
CANADA / JUDGMENT

Kuras v. Repo

2014 BCSC 1634

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1634 Kuras v. Repo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kuras v. Repo,

2014 BCSC 1634

Date: 20140826

Docket: M120948

Registry: Vancouver

Between:

Martha Kuras

Plaintiff

And

Natasha Kathleen Repo

Defendant

Before: The Honourable Madam Justice H. Holmes

Reasons for Judgment

Counsel for the Plaintiff:

Tanya L. Martin

Pauline V. Gardikiotis

Counsel for the Defendant:

Andrea Jones

Place and Dates of Trial:

Vancouver, B.C.

April 14-17, 22-25, 2014

June 3, 2014

Place and Date of Judgment:

Vancouver, B.C.

August 26, 2014

INTRODUCTION

- [1] Martha Kuras was injured on May 19, 2010, when the car she was driving was rear-ended on West 4th Avenue in Vancouver, B.C., after she slowed or came to a stop to allow a parked vehicle to pull out in front of her. The impact was minor in its force, the cost to repair Ms. Kuras's vehicle only about \$800. The defendant admits liability for the accident.
- [2] The trial concerned Ms. Kuras's damages. Ms. Kuras sustained soft tissue injuries to her neck, upper back, and low back, and began to experience different and more frequent headaches than the migraine headaches she had suffered for a long time before. She claims she experiences pain which is now chronic and unlikely to improve, and which prevents her resuming some of the forms of physical exercise that support her emotional health and enrich her recreational and family life. She also claims that her injuries will prevent her working to the extent she anticipated in her new, second career as a Registered Nurse. Ms. Kuras seeks substantial damages for her non-pecuniary losses (pain, suffering, and loss of enjoyment of life) and for loss of her capacity to earn in the future, as well as more modest damages for out-of-pocket expenses and costs of future care. The parties agree that Ms. Kuras should receive damages of \$15,000 to compensate her for income she lost in the weeks or months after the accident in her former career as a consulting software developer.
- [3] The defendant acknowledges that the accident caused the soft tissue injuries and headaches Ms. Kuras experienced in the months that followed, but says that those injuries were substantially resolved by the end of 2010. The defendant says that Ms. Kuras has not established that any neck or back pain and headaches after that time resulted from the accident, and not from other causes, notably the pregnancy that led to the birth of Ms. Kuras's child in October 2011, or the early degenerative changes which, as Ms. Kuras acknowledges, pre-dated the accident. The defendant says that in any event Ms. Kuras has established no loss of earning capacity, because not all RN jobs have the types of physical demands which Ms. Kuras claims her injuries prevent her meeting, and numerous forms of assistance and accommodations are available. Since, the defendant says, the only real effect of her injuries is on some forms of her recreational exercise, Ms. Kuras's main damages are

properly for non-pecuniary losses, and not loss of earning capacity. The defendant submits that Ms. Kuras's damages should in any event be assessed with caution, because her claim is based only on her subjective reports of symptoms and on the evidence of her husband, Malcolm Patterson, an interested party, and is unsupported by evidence from more objective witnesses who were or are in a position to see Ms. Kuras contending with the limitations she claims.

ISSUES

- [4] The parties' positions and the evidence give rise to the following issues:
- (a) whether Ms. Kuras has established that the accident was the cause of the symptoms she experienced after the end of 2010 and continuing;
 - (b) taking into account how that issue is determined, the amount of non-pecuniary damages (as compensation for pain and suffering and loss of enjoyment of life) Ms. Kuras should receive;
 - (c) whether Ms. Kuras has established a loss of future earning capacity, and, if she has, the amount of damages she should receive as compensation for that loss;
 - (d) whether the evidence supports Ms. Kuras's claim for costs of future care; and
 - (e) whether Ms. Kuras's special damages for her out-of-pocket expenses should include compensation for orthotics and an air foam mattress she purchased.
- [5] I will address these issues in turn.
- (a) DID THE ACCIDENT CAUSE SYMPTOMS AFTER 2010?
- [6] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to the injury in respect of which the plaintiff seeks compensation. The defendant's negligence need not have been the sole cause of the injury; a plaintiff need establish only a substantial connection between the two: *Sam v. Wilson*, 2007 BCCA 622, at paras. 108-109.
- [7] Causation is generally assessed according to the "but for" test: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Applying that test, the court asks whether, but for -- or without -- the defendant's negligence, the plaintiff would have suffered the injury.
- [8] As I have mentioned, the defendant acknowledges that the accident caused soft tissue injuries and headaches, but submits that those injuries were substantially resolved by the end of 2010. The defendant contends that Ms. Kuras has failed to establish that the neck or back pain and headaches she claims to have experienced since that time and on an ongoing basis are attributable to the accident. The defendant submits that, on the evidence, the more likely causes are either or both of Ms. Kuras's pregnancy and the early degenerative changes that pre-dated the accident.

- [9] Before addressing this submission, I will note in passing that both parties recognize or accept that the headaches Ms. Kuras attributes to the accident are different in nature from the migraine headaches she has experienced since a teenager. The migraine headaches continue, at an average of between two and three per month, and there is no suggestion that the accident caused or aggravated them. The headaches Ms. Kuras attributes to the accident are different in their quality and, Ms. Kuras claims, occur in addition. Dr. Russell O'Connor, physiatrist (physical medicine and rehabilitation), who examined Ms. Kuras in August 2012 and December 2013 and gave evidence for Ms. Kuras, described those headaches as mechanical or cervicogenic.
- [10] As to both those additional headaches and her neck and back pain, I am satisfied that Ms. Kuras has established that those symptoms troubled her beyond 2010 and that they continue, as she claims, and that the accident was their cause.
- [11] I also find that the post-2010 symptoms affected Ms. Kuras in the various ways she described in her evidence, and find no basis for the defendant's submission that Ms. Kuras overstates those effects. The defendant's surveillance video-recording of Ms. Kuras shopping with Mr. Patterson and their daughter showed no behaviour on Ms. Kuras's part that was inconsistent with her account of the pain and limitations she experiences. In making that observation, I take into account that Ms. Kuras does not claim to be completely unable to perform certain tasks, such as picking up and carrying her daughter, but rather claims that she must limit their frequency if she is to avoid increasing her pain and fatigue. And, for reasons similar to those I will give later in relation to a different aspect of Ms. Kuras's claim, I find no weakness in Ms. Kuras's case in this area as a result of the absence of evidence from witnesses not called.
- [12] As to the cause of the post-2010 symptoms, Dr. O'Connor's evidence amply supports the conclusion that they were caused by the accident, and I accept it. His evidence explains the mechanical cause of Ms. Kuras's pain, and how it is that her pain continues for longer than usual. I will describe the effects of Ms. Kuras's symptoms in more detail below when I discuss the assessment of damages for her pain and suffering and loss of enjoyment of life.
- [13] Dr. O'Connor was asked, in cross-examination, about the role of Ms. Kuras's pregnancy, and he responded that the pregnancy essentially pushed a notional pause button, placing Ms. Kuras's recovery from the accident injuries on hold while her body changed in various ways and while she likely had less time or opportunity for the strength and conditioning she had been doing before. He agreed that the pregnancy likely changed Ms. Kuras's low back pain, causing it to shift its location from right of the midline to the left side, but disagreed with the defendant's suggestion that the pregnancy caused the pain in the new location. Dr. O'Connor explained that although body changes in a pregnancy often do produce back pain, the pain Ms. Kuras experienced on the lower left side was not new with the pregnancy: it began with the injury from the accident that caused it, and it "grumbled along", albeit in a slightly different location, through her pregnancy and afterwards.

- [14] Dr. O'Connor also rejected the defendant's suggestion that an alternative cause or contributor was the early degenerative changes in Ms. Kuras's neck and back that came to light in an MRI conducted in December 2012. There is no suggestion in the evidence or submissions that these changes caused any symptoms -- or were even known to exist -- before the accident. Dr. Iain Dommissie, orthopedic surgeon, who gave evidence for the defendant, noted that fully 40% of the population have degenerative changes without pain.
- [15] Rather, it is clear that the accident aggravated the previously asymptomatic condition and rendered it symptomatic. Dr. O'Connor testified that this was so, and Dr. Dommissie gave evidence on this point which was largely consistent with Dr. O'Connor's, saying that the pre-existing degenerative changes were activated by the accident, and symptoms followed.
- [16] The only evidence to support the defendant's position that the injuries from the accident were largely resolved by the end of 2010 is a record, made in October 2010, of a treating physiotherapist who gave no evidence in the trial:

Currently I have returned her to almost pain-free status and she has been back to running and other laborious activity.

- [17] Ms. Kuras acknowledged that the course of physiotherapy helped the mobility in her neck, and later with her back, but she testified that it never returned her to "almost pain-free status", at least not if she tried to resume her normal running. She told the physiotherapist that running almost always led to considerable pain, especially the next day, but he encouraged her to continue and predicted that she "would be okay". Ms. Kuras testified that her continuing attempts were not "okay", and that is why she returned to her family physician, Dr. Paula Iriarte.
- [18] In my assessment, Ms. Kuras's evidence on this point is confirmed by that of Dr. Iriarte. Dr. Iriarte explained that Ms. Kuras's pain would come and go, sometimes as a result of the anti-inflammatory medication she was taking. Clinical records support this evidence: for example, in mid-December 2010, Dr. Iriarte saw Ms. Kuras and noted, "[s]lowly her back getting better" and "still not able to run aggravates her pain", and in February 2011, "hasn't run since the summer, very disappointed". Dr. Iriarte noted also that Ms. Kuras was accustomed to running significant distances before the accident, and that being able to run only 5 kilometres would not have been satisfactory to her. I note also that Dr. Iriarte saw the physiotherapist's record before she prepared her report for the trial, if not long before, but it did not affect her opinion that Ms. Kuras's pain from the accident continued after the end of 2010.
- [19] Neither Dr. O'Connor nor Dr. Iriarte was asked directly to comment on the proposition that the injuries from the accident were substantially resolved by the end of 2010. I find no basis on which to find that they were, and am satisfied that Ms. Kuras has established that her symptoms, as she describes them, from the injuries caused by the accident continue to this day.

(b) WHAT DAMAGES WILL COMPENSATE MS. KURAS'S NON-PECUNIARY LOSSES?

[20] On that basis, I turn to assess the damages Ms. Kuras should receive to compensate her for the non-pecuniary losses resulting from these injuries.

[21] Before doing so, I will briefly reject the defendant's suggestion that Ms. Kuras's pleadings do not encompass a claim in respect of the chronic pain she alleges. The pleadings clearly allege various consequences of Ms. Kuras's injuries, including neck and back pain and headaches, and, as I have discussed, the evidence establishes that they are chronic, in the sense that they have persisted for four years since the accident and are expected to continue. It was not necessary for Ms. Kuras's pleadings to specify the duration of the pain and headaches for which she was claiming, or to characterize them specifically as chronic.

[22] Damages for non-pecuniary losses compensate a plaintiff for consequences such as pain, suffering, loss of enjoyment of life, and loss of amenities. Consequences, or losses, of this nature cannot be truly or directly compensated by money. As McLachlin J. (as she then was) explained in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), at para. 262, these damages are awarded "for the purpose of providing substitute pleasures and amenities to make the life of the injured person more bearable".

[23] The amount of compensation should be fair to all parties. Fairness is generally measured by reference to awards made in comparable cases; however, such cases, though helpful, can serve only as a rough guide because each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882, at paras. 188-189.

[24] The factors a court will consider when assessing damages for non-pecuniary losses are helpfully set out in *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (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:

- (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 (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).
- [25] As those factors make clear, the assessment is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences. It will also be influenced by the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56, at para. 25.
- [26] Where a plaintiff's claim depends on his or her subjective reports of pain, the court should exercise great caution, especially where complaints of pain persist long after the usual recovery period. This is because complaints of pain cannot easily be disproved. The plaintiff's evidence must be convincing; it may, however, consist of the plaintiff's evidence alone, if the surrounding circumstances are consistent. McEachern C.J.S.C. gave this guidance in the following oft-quoted discussion in *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.), at para. 5:

In *Butler v. Blaylock*, decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

- [27] Each plaintiff's claim is to be assessed according to the unique set of facts in which it is made. The accident that caused Ms. Kuras's injuries was relatively minor, and her injuries have taken longer than the norm to resolve and may never do so entirely. However, as I have explained, I am satisfied that her injuries and the symptoms she describes are real.
- [28] The defendant submits that Ms. Kuras overstates those symptoms, and that the Court may infer this from her failure to see a doctor until about three weeks after the accident. However, I am satisfied that Ms. Kuras believed -- rightly or wrongly -- that a walk-in clinic would not help her, in her own doctor's absence on vacation, and, more significantly, that she expected her symptoms to resolve. I note also that Ms. Kuras later undertook extensive courses of physiotherapy and massage therapy, and, more recently underwent painful trigger point injections. She would not likely have committed the time and effort she gave to these therapies, had her symptoms not had a meaningful effect on her life.

- [29] I do not propose to summarize the extensive evidence concerning Ms. Kuras's background before the accident, and the effects of her injuries since. Ms. Kuras and Mr. Patterson each gave credible and detailed evidence that provided a convincing picture of Ms. Kuras's personality and her life before and after the accident, with particular emphasis on her physical activities over the years. I will simply summarize my findings concerning the main effects of the injuries.
- [30] At the time of the accident, Ms. Kuras was 31 years of age, and had been married to Mr. Patterson for approximately eight years. The two had met two or so years earlier, when they were both close to graduating from the University of British Columbia with bachelor's degrees in computer science. Fitness was important to them both. Ms. Kuras engaged in some form of exercise almost every day, whether gym workouts, running, cycling, or some other fitness-oriented activity. Her runs were sometimes as long as 20 kilometres, but were usually between 5 and 10 kilometres. In addition to their individual exercise regimes, Ms. Kuras and Mr. Patterson often undertook outdoor activities together, as part of their recreational or social life; day-hiking and cycling are examples. For some of their holidays, they cycle-toured and camped, without van or other support, travelling substantial distances each day. Ms. Kuras had no health problems at all, apart from the migraines I mentioned earlier.
- [31] After the accident, Ms. Kuras began to experience increasing neck and back pain, as well as headaches, that within a few days prevented her exercising. She saw Dr. Iriarte's partner, Dr. Menzies, about three weeks after the accident, and he noted that her neck appeared to be stiff and sore, and that it and her spine were restricted in their mobility. On Dr. Menzies' recommendation, Ms. Kuras started physiotherapy and massage therapy shortly afterwards.
- [32] Ms. Kuras's pain continued, and she was prescribed a muscle relaxant and an anti-inflammatory medication. She had difficulty sitting for more than thirty minutes at a time, and her work as a software developer was consequently affected. It was not until the fall of 2010 that she was able to take up yoga and swimming, in an effort to maintain her fitness. As I discussed earlier, she tried to resume regular running, when her physiotherapist urged her to, but did not succeed.
- [33] In early 2011, Ms. Kuras's pain was worse, not better, and was waking her at night. However, in March 2011, after learning unexpectedly that Ms. Kuras was pregnant, she and Mr. Patterson decided to try another cycle tour that they had postponed from the fall of 2010 because of her injuries. However, the drive to the start of the cycle tour exacerbated Ms. Kuras's back pain, and required the couple to take unplanned respite in a hotel. Also, despite adjustments to Ms. Kuras's bicycle at the recommendation of her physiotherapist, cycling led to neck pain and headaches, and required the couple to reduce their distance on cycling days and increase the number of rest days.
- [34] Ms. Kuras had a healthy and normal pregnancy, during which she continued with physiotherapy.

- [35] The demands of new motherhood, notably breastfeeding, required Ms. Kuras to hold positions for extended periods which triggered or worsened her neck and back pain and gave rise to more frequent headaches. As the couple's daughter grew bigger, lifting and carrying her became more challenging. Even now, Ms. Kuras tries to limit the amount that she lifts her daughter, who is now two years of age and weighs about 30 lbs.
- [36] As I will discuss later, in relation to Ms. Kuras's claim for lost future earning capacity, she decided to start a new career as a registered nurse after about ten years as a computer software developer. She applied in January 2011 for admission to the accelerated (twenty month) nursing degree program at U.B.C., but, on learning of her pregnancy, deferred her entrance for a year, until the fall of 2012. At the time of the trial, Ms. Kuras was completing her final shifts during the preceptorship that concludes the program, and expected to write her licensing examination in June 2014.
- [37] During the program, Ms. Kuras tried to stay active by commuting to nursing school by bicycle. However, she found that her symptoms did not allow her to cycle both ways, and she therefore cycled only one way each day and took the bus the other way. She found that cycling inevitably produced neck pain, which, in turn, led to a headache, which she usually treated with Tylenol or ibuprofen. During this period, Ms. Kuras also did yoga, worked out at a gym, and periodically tried to resume running; however, increases in her activity level always led to flare-ups of her symptoms.
- [38] In her nursing program, it was in the clinical portions that Ms. Kuras's symptoms troubled her the most. Her clinical rotations began in late 2012 or early 2013, continued through to and included her preceptorship, which concluded at the time of the trial.
- [39] In her preceptorship, Ms. Kuras shadowed a qualified RN, working with her on a schedule, typical for RN work, of four 12-hour shifts, followed by four days off. The four work shifts consist of two day shifts followed by two night shifts. As I will discuss later in relation to her claim for lost future earning capacity, Ms. Kuras finds her symptoms progressively more difficult to manage during the course of this four-day course of work. In short, Ms. Kuras struggles to get through the four shifts, and has little energy left for positive family time or other activities except in the short period of a day or, at most, two, after she has recovered from the four working shifts and before she prepares herself to start the next. In noting these effects for Ms. Kuras, I take into account that a course of 12-hour work shifts, which includes both day and night shifts, is a demanding regimen even for the uninjured.
- [40] Unsurprisingly, Ms. Kuras's mood is affected by her symptoms and the limitations they place on her family life.
- [41] The limitations also affect Ms. Kuras's emotional health in a less direct way by reducing the extent to which she can rely on exercise to cope with stress and other challenges, as she did before. Ms. Kuras struggled with an eating disorder in her teens and later, and exercise was one of the tools she used to keep it in check. She testified that although the eating disorder has not resurfaced since the accident, she recognizes in herself the beginnings of some

unhealthy thought patterns she associates with the previous problems. Although in cross-examination Ms. Kuras resiled somewhat from the evidence she had given to this effect in her examination-in-chief, I find that her eating disorder has the potential to re-emerge, with the loss of frequent and strenuous exercise as her main coping mechanism.

- [42] At this point in her recovery, Ms. Kuras continues with yoga and swimming and some workouts at the gym, but is unable to resume her preferred forms of exercise at her pre-accident level. She does cycle, but no longer for significant distances, and usually with neck pain and headaches as consequences, and cycle-touring seems to be out of the question. She walks with Mr. Patterson and their daughter, sometimes for considerable distances, but rigorous hikes are no longer enjoyable for her because of the pain they produce. Her efforts to resume running produce flare-ups that she cannot tolerate.
- [43] Ms. Kuras seeks an award of between \$100,000 and \$125,000 for her non-pecuniary losses, and relies on the following cases in support: *Gosselin v. Neal*, 2010 BCSC 456; *Foran v. Nguyen*, 2006 BCSC 605; and *Fox v. Danis*, 2005 BCSC 102.
- [44] However, in my view the plaintiffs in those cases generally experienced injuries with consequences more severe than in the present case. For example, the plaintiff in *Foran* had lasting pain in her neck that radiated to her head and trapezius and was "always" present, though it ranged in severity (paras. 13-14). She was unable to sleep through the night and was also left with a significantly higher risk for re-injury to her neck. In *Fox*, the plaintiff experienced permanent nerve damage in addition to the soft tissue injury to her lower back.
- [45] The defendant suggests an award of between \$40,000 and \$50,000, and relies on these cases in support: *Rozendaal v. Landingin*, 2013 BCSC 24; *Sharpe v. Tidey*, 2009 BCSC 948; *Lees v. Compton*, 2013 BCSC 1015; *Hatch v. Kumar*, 2013 BCSC 2049; *Skusek v. Horning*, 2009 BCSC 893; *DeGuzman v. Ge*, 2013 BCSC 1450; and *Singh v. Borejszo*, 2013 BCSC 1584.
- [46] Some of the cases on which the defendant relies involved consequences less severe than those experienced by Ms. Kuras. For example, the plaintiff in *Sharpe*, who, like Ms. Kuras, was an athletic person, did not experience significant changes in his lifestyle and, in fact, found that sports activity helped him to manage his pain; also, his symptoms were expected to abate over the longer term, though not to fully resolve. In both *Lees* and *Skusek*, documentary evidence indicated that the impact of the injuries had not been so severe as to prevent strenuous recreational activity. In *Singh*, the plaintiff's symptoms, which included headaches and pain in her neck, back, and shoulders, were "80% recovered" by approximately two years after the accident (para. 30).
- [47] Ms. Kuras's symptoms are not dissimilar to those of the plaintiff in *Rozendaal*, where the award was \$40,000. However, the consequences of those symptoms on Ms. Kuras's enjoyment of life supports a higher award. Like Ms. *Rozendaal*, Ms. Kuras is now restricted in her enjoyment of many aspects of her daily life, and will likely continue to be constrained by her symptoms, which intrude with varying frequency and intensity. But in addition, Ms. Kuras can no longer engage in activities (running, long-distance cycling, and serious hiking)

which she not only enjoyed but also relied on for her emotional well-being. Moreover, some of those activities were key elements of her family life with Mr. Patterson, including vacations.

[48] I conclude that the appropriate award for Ms. Kuras's non-pecuniary losses is \$80,000.

(c) IS LOSS OF FUTURE EARNING CAPACITY PROVEN? WHAT DAMAGES WILL COMPENSATE?

[49] A claim for loss of future earning capacity raises two key questions: first, has the plaintiff's earning capacity been impaired by his or her injuries; and second, if it has, what compensation should be awarded for the financial harm that will accrue over time as a result? To the extent that this is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106, at para. 185. The Court thus compares the plaintiff's working life as it is likely now to be, with the working life the plaintiff would likely have had without the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, at para. 32.

[50] The assessment of loss must be based on the evidence, and is not reached by the application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case. There are two main approaches to the assessment of loss of future earning capacity: the "earnings approach", outlined in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), at para. 43, which is based mainly on projected income loss; and the "capital asset approach", outlined in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), which examines the effects on the plaintiff's overall capacity to earn, her value to herself and to others in the applicable employment market, and the range of job opportunities she is able to take up. Both approaches are correct approaches, the choice between them turning largely on whether the loss in question can be quantified in a measureable way: *Perren v. Lalari*, 2010 BCCA 140. The overall fairness and reasonableness of the award must also be considered, because the assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1, at para. 18.

[51] The standard of proof in relation to future events is simple probability, not the balance of probabilities. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring. Thus, hypothetical events are to be given weight according to their relative likelihood: *Athey*, at para. 27. Similarly, since future events are inherently unknown, the assessment must allow for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina*, at para. 175.

[52] Ms. Kuras submits that her earning capacity is significantly reduced by her inability to take up a full-time nursing position or to work overtime when that work is available. She testified that her experience in the preceptorship, with the shift structure typical for RN work in direct patient care, led her to conclude that she can manage two consecutive shifts, but not four. Ms. Kuras testified that after her first shift, she usually needed to take a Tylenol in the

evening after she returned home. After the second shift, she had similar symptoms but they were still "tolerable". However, because she knew that her pain would not likely abate during the day between her second shift, a day shift, and her third shift, a night shift, she usually took Tylenol 3 during that time, in order to be able to take up the night shift on the third day. She also tried to rest as much as possible during that third day, and limited her activities with her daughter. When she worked the two night shifts, she found herself unable, because of pain, to sleep in the two-hour rest period available to RNs for that purpose. By her fourth and last shift, her pain was distracting and prevented her from concentrating properly on her work.

- [53] Ms. Kuras testified that she tried to time her medications during the course of the four working shifts in her preceptorship so that they interfered as little as possible with her cognitive function while working, and she relied also, for safety, on the constant supervision of her work by her preceptor.
- [54] She testified that as a result of her experience during her preceptorship, and contrary to her and Mr. Patterson's original plan to recoup the costs of her change of career, she intends not to seek a full-time nursing position but rather to seek a part-time position allowing her to work for two days at a time. She hopes to gain as much experience as she can on that basis until she is able to work at full capacity.
- [55] Ms. Kuras submits also that over the longer term, her injuries will restrict the range of positions she can manage, limiting her to positions with lighter duties or without shift work. Furthermore, she submits that her injuries will place her at increased risk of re-injury in a profession which, as I find the evidence established, itself involves a high risk of injury. These effects all place Ms. Kuras at increased risk of unemployment, she submits.
- [56] The evidence made clear that new graduates are expected to work in direct patient care until, usually after one or two years (occasionally as little as six months), they secure a permanent full-time position. Direct patient care is recognized as physically demanding for nurses, who are required to shift and manoeuvre equipment and to move patients and to help them move themselves. It is this type of care which, as I discussed above, Ms. Kuras found too difficult to sustain over the course of four consecutive shifts without pain that interfered with her family and personal life and caused her concern about safe practice as a nurse.
- [57] The defendant submits first that Ms. Kuras has not established that her injuries make her unable to meet the physical demands of a full-time nursing position, because her own evidence on that point is not credible or reliable, and it lacks any support from objective sources, such as co-workers, who could be expected to confirm Ms. Kuras's limitations if they were real.

- [58] This submission cannot succeed, because I find Ms. Kuras's evidence convincing about her experience in her preceptorship. It is also confirmed by the evidence given by Mr. Patterson and, to an extent, Ms. Kuras's mother, and is largely consistent with the result of functional capacity testing by Russell McNeil, occupational therapist, as well as with Dr. O'Connor's observations and opinion, all of which I accept.
- [59] That Ms. Kuras has chosen not to advise any of her supervisors or co-workers about her symptoms or limitations says more, on my view of the evidence as a whole, about her determination to succeed in her chosen field (therefore not wanting to reveal her limitations) than it does about the nature and effects of her symptoms and limitations. Also, although I find Ms. Kuras entirely credible on the subjects of her symptoms and their effects, I conclude that she has been strategic in what she chooses to say about those or other subjects to people in or associated with her workplace or nursing program. For example, in an email to an administrator of the nursing program, Ms. Kuras gave false information about her travel plans in an effort to gain advance information about her preceptorship placement.
- [60] The defendant submits also that it is not enough for Ms. Kuras to surmise that she will have difficulty meeting the physical demands of a full-time job as an RN; she must prove that this will be so. As the Court of Appeal noted in *Kim v. Morier*, 2014 BCCA 63, at para. 8, a plaintiff must show a realistic possibility that she will be less able to compete in the marketplace in a manner that has economic consequences, and not merely psychological ones, such as anxiety or fear about her future.
- [61] However, Ms. Kuras's claim in this area does not rely on her perception alone. It has the support of her experience to date, as she described it in her evidence, and of the evidence of Dr. O'Connor and Mr. McNeil about her physical limitations and how they are likely to affect her ability to perform as the job of an RN requires. Cynthia Startup testified about vocational opportunities for RNs, and her report describes those requirements in detail.
- [62] Robert Carson, economist, calculates lifetime earnings for a newly-qualified RN from the time of the trial with a present value of between approximately \$1 million (to Ms. Kuras's age 59) and approximately \$1.5 million (to her age 63). Ms. Kuras submits that the assessment of her loss of future earning capacity should be based on a conclusion that she will experience a 25% reduction in her capacity to work over the course of her working career. She suggests an award of \$371,885, plus additional compensation in respect of lost overtime shifts, an aspect of her claim I will address later.
- [63] However, in my view, a lifetime earnings-based approach is not the most suitable approach to the assessment of Ms. Kuras's loss, because I am unable to accept her position that she may be limited to part-time work for most, and possibly all, of her career as an RN.
- [64] In my view, once Ms. Kuras has completed the necessary amount of direct patient care to qualify her for an entry-level permanent position, she will find such a position, suited to her physical capabilities and interests, that she will be able to maintain on a full-time basis. The

evidence made clear that within the wide range of job opportunities for RNs are many for which the physical requirements are far less onerous than the direct patient care Ms. Kuras performed during her preceptorship. Although the work for RNs varies greatly, the rate of pay does not, subject to lock-step increments reflecting experience.

- [65] Ms. Kuras submits that her career choice is to work on an acute care or medical ward, such as a cardiac ward, where the physical demands are high, and that she will likely never be able to manage full-time work in such a position. However, in my view, Ms. Kuras's interests within the nursing field are less fixed than this submission implies. On the evidence, her interest in, specifically, cardiac care did not emerge until December 2013 or January 2014, only months before the trial. In emails relating to actual or contemplated job applications, Ms. Kuras indicated interest in entirely different nursing fields: for example, in January 2014, she said she felt a pull toward eventually completing the Nurse Practitioner program. Qualification as a Nurse Practitioner would require further education, but would lead to higher earnings than an RN's, with significantly lower physical demands than for RN direct patient care.
- [66] On all the evidence, the career of Nurse Practitioner seems well-suited to Ms. Kuras's interests and to her evident strengths, and is a career option that I consider her very likely to have pursued at some point, even without the accident. I therefore cannot conclude that, over the long term, Ms. Kuras's earnings will be seriously diminished by the accident's effects.
- [67] Nonetheless, Ms. Kuras has established a loss of future earning capacity that has two main aspects.
- [68] First, I accept that in order to gain the experience equivalent to between one and two years in direct patient care, she will not be able to work more than two shifts on consecutive days before taking days off. This will likely mean that she is confined to part-time work, with correspondingly reduced earnings. I see a possibility that Ms. Kuras will find a position which allows her to adjust the shift schedule and to work, for example, two days on and then two days off. However, I consider that possibility quite small: while employers of RNs generally try to accommodate disabilities and physical limitations where it is reasonable and practicable to do so, the evidence in the trial referred to no specifics of how this might be done for Ms. Kuras in a direct patient care position.
- [69] The award will therefore include compensation for a loss of approximately 50% of the full-time RN earnings over Ms. Kuras's first and second years. Using Mr. Carson's and economist Mark Szekely's calculations as a general guide -- although they did not address this outcome specifically -- I conclude that this aspect of the award should be in the amount of \$40,000.
- [70] With Ms. Kuras confined to part-time work while she completes the necessary period of work in direct patient care, that period will be longer than if she were working full-time, delaying the start of her employment in a higher-paying permanent full-time position suited to her interests and abilities. The award will therefore also include compensation to reflect

the "lag" effect on her earnings in her second, third, and fourth working years. Since the annual increase in full-time RN earnings in those early years appears to be approximately \$2,500 per year, the award will include approximately \$7,500 to reflect the lag effect.

- [71] The award will not include compensation for an ongoing or indefinite "lag" in earnings (beyond four years), resulting from the delayed start to Ms. Kuras's first full-time position, because, as discussed above, I conclude that without the accident she would likely at that stage have taken up additional education to gain qualification as a Nurse Practitioner, with, then, higher earnings than as an RN.
- [72] Second, Ms. Kuras has established a loss of future earning capacity that has a lifetime aspect. Although, as I have indicated, I conclude that, after the period of part-time or shift-modified work in direct patient care, Ms. Kuras will secure a full-time position suited to her interests and physical abilities, the range of options open to her, and consequently her marketability, are nonetheless restricted by her limitations.
- [73] This aspect of the award will be \$60,000. I see no basis in the evidence for reducing that amount because of possibilities that other factors would have limited Ms. Kuras in this way even without the accident.
- [74] As I mentioned above, Ms. Kuras asks that the award for lost earning capacity take account also of lost opportunity to work overtime shifts at substantial increases in the hourly rate of pay. Based on Mr. Carson's calculations, she asks that her award include an additional \$170,000 to reflect this loss.
- [75] I do not doubt that Ms. Kuras has a strong work ethic, or that she and Mr. Patterson made financial and other sacrifices to allow her to take up her new career. However, they also lead and value full and rich personal lives, which include substantial amounts of time devoted to exercise and outdoor recreation, for personal fitness or as family activities. I do not view the evidence as establishing that but for the accident Ms. Kuras would have worked overtime when opportunity presented.
- [76] On the basis I have outlined, the award for Ms. Kuras's loss of earning capacity will be in the total amount of \$107,500.
- [77] On the approach I have taken to the assessment of this loss, I doubt that the recent change to the discount rate will have any meaningful effect on the amount. However, as they suggested by letter after the Court reserved judgment, counsel will have leave to apply concerning the matter, should further direction be necessary.
- (d) WHAT ARE THE COSTS OF FUTURE CARE?
- [78] A 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. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: Milina, at para. 172.

[79] Ms. Kuras claims a total of \$15,000 for the costs of future care, reflecting the costs of the following:

- "trigger point injections including Botox" (plaintiff's written submissions), between three and four times per year, at a cost of between \$400 and \$800 for each set; and
- various items or forms of assistance recommended by Mr. McNeil for pain management or housekeeping, having a total cost of approximately \$850 for initial purchases, before taxes, with many of the items requiring replacement every two to three years; for the initial and replacement costs, Mr. Carson calculates a total present value of approximately \$9,000.

[80] Future care costs must be justified as medically necessary, and they must be reasonable.

[81] The defendant submits that the cost of trigger point injections lacks medical support, but I do not agree.

[82] Dr. O'Connor testified that although trigger point injections are unlikely to give Ms. Kuras any significant benefit, they may offer a temporary pain management strategy. In light of that advice, it is reasonable for Ms. Kuras to undergo the injections in the hope of some relief. Indeed, Ms. Kuras has already begun a difficult process to this end, having had what she testified were extraordinarily painful trigger point injections on two occasions, without relief at those times but on the understanding that success often requires on average eight treatments.

[83] However, it is not apparent from the evidence that the trigger point injections come at a cost to Ms. Kuras, or, if they do, what it is. In her submissions, Ms. Kuras claims a cost of between \$400 and \$800 for each set of "trigger point injections including Botox", to be administered between three and four times per year. However, this cost appears to be taken from Dr. O'Connor's December 2013 report, which, as I read it, distinguishes trigger point injections from Botox injections, and allocates the \$400-800 cost to the latter only:

She could trial trigger point injections into the neck and peri-facet area. She could also try a facet block . Lastly, she could also trial Botox injections to see if this would help with her neck pain and headache frequency. The cost for this is approximately \$400-\$800 every three months depending on whether she needs one or two vials of Botox.

[84] There is no evidence of the cost to Ms. Kuras of the trigger point injections she will continue. And although Dr. O'Connor does state a cost for Botox injections, there is no evidence that Ms. Kuras wishes or plans to undergo those injections. On all the evidence, including the evidence of Ms. Kuras's attention to healthy living and her general dislike of taking medicines, I cannot infer that she will likely undergo the Botox injections as a form of treatment.

[85] Nor am I persuaded that Ms. Kuras has established her claim for the costs of all the items recommended by Mr. McNeil. There is no evidence that Ms. Kuras has purchased or intends to purchase the various housekeeping items -- or, indeed, that she and Mr. Patterson did not

already have housekeeping equipment with the features Mr. McNeil views as beneficial. Nor is there evidence to support a conclusion that Ms. Kuras will likely purchase and use the various pain management devices, the most costly of which is a TENS unit, together with training by a physiotherapist in how to use it.

[86] In all these circumstances, the evidence does not support an award for future care costs.

(e) SHOULD SPECIAL DAMAGES INCLUDE THE COSTS OF ORTHOTICS AND AN AIR FOAM MATTRESS?

[87] The defendant submits that the evidence does not support Ms. Kuras's claim for the cost of orthotics, but I do not agree. Ms. Kuras testified that Dr. Iriarte recommended orthotics when Ms. Kuras expressed concern about embarking on her preceptorship with her usual level of pain. In my view, that evidence sufficiently supports the claim for the cost of this item.

[88] However, I reach the opposite conclusion about Ms. Kuras's claim for the cost of an air foam mattress. Ms. Kuras testified that she purchased the mattress because she hoped it would help her back. There is no evidence that it did, or that the purchase was recommended by a medical professional or, indeed, anyone else. Ms. Kuras's hope does not provide a sufficient foundation for requiring the defendant to compensate her.

[89] The award for special damages will reflect the cost of orthotics as well the expenses the defendant agrees should be compensated, namely for physiotherapy, massage therapy, acupuncture, and medications to the time of the trial.

[90] On this basis, the award will be in the amount of \$3,677.

ORDER

[91] Damages are awarded as follows:

(a) Non-pecuniary damages:

\$80,000

(b) Special damages:

\$3,677

(c) Past wage loss, as agreed:

\$15,000

(d) Future care:

\$0

(e) Loss of future earning capacity:

\$107,500

TOTAL:

\$206,177

[92] If the parties are unable to agree on costs, they may, within 21 days of these reasons, and before entry of the order reflecting these reasons, arrange to speak to the issue at their and the Court's earliest convenience. Otherwise, the order will provide for Ms. Kuras to have her costs at Scale B.

"H. Holmes, J."

The Honourable Madam Justice H. Holmes

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