is to compare her overtime in the 12 month period before the collision with her overtime earnings in the 12 month period after the collision.
- [92] In comparing the overtime earned by Ms. Juelfs in the year preceding the collision with the overtime earned Ms. Juelfs in the following year, it is necessary to consider the evidence of Ms. Saito that due to a gap in overtime billing policy at Hatfield, overtime in the year preceding the collision was actually over-stated by some 10 to 15 percent. I agree with the defendants that the overtime loss should be reduced by 12.5%, the average of these two figures.
- [93] It is also necessary to consider the amount of overtime available to Ms. Juelfs at two different pay rates. Some of Ms. Juelfs' overtime work was paid at time and a half, and some of it was paid at double time.
- [94] With respect to time and a half, Ms. Juelfs worked 756 hours in the 12 months before the collision, and 160.25 hours in the 12 months after the collision. The difference between these two figures is 595.75. Adjusting this figure by 12.5% on account of the inflated overtime identified by Ms. Seito, the net result is 521.25 hours. At a rate of \$36.75 per hour, this amounts to a total of \$19,155.93 in lost wages at the time and a half rate.
- [95] With respect to double time, Ms. Juelfs worked 86.75 hours in the 12 months before the collision, and 29.5 hours in the 12 months after the collision. The difference between these two figures is 57.25 hours. Adjusting this figure by 12.5% on account the inflated overtime identified by Ms. Seito, the net result is 50 hours. At a rate of \$49.09 per hour, this amounts to a total of \$2,454.50 in lost wages at the double time rate.
- [96] In total, Ms. Juelfs made \$21,610.43 more in overtime in the year preceding the collision than she did in the following year. I conclude that at a tax rate of 28.2%, Ms. Juelfs' net loss of overtime earnings in the 12 months following the collision was \$15,516.29.

(4.3) Loss of Future Earning Capacity

- [97] The evidence indicates Ms. Juelfs has suffered collision-related soft tissue injuries which are chronic and not expected to resolve. I find that as a result of these injuries, Ms. Juelfs will experience limitations in her chosen occupation as a wildlife biologist, in terms of both field work and office work.

- [98] With regard to field work, I find that going forward Ms. Juelfs will be limited in her ability to travel in small aircraft, travel in vehicles over rough terrain, carry backpacks for extended periods of time, navigate rugged terrain on foot, lug heavy lab equipment, operate small boats, use various devices including fishing nets and electro-fishers, and in her ability to sustain awkward positions for prolonged periods of time while surveying wildlife.
- [99] The defendants say Ms. Juelfs may be able to overcome or avoid some of these limitations by assigning certain tasks to co-workers during field work. I do not find any merit in that argument, which boils down to a submission that the plaintiff will not be limited in her ability to field work if she gets others to do her job for her. I would expect such an approach would significantly undermine Ms. Juelfs' effectiveness in the field, where co-workers are presumably expected to divide the work and share equally in the performance of physically demanding tasks.
- [100] The defendants also say Ms. Juelfs could overcome her expressed limitations in holding awkward body positions during wildlife surveys by working with a kinesiologist to strengthen her neck muscles. While it is true that Dr. Craig recommended exercise sessions with a kinesiologist to address muscle dysfunction, her recommendations were intended to assist Ms. Juelfs in managing her symptoms, without any expectation that the symptoms would be resolved. In her report, Dr. Craig made recommendations to "assist Ms. Juelfs to manage her symptoms that occur in response to work activities". Dr. Craig expressly noted that the treatment programs she recommended would not be expected to "result in resolution of [the plaintiff's] symptoms to restore her prior functional capacity".
- [101] With regard to office work, I find that going forward Ms. Juelfs will be limited in her ability to work at a desk in a sitting position for prolonged periods of time. There is a considerable body of evidence that Ms. Juelfs has suffered and continues to suffer discomfort due to low back pain. I agree with the defendants that Ms. Juelfs may be able to better manage her low back pain by using a sit-stand work station, although I find that the potential for pain with prolonged sitting will still be present and that this poses a moderate limitation on the plaintiff's ability to perform office work.
- [102] The more challenging issue for the plaintiff is in establishing that the limitations described above have resulted in an actual impairment of her future income-earning capacity. As the defendants point out, since the collision Ms. Juelfs has changed employers and is now a senior wildlife biologist, earning more money and enjoying a better work-life balance than she had at the time of the collision. Ms. Juelfs herself concedes that her new job could be viewed as a promotion. She earns a higher base salary, and her new job is not as physically demanding as her old one. There is also some suggestion in the evidence that senior wildlife biologists such as Ms. Juelfs and supervisors such as Ms. Dupuis do less field work than their junior counterparts. In these circumstances, the defendants question whether there is a real and substantial possibility that Ms. Juelfs will suffer a pecuniary loss.

- [103] One of the leading cases on this issue is *Perren v. Lalari*, 2010 BCCA 140. In that case, the plaintiff worked as a manager in a government office. She was injured in a motor vehicle collision that left her unable to perform physically demanding or repetitive work. After the collision, the plaintiff returned to her pre-accident job, and the trial judge found that she would probably continue in that employment. The trial judge reasoned that the plaintiff's injuries would have "slight, if any, actual impact on her future earnings", and went on to make an "appropriately modest" award of \$10,000. This award was set aside on appeal because the trial judge overlooked the requirement that the plaintiff "must always prove" a "real and substantial possibility of a future event leading to an income loss". It is only after the plaintiff discharges that burden that the court will consider the value of the loss, using either the income approach or the capital asset approach: *Perren* at para. 32-33.
- [104] Thus, the plaintiff must prove a "substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur": *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (B.C.C.A.) at para. 17, cited with approval in *Perren* at para. 23. The concept of "real and substantial possibility" does not require proof on a balance of probabilities. Rather, "[a] future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation": *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Perren* at para. 32.
- [105] Applying those principles to the facts in the case at bar, I have already found above that the plaintiff's injuries will result in some limitations on her ability to do certain kinds of work in her chosen occupation as a wildlife biologist. I am satisfied that these limitations could be expected to impact on the plaintiff's future earning capacity in two particular ways.
- [106] First, with respect to field work, the evidence indicates that this is an important component of the plaintiff's occupation. I accept the plaintiff's submission, which is supported by the evidence, that "[t]he work of a wildlife biologist ranges from almost exclusively field work to almost exclusively office work to every combination in between". Although Ms. Juelfs now works in a position that involves a very limited amount of light field work, she is still relatively young, and it is by no means certain that she will stay in her current position for the balance of her career. Ms. Juelfs has a fair degree of professional enthusiasm and some apparent ambition for further advancement. In these circumstances, there is a real and substantial possibility that the limitations on Ms. Juelfs' ability to do field work will impact upon her opportunity for advancement within her chosen occupation. As Ms. Dupuis acknowledged, a wildlife biologist with a limited ability to do field work will generally have less opportunity than a wildlife biologist who has no such restrictions.
- [107] Second, with respect to office work, the evidence satisfies me that Ms. Juelfs is moderately restricted in her ability to work long hours at a desk. Co-workers at both Hatfield and Pinchin testified to seeing Ms. Juelfs, from time to time, in noticeable discomfort while working at her desk. Although the use of a sit-stand work desk could ameliorate this problem to a certain extent, even with the benefit of this kind of set-up the plaintiff's

injuries will pose some limitation on her office productivity. There is also the issue of flare ups which can be anticipated keep Ms. Juelfs away from her office for several days at a time, on a sporadic basis. There is a real and substantial possibility that the plaintiff's unresolved soft-tissue injuries will impact on her office performance in two concrete ways. First, it is reasonably possible that these limitations will impact on the plaintiff's ability to do office-based overtime work. Second, it is also a reasonable possibility that these limitations will impact the plaintiff's overall office productivity and capacity for advancement.

- [108] Having found an impairment of the plaintiff's future income-earning capacity, it is next necessary to value the loss. I consider that the plaintiff's loss is best assessed using the capital asset approach. What Ms. Juelfs has lost is not some identifiable stream of income, but rather a general capacity to earn income in her chosen field. Because of the limitations imposed by her collision-related injuries, Ms. Juelfs has been rendered somewhat "less marketable" to potential employers, and has lost "the ability to take advantage of all job opportunities" that might otherwise have been open to her within her occupation, as these concepts are discussed in *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353 (B.C.S.C.) at para. 8.
- [109] The parties have advanced vastly different positions with regard to assessment of the plaintiff's loss. The defendants, while maintaining the position that the plaintiff has failed to prove an impairment of her future earning capacity, argues in the alternative that the court should award a nominal amount for loss of future earnings, in the amount of \$10,000. In support of this approach, the defendants cited *DeVries v. Poltorak*, 2013 BCSC 2527 at para 97-101 and *MacKenzie v. John Doe*, 2018 BCSC 104 at para. 168.
- [110] The plaintiff urges the approach suggested in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 33, which involves a consideration of "the likely duration of the plaintiff's prospective working life", as well as a consideration of the "negative and positive contingencies which are unique to each case". Counsel says the court should assess the loss using an annual salary of \$80,000, representing the plaintiff's total earnings in the 12 months preceding the collision. Counsel says this is reasonable because it is doubtful that Ms. Juelfs had reached "peak" earnings at age 31 when the collision occurred. Using a working age of 67, and an economic multiplier of 18.806, the present-day value of the plaintiff's income is \$1,500,000. Counsel urges the court to conclude that as a result of the collision-related injuries, the value of this asset has been reduced by 20%, resulting in damages of \$300,000.
- [111] I prefer the plaintiff's approach in that it offers a transparent, rational means of assessing the value of the plaintiff's loss. In reaching this conclusion, I appreciate that the court's task is to assess damages, not calculate them according to some mathematical formula. The court must base its decision on "what is reasonable in all the circumstances", and "[p]rojections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable": *Parypa v. Wickware*, 1999 BCCA 88 at para. 36. In the case at bar I find the plaintiff's approach useful in assessing what is "fair and reasonable", although I would make two adjustments to the figures proposed by plaintiff's

counsel.

- [112] First, I would use the plaintiff's current base salary of \$70,000 when determining the present-day value of her income. Using the multiplier proposed by the plaintiff, the present-day value of the plaintiff's income is \$1,315,000.
- [113] Second, I do not agree that the plaintiff's income-earning capacity has been reduced by 20%. Accepting that Ms. Juelfs has suffered a loss of earning capacity in the manner described above, I would consider the diminishment of the plaintiff's capacity to do field work to be significant, but I must also account for the contingency that the plaintiff will remain in her current position for the balance of her working life, or that if she chooses to change positions, she would move to a position involving a relatively minimal degree of field work. There is some suggestion in the evidence, which I accept, that senior wildlife biologists positions generally involve less field work than lower level positions. With regard to the diminishment of the plaintiff's capacity to do office work, I would consider it to be moderate, keeping in mind that her limitations can be ameliorated to some extent through the use of a sit-stand work desk. Taking all of this into account, I conclude that Ms. Juelfs' future earning capacity has been diminished by 10%.
- [114] To summarize, I find that the present-day value of the plaintiff's income is \$1,315,000, and that her injuries have led to a 10% reduction in her income-earning capacity. I thus conclude that the plaintiff's loss of future earning capacity would be valued at \$131,500. I consider this to be a fair and reasonable assessment of the plaintiff's loss.

(4.4) Special Damages

- [115] Ms. Juelfs seeks special damages in the amount of \$18,120.24. In her testimony, Ms. Juelfs asserted that all of the claimed expenses were incurred as a result of the collision. Receipts verifying these expenditures were marked in evidence.
- [116] The defendants take issue with two specific amounts.
- [117] The first disputed item is a claim of \$6,804 for cross-fit membership fees. Ms. Juelfs testified that she was heavily involved in fitness programs, including spin classes and aerobics, before the collision. At some point she took up cross-fit. I am satisfied, based on her lifestyle and keen interest in fitness, that quite apart from what happened to her in the collision, Ms. Juelfs would have paid for cross-fit membership fees in any event, and that these fees are not attributable to the collision. I would therefore dismiss this aspect of the plaintiff's claim. See *Brunelle v. Yoshida*, 2014 BCSC 1006 at para. 185.
- [118] The second disputed item is for mileage. The defendants say a significant proportion of the mileage claim pertains to the plaintiff's attendance at treatment providers in North Vancouver, during time periods when Ms. Juelfs in fact worked in that municipality. I agree with the defendants that the plaintiff is not entitled to recover travel costs for treatment received at facilities in close proximity to her workplace, on week days when Ms. Juelfs would have had to travel to North Vancouver for work in any event. However, examining the

plaintiff's itemized list of mileage claims and attached receipts, I see that of the plaintiff's total claim of \$1,531.22 in mileage costs, only \$285.48 relates to weekday attendance at programs in North Vancouver near the plaintiff's work place. I would exclude this amount, but otherwise allow the plaintiff's claim for mileage associated with attendance at treatment programs.

[119] I conclude that the plaintiff is entitled to special damages totalling \$11,030.76.

(4.5) Costs of Future Care

[120] My consideration of costs of future care is guided by three principles. First, damages for costs of future care are awarded to restore the plaintiff to his or her pre-accident condition, to the extent that this possible, based on what is shown to be reasonably necessary to preserve or promote the plaintiff's mental and physical health: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29-30. Second, the amounts claimed must be (i) justified based on medical evidence as to what is reasonably required to preserve or maintain the plaintiff's health, and (ii) reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at p. 84. Third, the trial judge must take into account future contingencies, positive and negative, that may have a bearing on costs of future care: *Gignac* at para. 51-52.

(4.5.1) Chiropractic Treatment and Massage Therapy

[121] I am satisfied that Ms. Juelfs will require chiropractic treatment or massage therapy to manage flare ups in her neck and back pain. Dr. Shore recommended that Ms. Juelfs should receive ongoing chiropractic care at an estimated cost of \$1,100 per year. Ms. Craig recommended six chiropractic and six massage therapy sessions per year, at a cost of \$75 per session, for a total of \$900. I prefer Dr. Shore's recommendation, which is more precise.

[122] The plaintiff submitted that she will require these treatments for the balance of her life. The defendants submitted that the costs should be time-limited. Given my finding that Ms. Juelfs will continue to suffer intermittent neck, upper back, and lower back pain into the indefinite future, my conclusion is that the award should cover the costs of these treatments for the balance of the plaintiff's life, reduced by 30% to account for the contingency that at some point the treatments may not longer be required or may cease to be useful. I therefore award \$19,525 for future chiropractic and message therapy treatments.

(4.5.2) Kinesiology

[123] Dr. Shore recommended that Ms. Juelfs engage in an active rehabilitation program supervised by a kinesiologist. Ms. Craig also recommended that Ms. Juelfs attend 8 to 12 kinesiology sessions to improve muscle strength and to address dysfunction of muscle recruitment, to manage her symptoms. I accept that these kinesiology sessions are medically necessary and reasonable and I award a total of \$750 under this heading.

(4.5.3) Ergonomic Workstation

[124] Ms. Craig recommended an adjustable chair (at a cost of \$250), and a sit-stand work station (at a cost of \$700 to \$1500) to accommodate the plaintiff's limitations and to allow her to maintain good posture when doing office work. The defendant concedes that the cost of an ergonomic work station should be included in the cost of future care award. I award the plaintiff \$2,000 under this heading.

(4.5.4) Cross-Fit Training

[125] Ms. Juelfs testified that she has always been an active person who enjoys fitness programs. She previously participated in spin classes and aerobics programs. At some point she started taking cross-fit programs. Ms. Juelfs further testified that she continues to attend cross-fit training on the recommendation of her treating chiropractor Dr. Shore, and her treating physiatrist Dr. Sudol. Both Dr. Shore and Dr. Sudol opined that regular attendance at a strength and conditioning program will be an important factor in the ongoing management of the symptoms associated with the plaintiff's soft-tissue injuries.

[126] Against this backdrop, the plaintiff seeks damages to recover the cost of her monthly cross-fit membership fees, at \$126 per month, for the balance of her lifetime at a total cost of \$46,857. The plaintiff says the program fees provide good value, in that she presently attends 16 classes per month, which works out to \$8 per class.

[127] The defendants argue that the plaintiff has always been interested in fitness, and that she would pay for the cross-fit membership fees in any event, quite apart from whether these programs were recommended by her treatment providers in connection with her collision-related injuries. The defendants submit that "no award is appropriate for expenses that the plaintiff would have incurred in any event", citing Brunette at para. 187, and Lourenco v. Pham, 2013 BCSC 2090 at para. 79.

[128] Recall that I declined to include the past cost of cross-fit membership fees in the plaintiff's special expenses claim, on the basis that Ms. Juelfs would have paid these fees in any event, regardless of her soft-tissue injuries. By the same reasoning, I find that going forward, the most likely possibility is that Ms. Juelfs will continue to be a fitness enthusiast and thus incur costs of a monthly fitness program, quite apart from any collision-related treatment needs she may have. However, I am also satisfied that there is a reasonable possibility that at some point in the future Ms. Juelfs would lose interest in attending a cross-fit program with such regularity as she has in the past. In that eventuality, Ms. Juelfs could still be anticipated to follow the advice of her treating chiropractor and physiatrist by continuing with regular attendance at a structured fitness program as part of her treatment regimen. Assigning a 25% probability to this eventuality, I would award the plaintiff \$11,715 to cover the costs of continued participation in a structured monthly fitness program.

(4.5.5) Future Costs of Care in relation to TMJ Dysfunction

[129] Ms. Juelfs attended four specialist appointments and acquired a dental appliance to manage her TMJ dysfunction, at a total cost of \$1,600. She says the dental appliance is now 30 months old, and at some point she will require replacement, along with follow up specialist appointments. However, the plaintiff has not tendered any evidence to establish the useful life of a dental appliance, nor has she presented evidence that the TMJ dysfunction will continue beyond the useful life of the device. I am therefore not satisfied that the plaintiff has proven any medically necessary future costs associated with her TMJ dysfunction.

(4.5.6) Assistance with Heavy Yard Work, Home Cleaning and Maintenance

[130] Ms. Craig opined that the plaintiff will require assistance with heavier seasonal cleaning such as washing walls, windows, and blinds. The plaintiff also contends that although she presently lives in a condominium with no yard or a garden, this may change in the future, in which case she will require assistance with heavy yard work. I am not satisfied that Ms. Juelfs will require assistance in relation to any of these things. Ms. Juelfs is a reasonably fit person involved in weightlifting and cross-fit training. While her injuries impose physical limits, the evidence does not satisfy me that occasional heavy duty cleaning or yard work will exceed those limits. I would dismiss this aspect of the plaintiff's claim.

(5) Summary

[131] In summary, I award the following damages:

- (i) Non-pecuniary Damages: \$ 65,000.00
- (ii) Loss of Past Earning Capacity: \$ 15,516.29
- (iii) Loss of Future Earning Capacity: \$ 131,500.00
- (iv) Special Damages: \$ 11,030.76
- (v) Costs of Future Care: \$ 33,990.00

Total: \$ 257,037.05

(6) Costs

[132] If the parties are unable to agree on costs, they can file written submissions. Counsel for the plaintiff may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within three weeks of the release of these reasons. Counsel for the defendants may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within three weeks of receiving the plaintiff's written submissions. Counsel for the plaintiff may file a reply of two pages or less (plus any reply affidavit material) within one week of receiving the written submissions of the defendants. If either party takes the view that submissions on costs cannot effectively be dealt with in writing, that party may, within the time limits set out above, submit a request to schedule a further appearance for oral submissions on costs.

"Riley J."

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