

2018 BCSC 988  
British Columbia Supreme Court

Johnstone v. Rogic

2018 CarswellBC 1559, 2018 BCSC 988

**Julie Lily Johnstone (Plaintiff) and Steve Rogic and  
Ridgemont Constructions Management Ltd. (Defendants)**

E. Burke J.

Heard: November 20, 2017; November 21, 2017; November 22, 2017; November 23, 2017; November 24, 2017

Judgment: June 15, 2018

Docket: Vancouver M154630

Counsel: T. Pettit, S. Khasha, for Plaintiff

Y.H.A. Ng, for Defendants

Subject: Civil Practice and Procedure; Evidence; Torts

**Related Abridgment Classifications**

Remedies

I Damages

I.5 Damages in tort

I.5.a Personal injury

I.5.a.i Special damages (pre-trial pecuniary loss)

I.5.a.i.A Expenditures

I.5.a.i.A.13 Multiple expenses considered

Remedies

I Damages

I.5 Damages in tort

I.5.a Personal injury

I.5.a.iii Principles relating to non-pecuniary loss

I.5.a.iii.F Multiple factors considered

Remedies

I Damages

I.5 Damages in tort

I.5.a Personal injury

I.5.a.iv Prospective pecuniary loss

I.5.a.iv.D Diminution of earning capacity

Remedies

I Damages

I.5 Damages in tort

I.5.a Personal injury

I.5.a.vii Cost of future care

I.5.a.vii.A Medication and treatment programs

**Headnote**

Remedies --- Damages — Damages in tort — Personal injury — Principles relating to non-pecuniary loss — Multiple factors considered

Plaintiff suffered injuries in 2013 motor vehicle accident — At time of accident, plaintiff was 42 years old and married with two young children — Plaintiff worked as quality assurance manager for company at salary of \$146,567 — Plaintiff claimed injuries to back and neck and that she developed chronic pain including severe headaches — Plaintiff did not take time off work and continued with normal work duties — Plaintiff was unable to properly care for children or undertake necessary household chores — Plaintiff's husband did majority of household tasks and described very changed household — Plaintiff previously enjoyed active recreational lifestyle including cycling and hiking but such activities aggravated plaintiff's condition — Plaintiff's temperament was affected by the pain and discomfort from collision — Plaintiff brought action for, among other things, non-pecuniary damages — Action allowed — Plaintiff suffered injury to back and symptoms of previously existing fibromyalgia were exacerbated by accident — Prognosis was guarded and uncertain — Injuries had profound effect on plaintiff's life — Plaintiff was irritable and unable to undertake activities with children or play physically as it caused too much pain — Appropriate award for non-pecuniary damages was \$145,000. Remedies --- Damages — Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Expenditures — Multiple expenses considered

Plaintiff suffered injuries in 2013 motor vehicle accident — Plaintiff brought action for, among other things, special damages — Action allowed — Special damages were agreed in amount of \$17,185.

Remedies --- Damages — Damages in tort — Personal injury — Prospective pecuniary loss — Diminution of earning capacity

Plaintiff suffered injuries in 2013 motor vehicle accident — At time of accident, plaintiff was 42 years old and married with two young children — Plaintiff worked as quality assurance manager for company at salary of \$146,567 — Plaintiff claimed injuries to back and neck and that she developed chronic pain including severe headaches — Plaintiff did not take time off work and continued with normal work duties — Plaintiff's temperament was affected by the pain and discomfort from collision — Plaintiff brought action for, among other things, prospective pecuniary loss — Action allowed — Plaintiff was in a high level executive position that required high degree of concentration — Medical evidence established that pain condition placed impairment on plaintiff's ability to work — There were also potential cognitive effects from long-term use of pain medication — Real and substantial possibility of loss of income in future was established — Plaintiff's future path was likely be in consulting with annual salary of \$100,000 — Plaintiff's total loss resulting from transition into consulting was amount of \$1,537,440.

Remedies --- Damages — Damages in tort — Personal injury — Cost of future care — Medication and treatment programs

Plaintiff suffered injuries in 2013 motor vehicle accident — At time of accident, plaintiff was 42 years old and married with two young children — Plaintiff worked in executive position — Plaintiff claimed injuries to back and neck and that she developed chronic pain including severe headaches — Plaintiff's temperament was affected by the pain and discomfort from collision — Plaintiff brought action for, among other things, cost of future care — Action allowed — Cost of future care was difficult to assess due to contingencies such as changes to treatment and time limitations of some treatments — Costs included medication, rehabilitation and household services — Realistic assessment of plaintiff's future care costs was \$250,000.

ACTION by plaintiff for damages for injuries suffered in motor vehicle accident.

*E. Burke J.:*

## INTRODUCTION

1 The plaintiff, Julie Lily Johnstone seeks damages for injuries sustained in a car accident that occurred on November 18, 2013. She was 38 years old at the time and had not suffered any injuries from any motor vehicle collisions prior to that date.

2 On June 29, 2015, Ms. Johnstone commenced this action against the defendants, Stefano Rogic and Ridgemont Constructions Management Ltd, the driver and owner respectively of the other vehicle involved in the accident.

3 Liability has been admitted. While the defendants concede Ms. Johnstone was injured in the accident, they contest the nature, extent, and seriousness of her injuries.

## **BACKGROUND**

4 Ms. Johnstone is now 42 years old. She is married with two children; a daughter, aged 6, and a son, aged 9. She is a Quality Assurance Manager at Jacobs Engineering, a company for which she has worked in various iterations for 16 years. She is, by all accounts, a highly driven individual who excelled at her job.

## **ISSUES**

5 The issues raised in this matter are:

1. What are the nature, extent, and duration of the injuries Ms. Johnstone suffered in the accident?
2. What is the appropriate award of non-pecuniary damages for pain and suffering?
3. What is the appropriate award for past income loss?
4. What is the appropriate award for future loss of earnings or income-earning capacity?
5. What amount, if any, should be awarded for the cost of future care?
6. What is the appropriate award of special damages?

## **THE MOTOR VEHICLE ACCIDENT**

6 On November 18, 2013, at around 8:00 a.m. Ms. Johnstone was returning home after dropping off her son to daycare. It was light out; dry and cloudy. Ms. Johnstone stopped at a pedestrian light that had been triggered near the intersection of Como Lake Avenue and Banting Street in Coquitlam and was forcefully rear-ended by a large construction van.

7 Ms. Johnstone could see the van coming in the rear view mirror. While hoping it would stop, she braced for the collision. The collision was hard and Ms. Johnstone described being in shock and started crying. She could not get out of her Nissan Pathfinder as the door was stuck. Ms. Johnstone also could not move her vehicle as the van was stuck to her car. The occupant of a second construction van following behind, assisted in releasing the two vehicles and she was able to drive around the corner to exchange information. Ms. Johnstone then drove home but required her husband's assistance to get out of the vehicle as the door would not open. The frame of the vehicle was bent by the collision.

8 Ms. Johnstone suffered a significant headache and pain at the back of her neck immediately after the accident and was in shock. However, she had an important meeting that afternoon. After reporting the claim to ICBC she went into work and requested assistance from another manager to co-facilitate the meeting.

9 The next day, Ms. Johnstone felt extremely sore and took pain medication. Ms. Johnstone left work early to attend a walk-in clinic. Unfortunately, the clinic was full. She eventually saw a doctor two to three days later. Ms. Johnstone was in significant pain and had more severe headaches. She described them as shooting pain tension headaches.

10 By the beginning of 2014, Ms. Johnstone remained in significant pain. She ultimately attended Dr. Hyams, a pain specialist in June 2014 for a variety of treatments and medication for pain, ultimately requiring a Butrans patch. From August 2016 she attended the CHANGEpain clinic. Her Butrans pain medication patch has been increased to the maximum dosage. Ms. Johnstone has also undertaken Botox injections from April 2015 to present and acupuncture treatment both for pain from November 2016 to the present time.

11 As a result of the accident, Ms. Johnstone also attended numerous chiropractor and massage therapy treatments. She ultimately found both to be too painful to continue. These are detailed in the schedule of special damages and encompass close to 100 visits from November 2013 to May 2016.

12 Despite all this, Ms. Johnstone has not taken time off work and continued with her normal work duties.

13 Ms. Johnstone and her husband largely shared the care and maintenance of the home. Ms. Johnstone had a "good marriage" and a cheerful disposition. As noted, she has two young children and was constantly active and loving with the family. Since the accident, however, Ms. Johnstone has been unable to properly care for her children or undertake necessary household chores. Her husband now does the majority of the household tasks and described a very changed household.

14 Ms. Johnstone had also previously enjoyed an active recreational lifestyle, including cycling and hiking. Since the collision, she is unable to do so as her symptoms are aggravated.

15 Ms. Johnstone's temperament has been affected by the pain and discomfort from the collision. She is reported by friends, family and co-workers to now be short-tempered and no longer displaying her previously bubbly outgoing disposition. Her husband attributes this to the pain she is suffering. This has impacted her husband and children. While understanding that the pain is the cause of this, her family, and Ms. Johnstone's husband in particular, has grown frustrated by the debilitating effect of coping with Ms. Johnstone's persistent back pain and common severe migraines.

***1. What are the nature, extent, and duration of the injuries Ms. Johnstone suffered in the accident?***

*Legal Principles*

16 Ms. Johnstone claims she sustained soft tissue injuries to her neck and lower back. She claims she has developed chronic pain in her back and severe headaches that are debilitating. While she has Type 1 Diabetes and fibromyalgia, she was not receiving treatment for the latter for at least four years prior to the accident. Her Type 1 Diabetes was controlled with an insulin pump.

17 Ms. Johnstone must prove on a balance of probabilities that "but for" the accident, she would not have suffered the injuries she now complains of.

18 As per *Athey v. Leonati*, [1996] 3 S.C.R. 458, I must ascertain whether the accident is the cause of Ms. Johnstone's current issues and whether there were pre-existing injuries and therefore "a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence". A plaintiff is entitled to be restored to her original condition, which in this case the defendants argue, included pre-existing conditions.

*The Medical Evidence*

19 There was no dispute in the medical evidence that Ms. Johnstone suffered injury to her lower back as a result of the November 2013 accident. The defendants nonetheless submit that in order to properly determine the injuries suffered, I should consider Ms. Johnstone's pre-existing health status. They submit that her longstanding Type 1 Diabetes and associated complications remain risks into the future. The defendants also argue that her Dupuytren's contracture, trigger finger and carpal tunnel are independent of any effects of the accident, and that her pre-existing fibromyalgia has caused headaches, migraines and soreness in her neck.

20 The defendants agree that Ms. Johnstone experienced soft tissue injuries that manifested as back pain. They say however, when overlaid on her pre-existing fibromyalgia, there may have been some increase in overall pain, headaches and migraines, but they are not otherwise connected to the accident. I will deal with the fibromyalgia issues later in my analysis.

21 Dr. le Nobel, the physiatrist called by Ms. Johnstone, was of the opinion, as set out in his report of March 2017, that Ms. Johnstone sustained myofascial injuries to her lower back with a possible injury involving the facet joints in the lower back. Due to the passage of time, he diagnosed Ms. Johnstone's lower back condition as a chronic pain condition.

22 Dr. Stolar, a rheumatologist called by Ms. Johnstone, provided a similar diagnosis of chronic lumbar spine pain in her report of May 2017.

23 While the defendants raised an issue as to whether Ms. Johnstone sustained an associated injury to her hips, there is no dispute she complained of injuries to her hips to Dr. Cubra, her family physician, on November 21, 2013 and onward. Dr. le Nobel confirmed the accident has caused hip complaints and noted these in April 2014 physiotherapy records. He diagnosed this as tendinopathy and greater trochanteric bursitis in his July 2017 report.

24 While Dr. Hummel, an orthopedic surgeon, was of the view the hip pain started after injections for pain in October 2014, he agreed he had missed the reference to left hip pain in Dr. Cubra's November 2013 records. In any event, the parties agreed as the injections were necessitated by the ongoing pain from the accident, the hip pain was in any event caused by the accident.

25 Ms. Johnstone has followed all advice and spent considerable time and energy to attempt to treat her lower back injury. This, however, has not been successful. She continues to suffer significant pain from the lower back injury. As noted, Ms. Johnstone undertook chiropractic and massage therapy from November 2013 to May 2016. She attended Dr. Hyams, a pain specialist for trigger point injections, prolotherapy, other medications and ultimately was prescribed a significant opioid medication, and a Butrans patch beginning at 10 mcg which increased to 15 mcg in November 2015. Ms. Johnstone, then attended at the CHANGEpain clinic from August 2016 receiving further treatment, including injections for pain and further medications.

26 In November 2016 her doctor increased her Butrans patch to 20 mcg, the maximum dosage for this medication. She has also pursued acupuncture. Ms. Johnstone testified that the only medication that has worked for her and enabled her to function at work is the Butrans patch.

27 Dr. le Nobel recommended further treatments including a multi-disciplinary rehabilitation program, fluoroscopic x-ray guided injections, physiotherapy, intramuscular stimulation and/or acupuncture and facet rhizotomies. He nonetheless opined that there were no treatments available which would, with certainty, resolve Ms. Johnstone's lower back pain permanently. He also recommended image-guided instillation of local anesthetic and corticosteroid to manage Ms. Johnstone's hip pain.

28 Dr. Stolar noted that most of the treatments that had been tried by Ms. Johnstone to date, apart from the Butrans patch, had not been successful, and some had even aggravated the pain. She recommended CT scanning or an MRI to evaluate whether there was nerve root impingement. This was done, but did not show nerve root impingement. Dr. Stolar also recommended continuation of the Butrans patch, Cymbalta and continued follow up with a multidisciplinary pain approach.

29 Dr. Hummel recommended only a self-directed course of exercises, treatment for Ms. Johnstone's fibromyalgia and core strengthening. Nonetheless, he agreed with Dr. le Nobel and Dr. Stolar that Ms. Johnstone had suffered an injury to her lower back and that her prognosis was guarded, as she had numerous barriers to recovery. He also agreed in his testimony that Ms. Johnstone's prior fibromyalgia could have been exacerbated by the accident and that he deferred to those experts that had given an opinion about the connection between her complaints of headaches and the accident.

30 I accept that Ms. Johnstone suffered injury to her back and that the symptoms of her previously existing fibromyalgia were exacerbated by the accident. She has not recovered from the injuries she sustained and in fact, her prognosis is guarded and uncertain. She continues to experience physical pain and her family and social life has also suffered.

31 Fundamentally, as Ms. Johnstone has argued, the injuries and pain arising from the motor vehicle accident have had a profound effect on her life. She is now irritable as described by her husband with a significantly less happy household. She is not able to undertake activities with her children nor play with them physically as this causes too much pain.

32 Previously, Ms. Johnstone was described by her husband as essentially a "perfect" or "TV" mom who baked for friends and family. Her friends described her "bubbly personality" as now gone and her limited ability to interact socially with them. Mr. Sawyer, a work colleague, described her difficulty with walking up stairs. Mr. Johnstone also noted she essentially goes to work, comes home exhausted and has to lie down to rest. This significantly impedes her interactions with her young children and her husband. Ms. Johnstone no longer walks the family dog and cannot pursue recreational activities such as tent camping or skating with the children.

## **2. What is the appropriate award of non-pecuniary damages for pain and suffering?**

### *Non-Pecuniary Damages*

#### **Legal Principles and Assessment**

33 There is no real dispute about the principles to be applied in assessing non-pecuniary damages.

34 Ms. Johnstone submits that but for the accident, she would not have suffered from the significant chronic pain that she experiences today. As stated in *Athey*, a plaintiff must prove, on a balance of probabilities that the defendant's negligence caused the injury. The defendant's negligence need not be the sole cause of the injury as long as it is part of the cause beyond the range of *de minimis*. Causation need not be determined with precision: *Athey*; *Teunissen v. Hulstra*, 2017 BCSC 1569 at para. 18.

35 The defendant is liable for the injuries caused, but not pre-existing damage. In other words, the defendant is liable for the additional damage and damages must return the plaintiff to the position she would have been in "but for" the accident: *Athey* at 473-474; *Teunissen* at para. 19.

36 Ms. Johnstone submits that she has met the burden of proof as the medical evidence cited above confirms that "but for" the 2013 motor vehicle accident, she would not have suffered a low back injury with associated hip issues and worsened fibromyalgia/chronic pain/headaches. Furthermore, the evidence of the plaintiff and the lay witnesses Paul Sawyer, Jason Johnson, Lindsay Ansel and Michelle Brittain all confirm a profound change in the plaintiff's physical condition before and immediately following the 2013 motor vehicle accident.

37 An assessment of general damages includes a consideration of the factors outlined in *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46:

- (a) age of the plaintiff,
- (b) nature of the injury,
- (c) severity and duration of the pain,
- (d) disability,
- (e) emotional suffering,
- (f) loss or impairment of life,
- (g) impairment of family, marital, and social relationships,
- (h) impairment of physical and mental abilities,



- (i) loss of lifestyle, and
- (j) the plaintiff's stoicism.

38 There is no doubt Ms. Johnstone has severe chronic pain as reflected by the strength of the pain medication. This has had significant impairment on her life. Ms. Johnstone has approached these injuries in a stoic manner and worked hard to both get better and maintain her job and family duties. She is relatively young and unfortunately her prognosis is guarded.

39 A plaintiff is entitled to be restored to her original position. In order to properly determine the extent of Ms. Johnstone's injuries, I should consider her pre-existing conditions. I find, however, that Ms. Johnstone is a highly driven individual who, prior to the accident, was effectively managing her pre-existing conditions, enjoying success at work and in her social and family life. There is no doubt she would have continued to do so but for the accident. The lower back injury sustained in the accident is the main source of her pain which has led to the impairment of her quality of life. Her previous fibromyalgia symptoms have also been exacerbated due to the accident.

40 This case is unlike the cases relied upon by the defendants which reflect adverse effects on parts of each person's life and work. In this case the chronic effect of the injury has permeated every aspect of Ms. Johnstone's life in a fundamental way. This includes her personal, family and social relationships along with her work. Ms. Johnstone's husband, friends and work colleagues all testified to this effect.

41 Ms. Johnstone's injuries and their effect are therefore more akin to those identified by the plaintiff's authorities, which largely involve significant chronic pain injury sufferers (see *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762; *Ranahan v. Iron Horse Enterprises & Logistics Inc.*, 2017 BCSC 759; *Redmond v. Krider*, 2015 BCSC 178; *Hosseinzadeh v. Leung*, 2014 BCSC 2260; *Morlan v. Barrett*, 2010 BCSC 1767).

42 I have considered the authorities submitted by both parties and assess the plaintiff's non-pecuniary damages at \$145,000.

### **3. What is the appropriate award for past income loss?**

43 Ms. Johnstone agrees there is no past income loss.

### **4. What is the appropriate award for future loss of earnings or income-earning capacity?**

#### *Legal Principles*

44 The principles for assessment of loss of capacity are set out in *Perren v. Lalari*, 2010 BCCA 140 and *Graydon v. Harris*, 2014 BCCA 412. Entitlement to an award for loss of future earning capacity is a two-step process:

1. The plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss.
2. If the first step is met, then, the court must assess the loss. This is generally done either by an earnings approach or a capital asset approach.

45 In *Davidge v. Fairholm*, 2014 BCSC 1948 at para. 166, various factors were discussed as supporting a conclusion of a real and substantial possibility of a future loss on the part of a young plaintiff which included:

1. The plaintiff had a relatively high level of chronic pain;
2. The plaintiff's job required a great deal of concentration;

3. The plaintiff's job put physical stresses on his body;
4. The plaintiff had physical limitations preventing him from performing even more physically demanding tasks than those he performs in his present job;
5. As a matter of ordinary human experience and common sense, a person's ability to tolerate chronic pain diminishes with age.

46 In my view, Ms. Johnstone has established there is a real and substantial possibility that she could earn less in the future because of her injuries.

47 This case is similar to *Davidge*. Ms. Johnstone has significant levels of chronic pain. She is on the maximum dosage of pain medication — a 24-hour Butrans opiate patch and other medication.

48 Ms. Johnstone is in a high level executive in a position — quality-control — that requires a high degree of concentration. In 2013 she was paid an annual salary of \$146,567 and had benefits associated with her position. By 2016, her employment income was \$174,330. The evidence made clear Ms. Johnstone was on a stellar career path.

49 The medical evidence, however, establishes the impairment that the pain condition now places upon her ability to do her work. Both Dr. le Nobel and Dr. Stolar attested to this with Dr. Stolar noting "the low back pain has had a significant impact on the quality of her life and has not allowed her to function without significant pain in the workplace and home." This affects her concentration and ability to travel which can be part of her job requirements.

50 Both Dr. Stolar and Jodie Fischer, an occupational therapist called by the plaintiff, noted the plaintiff should reduce her hours or work part-time. While Ms. Johnstone could work full-time, it adversely impacts her personal and family life. Ultimately, this is not sustainable long-term.

51 Ms. Johnstone is now in the position of being required to pick between two positions at work both of which involve considerable stress and cannot be undertaken on a part-time basis. The evidence is also clear there are potential cognitive effects from long-term use of Butrans as noted by Dr. le Nobel and Dr. Stolar.

52 While the defendants point out Ms. Johnstone is a very valued employee, this comes at the cost of her personal and family life. As noted above this is simply not sustainable. The defendants cannot overcome this reality and simply chose to ignore it. While Ms. Johnstone continues to be rated as "excellent" in the workplace performance reviews, she has reduced her hours to four days a week. Ms. Johnstone has outlined the debilitating effects of the travel required as part of her position and testified as to her mobility and exhaustion problems. This is all corroborated by testimony from work colleagues, friends and family.

53 Ultimately, it is apparent from these and other factors that there is a real and substantial possibility of a loss of income in the future.

#### *Assessment of Loss of Capacity*

54 In the circumstances of this case, the parties essentially agree the capital asset approach is the proper approach in determining the loss of capacity.

55 As noted in the submissions, to determine a loss of future earnings using this approach, the four factors from *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8 must be applied:

1. Whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. Whether the plaintiff is less marketable or attractive as an employee to potential employers;



3. Whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured; and

4. Whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

56 The assessment of loss of capacity is a matter of judgment: *Teunissen* at para. 142 quoting *Hardychuk v. Johnstone*, 2012 BCSC 1359 and *Rosvold v. Dunlop*, 2001 BCCA 1. A plaintiff is to be put in the position she would have been in, from a work/life perspective, but for the injuries caused by the defendant's negligence. The court must compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after its occurrence: *Teunissen* at para. 142 quoting *Hardychuk* and *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106.

57 The defendants agree the analysis of future income loss via a capital asset approach involves the four factors identified in *Brown* set out earlier.

58 The defendants submit that when considering these factors, it is unlikely that the plaintiff would reduce her working hours to below 30 hours a week. The defendants point out further, company acquisitions, divestitures, and senior management movements will happen regardless of the motor vehicle accident.

59 In addition, the defendants say other contingencies need to be taken into account. Even before the subject motor vehicle accident, Ms. Johnstone faced the same fatigue issues with her longstanding diabetes, eye retinopathy, her carpal tunnel syndrome, hand contracture, trigger finger, and fibromyalgia health issues. These affected Ms. Johnstone and required surgical intervention and time taken off. Dominant hand strength, shoulder range of motion, eye vision range and focus are functional factors to take into account independent of any motor vehicle accident issues. These issues will affect Ms. Johnstone as time goes by.

60 Given the above facts and taking into account the contingencies, the defendants submit the amount of \$73,500 to \$147,000 — being the amount equivalent to roughly half to one year of the 2012 to 2016 average income reported on annual taxes, should be the quantum of any loss of future capacity to earn income assessed using the capital asset approach.

61 I disagree. As noted above, I find that, but for the accident, Ms. Johnstone would have continued to manage her pre-existing conditions effectively. Her income would have continued to rise. The injuries sustained in the accident are the cause of the unsustainable situation she finds herself in with respect to meeting both her workplace and family obligations.

62 As noted by Ms. Johnstone, the evidence is overwhelming that her "absent accident" career trajectory has been negatively impacted by injuries associated with the accident. There was strong evidence Ms. Johnstone was being considered for a promotion that would result in an increase in earnings. There was also strong evidence she was effectively managing her medical issues at the time.

63 Ms. Johnstone has testified she will decline the offered promotion due to her present accident-related pain. Ms. Johnstone definitively said she would not take either available job. She at present is in a precarious position due to the acquisition of the company and her inability to continue to function at this level and undertake any of her other obligations to her family. It is simply not realistic on the evidence that Ms. Johnstone can continue at this level.

64 I accept this reality and note it is overwhelmingly supported by the medical and other evidence. I also note the evidence of Ms. Johnstone that this may eventually lead to job loss. Ms. Johnstone's work is demanding and requires travel, sometimes by airplane. This is largely debilitating due to her lower back pain as noted by Dr. Stolar. Ms. Johnstone also testified to the significant pain and debilitating effect of plane travel required in her work position. Once again, her

present position is not sustainable long-term. Mr. Johnstone noted the daily exhaustion she suffers from work which requires her to rest immediately on her return home.

65 I conclude it is more than likely that Ms. Johnstone would undertake part-time work or part-time consulting. Ms. Johnstone has reduced her hours to four days per week. This, however, requires use of "personal time off" hours. Both Ms. Fischer's report and Dr. Stolar agreed that Ms. Johnstone is better suited for part-time work. The reality, however, is that job loss for Ms. Johnstone is likely if she works part-time. Ms. Johnstone nearly lost her job in 2010 in a previous transition. Jacobs Engineering is now going through a large acquisition and merger. Mr. Sawyer testified this puts certain departments at risk, including quality assurance. There is no seniority protection in a lay-off.

66 I conclude, therefore, it is more than likely that Ms. Johnstone's future path will be in consulting. She is, despite her debilitating injuries, very motivated. In my view, it is therefore more than likely with her motivation and skills that she would be able to earn around \$100,000 annually from consulting. Based on the economist report by Mr. Gosling, I conclude if Ms. Johnstone is able to earn \$100,000 from consulting, then, the income loss is  $(\$71,605 / \$1,000) \times \$15,681 = \$1,122,916.41$ . The associated loss of pension benefits remains at \$413,402. The associated loss of Supplementary Retirement Savings Plan is \$1,122. I reiterate that but for the injuries suffered in the accident, Ms. Johnstone was on a path to a stellar career.

67 Thus the total loss resulting from a transition into consulting at \$100,000 is  $\$1,122,916.41 + \$413,402 + \$1,122 = \$1,537,440.41$ .

68 I agree the most likely outcome is the scenario where Ms. Johnstone must move into consulting work and give up continued employment with Jacobs. Taking into account contingencies including the likelihood of the various possible outcomes, I conclude \$1.5 million is an appropriate assessment of loss of capacity. I agree as noted by counsel for Ms. Johnstone, this is a conservative award given the significant losses which Ms. Johnstone may experience as a result of her significant injuries.

**5. What amount, if any, should be awarded for the cost of future care?**

*Legal Principles*

69 As set out by Ms. Johnstone, the plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition, insofar as that is possible.

70 The test to establish an award for cost of future care is objective. There must be a medical justification for the claim, and the claim must be reasonable.

71 An assessment of damages for cost of future care is not a precise accounting exercise: *Teunissen* at para. 97 quoting *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

72 General contingencies may be taken into account where appropriate but where the adjustment to an award for future care is premised only on general contingencies, it should be modest: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351, at para. 52.

73 Ms. Fischer assessed the plaintiff and provided future care recommendations. These were as follows:

1. Medication continuation as recommended by Dr. le Nobel and Dr. Stolar.
2. Multidisciplinary Rehab Program as recommended by Dr. le Nobel, Dr. Stolar, and Ms. Fischer. Ms. Fischer provided greater detail as to what this program would entail.
3. Long-term allied health care services as recommended by Ms. Fischer.

4. Household services as recommended by Ms. Fischer.

74 The defendants say, however, when reviewing the medical recommendations of Drs. Hummel, le Nobel, and Stolar, the recommendations involve rehabilitation and guidance from kinesiology and physiotherapy (for a period of 10-12 months according to Dr. le Nobel), continuation on treating medication with tapering and reduction of Butrans (as per Dr. Stolar's advice and as acknowledged by the plaintiff).

75 Time limits to the recommended pharmacological treatments do not appear to be accounted for by Ms. Fischer and Mr. Gosling. Although Ms. Fischer quotes the report of Dr. Stolar that treatment with Butrans may be reduced in the future if possible, she does not appear to take this into consideration in her calculation of the annual cost of this medication. Mr. Gosling's report is based on her recommendations. The available medical advice in this regard is that the pain medication could be adjusted, by reducing use of the Butrans patch over time by using lower mcg/hr rate patches.

76 The cost of future care is somewhat difficult to assess. As noted by the defendants, contingencies such as changes to treatment and the time limitations of some of the treatment must be acknowledged. As a result, while Mr. Gosling has assessed the cost of medication with a benefit plan to age 65 at \$266,212 and at \$388,130 without a benefit plan, in my view the number should be moderated by these contingencies. As there is a range of potential outcomes for Ms. Johnstone's future, I conclude a more realistic assessment of Ms. Johnstone's future care costs is \$250,000.

**6. What is the appropriate award of special damages?**

77 Special damages are agreed to by the parties at \$17,185.08.

**SUMMARY OF DAMAGES**

78 In summary, Ms. Johnstone is awarded damages jointly and severally against both defendants as follows:

Non-pecuniary damages:	\$145,000.00
Impairment of future earning capacity:	\$1,500,000.00
Cost of future care:	\$250,000.00
Special Damages:	\$17,185.08
TOTAL:	\$1,912,185.08

**COSTS**

79 If the parties are unable to agree to costs, they may speak to the issue.

*Action allowed.*