IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Boettcher v. Bengert,*
2023 BCSC 1604

Date: 20230912
Docket: M116749
Registry: Kelowna

Between:

Serenna Boettcher

Plaintiff

And

Taylor Bengert

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraph [157] on September 21, 2023

Before: The Honourable Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:	P.J. Hergott
Counsel for the Defendant:	C.E. York E. Dyck
Place and Date of Trial/Hearing:	Kelowna, B.C. February 6 – 10, 13 – 17, 2023
Place and Date of Judgment:	Kelowna, B.C. September 12, 2023

Introduction

[1] The plaintiff seeks an assessment and award of damages for injuries received in a motor vehicle collision that occurred on May 15, 2015 (the “MVC”). She was 18-years-old at the time.

[2] The defendant admits liability for the collision and that the plaintiff was injured but disputes the quantum of damages claimed by the plaintiff.

Background

[3] Prior to the motor vehicle collision, the plaintiff was an active and healthy individual. She had no relevant prior health history and had no specific barriers influencing her future career, social or recreational interests.

[4] Her interests focused on activities in the outdoors. She hunted with her family from a young age and it remained an interest up to the time of the motor vehicle collision. Her other interests included, but were not limited to, hiking, camping and dirt biking.

[5] She graduated from high school with good grades in June 2014.

[6] In the summer of 2013, she worked for her father who operated a residential construction business. She worked as a labourer.

[7] After her graduation, she worked at a delicatessen/meat shop until April 2015. She left that job to rejoin her father in his construction business where she was working at the time of the motor vehicle collision.

[8] The plaintiff's long-term career plans had not crystallized at the time of the MVC. Her interest was to pursue a career where, in her words, she could "make a difference". Her interests seemed to lean toward educational or health-related careers. She did not intend to obtain a university degree but was considering shorter postsecondary education programs that included training as a care aide.

[9] The expert medical evidence at trial is limited to the reports of two practitioners tendered by the plaintiff. Dr. Travlos, a physical and rehabilitation specialist, prepared reports dated January 17, 2018 and October 5, 2022. An occupational therapist, Melanie Bos, prepared a report dated September 20, 2022. Each testified and was cross-examined at trial.

[10] Dr. Travlos provided a diagnosis of pain occurring from soft tissue injury with an "overriding diagnosis" of "a somatic symptom disorder with predominant pain that is mild".

[11] An agreed statement of facts entered as an exhibit at the trial sets out the plaintiff's post-collision employment as follows:

> 8. At the time of the Accident, the Plaintiff had been working at her father Darrell Boettcher's company, Arch Angel Contracting. She started on April 14, 2015.
> 9. Except for a brief return to work as a deli worker at Johnny's Fresh Meats & Deli in November and December 2015, the Plaintiff was off work from the time of the Accident until September 2016.
> 10. The Plaintiff attended Okanagan College in Penticton, BC, commencing September 2016.
> 11. In January 2017, Ms. Boettcher received her Education Assistant Certificate and obtained work on the casual list at School District No. 67. for the remainder of the school year.
> 12. In September 2017, Ms. Boettcher began a full time contract as a Certified Education Assistant ("CEA"), working at Parkway Elementary School in School District No. 67.
> 13. The Plaintiff began attending night school in November 2017 for continuing studies and received Certificate in Autism Spectrum in December 2017.
> 14. The Plaintiff started a full time position at Packing House Liquor Store in Kelowna, BC in August 2020.
> 15. The Plaintiff began working as a full time Support Worker at Personal Lifestyle Support in Kelowna, BC in July 2021.
> 16. The Plaintiff last worked as a CEA in June 2021 and resigned on September 1, 2021.
> 17. The Plaintiff resigned from Packing House Liquor Store on January 25, 2022 and her last day was January 31, 2022.

[12] At the time of trial, the plaintiff was continuing in her employment as a support worker at Personal Lifestyle Support in Kelowna. She describes her position as a “community support worker”. She works full time Monday through Friday 9:00 AM to 5:00 PM earning $22 per hour.

[13] The defence evidence included video surveillance of the plaintiff and post-MVC excerpts from her social media account posts. Her Instagram photos include pictures of her hiking, hunting, fishing, camping, feeding animals, and playing softball.

Positions of the Parties

[14] The plaintiff's position is, and the defendant accepts, that the plaintiff has a chronic pain disorder. The parties disagree, however, as to the significance of the impact of the symptoms since the motor vehicle collision and as to the impact the symptoms are likely to have on her personally and professionally in the future.

[15] The plaintiff acknowledges that, at least outwardly, she appears to be “very functional” but says that she must live with persistent symptoms that significantly affect her social and recreational activities. She also argues that she is significantly constrained in her career options and in particular her ability to pursue a career as a care aide.

[16] The defendant argues that the chronic pain disorder is connected with mild predominant pain and that the restrictions that she had in her activities up to the fall of 2016 have continually abated since. The defendant argues that “while the plaintiff may have some residual pain and restrictions, surveillance, her social media and her testimony indicate a very functional adult with a fulfilling life”. She has demonstrated an ability to work two full time jobs for an extended period since the accident.

[17] The defendant argues that the plaintiff is not entitled to any award for future loss of earning capacity and further argues that there is no basis to consider her earning potential as a care aid. In the alternative, the defendant argues that the

appropriate assessment should be based on a loss of capital asset and that any award should be modest.

[18] The positions of the plaintiff and defendant are reflected in their positions as to the appropriate awards under various heads of damage. Those are summarized in the table below:

	Plaintiff	**Defendant**
Nonpecuniary damages:	$105,000	$60,000 - $90,000
Past loss of earnings / capacity:	$137,333.94	$28,000
Future loss of earning capacity:	$694,732.79 - $738,764.50	$0
*Special damages:	$45,346.25 + mileage	$37,109 + appropriate mileage
Cost future care:	$64,387	$5,000 - $10,000

* In relation to special damages, the parties agree that a portion of the special damages have been paid by ICBC but that there is no evidence as to what that amount is. They ask the Court to make an award subject to deducting those amounts which have been paid. The amount to be deducted is to be determined either by agreement of the parties or upon a ruling following receipt of further submissions.

Analysis

[19] Before dealing with the specific claims under each head of damage, I will make more general comments and conclusions regarding the evidence.

[20] The reports of Dr. Travlos state the plaintiff's "overriding diagnosis is somatic symptom disorder with predominant pain that is mild." That is explained further in his reports and in his testimony. His January 17, 2018 report states:

> . . . Somatic symptom disorder is essentially a chronic pain disorder in which an individual finds the pain symptoms distressing and disruptive in their daily life. They spend disproportionate periods of time thinking about their symptoms, and the symptoms do cause levels of anxiety and limitation in activities.

[21] This conclusion was not challenged.

[22] At that time, Dr. Travlos was of the view that the plaintiff ". . . had an inordinate amount of therapies and treatments that have not really substantially changed her outcome." He noted that this was a concern as "dependency upon care providers is no different to dependency upon medication."

[23] He recommended the plaintiff see a psychologist versed in pain management strategies and techniques and that the plaintiff needed to be "empowered to increase her activities and return back to her usual activities." He expressed optimism that the plaintiff had the capacity for a full recovery but noted there was a possibility of only marginal improvement.

[24] Following that report and, although the plaintiff was sceptical of Dr. Travlos' diagnosis and recommendations, she did indeed reduce her attendances for therapy.

[25] In his report of October 5, 2022, after his second assessment, Dr. Travlos noted as follows:

> . . . It is clear that Ms. Boettcher has indeed continued to improve and has made gains since I last saw her. She is aware that she has plateaued and her chiropractor did make note of that in a letter of March 2022. It is my opinion that Ms. Boettcher likely has plateaued at her current level. I have made recommendations that I do feel will tweak the pain management and improve on her presentation but it will not make them go away. It is my expectation that Ms. Boettcher will have residual intermittent fluctuating symptoms through most of her body depending on the day's activities and stresses going forward. It is my opinion that she is at risk and, should another event or accident occur, she will likely have a protracted recovery and less than a return to her current baseline should such an event occur.

[26] In his assessment of her residual functional abilities or restrictions, Dr. Travlos included the following in his October 2022 report:

> When I last saw Ms. Boettcher, I felt that she was capable of increasing her activities. I encouraged her to do so and indeed she has. She has pushed the boundaries of activities in a comprehensive manner and she needs to again be credited on this. She has returned back to a lot of her preferred activities, albeit with some restrictions. I remain of the opinion that Ms. Boettcher needs to be as active as she can tolerate and to keep doing as many activities as she can tolerate. I would not specifically restrict her but she may have to restrict herself in order to accommodate her pains. She is aware that if she does too much she hurts more and so she has to establish what her boundaries are and adapt within those boundaries. She must then maintain these boundaries and activities to keep herself active.

[27] A functional capacity evaluation was carried out by Ms. Bos. Much of the focus of that report is related to various occupational demands which I will comment on in my assessment of loss of earnings claims. She did identify a need to interrupt activities such as sitting, standing and stooping to limit symptoms.

[28] In her testimony, the plaintiff described herself as being an active, fit, strong and motivated individual prior to the collision. Her career aspirations were not yet clear to her but she wanted to “make a difference”. Careers in the educational and healthcare fields are most attractive to her. She did not intend to pursue a university education.

[29] She was in a dating relationship with a young man, Mr. Lion, who shared her interest in hunting.

[30] Immediately following the collision, the plaintiff was aware of pain in her neck, chest and back. She was taken by ambulance to hospital and released with painkillers.

[31] During the first two to three months, she described pain affecting much of her body including her lower back, knees, right shoulder and arm, chest, ribs, pain from her hips into her legs, as well as in the base of her neck. She indicated she was “pretty sure she had a bit of brain fog.” She indicated she struggled to have the endurance or pain tolerance to walk her dogs and she struggled with cleaning activities at home.

[32] As noted in the agreed statement of facts set out above, she was off work until September 2016, save a brief effort to return as a deli worker at Johnny's Fresh Meats.

[33] Again as noted in that agreed statement of facts, she started her education as an education assistant in September 2016, and began working in that occupation in January 2017. By all indications, she excelled at school and in her placement at Parkway Elementary school in Penticton.

[34] The relationship with Mr. Lion ended in approximately March 2018. Both the plaintiff and Mr. Lion expressed the view that the plaintiff's limitations and their impact on the plaintiff's ability to participate in all activities they had previously enjoyed, contributed to the end of the relationship.

[35] The plaintiff advised that in her work as an education assistant, some children were more physically demanding than others. When she was met with those demands, it took a toll on her. It aggravated her symptoms and reduced her capacity for any other activities outside of work.

[36] It is relevant that all of this preceded the plaintiff's first attendance and assessment by Dr. Travlos and was during the period of time of intensive therapy. It is important to note that Dr. Travlos does not suggest that the plaintiff’s struggles or issues were not real but rather states that her “combination of mental health problems” caused her to be “preoccupied with her symptoms” and that the intensity of treatment she was undertaking was counterproductive.

[37] Dr. Travlos is clearly of the opinion that the plaintiff had, by the time of his second assessment “improved quite significantly” but that “she would still benefit from more education regarding chronic pain” including seeing a clinical psychologist for cognitive behavioural pain management, mindfulness-based therapies and education regarding meditation and self-hypnosis.

[38] The various lay witnesses who testified supported the plaintiff’s description of herself both before and after the MVC.

[39] The plaintiff currently lives with Mr. Ayers. They began dating in early 2021.

[40] Their activities include hunting, camping and fishing. He describes the plaintiff's limitations as flaring up if she does too much. They typically fish from a small boat and during a four to six hour day she displays stiffness and a need to stretch.

[41] He believes she has flare-ups in her symptoms once every one to two weeks that can last two to three days.

[42] They have plans to marry and have a family within the next five years.

[43] It is my view that none of the evidence of the plaintiff herself or other lay witnesses is inconsistent or cast any doubt on the conclusions and opinions offered by Dr. Travlos. As a result, I do not intend to review all of the lay witness testimony.

[44] The plaintiff was sceptical of Dr. Travlos' opinions expressed in his first report and somewhat reluctantly followed his recommendations regarding reducing therapies. Her counsel put it this way in his written submissions:

> 227. Things start turning around with Dr. Travlos' first report of January 17, 2018, which was timed approximately two months before the March, 2018, breakup with Mr. Lion.
>
> 228. The Plaintiff was upset by the report, which to her appeared to minimize the symptoms she was experiencing, encouraged her to embrace activity which was causing her flare-ups of pain and recommended weaning off the care that she had become dependent on to resolve her flare-ups.
>
> 229. It's a testament to the Plaintiff that she had what it took to follow through with the recommendations. The Care Timeline (Exhibit 2, tab 3) shows a marked reduction of passive therapies and the evidence shows the Plaintiff starting to regain her functionality.

[45] While she acknowledges that gains have been made, she continues to express scepticism about the benefits that counselling may offer. She did testify that she was to see a chronic pain psychologist after the trial concluded.

[46] She continues to be more willing to embrace the thinking that additional manual therapies and treatments, beyond what Dr. Travlos recommends, are helpful

to her. She is “scared” of the prospect of limited manual therapies. It would seem this is the manifestation of Dr. Travlos’ diagnosis and supports the need for the assistance of a suitably focussed psychologist.

[47] That testimony and those expressions form part of the basis for the defence to argue that the plaintiff is “litigation conscious”.

[48] The defence points to video surveillance, social media posts including photographs, as well as her resignation email to School District 67 in support of the argument that the plaintiff’s limitations are modest. I will comment further on this evidence in the analysis of the specific heads of damage.

[49] It is difficult to distinguish between the plaintiff being litigation conscious (which is really an assertion of lack of credibility) and someone displaying the symptoms of somatic symptom disorder and specifically a preoccupation with their symptoms. Either requires the trier of fact to recognize the plaintiff’s testimony regarding her symptoms is given with that influence. Obviously a conclusion that she is exaggerating to aid her claim has consequences in relation to the balance of her testimony.

[50] I conclude that the plaintiff was being an honest, straightforward witness but that her mental state continues to cause her to be somewhat preoccupied with her symptoms. Her sense that Dr. Travlos, and by extension the Court, may minimize her symptoms prompts her to try to ensure that does not occur. While, at least through counsel she accepts and endorses Dr. Travlos’ conclusions, she continues to find it difficult to accept those conclusions. This is further demonstrated by her hesitation to undertake his recommended treatment with a psychologist. She quite sincerely believes that her experience is a product of physical injury with only a consequential psychological impact.

[51] It is my conclusion that Dr. Travlos’ conclusions are accurate.

Non-Pecuniary damages

[52] The greatest impact of the collision injuries was during the period leading up to the plaintiff's second visit with Dr. Travlos. As a result of following at least some of the advice received following the first visit, her condition improved.

[53] A plaintiff should not be penalized as a result of their stoicism. Here, as is often the case where a plaintiff pushes through their pain, the question is how to interpret what the plaintiff has been able to do without inadvertently imposing such a penalty.

[54] Dr. Travlos has stressed the importance of being as active as the plaintiff can be to achieve maximal recovery. Dr. Travlos does not provide any objective measure of what that level of activity should be.

[55] The plaintiff has dealt with persistent pain that has limited her engagement in activities such as hunting. Those limitations have affected her relationships with past and present boyfriends. This is understandably frustrating for an active and young individual.

[56] Her work and particularly her ability to work two full time jobs over an extended period, albeit with consequences, her engagement in hunting, softball and other activities provides some perspective on the severity of her symptoms. This is generally consistent with Dr. Travlos' reports. In his first report, he noted her pain was mild. In his second report, he concluded that she had "clearly improved quite significantly". He further stated in October 2022, that "[a]lthough improved, Ms. Boettcher remains with a somatic symptom disorder with predominant pain, but this is quite mild now."

[57] In his October 2022 report, he confirmed she has "returned to a lot of her preferred activities, albeit with some restrictions" and that he "would not specifically restrict her but she may have to restrict herself in order to accommodate her pains".

[58] Being able to work two full time jobs for an extended period gives some objective context to the level of pain she lives with. Recognizing this is not penalizing the plaintiff for her stoicism but rather is simply considering the whole of the evidence to try to best understand the level of impairment she has.

[59] The surveillance video and social media posts again provide context. This evidence does not contradict her testimony or the opinion of Dr. Travlos as to her ongoing symptoms, but does provides some additional context as to the nature of those symptoms.

[60] The injuries place the plaintiff in a dilemma. She must push herself physically and find that maximum that does not become counterproductive. This requires her to maintain “structured continuous exercise”. She must also manage her symptoms with medication, and learn to cope with some level of persistent pain.

[61] With the diagnosis of somatic symptom disorder the assistance of a suitably trained psychologist is logical. The plaintiff testified about seeing a psychologist but no report was placed into evidence and there is no indication that met the parameters set out in Dr. Travlos’ recommendations. To the point of trial, there is no evidence she has undertaken the recommended psychological treatment in the form of “cognitive behavioural management, mindfulness-based therapies, and education regarding meditation self-hypnosis etc. [sic]”. The extent to which this would assist is therefore unknown.

[62] There is an observation in Dr. Travlos’ report of October 2022, which is referenced by the plaintiff that requires comment. Dr. Travlos notes at p. 19 of his October 2022 report that “[i]t is my opinion that she is at risk and, should another event or accident occur, she will likely have a protracted recovery and less than a return to her current baseline should such an event occur.” In her submissions on non-pecuniary damages, the plaintiff describes this as “an ominous risk”.

[63] Dr. Travlos does not suggest a risk of degeneration absent a future injury. He does not provide any further description of the type of “event” that would be required.

[64] In cases dealing with contingency deductions where plaintiffs have pre-existing conditions, the courts assess whether there is "a real and substantial possibility, thereby giving rise to a measurable risk" that a future event would have aggravated the pre-existing condition (see *Dornan v. Silva*, 2021 BCCA 228). Here the question is whether there is a risk the plaintiff will suffer such an event resulting in the decline in the plaintiff's condition. On the evidence here, I do not find that to be so.

[65] Both plaintiff and defence referenced authorities in support of their respective positions on non-pecuniary damages. While helpful, each case is of course unique. In addition, pain is a subjective experience and describing or categorizing it is not easy. This makes comparisons with others' experiences difficult. I will reference only some of those.

[66] *Stapley v. Hejslet*, 2006 BCCA 34, provides a foundation for the assessment. It is also a basis for a more structured approach to considering the authorities presented. The oft-cited paragraph from that decision is:

> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
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> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
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> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
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> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[67] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experience in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate those experiences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[68] In *Moon v. Yaranon*, 2021 BCSC 818, a 30-year-old nurse suffered soft tissue injuries. The Court stated in para. 30:

> [30] . . . I do accept that the accident has inflicted on the plaintiff chronic whiplash-associated disorder, chronic mechanical spine pain, chronic cervicogenic headaches, and chronic myofascial pain syndrome. There is a significant chance that she will continue to suffer from these conditions to some extent for the rest of her life, subject to further treatments, as discussed in the next section.

[69] The Court awarded $95,000 for non-pecuniary damages.

[70] In *Fennell v. Mikulasik*, 2021 BCSC 2102, the 25-year-old plaintiff sustained soft tissue injuries to her neck and shoulders and developed posttraumatic migraine headaches. The Court concluded that she was left with "ongoing neck pain which waxes and wanes in severity depending on what activities she is doing" and that she was "likely to encounter headaches and neck pain on a permanent, chronic, basis and any medication regime…[was] not likely to be curative." The Court awarded $105,000.

[71] In *Matthews v. Wong*, 2021 BCSC 237, the plaintiff was 35-years-old at the time of trial. The Court found he suffered a dislocation and tear in his right shoulder, soft tissue injuries to his neck, low back, right shoulder and right leg, and a right ulnar nerve injury to his right elbow. He also had ongoing pain and stiffness in his right shoulder and lower back. The Court described the impact on the plaintiff at paras. 55 to 59 as follows:

> [55] As a result of the injuries he suffered he is no longer engaging in the type of recreational activities he used to participate in. He no longer goes skiing or on difficult hikes. He has given up going camping and sold his camping equipment. He has been able to return to the gym but is not able to participate in the same type of weightlifting.

> [56] He experiences pain when he physically stresses his shoulder. The pain restricts his ability to lift, reach, and forcefully push and pull. He is able to carry out some household chores but finds vacuuming particularly bothersome for his back.
>
> [57] His sleep continues to be disrupted and he has to sleep in a certain position to ease the pain in his right shoulder.
>
> [58] He has tried a number of therapies. They have assisted but not resolved his injures.
>
> [59] The collective medical evidence is that a prognosis for a full recovery is poor. He is likely going to live with the ongoing shoulder and back pain for the rest of his life.

[72] The plaintiff was awarded $90,000 which included a component for his loss of housekeeping and cleaning capacity post-accident.

[73] *Herd v. Saroya*, 2021 BCSC 1267, involved a 38-year-old plaintiff who was left with chronic pain in her neck and left shoulder. She had restricted ability to turn her neck and her left shoulder had become locked. She experienced shooting pain down her left arm along with numbness and tingling in the fingers of her left hand leaving her limited in her ability to use her left arm. The focus of treatment was on pain management, and the accommodation of the plaintiff in her work and home life. She could not return to her work as a housekeeper. Her ability to enjoy recreational activities was impaired, her sleep disrupted and her mood adversely affected.

[74] She was awarded $110,000.

[75] *Reddy v. Enokson*, 2021 BCSC 412, involved a 22-year-old plaintiff. She suffered soft-tissue injuries to her neck and upper back, mid-back, low back and left knee. She was left with chronic and constant pain in her low to mid-back as well as pain in her neck and upper back and headaches several times each week. The knee injury resolved.

[76] Her injuries caused low mood, which led to weight gain. That in turn exacerbated her physical symptoms and further limited her work capacity and stamina. The prognosis for recovery was poor. Recommended treatments, including

counselling, were expected to help the plaintiff manage her pain and improve her functioning.

[77] The Court awarded $90,000 for non-pecuniary damages.

[78] In *Manhas v. Jaswal*, 2020 BCSC 586, the Court found the plaintiff's pain and mood symptoms were ongoing after more than seven years. She had continuing low levels of daily neck pain, semi-monthly flare ups of more serious neck pain, and associated headaches. During these flare ups, she was unable to function until her medication took effect. The plaintiff, who was described as "stoic and hardworking" needed time to recover at the end of each work day. Her award was $60,000.

[79] Considering these authorities, my findings, and the factors set out in *Stapley*, it is my conclusion that an award of $90,000 is appropriate for this plaintiff.

Loss of earnings/earning capacity

[80] The plaintiff's claim for loss of earnings, both past and prospective, is based on the assertion that she would have pursued a life long career as a care aide beginning in July 2016. That date assumes that she would have commenced the six-month training program by January 2016.

[81] In the agreed statement of facts is a table showing the earnings of publicly employed care aides. The following excerpts from her written argument explain the basis for the past and future income loss claims:

> 247 c) Care Aide earnings from July 1, 2016, through to the present, taking into account the applicable hourly rates plus Municipal Pension Plan employee contribution rates, derived from Exhibit 11. It is submitted that we add one overtime shift per week at double the applicable hourly rate. For ease of calculation, and to be conservative, it is proposed that we use the hourly rate As of April 1, 2016 ($23.05), which at 7.5 hours per overtime shift is $172.87, multiplied by 52 weeks is $8,989.50 per year.
>
> . . .
>
> 249 a) Care Aide earnings at current hourly rate / MMP employer contributions ($52,514.00 plus 9.31% ($4,889.05) plus an assumed one OT shift per week ($26.93 x 2 x 7.5 hours x 52 weeks = $21,005.40 totalling $78,308.45;

> b) Adding an assessment of the employer cost of benefits. In this regard it is proposed that we use the employer cost of benefits paid to Ronda Moores (Exhibit 10, page 2, Employer Contributions, Healthcare Benefit Trust of $6,885.80) as a guide, which as a percentage of Ms. Moore's gross earnings is $6,885.80 / $67,510.48 = 10.2%, and assume that the Plaintiff will actually have employer benefit contribution according to the average of 5.09% (Exhibit 11), a difference of approximately 5%. 5% of $78,308.45 is $3,915.42.

[82] Dr. Travlos' report notes the opinion of the occupational therapist regarding working as a care aide and had this to say regarding the potential of the plaintiff working in that occupation:

> Although Ms. Boettcher probably could do the work for a period of days at a time, she would not be able to do such work on a durable basis due to the persistence and the expected increase of her chronic pain condition (Somatic Symptom Disorder) with such heavier work. She needs to find work that she can tolerate and thus allow her to work full-time hours. By having tolerable work, she is less likely to have regular flare-ups.

[83] Ms. Bos opined that the plaintiff does not meet the job demands as an LPN or a care aide.

[84] I am satisfied that the plaintiff's injuries make it unrealistic for the plaintiff to pursue a career as a care aide. While she may be able to perform the duties in some placements, she certainly would not be suitable for most which would risk being unsuccessful as a new graduate in securing or retaining work.

[85] This conclusion does not however provide the foundation for accepting the plaintiff's arguments regarding the assessment of past and prospective loss of earnings or earning capacity.

[86] I will first comment on the focus on the earnings of a care aide as the foundation for these claims and then proceed with my assessment of the past and future loss of earnings claims separately.

[87] There are general and specific contingencies associated with the plaintiff's proposition. Although not mutually exclusive, I break these down into three categories. The first is the level of certainty the plaintiff would have pursued that as a

career had the MVC not occurred. The second is the likelihood it would have been a lifetime career if she did. The third is the level of earnings for a care aide even if it is appropriate to use that as a benchmark career.

Likelihood that the Plaintiff would become a care aide

[88] The plaintiff's evidence was that, at about the time she had started working with her father in April 2015, she was "thinking about it" but she "didn't really go any further other than it was an idea I was thinking of and I was seriously considering." In her argument she characterized the state of her plans by stating "[t]he Care Aide program was on the Plaintiff's radar at the time of the accident."

[89] She testified that she had talked to a friend (who did not testify), her sister-in-law, Madylon Christley, and a family friend, Ronda Moores, who all were working as care aides.

[90] Madylon Christley testified and described her path to working as a care aide, her impressions about the job and availability of work.

[91] She took her training at Okanagan College and understood there are significant wait lists to get into that program. She understands that program's graduates are sought after by employers. Her impression is that there is high demand generally for care aides and lots of overtime available once in the positions.

[92] The evidence is not clear on when the plaintiff might have entered school but for the MVC. It is not clear when or if the plaintiff would have been accepted into the Okanagan College program. There is no evidence as to where other programs are offered and the plaintiff's willingness to seek the training elsewhere.

[93] I find it likely she could and would have been able to save for the program but the specific costs and when she would have reached the goal are not established by the evidence.

[94] The plaintiff had shown a real interest in pursuing the job prior to the MVC but had taken no formal steps toward doing so. It is far from certain that the plaintiff

would have become a care aide at all and, if she did, what her commencement date for such employment would have been.

[95] The evidence does not support drawing the conclusion that the plaintiff would have become a care aide, only that there was a real and substantial possibility that she would have done so.

Likelihood that the Plaintiff would remain a care aide through her working life

[96] Ronda Moores testified that she has worked as a care aide for approximately 16 years.

[97] It was Ms. Moore's understanding that there is a shortage of care aides. In her experience some leave the job for less physically demanding jobs.

[98] Ms. Bos testified that job demands for care aides do vary by location and clientele. Ms. Bos' report contains this description:

> It is my opinion that Ms. Boettcher does not meet the job demands of an LPN or Care Aide. These positions require Medium level strength throughout an entire shift and on subsequent shifts. These positions do not have easy or light days for recovery. The care aid job involves providing personal care (dressing, toileting and bathing) for clients, transferring, mobilizing, and positioning.

[99] Ms. Bos agreed that people in the profession often move to other employment because of its demands.

[100] This is anecdotal evidence and not supported by any data or statistics.

[101] While I have no statistical or vocational expert evidence on these subjects, the evidence presented by the plaintiff suggests that, whether because of age impacting the ability to continue, dissatisfaction with pay given the demands or generally tiring of the position, some leave the occupation. These are general contingencies.

[102] The plaintiff has demonstrated, at least in the early stages of her working life, a willingness to change direction even after taking educational programs and while enjoying her work and being successful at it. This is a specific contingency.

[103] In her argument, the plaintiff noted she would have been motivated to become a care aide because she felt a level of competition with Ms. Christley.

[104] I do agree with the proposition that the plaintiff's job and career aspirations seem to be influenced by those close to her. In that regard another of the plaintiff's witnesses was Shaylee Cates. She graduated with the plaintiff and spent lots of time socializing with the plaintiff after graduation both before and after the MVC. She is employed as an early childhood education ("ECE") and presently earns $30/hr working at a daycare in Salmon Arm. At her previous placement she earned $19.75 working in Kelowna.

[105] It is equally as likely that the plaintiff would have been drawn to consider pursuit of becoming an ECE without the MVC, as she is now considering post-MVC, by the attraction of the income potential.

[106] When she resigned from her CEA position with School District 67, she sent an email to her employer indicating the only reason for her resignation was the commute. When cross-examined about her reasons, she indicated that was one reason but the main reason was the opportunity to earn more money doing community support work. She confirmed that she is currently looking at the possibility of becoming an ECE.

[107] There is nothing to indicate that the plaintiff's willingness to change career paths might not have been the case had the MVC not occurred and she had become a care aide. The plaintiff's ambitious nature alone may have provided other opportunities for career change. Add to that the demands of being a care aide and the incentive to transition out may have been high.

[108] I conclude that even if the plaintiff had become a care aide, there is a substantial possibility it would not have been a life-long career. This is a product of both general and specific contingencies.

Level of earnings if the plaintiff had become a care aide

[109] As a 16-year veteran, Ms. Moores earns $26.95/hr working in the private sector and could work as much overtime as she is willing to take. This is essentially the same as the hourly rate for publicly employed care aides in 2022 and $1.46/hr less than that benchmark in 2023. The annual base earnings for a publicly employed care aide in 2023 is $55,400. There is no other evidence of earnings in the private sector generally.

[110] If employed in the private sector, the evidence does not establish that the plaintiff would have earned the same amount as Ms. Moores in the early stages.

[111] The agreed statement of facts setting out the earnings of publicly employed care aides says nothing about the relevance, if any, of seniority to earnings levels. I infer from the evidence presented by the plaintiff that private sector earnings for new training graduates is less than in the public sector.

[112] The plaintiff is young, intelligent and motivated. To conclude that, even with her injuries, she will not now meet or exceed the earnings of Ms. Moores or that of a care aide in the public sector is inappropriately pessimistic. The proposition that the plaintiff will earn less than she would have as a care aide is not proved.

[113] She is young and motivated. She has demonstrated her interests and/or financial incentives have drawn her to change paths early in her working career. While her choices are now also influenced by and constrained by her injuries, her skills include adaptability.

[114] In *Dornan* at para. 157, the Court of Appeal endorsed these comments of Mr. Justice Voith (then of the Supreme Court of British Columbia) in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133:

> The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident…

Past Loss of income or opportunity

[115] The plaintiff's actual earnings since the MVC are as follows:

Tax Year	Total
2016	$487.00
2017	$22,380.70
2018	$31,193.16
2019	$31,514.52
2020	$44,481.78
2021	$57,138.27
2022	$50,284.14

[116] To determine the past loss claim, the plaintiff says her actual earnings should be subtracted from the amount she says she could have earned as a care aide assuming she would have commenced that employment in July 2016.

[117] In the context of past claims based on hypothetical events, the standard is a real and substantial possibility (*Rousta v. MacKay*, 2018 BCCA 29 at para. 17).

[118] As noted above, I am satisfied that the plaintiff has established to that standard that she may have become a care aide. It is realistic that she would have done so sometime in the period between the MVC and the date of trial.

[119] I must then assess whether there is a real and substantial possibility that consequence resulted in a pecuniary loss. The care aide earnings are not exceptionally high. The evidence of earnings of alternative occupations is limited to anecdotal information from witnesses and those witnesses' own earnings. Nonetheless this is some evidence to support what is also a logical proposition; that

other employment opportunities with as good as or better pay would be available to the plaintiff even with her post-MVC restrictions.

[120] Distilled from the discussion above, there are a number of contingencies that impact the reasonableness of the calculation presented by the plaintiff in argument as to the past loss claim. They include:

a) The plaintiff may not have actually chosen the care aide program due to financial constraints, delays in securing entry to a program of her choosing or simply deciding to pursue other options;

b) If the plaintiff was delayed in entry but still pursued the program, she would obviously have been delayed in obtaining the earnings of a care aide;

c) Upon completion of the program, she may not have succeeded in finding employment in the public sector;

d) If she took employment in the private sector her earnings may have been no higher than her actual earnings; and

e) If she found employment in some capacity as a care aide, she may have decided to leave that employment.

[121] The defendant does not dispute that the plaintiff's injuries prevented her from working from the MVC to September 2016, when she returned to school for her CEA program. The defence estimates the loss of income to that time based on her earnings at the time of the MVC using the following analysis:

> Assuming the Plaintiff worked there for 62 weeks (roughly until September 2016, with 4 weeks of holidays) averaging 35 hours a week at $16/hour, she would have made $34,700 gross or ~$29,950 net of tax and deductions.

[122] The defence argument proposes an award of $28,000.

[123] That calculation is reasonable if one adopts that analysis. I do not do so fully.

[124] It is my conclusion however that any additional past loss of earnings attributable to the prospect that the plaintiff would have become a care aide is minimal. I would add $10,000 for a total of $38,000.

Future loss of earnings/earning capacity

[125] The approach to the assessment of claims for future loss of earnings or earnings capacity has been addressed by the Court of Appeal with some frequency of late. A very recent summary of that approach is contained in *Davies v. Penner*, 2023 BCCA 300, as follows:

> [25] An award for loss of future earning capacity is intended to return the plaintiff to the position they would have been in, had they not been injured: *Athey v. Leonati*, [1996] 3 S.C.R. 458. The court must compare the likely future of the plaintiff's working life without the injury to their likely future working life with the injury: *Rab* at para. 65. The three-part test set out in *Rab*, at para. 47, involves two inquiries and an assessment:
>
> a) Whether the evidence discloses a potential future event that could lead to a loss of capacity;
>
> b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and, if a real and substantial possibility exists;
>
> c) Assessing the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.
>
> [26] The first step is "evidentiary". Where the evidence indicates no loss of income at the time of trial, a number of considerations are relevant to the question of whether there is an impairment of capacity: *Rab* at para. 36, referring to *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.):
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
>
> In *Rab*, Justice Grauer specifically recognized "chronic injury, future surgery or risk of arthritis" as circumstances that could give rise to a potential future event based on the considerations set out in *Brown*: at para. 47.

> [27] The second step requires a trial judge to consider whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. A real and substantial possibility is a higher bar than mere speculation, but does not require proof on a balance of probabilities: *Gao v. Dietrich*, 2018 BCCA 372 at para. 34. A finding of diminished earning capacity at the first stage does not necessarily mean that there is a real and substantial possibility that the plaintiff's diminished capacity will lead to a pecuniary loss in their particular circumstances: *Rab* at para. 44; *Bains v. Cheema*, 2022 BCCA 430 at para. 22. The inquiry must be answered based on the whole of the relevant evidence.
>
> [28] The final step is assessing the value of the possible future loss. This must include assessing "the relative likelihood of the possibility occurring": *Rab* at para. 47. There are two ways to quantify a loss of future earning capacity; the earnings approach and the capital asset approach. Generally, cases where plaintiffs' injuries have exposed them to future loss of capacity but their income at trial is at or near their pre-accident level of earnings, lend themselves to the capital asset approach: *Rab* at para. 30; *Kringhaug v. Men*, 2022 BCCA 186 at para. 43. Depending on the particular circumstances, there are a number of methods by which the court can assess loss of future earning capacity based on the capital asset approach: *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43 (C.A.).

[126] In *Rab v. Prescott*, 2021 BCCA 345, the Court described less challenging factual scenarios at para. 29 but added this at para. 30:

> [30] But in other cases, assessing the possibility of a future income loss is less straightforward. Among these are cases involving plaintiffs whose injuries have led to continuing deficits, or have exposed them to future problems, yet whose income at the time of the trial is at or near the level of earnings they enjoyed before the accident. These tend to be cases that lend themselves to the capital asset approach to quantifying the loss. Grewal was such a case, as were Pallos, Brown and Perren. This one is also such a case. The respondent advanced no claim for past loss of income, and her income at the time of trial, all of which was passive, was greater than it had been at the time of the accident.

[127] Here the plaintiff was less than a year out of high school at the time of the MVC and had not even settled on, let alone established, a specific career path.

[128] I have no difficulty concluding that the plaintiff has limitations that make each of the statements in *Brown v. Golaiy as* set out above in *Davies* applicable. As noted in *Rab*, however, such conclusions constitute the future event in the first inquiry (at para. 48) and do not determine an entitlement to an award. What I must go on to consider is "whether there is a real and substantial possibility" that this loss of

capacity will cause a pecuniary loss in the future. If so, I must then articulate an assessment of the relative likelihood of any such possibility occurring.

[129] The Court of Appeal in *Donan* provides guidance on the concept of a "real and substantial possibility" including the following:

> [63] Such discussion, of course, of necessity concerns hypothetical events: what will or what would have happened in the future? As observed by Mr. Justice Goepel in Grewal v Naumann, 2017 BCCA 158 at para 48, and as I discuss further below, "a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation". A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable.
>
> [64] It follows that the process is one of determining whether, on the evidence, the contingency or risk is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood. This was explained succinctly by Justice Major in Athey:
>
> > 27 Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: Mallett v. McMonagle, [1970] A.C. 166 (H.L.); Malec v. J. C. Hutton Proprietary Ltd. (1990), 169 C.L.R. 638 (Aust. H.C.); Janiak v. Ippolito, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: Schrump v. Koot (1977), 18 O.R. (2d) 337 (C.A.); Graham v. Rourke (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).[Emphasis added.]

[130] The plaintiff says her projected earnings from her current employment should be subtracted from the future loss claim.

[131] The plaintiff's arguments that being a care aide would have been her lifelong career or that her with-injury earnings will never exceed the present level are not compelling.

[132] My comments above regarding general and specific contingencies apply here as well. In the much longer future time frame under consideration in the future loss analysis, the plaintiff acknowledges additional considerations. They include the following from her argument:

1. The likelihood of the Plaintiff having children and taking maternity leave; and
2. The potential, if established by the defence, of the Plaintiff taking some further training to achieve earnings at or above her "should have" Care Aide earnings.

[133] The plaintiff testified that she plans to have children. She presented a present value table providing a calculation with the trial date as the starting point and assuming zero income for a one-year maternity leave in three years and another maternity leave in five years after trial. The table extends out to the plaintiff's age 67.

[134] In my view, there are so many variables and considerations that using the care aide earnings as a foundation for this assessment has little value. Indeed setting that as a ceiling for her future earnings potential either with or without the MVC injuries is not reflective of her potential.

[135] This does mean that the evidence does not support a conclusion her chronic injury could give rise to a future event based on the considerations set out in *Brown*. It is my conclusion that there is a real and substantial possibility that the "future event" in question will cause a pecuniary loss.

[136] There is no specific calculation that I can discern from the evidence to assess that possibility. Given her age, even a modest annualized loss for a working career to age 65 is significant. For every $1000 annual loss, the net present value using the applicable multiplier is $29,916.

[137] In all of the circumstances, I assess the future loss of earnings capacity to be $150,000 (~$5000 x $29.916). I note as well this is roughly the equivalent of three years' current earnings.

Costs of Future Care

[138] Dr. Travlos provides the only expert guidance on future care. He is the plaintiff's expert. The list below is drawn from his October 5, 2022 report:

- She would benefit from cognitive behavioural pain management, mindfulness-based therapies, and education regarding meditation, self-hypnosis, etc.
- I remain of the opinion that she needs to be predominantly reliant upon herself for her pain management, but in individuals with chronic pain the occasional use of outside assistance to assist with symptom flare-ups is appropriate. In other words, the occasional physiotherapy or massage therapy treatment is reasonable, but I would not envisage more than 10-15 such treatments in combination per year going forwards. In other words, Ms. Boettcher needs to organize and manage her activities, exercise and do her stretches on a regular basis to manage and cope with the pain symptoms, and then if necessary she can go for additional assistance.
- Ms. Boettcher would benefit from the intermittent use of medications in the form of over-the-counter pain relievers when needed.
- Ms. Boettcher no longer requires antidepressants such as Cipralex for depression per se. I do nevertheless recommend a trial of nortriptyline rather than the amitriptyline that she tried before. The nortriptyline is definitely better tolerated and less sedating. The dose should start out at between 5-10 mg and increase slowly depending on her tolerance in either 5 mg or 1 0 mg increments. She may probably only need between 10-20 mg.
- I do strongly recommend Ms. Boettcher try to follow sleep hygiene guidelines and she may need some education in that regard.
- The last, and probably the most important, mainstay of symptom management is going to be structured, continuous exercise. . . . she does not need to continue to see the kinesiologist. If she plans to go back to the gym, she probably should have five or six sessions with a kinesiologist in the gym to help her adjust to a new gym-based program that would involve the different equipment within the gym.

[139] In her written argument, the plaintiff proposes the following items of future care:

> 259 . . . that physiotherapy be awarded at a rate of 20 per year for each of 2023 and 2024, and then 15 per year for the next 10 years and then 12 ½ per year thereafter through her life expectancy. . . .
>
> . . .
>
> 263. . . . the Plaintiff be awarded the expense of 15 further kinesiology sessions on the bases that to accommodate her perceptions of what will best assist her.
>
> 264. [Cannabis on the basis of] the last 6 months of expense results in an average annual expenditure of $620.80

[140] For the most part, the claims do not accord with Dr. Travlos' recommendations. Key to Dr. Travlos' opinion is the comment that the plaintiff's condition is punctuated by a counterproductive dependency on care providers. This is not simply a question of how much treatment is enough but rather a case where the plaintiff's desire for more is a symptom of her injury and supporting her request is actually not in her interests.

[141] In my view, the award must be based on Dr Travlos' recommendations.

[142] While Dr. Travlos did not specify the period over which the use of physiotherapy or massage would be needed, the inference is that it will be a sustained requirement. The cost equivalent of 12.5 sessions/year or $1151.25 annually to age 70 is awarded.

[143] The plaintiff suggests an allowance for mileage for those attendances based on "current mileage round trip of 16.2 kms, which at $0.50 is $8.10, for a per-physiotherapy expense of $84.00 plus $8.10 = $92.10." That is to be added to the award.

[144] Curiously, the plaintiff's claim for care costs does not include any costs for psychological counselling or sleep hygiene education. I have no evidence of the cost of the specific type of counselling recommended by Dr. Travlos or that the plaintiff would engage in it beyond the appointment she described post trial. No award is made for that recommended counselling.

[145] The plaintiff has, on her own initiative chosen marijuana to manage her sleep and pain. She testified that after a six-week trial of recommended medications, she discontinued them in favour of marijuana edibles. It appears she has not tried the nortriptyline as an alternative to the amitriptyline that she did not tolerate well. The use of marijuana is not supported by any medical opinion nor is there any evidence as to the appropriate amount. I decline to make any award in this regard.

[146] The plaintiff did not indicate an intention to restart a gym program so no award is made in that regard.

[147] The amount awarded here is subject to any argument regarding deductions pursuant to section 83 of the *Insurance (Vehicle) Act*, RSBC 1996, c. 231. The parties agree any issues in this regard will be dealt with by agreement with leave to re-appear if they are unable to agree.

Special Damages

[148] As noted above, the parties ask the Court to rule on the special damages the plaintiff is entitled to but that an award not be made. As stated in the plaintiff's argument:

> "Much of the Special Damages amounts are not outstanding in terms of having been paid for by the Plaintiff and not been reimbursed. Many were paid directly by or reimbursed by ICBC. The Plaintiff proposes that the Court assess the expenses incurred, leaving it up to the parties to hopefully sort out what has been reimbursed or paid directly by ICBC."

[149] The award of special damages should reflect out-of-pocket expenses reasonably incurred as a result of an accident. Claims for special damages are generally subject only to the standard of reasonableness. When a claimed expense has been incurred for treatment aimed at promoting a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.

[150] The plaintiff's level of reliance on therapies is a feature of her diagnosis. She learned of this from Dr. Travlos' January 2018 report.

[151] The tapering of her attendances with treatment providers collectively is revealed in the table below. The data is taken from the records in evidence in support of her special damages claim. A "care timeline" prepared as an aid by plaintiff's counsel has totals that are different although similar. I have been unable to account for the difference but it does not impact my analysis. The pattern is however similar and that is the foundation of my conclusion:

	Psych	**Physio**	**Chiro**	**Massage**	**Kin-esiology**	**Prolo-therapy**	**Occ. Therapy**	**Plaintiff's Care Timeline totals**	**Total**
2015		45	19	19			5	88	88
2016		59	4	27	13		7	113	97
2017		36	2	19	5	8		75	65
2018		19	1	1	8	1		35	22
2019					8	1		22	9
2020	1	32	1	7	2	1		23	44
2021	1	20	3	1	3	3		29	31
2022		25		3	9	3		40	40
2023					1				1

[152] It was only in his October 2022 report that Dr. Travlos stated specifically the number of treatments he felt was appropriate. The plaintiff cannot be criticized for the number of treatments she attended in the time between the reports. She is entitled to recover all of the costs incurred including mileage subject to the deduction for expenses already paid.

[153] The defence suggests some of the mileage would have been incurred as the plaintiff was travelling anyway. It may be this is an example of the colloquial "chicken and egg" issue. In my view, the plaintiff is entitled to recover those travel costs.

[154] There will be no reimbursement for any cannabis expenses for the same reasons set out in relation to costs of future care.

[155] The cost of a vocational assessment has not been proved as a special damage. The plaintiff testified that she attended but details were never provided.

[156] As noted above, ICBC has paid for some of the treatments and any issues regarding the amount to be paid is to be resolved between the parties with leave to re-appear before me to resolve any remaining arithmetic issues.

Conclusion

[157] The total award is set out in the table below:

	Plaintiff	**Defendant**	**Award**
Nonpecuniary damages:	$105,000	$60,000 - $90,000	$90,000
Past loss of earnings / capacity:	$137,333.94	$28,000	$38,000
Future loss of earning capacity:	$694,732.79 - $738,764.50	$0	$150,000
Special damages:	$45,346.25 plus mileage	$37,109	To be determined per paras. 18, 148 & 156
Cost of future care:	$64,387	$5,000 - $10,000	$36,666.64

[158] I will not make any order as to costs here. In the absence of any other evidence, the plaintiff would be entitled to her costs. I have not heard from the parties and am unaware of any offers or other circumstances that may be relevant.

[159] If the parties wish to make submissions as to costs, any deductions or other issues arising out of these reasons, they should advise Scheduling within 30 days of the release of this decision.

"Betton J."