# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ferguson v. Watt,*
2018 BCSC 1587

Date: 20180917
Docket: M146014
Registry: Vancouver

Between:

**Kimberly Ann Ferguson**

Plaintiff

And

**Christopher Robert Watt**

Defendant

Before: The Honourable Madam Justice Marzari

## Reasons for Judgment

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|---|---|
| Counsel for the Plaintiff: | K.L. Simon<br>A. Reimer |
| Counsel for the Defendant: | A. Mihailovic<br>R. Shirreff |
| Place and Date of Trial/Hearing: | Vancouver, B.C.<br>May 7-11, 14-18 and June 22, 2018 |
| Place and Date of Judgment: | Vancouver, B.C.<br>September 17, 2018 |

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## INTRODUCTION

[1] On February 1, 2013 at approximately 4:00 a.m., Ms. Ferguson was driving to work as a nurse at BC Children's Hospital when the defendant ran a red light, causing her car to collide with his (the "accident"). The force of the impact was significant, sending the defendant's car into a storefront, and crushing the front of Ms. Ferguson's vehicle and spinning it around 180 degrees. Fortunately, neither driver suffered life threatening injuries.

[2] As a result of the accident, Ms. Ferguson suffered injuries to her jaw, chest, thumbs and left knee, as well as soft tissue injuries the extent of which will be discussed below. Her knee in particular was very swollen. She also suffered headaches, sleep disruption, depressed mood and severe anxiety.

[3] While a number of her injuries resolved within six months of the accident, she continues to suffer from chronic pain in her neck, upper back, right shoulder and left knee, and fluctuating levels of sleeplessness, depressed mood and frustration.

[4] Despite her injuries, and even when they were acute, Ms. Ferguson continued to work in her demanding job as a nurse. She has continued to be successful as a nurse in management positions, working well above 40 hours per week, and receiving and seeking out promotions and new job opportunities. She has done so despite significant and ongoing pain, and despite what she describes as a deep sense of loss that she is unable to return to the operating room where her passion for her profession is rooted.

[5] The defendant questions the extent of Ms. Ferguson's ongoing pain and stated limitations, and says that much of her ongoing pain is not causally related to the accident. While acknowledging Ms. Ferguson has suffered losses that are compensable as non-pecuniary damages, the defendant says that those losses are much lower than what Ms. Ferguson claims. He says that she was, and remains, a "rockstar" in her profession and that the accident did not materially affect her career trajectory, income or opportunities.

[6] The most contentious issues are Ms. Ferguson's claims for significant pecuniary damages for past earnings losses and loss of future earning capacity based on what she says she would have made as an operating room ("OR") nurse as opposed to the nursing management positions she has remained in since the accident. Her special damages, particularly her education costs, are also strongly contested.



## ISSUES

[7] Liability was admitted on the first day of trial. The defendant also admits that Ms. Ferguson suffered some initial injuries and damages. The issues for determination are therefore:

a) What ongoing injuries did Ms. Ferguson sustain as a result of the accident, and specifically, what is the nature, extent, cause, prognosis and impact of those injuries?

b) What damages arise as a consequence of the accident, and specifically:

   i. What damages, if any, is Ms. Ferguson entitled to for past wage loss?

   ii. What damages, if any, is Ms. Ferguson entitled to in relation to future earning capacity?

   iii. What damages, if any, is Ms. Ferguson entitled to in relation to loss of housekeeping capacity?

   iv. What damages is Ms. Ferguson entitled to with respect to her costs of future care?

   v. What special damages is Ms. Ferguson entitled to?

   vi. What damages is Ms. Ferguson entitled to for non-pecuniary losses?

## BACKGROUND

### Prior to the Accident

[8] Ms. Ferguson is by all accounts a diligent, thorough and hard worker. She is a self-described “late bloomer” in that she only found her calling as a nurse in 2005 at the age of 36. Nevertheless, she has been very successful in her chosen profession, moving up quickly through positions of greater responsibility with consistently strong reviews.

[9] She obtained her Associate Degree in Nursing in the fall of 2007 in Florida, where she then worked as an OR nurse from 2008 to mid 2012. Her evidence was that throughout her education, internship and employment in Florida she regularly worked long hours and looked for and took on-call and overtime opportunities.

[10] In 2012 she began looking at other career options. She is a Canadian citizen with an American nursing certification. She considered travel nursing in Canada and in the United States, and was recruited to come to BC, where she accepted a position as a pediatric OR nurse at BC Children’s Hospital commencing in July 2012.

[11] In December 2012, Ms. Ferguson began working as a Quality and Safety Leader at BC Children’s Hospital, a non-unionized nursing position which was described variously as a leadership, management or administrative position. Ordinarily this position requires a master’s degree in nursing, which Ms. Ferguson did not have. It also involves some contribution to the operating room, but generally does not require the same physical mobility and stamina of an OR nurse. It also has a higher hourly pay rate, but is exempt from the overtime entitlements of OR nurses, so it is arguable (and indeed it was argued) that the overall wage is less than an OR nurse working overtime and premium shifts.

[12] Ms. Ferguson gave evidence that she was encouraged to apply for, and ultimately accepted, this Quality and Safety position to enhance her leadership skills and her future employment opportunities, but that it was never her plan or desire to leave the OR on a long-term basis. She thrived in the high pressure operating room

with its immediacy of direct patient care, whereas she considers administrative and management nursing work to be not as rewarding personally or financially.

[13] The defendant argues that her move into a management position was part of a pattern of Ms. Ferguson taking on leadership positions that would most likely have continued regardless of the accident. He also points to her pay records in Florida, where she worked on-call fairly frequently but rarely logged significant overtime once she completed her schooling and practicums.

[14] Prior to the accident Ms. Ferguson had no history of disability or anxiety or mood problems, and was functioning generally without pain or limitation. The evidence suggests that she was both fit and physically active. She enjoyed travel and new experiences, and her trips often included active itineraries, including hiking and camping. In Florida, she exercised three to four times per week at a 24-hour gym, and participated in running races, including a five kilometer race in 2011. When she moved to Vancouver, she walked the seawall, went hiking and bike riding, and had plans to learn how to kayak and ski. Prior to the accident, she regularly walked the five kilometers to and from work at BC Children's Hospital.

[15] Ms. Ferguson had no difficulties sleeping, no physical limitations at work, and no difficulties with the physical requirements of her demanding job. She had not been in any prior motor vehicle accidents, and had not been off work or limited in her recreational or housekeeping activities for any extended period due to injury or illness.

[16] On all the evidence, I find that prior to the accident Ms. Ferguson was a healthy and active woman in her early 40s who had recently found her life's calling. She was a workaholic whose self-worth was and remains strongly tied to her identity as an outdoor adventurer and a highly capable operating room nurse. I find that she frequently worked on-call, and was capable of working well over 40 hours a week, although she did so only intermittently. I find that she continued to work 50 hours or more each week in her various management positions before and after the accident.

### Accident and Post-Accident

[17] With respect to the accident itself, Ms. Ferguson testified that the force of the impact felt like “hitting a wall”. As her vehicle spun, her right shoulder twisted forward. The front of her vehicle pushed into her on an angle, causing the dashboard to strike her left knee and her body to twist further. Her vehicle was “totalled”. Mr. Watt’s vehicle went through a storefront window.

[18] Ms. Ferguson initially refused medical attention from the ambulance attendants but was eventually convinced to go to the hospital, and to take the day off work. When she returned home she was deeply shaken. She cried constantly, and re-lived the accident in her mind repeatedly, imagining both more serious consequences for herself, but also the possibility that she could have seriously injured the other driver. She was unable to drive and sought therapy to resolve this issue. She suffered anxiety and sleeplessness.

[19] After the accident, Ms. Ferguson continued to work in her role as a Quality and Safety Lead, only missing work for medical and therapy appointments despite the presence of pain and swelling, headaches, sleeplessness and severe anxiety. Despite some absences for treatment, it would appear that she continued to work substantially more than 40 hours a week on average. While she became less mobile at work, her coworkers and supervisors noted her continued and diligent work ethic and long hours. She took work home when she could not complete it at the office.

[20] In July 2015, she was recruited to a management position related to the redevelopment of BC Children’s Hospital, and continued in that position until February 2017, when she applied for and obtained a position as the Program Manager of Surgical Services & Outpatient Clinics at the general hospital in Brockville, Ontario.

## CREDIBILITY

[21] The credibility of the plaintiff is a key issue in this trial. This is not unusual in cases of chronic pain, where the court must always be concerned with the reality of

the plaintiff's complaints of ongoing soft tissue pain in order to determine the existence and extent of the injuries and properly assess damages based on such complaints. The applicable principles were summarized by Mr. Justice Abrioux in *Buttar v. Brennan*, 2012 BCSC 531 at para. 24:

> …
>
> - the assessment of damages in a moderate or moderately severe soft tissue injury is always difficult because the plaintiffs are usually genuine, decent people who honestly try to be as objective and factual as they can. Unfortunately every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 397 (S.C.);
>
> - 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 (*Price* at 399);
>
> - 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 (*Price* at 399);
>
> - the doctor's function is to take the patient's complaints at face value and offer an opinion based on them. It is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114;
>
> - in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73;
>
> - in a case of this kind care must be taken in reaching conclusions about injury alleged to have continued long past the expected resolution. The task of the court is to assess the assertion in light of the surrounding circumstances including the medical evidence. The question is whether that evidence supported the plaintiff's assertion and, if not, whether a sound explanation for discounting it was given *Tai v. De Busscher*, 2007 BCCA 371 at para. 41.

[22] The court's assessment of the plaintiff's credibility is therefore critical. I am guided in this assessment by numerous cases, including the following statement from *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357:

> The test must reasonably subject his story to an examination of its consistency with the probabilities which surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.



[23] The plaintiff was a credible witness. I find that she does not malinger or exaggerate, and that her complaints regarding her physical injuries are real and impose real limitations on her ability to realize her ambition to return to the OR and to lead the level of active life that she did prior to the accident. I find that she regularly pushes herself to overcome these injuries, and that if it was physically possible to overcome these injuries, she would do so.

[24] This is supported not only by Ms. Ferguson's evidence, but also by the other witnesses who testified, other than Dr. Marks. These witnesses were professional and credible, unless otherwise noted.

## THE NATURE, EXTENT, CAUSE and PROGNOSIS OF MS. FERGUSON'S INJURIES

### Plaintiff's Claim

[25] Ms. Ferguson's evidence was that she suffered from a number of injuries after the accident, not all of which have resolved.

[26] Her injuries that were fully resolved within approximately six months of the accident included:

a) pain and bruising to her chest and abdomen, caused by the tightening of her lap and shoulder belt on impact;

b) jaw pain;

c) nightmares respecting the accident, which Ms. Ferguson experienced nightly at first, and which gradually diminished over time and resolved in three to four months during the course of her therapy sessions with Dr. McCullogh;

d) sprained thumbs;

e) injury to the tongue from biting it on impact; and

f) bruising and swelling to the left knee.

[27] Ms. Ferguson gave evidence that her post-accident symptoms which have largely but not completely resolved include flashbacks, fear of driving and driving anxiety. She participated in therapy sessions focused largely on driving anxiety, and her fear of driving has largely resolved.

[28] Finally, Ms. Ferguson says that despite experiencing an initial substantial level of recovery, she suffers from significant persistent pain and dysfunction, and there has been no meaningful change in these symptoms in quite some time. These include:

a) Depressed mood and anxiety respecting her future;

b) Headaches, which began as severe and constant, but which she now experiences once every three to four weeks, and treats with massage, physiotherapy, and prescription medication;

c) Neck, upper back and right shoulder girdle pain extending up the right side of her neck, down to her right elbow, and into her shoulder joint, which gradually improved over the first year with the help of physiotherapy and massage therapy. While her neck pain and range of motion have improved over time, they continue to flare, and she manages these symptoms with Ibuprofen and Naproxen, and Flexeril on weekends. Her right shoulder symptoms, she says, have remained constant and include constant right shoulder pain and weakness, and a “clicking” sensation in

the shoulder joint. Her shoulder pain continues to cause her to awaken at night and is distracting during the day;

d) Difficulty sleeping, which she largely attributes to her shoulder pain and headaches;

e) Injury to her left knee. While the swelling immediately following the accident resolved itself, her knee later began to click and lock. Since then, she says her knee pain has been constant and chronic, particularly when walking on uneven surfaces or for long distances. At times, her knee will give out unexpectedly when she walks, and swells if she walks more than a few kilometers. She wears a knee brace when walking on uneven surfaces and trails. She began treatment for her left knee injury at physiotherapy, and she had injections of cortisone followed by sessions of active rehabilitation, which provided slight relief. In 2016, she received injections of Monovisc, which is used to treat pain in osteoarthritis of the knee, followed by further sessions of active rehabilitation. The Monovisc injections provided sufficient pain relief to allow her to push herself more during active rehabilitation, and she noticed improvement to her symptoms during that time. Her knee symptoms have shown no improvement since the improvement that she experienced following the injection and active rehabilitation in 2016. She manages her symptoms with Naproxen. She will likely pursue further Monovisc injections; and

f) Hip and foot pain, which has increased and which she says is related to her knee pain.

[29] Ms. Ferguson has been taking 500 mg of Naproxen twice a day, every day, to manage her shoulder and knee symptoms. In 2017 she temporarily stopped taking Naproxen in an attempt to control an elevation in her blood pressure. Without medication, her right shoulder pain and stiffness increased significantly. She was unable to sleep at night and her ability to function in her daily activities declined. She

has resumed taking Naproxen at her previous dosage, deciding that the risks of elevated blood pressure are outweighed by her need for sleep and relief from pain.

[30] Ms. Ferguson attended physiotherapy regularly at the Kitsilano Physiotherapy Clinic with Mark Mandelstam from February 2013 to January 2017. She also initially attended massage therapy once a week following the accident, but she has gradually decreased the frequency of her sessions and currently attends massage therapy in Brockville on average once every five weeks. Ms. Ferguson testified that these treatments provided relief of her pain symptoms, particularly with respect to the tightness in her neck and shoulder area which she associates with both headaches and shoulder pain.

[31] In addition to her own testimony, a number of medical experts prepared reports and testified with respect to Ms. Ferguson's injuries and their likely cause.

[32] Ms. Ferguson's original treating family physician, Dr. McKechnie, testified with respect to her clinical notes in and around the time of the accident and the months thereafter. Dr. McKechnie has since retired, and was careful not to provide any opinions.

[33] Ms. Ferguson's family doctor since 2015, Dr. Parhar, also gave evidence and filed a number of reports. His examinations, diagnosis, care and treatment of Ms. Ferguson generally support her testimony in terms of the scope of her injuries and the accident as their cause. Dr. Parhar opines that Ms. Ferguson is more vulnerable and susceptible to future trauma that can cause injury to the areas that were injured in the accident, specifically her neck, mid-back, right shoulder and left knee, and to intermittent exacerbation of the pain she experiences in these areas.

[34] With respect to Ms. Ferguson's right shoulder, he described it as pain in the area of the right shoulder diffusely, and in his report referred to it as muscle strain, biceps muscle tear, post-traumatic tendonitis and subracrominal bursitis, as well as impingement. With respect to her left knee, he described contusion, sprain or strain,

hematoma, patellofemoral syndrome and aggravation of pre-existing asymptomatic left knee osteoarthritis.

[35] Under cross-examination, Dr. Parhar agreed that he relied on Ms. Ferguson's own reports of her pain, physical limitations, sleep difficulties and anxiety. His examinations were focused on treating her, rather than on the litigation. His clinical records indicate positive and notable findings on his examinations but not negative findings, as he was not making the notes for the purpose of a later medical litigation report. Overall, Dr. Parhar provided helpful and consistent evidence.

[36] Dr. Parhar referred Ms. Ferguson to an orthopedic surgeon to assist with the resolution of her shoulder pain. He also referred her for an MRI of her right shoulder.

[37] Dr. Zarkadas was Ms. Ferguson's treating orthopedic surgeon. He specializes in elbow, shoulder and knee surgery. He saw Ms. Ferguson over the course of six visits, and a further telephone consultation. His reports were addressed to Dr. Parhar in relation to his findings, diagnosis, recommendations and treatment. In addition he prepared a responsive report to the report of Dr. Marks.

[38] Dr. Zarkadas reviewed the MRI scans of Ms. Ferguson's shoulder and knee himself. It was Dr. Zarkadas who initially identified Ms. Ferguson's underlying medial compartment osteoarthritis in her knee, as well as a small longitudinal tear of the long head of her bicep tendon in her right shoulder. He also identified supraspinatus tendinopathy, associated bursitis, inflammation and thickening of her rotator cuff tendons, and impingement of her shoulder. With respect to the longitudinal split tear, his report and his oral testimony were clear that this is an unusual condition that one would not expect to exist as an underlying condition, nor as a degenerative one, but is rather associated with a specific and acute trauma. He states that it is "in keeping with the mechanism of injury that I would expect while bracing by gripping the steering wheel during a head-on collision."

[39] Dr. Zarkadas treated Ms. Ferguson with cortisone injections to the shoulder and Monovisc injections to the knee. He does not recommend further cortisone

injections for the shoulder, but rather recommends surgery. He does recommend further Monovisc injections to relieve pain and provide mobility as required.

[40] In addition to her treating physicians, Ms. Ferguson attended at a physiatrist in early 2016, Dr. Giantomaso, who prepared an independent medical legal report for the purposes of this litigation. Dr. Giantomaso's opinion, based on his interview, physical examination, and review of her medical records and documentation, concludes that Ms. Ferguson is suffering from chronic pain in the area of her cervical and thoracic spine, right shoulder and left knee that is temporally and causally related to the accident.

[41] With respect to causation, Dr. Giantomaso states that "the mechanism of action of the motor vehicle collision in question could reasonably be associated with the above-noted post-traumatic injuries including injuries to the cervicothoracic spine, left knee and ongoing shoulder issues."

[42] When asked in cross-examination whether it was typical for impingement of the shoulder to arise months after an accident, Dr. Giantomaso explained that it often comes later on. In his opinion, Ms. Ferguson likely had a chronic kinetic problem that caused some inflammation of the rotator cuff and increased impingement over time. In his opinion, three to six months after trauma was a reasonable time for that to occur.

[43] Dr. Giantomaso also recommended injections for diagnostic as well as therapeutic benefit.

[44] Ms. Ferguson's treating physiotherapist also testified with respect to his treatment of Ms. Ferguson.

[45] Finally, Ms. Ferguson had a functional/work capacity evaluation conducted by Ms. Ditson, an occupational therapist, in January 2017, with a follow-up interview in July 2017. Ms. Ditson expressed the opinion that Ms. Ferguson, at the time of assessment, demonstrated the strength to perform work at up to a light strength

level with some aspects in modified medium strength level. Her strength capacity did not meet the functional requirements for an OR nurse.

[46] Ms. Ditson's testing identified consistent limitations with:

a) Lifting and carrying (demonstrated sedentary to light level strength);

b) Forward reaching and overhead reaching, especially if combined with sustained positioning of the neck;

c) Prolonged standing, walking, bending and kneeling;

d) Sitting and balancing; and

e) Stair climbing and crouching.

[47] Ms. Ditson conducted standardized tests, and through the course of those tests, she examined Ms. Ferguson in terms of her voluntary effort. I accept her opinion that Ms. Ferguson put forth a consistent and high level of physical effort during testing, and that the assessment findings were an accurate measure of her functional capacity evaluation ("FCE") at that time.

**Defendant's Position**

[48] The defendant concedes that Ms. Ferguson has suffered soft tissue injuries in the areas of her neck and upper and mid-back as a result of the accident. He accepts that she suffers some residual complaints with respect to those areas but says that the symptoms are mild, and not disabling.

[49] The defendant says that while the blow to Ms. Ferguson's knee caused bruising and swelling, those symptoms resolved within a few months and, as a result, the left knee issue is not disabling and has not been so for quite some time. The defendant says that Ms. Ferguson likely has underlying arthritis in both her knees and would likely experience some discomfort as a result of that in both knees when kneeling. The defendant therefore takes no responsibility for Ms. Ferguson's

ongoing complaints in her left knee, and says that Ms. Ferguson should simply continue with strengthening exercises and pursue weight loss.

[50] The defendant's position is that Ms. Ferguson's right shoulder symptoms are not related to the accident at all.

[51] With respect to the right shoulder, the defendant says that the plaintiff's tendinopathy and inflamed bursa, as well as the longitudinal tear in her bicep, could have occurred without trauma and is commonly associated with overuse and repetitive use. He says that the five month delay in Dr. McKechnie's clinical records between the accident and her recording of right shoulder pain make it unlikely that there is a causal connection between the accident and the right shoulder pain. Instead, the defendant asserts that because OR nurses do a great deal of potentially heavy and repetitive work, it is more likely that her shoulder injury and her MRI results are a result of her natural history.

[52] The defendant primarily relies on the examination and opinion of his expert, Dr. Marks, who examined Ms. Ferguson in January 2018 and did not consider the right shoulder injury to be an injury arising from the accident. Dr. Marks concluded that Ms. Ferguson does not suffer from any physical limitations and could return to the operating room work immediately. His oral evidence made clear that he relied upon his brief physical exam of Ms. Ferguson, but gave little to no weight to Ms. Ferguson's oral history, or the observations or opinions of her long-term care providers. In both his written and oral evidence Dr. Marks relied significantly on his own assessment of Ms. Ferguson's credibility that is not consistent with my findings in this case, including the veracity of Ms. Ferguson's reports of initial and ongoing pain symptoms.

[53] In addition, Dr. Marks' evidence in court was frequently argumentative and non-responsive to the questions asked of him; he attempted repeatedly to pose and answer his own questions. Overall, I find that the assumptions and conclusions of Dr. Marks' expert opinion were not supported by the weight of the evidence in this case.

[54] Beyond the evidence of Dr. Marks, the defendant says that it is self evident that Ms. Ferguson's pain in her left foot and left hip are not related to the accident because they only arose in late 2016. Other than the evidence of Ms. Ferguson's physiotherapist, Mr. Mandelstam, who diagnosed plantar fasciitis of her left foot and treated it as part of her ongoing recovery in her left knee, the defendant says there is no evidence that this injury is linked to the accident.

[55] Finally, the defendant objects to the evidence of the occupational therapist, Ms. Ditson, and the FCE completed on January 20, 2017 on the basis that it does not provide an accurate assessment of Ms. Ferguson's true capacity or her impairments caused by the accident. Furthermore, given that the plaintiff has reported improvement of about 70 to 80% at trial since the accident, and she has advanced in her hiking, gym program and other recreational activities since January 2017, her physical capacity has likely improved since the date of the FCE.

[56] The defendant relies in particular on the fact that Ms. Ferguson was suffering from left hip and left foot pain at the time of the FCE. As the defendant takes the position that the left hip and left foot pain were not caused by the accident, he says that the limitations described by Ms. Ditson cannot properly be parsed as to those that were caused by the accident and those that were not. Finally, he says that the subjective element of the FCE undermines the results of the examination itself.

**Legal Principles**

[57] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to her injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the *de minimis* range. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[58] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between

the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

[59] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

> … Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey.* …

[60] The plaintiff must be placed in the position that she would have been in if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person. However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which she would have experienced anyway: *Athey* at paras. 32-35.

**Determination**

[61] The defendant concedes that Ms. Ferguson suffers from chronic soft tissue injuries in the neck and upper and mid-back areas as a result of the accident. However, the defendant says that these symptoms are mild and not disabling.

[62] I accept Ms. Ferguson's evidence with respect to the extent of her symptoms, muscle soreness and pain. Specifically, I find that Ms. Ferguson is impatient with this pain, and generally does not exaggerate or linger in it. Rather, I find that Ms. Ferguson is stoic in her approach to addressing her pain and limitations. I therefore accept her evidence that while she has experienced a significant recovery from her initial symptoms within the first few months of the accident, her current and ongoing pain symptoms in her neck and upper back are more than mild, and require regular treatment to prevent them from being more disabling than they currently are.

[63] I find that her neck, upper back and shoulder pain and tightness caused by the accident is also related to her ongoing headaches, sleeplessness, anxiety and depressed mood.

[64] With respect to Ms. Ferguson's right shoulder inflammation, impingement and chronic pain, I find that this symptom, as recorded by Dr. McKechnie five months after the accident, is sufficiently and properly linked to the accident itself.

[65] The defendant's theory of causation, that Ms. Ferguson developed the bicep tear and shoulder bursitis and impingement as a result of her ongoing work as an OR nurse, is not supported by the evidence. The evidence establishes that Ms. Ferguson had no pain in her right shoulder prior to the accident, and at the time of the accident and thereafter she was working as a quality and safety manager, and not in the operating room. There is no evidence of an intervening event or alternative cause of this pain, tear and inflammation between the accident and its recording in Dr. McKechnie's notes.

[66] As a whole, the expert evidence strongly supports the causal connection between Ms. Ferguson's right shoulder injuries and the accident. In this regard, there are multiple explanations for why a specific right shoulder injury may not have been recorded for five months after it was caused, including a failure of complete examination, a failure of complete documentation at a walk-in medical clinic, its implicit incorporation in the notes regarding Ms. Ferguson's pain in the right trapezius area, the masking of the pain as a result of more significant pain or the existence of pain killers, or Ms. Ferguson's favouring of the right shoulder in the immediate aftermath of the accident.

[67] Overall, I find that the accident is the cause of Ms. Ferguson's chronic pain, impingement, inflammation and weakness in her right shoulder.

[68] With respect to Ms. Ferguson's left knee symptoms, I find on the whole of the evidence that this pain and inflammation is chronic, limiting, and caused by the accident. I find that it is likely that Ms. Ferguson had underlying osteoarthritis in her

left knee. However, there is no indication that this osteoarthritis was symptomatic prior to the accident. Furthermore the expert evidence establishes that the osteoarthritis apparent in Ms. Ferguson's left knee may have remained asymptomatic indefinitely but for the accident.



[69] Furthermore there was no evidence beyond speculation to establish that Ms. Ferguson's osteoarthritis in her left knee would have become symptomatic in the future: see *Athey* at para. 36; *Badillo v. Bedi*, 2015 BCSC 1692 at para. 109; and *Gordon v. Ahn*, 2017 BCCA 221 at paras. 33-36.

[70] On all of the evidence I find that but for the accident, Ms. Ferguson's left knee would have remained asymptomatic. As a result of the accident, she suffers chronic pain and inflammation in her left knee that limits her ability to crouch, kneel, stand still for long periods of time, walk, hike or run to the extent that she was able to prior to the accident.

[71] With respect to Ms. Ferguson's pain in her left hip and foot, including the plantar fasciitis which developed in or around 2016, I find that the medical evidence on the whole supports a causal connection between this pain and the injury to Ms. Ferguson's left knee caused by the accident. In addition to the evidence of the physiotherapist in this respect, all of the medical experts, including the defendant's, emphasized that injury to one joint had to be examined and treated in the context of the joints above and below it. There is no question that Ms. Ferguson was still suffering from and treating her left knee symptoms at the time that her left foot pain became an issue, and the hip pain itself has been present since the accident. I find that this pain would not have arisen but for the accident and the injury to Ms. Ferguson's left knee.

[72] With respect to Ms. Ferguson's prognosis, on all the evidence I find that she is likely to continue to suffer chronic pain and limitations in her left knee and right shoulder, as well as tightness in her upper back and neck with associated headaches and sleeplessness. I find that she will continue to require medication, injections, massage, physiotherapy and exercise therapy to address these chronic

conditions. While there is some prospect for further improvement, I find that her condition will likely continue to cause depressed mood, frustration and anxiety.

[73] With respect to the impact of these conditions, I find that Ms. Ferguson is limited in her physical ability to work, specifically as an OR nurse. While Ms. Ferguson is able to continue to work in nursing related management positions, I accept that pure management is not Ms. Ferguson's passion. She feels trapped by her lack of opportunities, and is depressed by her inability to provide patient care and perform work that she feels is meaningful and important. She no longer enjoys her work, and it no longer gives her the same pride or satisfaction. She worries that she will not be able to complete her master's degree and will be stuck in a career doing HR work and payroll. She is currently looking for another job, but is limited to administrative roles due to the accident. Overall, she is pursuing the career that she anticipated pursuing in her 60s, not in her 50s, and certainly not in her 40s.

[74] Her injuries have also affected her quality of life and recreational pursuits. Ms. Ferguson testified that for the first couple of years post-accident, she was unable to walk for prolonged periods or on uneven surfaces, as her knee would become swollen or give out unexpectedly. She initially ceased walking to work, hiking, and going on walks through the city. She gained weight following the accident, and suffered from low self-esteem.

[75] In 2015, Ms. Ferguson made the decision to be as active as possible within her limitations. She completed her first hike since the accident in May 2015 on a short, semi-paved, flat trail. She went camping for the first time since the accident in 2017 which, though physically difficult and requiring increased icing and pain relievers, was highly emotionally gratifying.

[76] Ms. Ferguson continues to modify her activities to accommodate her limitations. When she hikes, she wears a knee brace and uses walking poles, and chooses easier and shorter trails, usually around five kilometers in length. When she travels, she engages in sightseeing excursions rather than physical activities.

Ms. Ferguson has also modified her social activities since the accident, going home earlier and declining more physically demanding social activities.

[77] Initially Ms. Ferguson's psychological symptoms disabled her from driving, and she continues to experience low mood and anxiety as she struggles to deal with the physical limitations associated with her injuries and symptoms, and the unknowns of her future. She also grieves the loss of her role as an OR nurse in which she took great pride.

[78] Ms. Ferguson has pursued a number of treatments, and there is a possibility that she will undergo surgery for her right shoulder injury in the future.



## DAMAGES

### Past Wage Loss

#### *Plaintiff's Position*

[79] Ms. Ferguson says that her injuries have reduced her earning capacity. At the time of the accident, she was not at her maximum earning capacity. She was working in an administrative position and had not yet begun taking on additional OR shifts to supplement her income. She intended to return to a full-time OR nursing position, where she could earn significantly more, after a couple of years. She says this all changed because of the accident, and but for the accident, she would have pursued one of the following three career paths:

a) First, she says she may have worked full-time in a non-unionized management or administrative position and also in the OR on a casual basis at either a private facility or a hospital in a different health authority, starting six months into her non-unionized position in June 2013 and continuing with an average of eight hours per week in the OR. Assuming she would have continued to work eight hours per week to the date of the trial, which is five years or 260 weeks, and that she would have continued to earn $35.52 per hour, her income loss and lost opportunity to earn income is alleged to be $73,881.60.

b) Second, Ms. Ferguson says she may have continued in her full-time administrative position for two years, followed by a return to full-time OR nursing in January 2015. Given her experience and leadership skills, Ms. Ferguson says she would likely have returned to the OR as a Clinical Nurse Coordinator (or equivalent position) in January 2015, which is the highest level an OR nurse can obtain while maintaining the ability to work on-call, in which case her average hourly rate for 2015, 2016 and 2017 would have been $41.64 per hour. In addition, while in this position, Ms. Ferguson says she would have worked on-call, worked some overtime, and worked shifts which earned premiums, such as statutory holidays. Thus, in addition to her regular hours of work, she would likely have been paid the equivalent of working 16 extra hours per week (which may be accomplished by being on-call but not attending at work) and working an additional shift or so each week, resulting in an average annual salary of $116,939.16 and making her loss during this time $45,908.95.

c) Third, Ms. Ferguson says that she may have worked as a Quality and Safety Leader for two years while also working in the OR on a casual or part-time basis starting in June 2013, and then would have worked on a full-time basis as a travel nurse starting in January 2015. Assuming she would have earned an average of $52.00 per hour, and would have worked approximately 54 hours per week and taken three weeks of unpaid vacation between postings, Ms. Ferguson says she would have earned an annual salary of approximately $137,592.00, making her loss between January 2015 and June 2018 $118,193.89.

[80] The plaintiff is claiming $100,000 for past loss of earning capacity.

***Defendant's Position***

[81] The defendant's main position with respect to Ms. Ferguson's income loss claims is that her career history indicates that she did not work substantial overtime

as an OR nurse, and that the accident did not change her career trajectory, which he says was always towards less overtime and more management positions. The defendant therefore says that Ms. Ferguson is not entitled to any damages for past or future income loss as a result of her loss of opportunity to earn overtime and premium pay as a unionized operating room nurse or travel nurse. With respect to past wage loss, the defendant says that Ms. Ferguson is entitled to $20,000 at most.

[82] Specifically, the defendant points to a review of Ms. Ferguson's timesheets as a nurse in Florida, which do not indicate an excessive amount of overtime. In addition, the defendant points to the fact that the plaintiff held two positions at the Florida Hospital that were "management" positions in that she was promoted to positions where she was supervising other nurses. I note that these were not positions of management in the sense used in British Columbia to distinguish between unionized and non-unionized nursing related positions, but would more generally be called "leadership" positions within the nursing profession, and were still patient care positions where overtime could be earned.

[83] The evidence also establishes that when Ms. Ferguson moved to BC from Florida, she found that her orientation training to work as an OR nurse at BC Children's Hospital was not challenging or stimulating, and that she was used to much greater challenges in her roles in Florida. While she was still in orientation, she was strongly encouraged to apply for a two-year management position as Quality and Safety lead. This was a "management" position in the true sense, in that it is an exempt supervisory position. Ms. Ferguson was in training for the position by November 2012 and started as Quality and Safety Manager on December 1, 2012.

[84] Within five months of being in the quality and safety management position, and after the accident, Ms. Ferguson was offered a further promotion to Program Manager of Surgical Services for a temporary, one-year term from October 2013 to October 2014. She later moved back to her quality and safety management position, before being offered the temporary position of C&W Redevelopment Project Clinical Lead of Surgical Services where she was part of the management team preparing

for the construction of a new Children's Hospital. Finally, the plaintiff applied for and was hired as Program Manager of Surgical Services and Outpatient Clinics at the Brockville Hospital in Ontario in 2017. In that role she is doing some of the work that a director of a hospital would ordinarily do. The evidence establishes that she chose to apply for and pursue that opportunity because it is close to her parents' home in Ontario, and was able to secure that position despite the lack of a master's degree, which would ordinarily be required. The defendant says that Ms. Ferguson's choice to pursue this opportunity would have occurred regardless of the accident, and makes her other proposed career scenarios less likely.

[85] Throughout her time in all of these management positions Ms. Ferguson has received glowing performance reviews and salary increases. Despite Ms. Ferguson's evidence regarding her personal struggles to complete her work, there is no objective or external evidence that she is unable to do so.

[86] On the basis of this evidence, the defendant says that Ms. Ferguson would have continued in management regardless of the accident, and would not have returned to or sought out unionized OR nursing positions; nor can it be predicted that she would have taken on significant paid overtime, premium or on-call work had she returned to OR nursing.

[87] With respect to the suggestion that Ms. Ferguson could have worked as an OR nurse at an equivalent of 54 hours per week, the defendant says that this would essentially require to her to work one-and-a-half positions. He says that these hours are not sustainable on a consistent basis, and indeed the plaintiff has no record of sustaining this extent of overtime shifts in her previous role as an OR nurse.

[88] Furthermore, the defendant says that it is highly unlikely that Ms. Ferguson would have sought out OR work in addition to her administrative and management work regardless of the accident. There is no evidence of any other nurses in management positions doing so, and Ms. Ferguson would not have been entitled to any of the overtime premiums for taking on this type of shift work, nor would she have had the seniority to take on premium shifts such as weekends and holidays.

[89] Finally, the defendant says that Ms. Ferguson's potential for travel nursing is significantly overstated, and that the wages paid for travel nursing are not as lucrative as they appear, as they do not include the same benefits, including pension benefits, that staff nurses receive.

[90] The defendant says that Ms. Ferguson managed to increase her income and hours of work steadily and continuously after the accident, and that the accident would not have interfered with that progression. Certainly the evidence establishes that she has continued to earn more each year, including after the accident.

[91] The defendant says that Ms. Ferguson's past work behaviour is the best predictor of her future and any award should be based on her continuing to work her pre-accident hours. The defendant relies on *McCarthy v. Davies*, 2014 BCSC 1498.

***Legal Principles***

[20] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; and *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[21] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the plaintiff is entitled to recover damages for only her past net income loss. In exercising this discretion, I must keep in mind that the plaintiff is to be put back in the position she would have been in had the accident not occurred: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 185-186.

[92] The plaintiff need not establish earnings loss on a balance of probabilities – since what would have happened between the date of the accident and prior to the trial is essentially hypothetical, as are predictions regarding future losses. As stated in *Smith v. Knudsen,* 2004 BCCA 613 at para 29:

> … What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying

> the balance of probabilities test that is applied with respect to past actual events.

[22] A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; and *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

***Determination***

[93] With respect to Ms. Ferguson's first suggested career path, I am not convinced that there is a real and substantial possibility that Ms. Ferguson would have been able to reduce her administrative nursing hours in 2013 or 2014 sufficiently to take on extra shifts OR nursing shifts in another health authority. No examples of nurses in administrative positions doing so were provided, and, in any event, I find that Ms. Ferguson's tendency toward wanting to excel in whatever position she was in would militate against her ability to cut down on the overtime in her administrative position in order to take on these extra shifts. The evidence from other nurses in similar administrative positions is that the work always exceeds the hours available, and was never less than 50 hours a week. While it is possible Ms. Ferguson would have been more efficient but for the accident and her related sleep and health issues, overall I do not consider her taking on a second job at another health authority to be a real possibility on the evidence. After she moved to Brockville, this would have been even more unlikely given that she now has more responsibilities, and a much greater distance to other health authorities.

[94] I find that there was a real and substantial possibility that Ms. Ferguson would have completed her work in Quality and Safety and moved back to an OR nursing position at a higher wage level while taking on on-call work and overtime in or about 2015. I also find that there was a real potential for that course of events to have been more lucrative, and I find there is a strong likelihood that she would have worked hours similar to what she worked after the accident (50 hours or more per week). I also accept the evidence that a nurse moving back and forth between unionized OR nursing and management positions is often able to leverage her

hourly wage to ensure that her salary is not diminished and that the management positions provide an overall increase in pay.

[95] The defendant would have me rely on the paid overtime hours Ms. Ferguson clocked in the years leading up to the accident, which he says were not significant, rather than the hours she worked after the accident. In this regard, I find that Ms. Ferguson regularly worked additional shifts that were not always clocked in during her nursing training in Florida, and that she generally worked more than 37-40 hours a week, though not the equivalent of 50% more. She also applied herself to her part-time studies for significant periods of her development as a nurse prior to the accident while also working. I find that her orientation period at BC Children's Hospital in the months leading up to the accident is not indicative of the amount of overtime she was likely to take on in future years, in part because on-call and overtime work were not permitted for the majority of this time.

[96] Furthermore, I find that in the two months leading up to the accident, and since the accident, Ms. Ferguson has generally worked over 50 hours per week in her nursing related managerial positions, despite the fact that there is no overtime compensation for these additional hours. Although OR nursing and management nursing present different physical demands, I accept Ms. Ferguson's evidence that OR nursing was also more energizing and compelling for her, such that I do not find that she would have worked a significantly lower number of hours had she been able to continue in OR nursing positions prior to the trial, or in the future.

[97] I also find that there is sufficient evidence to establish that there are significant OR nursing opportunities in BC, Ontario and other parts of North America, including requirements to take on on-call work and significant opportunities to perform overtime work. This includes Ms. Ferguson's own evidence of available nursing positions in Brockville, Ontario.

[98] In order to support an average annual salary of $116,939.16, the plaintiff relies on records published by the BC Provincial Health Services Authority ("PHSA") showing the salary of all employees earning wages of over $75,000 annually in the

years leading up to the trial. The defendant objects to these records on the basis that they constitute hearsay evidence with respect to any inferences that may be drawn from them regarding Ms. Ferguson's own potential salary.

[99] I find that these records are admissible as statistical evidence of salaries within the PHSA for the years stated, but I note that their usefulness is limited. They do not show average or even mean salaries, only salaries above $75,000. In addition, with respect to the specific entries on the records, it is not possible to glean from the record itself how the wages were achieved. Nevertheless, these records, together with the evidence of persons who supervised some of the nurses listed on the records, establish that OR nurses can earn substantially above the stated base wage in the collective agreement. I reject the plaintiff's proposition that $116,000 is at the lower end of the 2016-2017 incomes of PHSA nurses, but I do accept that this was an achievable wage for an experienced OR nurse in BC who worked on call, premium and overtime shifts.

[100] Overall, I consider that there was a real and substantial possibility that but for the accident Ms. Ferguson would have returned to OR nursing in 2015 upon completion of her term as a Quality and Safety Lead, and that she likely would have been able to leverage her experience in that leadership position to be placed at a higher wage rate averaging $41 per hour between 2015-2017. I find that she would likely have been paid for the equivalent of an extra paid shift each week, through a combination of on-call hours, premium shift rates and straight overtime, for which she would have earned a multiplied factor of the base hourly rate. Furthermore, I find that if she again returned to management roles during this time, she would have had the advantage of negotiating a higher base salary based on any salary she was earning as an OR nurse, thereby generally elevating her overall earning capacity and real wages.

[101] With respect to Ms. Ferguson's position that she may have taken on a position as a travel nurse in 2015 based on Ms. Ferguson's own evidence I do not find this to be a real and substantial possibility for this time period. Ms. Ferguson's

evidence was that she looked forward to taking on this opportunity at some point, but not until she had cemented her knowledge and experience in Canadian and BC operating rooms. I have already found that it was very unlikely that she would have taken on OR work while performing her demanding Quality and Safety position. The timeframe for her to have established herself in the operating room sufficiently to begin travel nursing prior to her move to Ontario in 2017 is too slim to give weight to.

[102] Finally, I must consider the chance that Ms. Ferguson would have been tempted to take the same or a similar career path to the one she ultimately did take, as the defendant suggests. This involved a steady increase in her salary, although essentially no compensation for the overtime that she worked. The opportunities that were presented to her to take on managerial positions would have undoubtedly been available in the absence of the accident, and did have financial and career related benefits.

[103] While this possibility cannot be discounted entirely, Ms. Ferguson was attracted to work in BC at least in part by the overtime rates, hourly minimums and rate premiums of unionized OR nursing in BC. Furthermore, I find that she deeply missed the work she performed in the OR during this time. I therefore consider it unlikely that she would have entirely forgone the opportunity to do this work between 2013 and 2018, and at the very least, would have been in a position to work in the union environment for a number of years and to improve her salary position in relation to any other management positions that she ultimately may have taken on.

[104] Nevertheless, the substantial salary she has made in her administrative positions must be considered.

[105] Taking into account all of the above factors, I would award Ms. Ferguson $35,000 for loss of past earning capacity.

### Future Earning Capacity

#### *Plaintiff's Position*

[106] Ms. Ferguson's main position is that OR nurses have a higher earning potential than the vast majority of nurses working in excluded management or administrative positions, through their ability to work overtime, on-call, and to collect premiums for working weekend, holiday and evening shifts. Furthermore, OR nurses have much greater job opportunities due to a critical shortage of OR nurses in Canada and the USA which has persisted since the accident.

[107] With respect to her loss of future earning capacity, Ms. Ferguson argues that she had two likely future career paths ahead of her that she would have pursued but for the accident:

a) In the first career path, she would have continued working full-time in a non-unionized management position for a time while working in the OR on a casual or part-time basis. Assuming that she would have continued to earn $102,000.00 until retirement at age 67 in her current management role, and taken on an average of three to four shifts per month in the OR on a casual basis, and assuming BC wage grids for OR nurses applied and that she would be at the top level of experience, Ms. Ferguson says her lost capacity to earn is approximately $20,000.00 annually.

b) In the second career path, which Ms. Ferguson says is the most likely she would have taken but for the accident, she would have worked full-time in the OR in a long-term permanent position or as a travel nurse. Given her experience and leadership skills, she says she would most likely have worked as a Clinical Nurse Coordinator (or equivalent position) and would have earned $51.24 per hour (at current rates). In this position, Ms. Ferguson could have worked on-call, worked some overtime, and worked shifts which earned premiums, such as statutory holidays. Thus, in addition to her regular hours of work, she would likely have been paid the equivalent of 16 extra hours per week (without necessarily working those

> hours). This equates to being paid for approximately 54 hours per week in total. At current rates, Ms. Ferguson's annual salary in this second scenario exceeds $140,000.00**.** Relative to her current management salary, she argues she is therefore losing the opportunity to earn approximately $40,000.00 annually.

[108] Ms. Ferguson states that she would have stopped taking significant overtime in the OR at approximately age 60-62 due to the physical demands of OR nursing. In her *viva voce* evidence, Ms. Ferguson testified that prior to the accident, she planned to work full-time as an OR nurse until at least age 60, and then to gradually stop taking overtime and on-call shifts. She planned to work until she no longer could. At that point, she may have continued in the OR but worked fewer overtime and on-call hours, found more lucrative but short term travel nursing assignments, or sought out a full-time management or administrative position until she retired at 67.

[109] Ms. Ferguson says two other factors to consider in assessing her diminished earning capacity include:

a) the real and substantial possibility that she will be off work for an extended time following shoulder surgery, and

b) the real and substantial possibility that she will retire earlier, or reduce her hours to a part-time work week, because of her continuing symptoms.

[110] Given all of this, the plaintiff says a mathematical calculation is helpful, but not determinative. Instead, a global capacity approach – with consideration to the illustrations above – is the most practical way to assess value of Ms. Ferguson's future loss of capacity. The plaintiff submits the following cases are illustrative of the global capacity approach.

[111] In *Lauriente v. Schoonhoven*, 2017 BCSC 2246, a case involving an emergency room nurse who suffered chronic headaches and depression as a result of two car accidents, the court took into account the positive and negative contingencies, including the possibility of improvement, the chance of early

retirement and the potential need to reduce her workload further, and awarded $450,000 for her diminished ability to earn income as a result of the accidents.

[112] In *Young v. Insurance Corp. of British Columbia*, 2018 BCSC 138 [*Young*], the court accepted that the plaintiff was incapable of fulfilling the normal requirements of the job of a registered psychiatric nurse such as sustained sitting or standing, and would not likely be able to work full-time. The court calculated the plaintiff's loss of future income based on the assumption that she is likely to return to full-time employment in the future, albeit with an annual income lower than that of a psychiatric nurse, and came to a figure of $800,000.00.

[113] Overall, Ms. Ferguson says that a fair award for her diminished future earning capacity is $300,000.00.

***Defendant's Position***

[114] The defendant essentially takes the same position for future earning capacity as he does for past earning losses. He says that Ms. Ferguson's suggested future career paths are not realistic, and that her past pre-accident work history indicates that she would have most likely pursued the same management positions that she ultimately accepted and excelled in, and where her salary has continued to increase. The defendant's position on damages under this head is that nothing should be awarded, or that if there is any award, it should be less than $80,000.

[115] With respect to the suggestion that Ms. Ferguson would continue in management but would have worked extra shifts, the defendant says that this is made even more unlikely by her move to Brockville, Ontario, where the next nearest health authority is over an hour away. He also says that this is unlikely given the hourly demands of her current position.

[116] Finally, the defendant says that if the plaintiff is entitled to any award, it should be extremely minor on the basis that she has voluntarily moved to a smaller community, her life circumstances have changed in the sense that she wants to be close to her parents, and that she is spending more time with her family. She is also

now pursuing a master's degree, which requires approximately 20 hours of her attention per week. Her ability to work overtime or take on other shifts is therefore limited given her family responsibilities, her educational and recreational ambitions, and her requirements to cook, clean and live independently.



***Legal Principles***

[117] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by her injuries; and, if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [*Brown*]; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) [*Pallos*]; and *Pett v. Pett*, 2009 BCCA 232. The plaintiff must establish that there is a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari*, 2010 BCCA 140 at para 32 [*Perren*].

[118] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

[119] Insofar as 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 essential task of the court is to 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 the accident: *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 32.

[120] There are two possible approaches to assess loss of future earning capacity: the "earnings approach" and the "capital asset approach". Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.

[121] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos; Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233 [*Gilbert*].

[122] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert* at para. 233; and *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 and 56 [*Morgan*].

[123] Though the capital asset approach is not a "mathematical calculation", I must still set out the factual basis of the award: *Morgan* at para. 56.

[124] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

> The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. 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: *Athey v. Leonati, supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be

> made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch, supra*, at 79. …

[125] Furthermore, increased earnings and efforts to mitigate the loss will not preclude an award. In *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44, Justice Southin stated:

> Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

***Determination***

[126] I find Ms. Ferguson's first proposed career path to be highly unlikely, such that it does not amount to a real and substantial possibility.

[127] I find that her second suggested career path wherein she would return to OR nursing for some period of time to be very likely, even if not for the entire period of time she suggests.

[128] I accept that there are ample OR positions available in BC, and even in Brockville, where Ms. Ferguson currently resides. In Ontario, the nursing wages stated in the collective agreements are approximately 5-10% less per hour than in BC for an experienced nurse, though I find that Ms. Ferguson was likely to continue to move to find new and lucrative opportunities as she has throughout her nursing career both before and after the accident.

[129] In addition to this probable loss in actual income, I must also consider Ms. Ferguson's broader loss in terms of her ability to access operating room nursing positions. I find that this has rendered her less capable overall of earning income from this broader range of employment, has made her less marketable or attractive as a potential employee; and that she has lost the ability to take advantage of job opportunities in a high demand field that would otherwise have been open to her.

Finally, there is no question that Ms. Ferguson considers herself less valuable as a person capable of earning income and providing direct care to patients.

[130] This is therefore an assessment and not a calculation. Overall, I consider that Ms. Ferguson's financial losses amount to approximately $12-15,000 per year going forward in terms of potential salary differentials. Her losses of opportunity to move around as a travel nurse, or to take permanent OR nursing positions, are also a real loss, to which I would ascribe a value of approximately 15% of her current salary. These amounts are roughly equivalent and confirm the appropriateness of an award in this range.

[131] I would ascribe this loss to her for a period of an additional 15 years, after which I find that Ms. Ferguson was so likely to have found herself squarely in a management position that ascribing OR nursing wages and opportunities to her would not be appropriate.

[132] Overall, I would award Ms. Ferguson $225,000 in damages for future earning capacity.

### Loss of Housekeeping Capacity

#### *Plaintiff's Position*

[133] Ms. Ferguson seeks damages for loss of housekeeping capacity as a distinct head of damage separate and apart from her claims for the cost of housekeeping assistance as a part of her costs of future care.

[134] Ms. Ferguson and Mr. Muha testified that a very significant reduction in her housekeeping activities began immediately after the accident. Ms. Ferguson then gradually returned to contributing to the household chores over the course of approximately one year. Since she began living alone in 2014 she has taken on much of the housekeeping herself again, incorporating pacing strategies, but not deep cleaning. Prior to the accident Ms. Ferguson did the overwhelming majority of the outdoor chores when she lived in a home with a yard. She enjoyed gardening and did not shy away from heavier yard work, as well as routine planting and

weeding. Since moving to Ontario in 2017, she has been unable to attend to routine yard maintenance and gardening that she was previously able to perform, and that she enjoyed.

[135] Ms. Ferguson claims $18,000.00, which is approximately $1,000.00 per year, for future loss of housekeeping capacity.

***Defendant's Position***

[136] The defendant addresses this claim as an element of Ms. Ferguson's damages for costs of future care for housework assistance, but even there says that the claim is not compensable as pecuniary damages, but is better dealt with, if at all, as a claim for non-pecuniary damages.

***Legal Principles***

[137] Damages for loss of housekeeping capacity are conceptually distinct from other heads of damage and this award may be given both prospectively and retrospectively.

[138] In *McTavish v. MacGillivray et al.*, 2000 BCCA 164, the Court of Appeal discussed loss of housekeeping capacity as follows:

> [68] In my view, when housekeeping capacity is lost, it is to be remunerated. When family members by their gratuitous labour replace costs that would otherwise be incurred or themselves incur costs, their work can be valued by a replacement cost or opportunity cost approach as the case may be. That value provides a measure of the plaintiff's loss. Like the trial judge I would prefer to characterize such compensation as general damages assessed in pecuniary terms, reserving special damages for those circumstances where the plaintiff actually spent money or incurred a monetary liability, although I do not wish to state a settled view on that question in the absence of full submissions as to the consequences of the distinction, if any.

[139] Madam Justice Kirkpatrick affirmed that the law in respect of loss of housekeeping capacity is conceptually distinct from costs of care in *O'Connell v. Yung*, 2012 BCCA 57 at para. 67 [*O'Connell*]:

> … As I understand the principle, it is the loss of a capacity – an asset – that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs

> are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required (*Krangle* at para. 22). …

***Determination***

[140] While I agree that loss of housekeeping capacity is a distinct head of damages, there is significant overlap in the plaintiff's claims in this regard with her claims for cost of future care. There was approximately one year, on the evidence, when Ms. Ferguson required the assistance of her then husband to assist with housekeeping that she had previously done but was unable to do. After that date, the evidence is that she lived independently, and was able to do much of the housekeeping for herself without any assistance in a smaller apartment. When she moved to Brockville and her larger home with a yard approximately one year before trial, she began to incur additional expenses. However, she continues to do her own cleaning, cooking, and other housekeeping tasks.

[141] While the loss of the ability to perform one's own housekeeping is a loss in and of itself, in this case Ms. Ferguson also claims direct compensation for these costs going forward as an aspect of her claim for cost of future care. During the one year where she was unable to perform this work, she had unpaid help to replace her own capacity. I would award her $1,000 under this head of damages.

[142] The remaining claims with respect to housekeeping and yard work properly fall under claims for cost of future care in this case, as they are claims for work that her healthcare providers have recommended that she seek assistance with, despite the fact that she does some of them herself already. I will address these under the heading of cost of future care.

**Cost of Future Care**

[143] The claim for cost of future care is one of the areas of largest contention in this case, with the plaintiff seeking to recover $215,000 and the defendant suggesting that the award should be less than $8,000.

***Plaintiff's Position***

[144] The plaintiff relies primarily on the report of the occupational therapist, Ms. Ditson, together with additional recommendations by Ms. Ferguson's family doctor, Dr. Parhar.

[145] These recommendations include costs for items such as heat pads ($80), supportive shoes ($1500), medications ($31,550) and monovisk injections into her knee ($7,900). They also include costs for ongoing therapies, including physiotherapy for nine sessions on average per year to the age of 80 ($15,220), massage therapy sessions once every three to four weeks to the age of 80 ($27,060), and ergonomic assessment of Ms. Ferguson's workstation ($200-$400 plus the cost of ergonomic equipment), osteopathy services in the short term pending an appropriate physiotherapist being located ($500), and an allowance for some psychological services ($900).

[146] Ms. Ferguson seeks some recovery for the costs of her gym membership. She recognizes that she has had a long history of gym attendance as a recreational activity prior to the accident, but says that the accident now requires her to attend the gym as part of her rehabilitation, rather than simply for recreational purposes, and requires she attend a gym with a greater accommodation of her needs. She argues that the defendant should make a contribution towards this expense. Her current gym fees are $600 to $700 per year, and the cost of consulting with the kinesiologist is approximately $75 per session. She seeks a total contribution from the defendant of $1,500.

[147] Ms. Ferguson also seeks compensation for the possibility that she may undertake shoulder surgery in the future, as recommended by Dr. Zarkadas. Ms. Ferguson has no immediate plans to pursue the surgery but she is open to further consideration on the basis of how her shoulder injury progresses. If she were to pursue the surgery she would likely require post-operative physiotherapy treatment, occupational therapy, assistive devices, medication for healing and pain management, personal care assistance, some additional household assistance, and

transportation assistance. Ms. Ferguson seeks an additional $10,000 to cover this contingency.

[148] Finally, these recommendations include an allowance for two hours per week of indoor housekeeping assistance to the age of 80 at approximately $120,000. Both Ms. Ditson and Dr. Parhar recommend yard work and maintenance assistance. Dr. Parhar recommends six days per year of seasonal cleaning assistance for heavier household chores both inside and outside the home. Ms. Ditson recommends assistance with a broader range of outdoor tasks, including lawn mowing, gutter cleaning, weeding, raking leaves, planting bed preparation, pruning and snow removal. Based on Ms. Ditson's recommendations, the plaintiff is seeking $2,000 a year to the age of 65 for this work and an additional $750 per year thereafter to the age of 82 recognize that Ms. Ferguson would have required some assistance in her later years with these tasks in any event.

[149] I note that the plaintiff is not seeking the full costs of all of the recommended items or therapies, and has generally sought recovery at the lower end of these recommendations, or sought contribution rather than full indemnity in a number of instances in her itemized claims above. She furthermore claims that, although these itemized amounts would amount to approximately $250,000 in future care costs, the total that she is seeking, taking into account the cost of future care, is a global assessment of $215,000.

[150] Ms. Ferguson says that the evidence shows that prior to the accident she was an active gardener, and did most of the housework, cleaning work and yard work. Although she lived in an apartment at the time of the accident and until 2017, prior to that date she had lived in homes with significant yards, been an active gardener, and had regularly shoveled snow while living in Ontario. She says that she would have continued to do even heavy cleaning and yard work were it not for the accident, and that she would have continued these activities until her mid 60s.

***Defendant's Position***

[151] The defendant argues that Ms. Ferguson's future care requirements are limited to exercise and ongoing strengthening at most. He says that she has already received extensive instruction from a physiotherapist and kinesiologist and can now pursue that physical training without further supervision.

[152] The defendant also says that the future care requirements should be limited to a much shorter period of time.

[153] With respect to the specific items recommended by the occupational therapist and sought by Ms. Ferguson, the defendant objects to any payment for the heat pad on the basis that Ms. Ferguson already has one and does not require regular replacement of it. The defendant objects to the contribution towards more supportive orthopedic shoes on the basis that this would have been required in any event as a result of the plaintiff's development of plantar fasciitis in 2016, and that no ongoing requirements arise in this regard.

[154] With respect to the costs of medication, the defendant relies on coverage by her benefits plan as reflected in her special damages claim. He says that as a result, minimal recovery should be awarded for this, or in the alternative the most that should be awarded for prescription and non-prescription medicines is $5,000. They say the expert medical evidence does not support continued Monovisc injections and no award should be made in this regard.

[155] With respect to ongoing therapeutic services, the defendant submits that there is no ongoing need for psychological or counselling services. He notes that osteopathy services have not been specifically recommended, and says that no ergonomic assessment has yet to be done and it is unlikely that she will do so in the future. The defendant asserts that Ms. Ferguson's employer would be able to pay for this in any event. With respect to massage therapy, the defendant says that this is not a curative therapy and is generally not recommended by the doctors for this purpose. It is only recommended by Dr. Parhar to relieve severe exacerbation of symptoms. Overall, the defendant says that the extent of the plaintiff's current use of

massage therapy is excessive and is driven more by her personal interest, and that more active therapies should be pursued.

[156] The defendant is prepared to support a small amount for physiotherapy over the next six months for a total of $745, but says that no ongoing or indefinite physiotherapy is recommended or required. The defendant is also prepared to contribute to the cost of gym membership, which the defendant continues to submit is the main therapy required by the defendant, at a cost of $600 to $2,000 for a period of one to three years.

[157] With respect to the contingency costs of surgery, the defendant takes the position that no surgery is necessary, and that in any event on the evidence Ms. Ferguson is unlikely to pursue this option.

[158] With respect to Ms. Ferguson's claim for housekeeping costs, the defendant notes that the plaintiff was living in a 1,000 square-foot apartment for the year following the accident and her husband was able to assist her with housekeeping during this time. In 2014 she moved into a rented 600 square-foot apartment on her own where she was capable of preparing her own meals and keeping her small apartment tidy and clean. When she moved to Ontario in the spring of 2017, she purchased of two-story home on a half-acre lot with a long driveway. In her current situation she does and is able to cook for herself, go grocery shopping, clean the kitchen and countertops, vacuum the house, sweep the bathroom floors, and do bathroom cleaning that she is able to do standing up. With respect to yard maintenance, the defendant says that there is no evidence that she is unable to mow her own lawn, the extent of any gardening that she currently does, and that much of the yard and maintenance work she claims is work that would ordinarily be contracted out. She is generally independent in her activities of daily living. The defendant objects to any payment for housekeeping costs, but specifically payments related to her larger property that she was moved into since her accident.

[159] The defendant relies on the case of *Travis v. Kwon*, 2009 BCSC 63, for the proposition that housekeeping assistance is not medically justified and is better dealt

with as non-pecuniary damages. The defendant also relies on *Friesen v. Pretorius Estate* (1997) 37 B.C.L.R. (3d) 255 (C.A.) at para. 37 for the proposition that the assessment of damages for cost of care cannot be affected by the choices of the injured person such as moving to Ontario.



***Legal Principles***

[160] 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. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. 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 v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) [*Milina*]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[31] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina* at p. 84; and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[161] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be able to be rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell* at paras. 55, 60 and 68-70.

[162] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases

negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert*.

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

***Decision re Costs of Future Care***

[164] The defendant's position with respect to the compensable costs of future care follows from his position that Ms. Ferguson does not suffer from any debilitating or chronic injuries sustained to her knee or neck or shoulder as a result of the accident. This position also seems to be informed by a view that all Ms. Ferguson is required to do is to lose weight. The defendant's position that no ongoing therapies are required flows from this position, which I have rejected.

[165] Nevertheless, the number of years for which Ms. Ferguson claims she will require the level of intensity of therapy that she claims is overstated on the evidence. While she has made some allowances for negative and positive contingencies in the future in terms of what services she may have required in any event, I find that the amount she seeks is higher than what she is entitled to.

[166] Ms. Ferguson's most significant claim is for housekeeping at $120,000, assuming assistance two hours each week until she is 80. I find on Ms. Ferguson's evidence that she is capable of doing much of her own housework, but that deep cleaning is no longer possible for her. I further find that it is likely that she would have required assistance with deep cleaning regardless of the accident by the time she was 68. I award her $15,000 to assist with paying a cleaner a few hours each month to perform deep cleaning tasks that she cannot perform safely as a result of the accident.

[167] With respect to yard work, I find that Ms. Ferguson has been disabled from doing some of the yard work she used to enjoy doing. However, the amount of work that Ms. Ditson recommends she have done relates at least in part to her choice to purchase a home with substantial grounds. In addition, Ms. Ferguson's own evidence is that she remains able to do at least some of this work. I award Ms. Ferguson $5,000 in compensation to pay for assistance with some of the moderately strenuous work she may have done but for the accident in any house she may have moved into or may still move into in the future.

[168] I see no reason to depart from Ms. Ditson's recommendations regarding specific devices such as heating pads, and shoes with supportive insoles. The same is true of recommended therapies, including massage and physiotherapy, psychological counselling, an ergonomic assessment, and monovisc injections. I would make a global award for all of these items of $50,000 taking into account the estimated costs and frequencies of each.

[169] With respect to medications, Ms. Ferguson claims over $31,000 for ongoing medications based on their retail cost. However, her special damages claim strongly suggests that these costs have been covered substantially to date by her insurance. I would award $5,000 to cover any future medication costs that are not otherwise covered by her employment plan.

[170] Ms. Ferguson seeks a total contribution from the defendant of $1,500 towards the costs of her gym membership. This is within the range that the defendant agreed is appropriate and I make that award.

[171] With respect to future potential shoulder surgery and recovery time and costs, I agree with the defendant that on Ms. Ferguson's own evidence she is not likely to agree to this surgery. However, I consider that she may yet be persuaded or required to do so. Taking into account the contingency that she may not pursue surgery, and the substantial awards for related therapies that she are already anticipated, I limit this award to $2,500.

**Special Damages**

[172] Ms. Ferguson seeks $22,611.77 in special damages covering numerous items since the accident, including medication, a contribution to her gym membership, massage therapy, physiotherapy and kinesiology, lawn care and maintenance, osteopathy consultations, a back support, mileage, parking, rental care and taxi services.

[173] The defendant objects to some but not all of these claims, most particularly the extent of the costs sought with respect to rental vehicles and taxis, yard maintenance, and the extent of her massage and physiotherapy. However, he agrees to the costs of the psychologist, medications, a significant portion of the mileage and parking, and the costs of various fitness endeavours and devices. He says that the costs of these items should be awarded in the amount of $20,375.85.

[174] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident.

[175] This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina* at 78.

[176] I agree with the defendant that the plaintiff's claims for rental vehicles costs is overstated, and includes some costs that were not necessary for her transportation or rehabilitation. I would still award a significant portion of this amount, however. I also agree with the defendant that the tree removal costs claimed by Ms. Ferguson for her new home are beyond what the defendant should be required to bear as a result of this accident.

[177] Taking all of the above into account, I award Ms. Ferguson $20,900 in special costs, excluding her educational claims.

***Education Costs***

[178] The more difficult issue is Ms. Ferguson's claims for the costs of her master's degree. Ms. Ferguson states that in order to stay competitive in the marketplace at the management level of nursing, she is required to work toward, and ultimately obtain, a master's degree in nursing. She has been undertaking such a degree on a part-time remote basis from George Washington University in the United States while pursuing her full-time employment. She says she would not have undertaken this program had the accident not occurred.

[179] The cost of this program is in US dollars but the amounts in Canadian dollars that she has incurred to date are approximately $32,500 in tuition and another $150 in textbooks. She is required to complete seven more classes to obtain her degree at approximately $4,500 Canadian per class for a total of $31,500 and further tuition. She anticipates another $200 will be required for further textbooks.

[180] Her current job requirement would ordinarily require a master's degree, and her employers have considered it important that she is pursuing that degree. A master's degree is generally a requirement for most managerial or administrative nursing positions. Although Ms. Ferguson has qualified for a number of positions to date without having obtained such a degree, I find on the evidence that to be competitive in the area of administrative nursing roles, a master's degree is required.

[181] The defendant says that this is a not a legitimate expense with respect to special damages.

[182] In addition, he says that the defendant should not be required to both pay for a master's program and pay future wage loss on the basis of Ms. Ferguson continuing to work as an OR nurse with substantial overtime. He says that these positions are inconsistent and had the plaintiff stayed on as an OR nurse she would not have had to obtain her master's degree. If the plaintiff stayed in nursing management, she would have had to obtain a master's degree in any event.

[183] I find that it is likely that Ms. Ferguson would have pursued a master's degree, though unlikely she would have done so until her late 50's were it not for the accident. The accident required her to become more competitive in the narrower field of management opportunities much sooner than would otherwise have been required. I also find that the defendant has benefited from Ms. Ferguson's ambitious plan to pursue that degree while continuing to work full-time, and that her pursuit of a master's degree at this time has assisted her in obtaining and maintaining her current management job and salary. This has led to a significant mitigation of Ms. Ferguson's losses, from which the defendant has benefitted. Although Ms. Ferguson's claim is for amounts greater than a management salary in the near future on the basis of overtime work of an OR nurse, the awards I have made in this case take into account the substantial salary she has made in her management positions to date and is likely to continue to make. I also find that while mitigating her losses in terms of the abundance and flexibility of nursing work she would otherwise have been qualified to do, the master's degree does not completely restore the breadth of those opportunities to her.

[184] The costs of retraining are generally recoverable as damages against the defendant, particularly where those costs will benefit the defendant in the longer term in relation to pecuniary claims for past and future wage losses, as well as non-pecuniary damages. In *S.R. v. Trasolini*, 2013 BCSC 1135, Madam Justice Ballance held that the cost of reasonable retraining, incurred prior to trial, could be compensated under the heading of special damages:

> [219] The law has long-recognized the cost of reasonable retraining to be a proper element of recovery under future loss: *Palmer v. Goodall* (1991), (BC CA), 53 B.C.L.R. (2d) 44 at 59 (C.A.); *Power v. Carswell*, 2011 BCSC 1672 at paras. 201-202. Counsel did not direct my attention to any authorities concerning recovery of that expense where it has been incurred before trial. However, I can see no principled reason to deny recovery of such cost where it is incurred prior to trial provided it is otherwise reasonable and appropriate. Given the nature of Ms. R.'s deficits brought about by the Accident and the poor outcome of her post-Accident job search, it was reasonable for her to take appropriate steps to enhance her general employability by taking those courses. Accordingly, she is entitled to compensation for that out-of-pocket cost in the amount of $3,895.

[185] In *Azuma-Dao v. MKA Leasing Ltd.*, 2012 BCSC 10, the court awarded the plaintiff damages for past wage loss due to her enrolment in a teaching program to retrain, adjusted for contingencies and failure to mitigate. The plaintiff also claimed the cost of her university tuition and books under the head of special damages. The court allowed these costs ($9,288.40 for tuition and $513.45 for books), but reduced them by 50% to account for contingencies, including the "substantial possibility that she would have wished to retrain at some point in the future, even if the accident had not occurred": see para. 92.

[186] Ms. Ferguson's retraining in this case is expensive, but no evidence was put to the court with respect to lesser alternative options for Ms. Ferguson, particularly in the context of her continued full-time work, from which the defendant significantly benefits.

[187] On the other hand, I find that Ms. Ferguson was likely to undertake a master's program in the future. She indicated that this was something her parents hoped for her, and that she contemplated doing perhaps much later in her career. I would therefore award Ms. Ferguson a portion but not all of her educational costs, to account for this expense coming a decade or more earlier in her career than it was likely to. I award Ms. Ferguson her costs to date with respect to her master's program in the amount of $32,650.

**Non-pecuniary Loss**

***Plaintiff's Position***

[188] Finally, with respect to her non-pecuniary losses, Ms. Ferguson is seeking damages in the range of $135,000 to $150,000

[189] She says that despite her ongoing limitations, she has carried on working as much as she can: pushing her limits, suffering setbacks, doing her master's degree courses, working longer hours to compensate for taking breaks and taking longer to complete tasks. Ms. Ferguson pushes herself at work out of necessity to complete her duties, and her hard working personality. The fact that Ms. Ferguson continues

to work long hours since the accident in this case is not an indication that she is not suffering. She is a workaholic by personality.

[190] The plaintiff refers to cases with ranges of $125-$150,000 for similar injuries and levels of impact. The lowest comparable case provided by the plaintiff is *Young*, where non-pecuniary damages in the amount of $110,000.00 were awarded to a psychiatric nurse in the context of lost earning capacity damages of $800,000. In that case, the plaintiff suffered from soft tissue injuries to her neck and back, a chronic injury to her hip and psychological injuries as a result of the motor vehicle accident. Though she had pursued all major treatments and had even had surgery, pain in her hip persisted.

[191] A number of comparable cases with awards of around $150,000 were provided, including *Gulati v. Chan*, 2015 BCSC 431; *Redmond v. Krider*, 2015 BCSC 178; and *Risling v. Riches-Glazema*, 2016 BCSC 2423.

***Defendant's Position***

[192] The defendant submits that the reasonable range of non-pecuniary damages is $75,000 to $80,000. The defendant relies on a number of cases which it says related to similar soft tissue injuries where the awards were in this range, including *Jorgenson v. Coonce*, 2013 BCSC 158; *Owen v. Peljhan*, 2017 BCSC 423; *Kuras v. Repo*, 2014 BCSC 1634; and *Park v Tagonski*, 2015 BCSC 555.

***Legal Principles***

[193] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[194] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

> The inexhaustive list of common factors cited in *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).

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

***Determination***

[196] I find on all the evidence that Ms. Ferguson's injuries have resulted in chronic, persistent, disabling pain which continues to impact her. The life she has ahead of her is not likely to be as enjoyable as a result of the accident and the injuries that continue to affect her – causing pain, discomfort, sleep disruption, loss of self esteem, limiting her recreational activities, causing her to take medication that may compromise her long term health, diverting time and energy to attend therapy, causing her to have less energy to engage in activities outside of work, and causing her stress and anxiety about her future. Most significantly, the accident has forced her to abandon the operating room. This has affected her identity as a capable and significant contributor to the direct care of patients, and has led her to question her own worth. While she still identifies as a nurse, and continues to wear her scrubs

years after the accident even in her management roles, her sense of loss in this regard is acute and ongoing.

[197] I would note in this case in particular that Ms. Ferguson's stoicism and perseverance in working through her pain has undoubtedly reduced her financial losses. I do not find, however, that it suggests that she is any less in pain, or less emotionally affected by the loss. To the contrary, I find that she has worked harder to make up for any lag in her physical or mental abilities caused by the accident and her ongoing symptoms and medications.

[198] In these circumstances, I find that her non-pecuniary losses are particularly significant and require compensation. I award $140,000 in non-pecuniary damages.

**SUMMARY**

[36] In summary, the defendant is required to pay Ms. Ferguson damages in the following amounts:

| | |
|---|---|
| a) Non Pecuniary Damages: | $140,000 |
| b) Past Loss of Earning Capacity: | $35,000 |
| c) Future Loss of Earning Capacity: | $225,000 |
| d) Loss of Housekeeping Capacity: | $1,000 |
| e) Costs of Future Care: | $79,000 |
| f) Special Costs, including education expenses: | $53,550 |

**INTEREST AND COSTS**

[199] The plaintiff is entitled to court order interest, in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79. She is also entitled to her costs at the usual scale, subject to the existence of any offers or other matters that I have not been made aware of. Should the parties require direction with respect to either of these

matters, they may make arrangements with court scheduling within 30 days of the release of these reasons to appear before me.

"Marzari J."