

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Aquino v. Insurance Corporation of British  
Columbia*,  
2025 BCCA 56

Date: 20250228  
Docket: CA49797

Between:

**Lou Sigrid Cardenas Aquino**

Appellant/  
Respondent on Cross Appeal  
(Plaintiff)

And

**Insurance Corporation of British Columbia**

Respondent/  
Appellant on Cross Appeal  
(Defendant)

And

**John Doe #1 and/or Jane Doe #1 and John Doe #2 and/or Jane Doe #2**

Respondents  
(Defendants)

Before: The Honourable Justice Griffin  
The Honourable Mr. Justice Butler  
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated  
March 5, 2024 (*Aquino v. Insurance Corporation of British Columbia*,  
Vancouver Docket M2010635).

Counsel for the Appellant/Respondent on  
Cross Appeal:

G.R. Cameron  
T.C. Schapiro

Counsel for the Respondent/Appellant on  
Cross Appeal:

M-H. Wright  
D. Machat

Place and Date of Hearing:

Vancouver, British Columbia  
October 11, 2024

Place and Date of Judgment:

Vancouver, British Columbia  
February 28, 2025

**Written Reasons by:**

The Honourable Justice Griffin

**Concurred in by:**

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

**Summary:**

*The appellant, a nurse, claimed damages for injuries caused by a motor vehicle accident. She appeals a jury’s award of no damages for loss of earning capacity, submitting that the judge erred in his charge to the jury in two ways: the instruction on unanimity; and the instruction on loss of earning capacity. Held: Appeal dismissed. The appellant did not object to the charge at trial. The judge did not err in instructing the jury at the outset that they needed to be unanimous. The discretion to instruct the jury otherwise and that only 75% need to agree, does not arise under s. 22 of the Jury Act until after three hours, and no party asked the judge to exercise this discretion. The judge did err in instructing the jury on loss of future earning capacity, in that the charge was too narrowly focused on one aspect of loss of earning capacity only, the difference between full-time work and part-time work. While that focus was understandable as it was the focus of the appellant, there was also some evidence that could support the argument that the appellant was less competitive as an employee because more physically demanding nursing jobs might be foreclosed to her. However, this focused approach did not lead to a miscarriage of justice, as a broader instruction would not have changed the outcome. The evidence and submissions on behalf of the appellant were that there were plenty of suitable nursing jobs available to her. Therefore, the evidence did not support the notion that she would suffer a financial loss if she could not pursue some more physically demanding types of nursing jobs.*

**Reasons for Judgment of the Honourable Justice Griffin:**

**Introduction**

[1] Ms. Aquino was involved in a motor vehicle accident on March 23, 2019, when a loose tire from an unidentified freight truck struck her vehicle while she was driving on a highway. The respondent ultimately admitted liability for the accident.

[2] Ms. Aquino was age 28 at the time of the accident and at early stages of her career as a nurse. She claimed the accident left her with significant ongoing neck and back pain; the respondent Insurance Corporation of British Columbia (“ICBC”) took the position that her injuries, if any, were very minor.

[3] After a trial in March 2024, the jury awarded damages but much less than Ms. Aquino claimed. The verdict was: \$86,000 for non-pecuniary damages; \$1,200 for past loss of earning capacity; \$9,200 for cost of future care; and \$26,400 in special damages for a total of \$122,800. The jury awarded no damages for loss of future earning capacity.

[4] Ms. Aquino appeals from the jury award of no damages for loss of future earning capacity.

**Issues and Positions of the Parties**

[5] Ms. Aquino raises two issues with the jury instructions.

[6] First, she submits the judge erred in instructing the jury they must be unanimous and in not advising them either at the outset or after three hours, the court could receive a verdict of 75% of the jurors.

[7] Second, she submits the judge's instruction on loss of future earning capacity improperly narrowed the potential loss to whether she would be unable to work full-time hours in her chosen field, which was nursing. She says the judge ought to have put to the jury other approaches to assessing loss that do not presume the person will stay in their same field.

[8] Ms. Aquino submits the proper remedy is to order a new trial.

[9] The jury verdict is not challenged on the basis it is so plainly unreasonable and unjust that no properly instructed jury reviewing the evidence as a whole and acting judicially could have reached it.

[10] The respondent asserts the judge made no such errors in the jury charge. The charge on unanimity was a standard charge. The judge has discretion to instruct the jury after three hours that a 75% majority will do, this is not a requirement, and the appellant did not ask the judge to exercise this discretion.

[11] The respondent also submits the loss of earning capacity instruction was based on the theory of loss of earning capacity advanced by Ms. Aquino and on the evidence.

[12] Further, the respondent submits the draft jury charge was reviewed with counsel prior to it being delivered, and counsel for Ms. Aquino made no objection to

the form of the jury charge in relation to the topics addressed in the two grounds of appeal, unanimity and loss of future earning capacity.

[13] The respondent adds that if there was an error in the charge, it was inconsequential and did not result in a substantial wrong or a miscarriage of justice.

**Analysis**

**Did the judge err in instructing the jury they must be unanimous?**

[14] Section 22 of the *Jury Act*, R.S.B.C 1996, c. 242, provides:

22 (1) If a jury does not reach a unanimous verdict within 3 hours from the time it retired to consider its verdict, the judge of the court may receive the verdict of 75% of those jurors.

(2) A verdict under subsection (1) is as binding in all respects and has the same effect as if it had been the unanimous verdict of the full jury.

(3) Nothing in this section applies to any prosecution, suit or other proceeding in respect of any offence or for the recovery of any penalties or forfeitures by or on behalf of the Crown.

[15] In his general charge, the judge instructed the jury “the law requires you to be unanimous in any verdict you see fit to return”.

[16] The jury instruction given by the judge was similar to an instruction contained in a leading BC text on model civil jury instructions, CIVJI: Civil Jury Instructions, 2<sup>nd</sup> ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2019 update). That text instructs the judge to start by telling the jury their verdict must be unanimous. The manual recommends the judge not tell the jury about the 75% rule until at least three hours have passed, with the possibility of waiting longer.

[17] Ms. Aquino submits the trial judge’s instruction on unanimity was in error, as is the advice in CIVJI. She submits it misled the jury. She suggests if jurors know about the 75% rule from the outset, it could materially affect their deliberations in a way that could result in a different verdict than one which is premised on unanimity. She suggests if the judge first instructs on the need for the jury to be unanimous,

and then later tells them unanimity is not in fact required, a jury will wonder if the judge has made other instructions that are not accurate.

[18] Ms. Aquino further submits a verdict premised on the requirement of unanimity could result in coercion of a minority juror's views. Ms. Aquino cites US authority in criminal cases in which an error was found in jury instructions which suggested the jury must be unanimous in a verdict of not guilty, including *Fields v. State*, 487 P. 2d 831, 837 (Alas. Sup. Ct. 1971).

[19] I am not persuaded by Ms. Aquino's submissions. In my view judges who advise juries at the outset of the jury charge that they must return a unanimous verdict are correctly applying s. 22 of the *Jury Act*.

[20] Pursuant to s. 22, the ability to accept a verdict from 75% of jurors does not arise until two conditions are met: at least three hours of deliberations have passed; and the judge has exercised discretion to accept a decision of 75% (this is preceded by an instruction to this effect to the jury). Thus, at the time of the general charge it is correct for a judge to say that unanimity is required, and this remains correct, unless and until three hours has passed and the judge exercises discretion under s. 22 to advise the jury of the 75% rule.

[21] Furthermore, I do not accept the argument that it is coercive of jurors holding a minority view to fail to advise jurors at the outset that if they do not reach a unanimous verdict within three hours, the judge has discretion to receive a verdict of 75% of those jurors. In my view, giving this instruction before the jury has made a serious attempt at deliberating may interfere with the obligation of the jurors to listen to each other's views in an honest attempt to reach unanimity.

[22] We cannot know what goes on in the jury room during deliberations, but we have to assume jurors will act respectfully towards each other and listen to other's points of view. I am unwilling to assume, as argued by counsel for Ms. Aquino, an instruction requiring unanimity is coercive of some jurors. I also do not accept the appellant's argument that if the jury knew of the 75% rule it would give those jurors

holding a minority view greater leverage over the other jurors to try to change others' minds.

[23] I therefore am not persuaded a miscarriage of justice would result from encouraging a jury to reach a unanimous verdict, and by not advising them at the outset there is a discretion after three hours to accept a verdict from 75% of jurors.

[24] For similar reasons, I do not accept the appellant's suggestion a civil jury should be instructed from the outset that it is possible for the jury to not reach a verdict and to become a hung jury.

[25] I understand in the present case approximately nine hours of deliberations occurred before the jury returned a unanimous verdict. While in my view it would be worthwhile, as a matter of practice, for a judge to canvas the s. 22 discretion with counsel sometime after three hours have passed, that did not happen here. However, both counsel were free to ask the judge to give the s. 22 instruction, and neither counsel raised that issue. This means both counsel were content with the jury continuing to try to reach unanimity. There is no requirement to instruct on the 75% rule after three hours; it is discretionary. Ultimately the jury was able to reach a unanimous verdict. No miscarriage of justice occurred.

[26] I therefore would not accede to the first ground of appeal.

**Did the judge err in instructing the jury on loss of future earning capacity?**

[27] As a second ground of appeal, Ms. Aquino submits the judge failed to instruct the jury there could be more than one way to approach the analysis of whether the appellant suffered a loss of future earning capacity. She submits the judge erred when he instructed the jury to consider whether she would be restricted from working full time hours in her chosen field. Ms. Aquino submits this was an income loss approach which was unduly mathematical, and removed from the jury the "loss of a capital asset" approach described in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) and jurisprudence following it.

[28] The respondent submits the judge’s instruction matched the manner in which the appellant presented her evidence and her case at trial.

***Standard of review when there is no objection to the civil jury charge***

[29] The law is well established on the approach an appeal court should take to review a civil jury instruction when the parties are given the opportunity to object or make corrections and fail to do so.

[30] A misdirection in a jury instruction is a legal error, and as such the standard of review is correctness: *McCliggot v. Elliott*, 2022 BCCA 315 at para. 48.

[31] However, the failure to object at trial on either review of a written draft jury charge or after a judge’s delivery of the oral charge is a “significant factor for consideration on appeal”: *Mazur v. Lucas*, 2014 BCCA 19; *McCliggot* at para. 49. An appellate court may decline to order a new trial, even where an error has been established, where counsel failed to object at the trial level: *McCliggot* at para. 48.

[32] The general rule in such cases is a new trial will not be ordered unless there has been a substantial wrong or miscarriage of justice: *Knauf v. Chao*, 2009 BCCA 605 at paras. 18–21; *Rhodes v. Surrey (City)*, 2018 BCCA 281 at para. 16; and *McCliggot* at para. 48. This is because inaction by counsel at trial, where the trial judge has an opportunity to take corrective action, “supports the presumption the instruction could not have been seriously misleading or unfair, leading to an injustice” (*Mazur*, at para. 41).

[33] The two questions on this second ground of appeal are therefore whether (1) the trial judge made an error in his direction to the jury and, if so, (2) whether this misdirection resulted in a substantial wrong or miscarriage of justice because a jury apprised of all relevant information might very well have arrived at a different verdict: *Mazur*, at para. 51.

[34] In answering these questions, this Court is obliged to “consider the entire charge to the jury, the whole of the evidence, and the positions of counsel as taken

from their addresses to the jury” before interfering: *Thomas v. Foskett*, 2020 BCCA 322 at para. 26, quoting *Lennox v. New Westminster (City)*, 2011 BCCA 182 at para. 25.

***Principles applicable to claims for loss of future earning capacity***

[35] It is helpful to review the principles applicable to assessing damages for loss of future earning capacity, before turning to the submissions of the parties at trial and the jury charge.

[36] Tort law seeks to restore a person to the position they would have been in had the negligent conduct not occurred: *Milina v. Bartsch*, (1985) 49 B.C.L.R. (2d) 33 (B.C.S.C.) per McLachlin J. as she then was.

[37] In a case arising from injuries caused by negligence, loss of future earning capacity is one category of financial loss that is especially difficult to assess because it is based on two forecasts:

- a) if not already resolved by time of trial, will the person’s injuries continue, worsen or flare up, or resolve in the future; and
- b) what would the future employment prospects have been like if the person had not been injured, as compared to the future now the person has been injured.

[38] This exercise of considering the future if the accident had not occurred, versus the future post-accident, was especially difficult in this case because the appellant was relatively young and at the beginning stages of her career as a nurse, had a non-accident related injury to her shoulder that required surgery, and was going through other significant changes in her life after the accident, including moving to two new communities as she followed her husband’s work employed in the US military.

[39] As explained in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity of which compensation must be made: *The Queen v. Jennings, supra*. A capital asset has been lost: what was its value?

[40] Recognizing what has to be assessed is based on hypothetical future events, the law does not require proof on a balance of probabilities; rather, the standard of proof is a “real and substantial possibility”, something that is more than mere speculation: *Charters v. Jordan*, 2024 BCCA 351 at para. 100.

[41] In *Rab v. Prescott*, 2021 BCCA 345, this Court outlined a three-step process for assessing loss of earning capacity “particularly where the evidence indicates no loss of income at the time of trial”:

[47] ...The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in [*Brown v. Golaj* (1985), 26 B.C.L.R. (3d) 353 (S.C.)]). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring.

[42] The standard form instruction on loss of earning capacity in CIVJI is informed by the *Rab* three-step test format, and as I will review shortly, was adopted by the judge here. In the present case the appellant takes issue with the judge’s charge on the second step in *Rab*.

[43] The second step in *Rab* requires consideration of the nature of the injury and the person’s employment prospects before and after the accident. This recognizes not all ongoing injuries will lead to possible loss of earning capacity. For some persons, an ongoing injury might in theory limit their ability to pursue some occupations but there is no real possibility it will cause them financial loss, because there was no real possibility they would have ever pursued those occupations based on the nature of their pre-accident employment or employment prospects.

[44] For example, an office worker who suffered a permanent finger injury might be able to establish the first step in *Rab*: they have a continuing injury that impairs their ability to do manual labour. However, if there was never any real and substantial possibility the office worker would do manual labour, and that plaintiff's ability to continue working as an office worker is unimpaired and indeed the plaintiff will earn more income than working as a manual labourer, then they have not been able to establish the second step in *Rab*. They have not shown a real and substantial possibility the injury will impair their future earning capacity.

[45] However, the second step in *Rab* must take into account that a person's ability to earn an income could be impaired by ongoing injuries in a whole variety of ways, depending on the nature of the injury and the person's pre-accident abilities. In *Brown*, this Court held continuing injuries could leave a person: less capable overall from earning income from any type of employment; less marketable or attractive to employers; less able to take advantage of all job opportunities; and less valuable in a competitive labour market. This is what has been described as the "capital asset approach", recognizing one's earning capacity is a capital asset that could be impaired in a variety of ways by an injury.

[46] In *Brown*, there was evidence from three orthopaedic surgeons who agreed that, due to his injuries from the motor vehicle accident, the 28-year-old plaintiff may develop degenerative arthritis in his knee, although they differed in their opinions of the relative likelihood of this occurring and the timeframe in which it was likely to occur. The judge found there was a significant likelihood on this evidence of the plaintiff developing degenerative arthritis and a significant risk this would cause symptoms which would preclude him from pursuing some types of work he had previously engaged in. Thus, the plaintiff's "worth as a capital asset capable of producing income" had been diminished or impaired by the accident, entitling him to compensation on this basis.

[47] In any event, it is only if there is a "real and substantial possibility" of the person's accident-caused injuries impairing their earning capacity in the future, that

the trier of fact will then need to go on to the third step in *Rab* and assess the amount of damages that should be awarded for loss of future earning capacity. The assessment of damages will take into account the likelihood of reasonable variables that could impact the future.

***The parties' positions at trial***

[48] At trial, Ms. Aquino focused her case for loss of earning capacity solely on the theory she would be able to find work as a registered nurse in the future, which was her chosen and desired occupation, but would not be able to work full-time hours, only part-time hours, due to her injuries, specifically ongoing neck and back pain.

[49] Among other evidence, this position was supported by Ms. Aquino's own evidence, plus the evidence of two experts: an occupational therapist, Dominic Shew, as well as a medical doctor who was a physical medicine and rehabilitation specialist, Dr. Malgorzata Sudol.

[50] Ms. Aquino's work history prior to trial was varied, due to several factors including the early stage of her career, her relocation to be with her husband, and the COVID-19 pandemic which was a difficult time for many nurses. There were times she worked full-time and times that she did not.

[51] The position of the respondent was that Ms. Aquino's injuries caused by the accident were not serious, that her shoulder injury caused by her own activities was more serious, and that she was not credible in her claims as to the severity of the injuries or how they affected her choices to work part-time. Further, the respondent challenged the evidence of her experts as relying on Ms. Aquino's subjective reports of pain.

***The jury charge***

[52] The judge charged the jury on the claim for loss of future earning capacity, after charging the jury on the appellant's claim for loss of income to the date of trial.

[53] On the issue of loss of future earning capacity, the trial judge explained the appellant sought compensation for the loss of income she would have been able to earn in the future, but that she will be unable to earn, because of the injuries sustained in the accident. He set out three steps or questions for the jury to consider in assessing the plaintiff's claim:

First, does the evidence establish that a potential future event could lead to a loss of earning capacity for Ms. Aquino?

Second, does the evidence establish a real and substantial possibility of an event giving rise to Ms. Aquino's future loss of capacity to earn income?

Third, if you answer both of those questions in the affirmative what is the assessed value of that possible future loss? Future means from today's date forward or after today.

[54] The three steps outlined by the judge were consistent with the standard charge in CIVJI, which as I have indicated, is consistent with the approach in *Rab*.

[55] On the first step, the trial judge instructed that the jury "must be satisfied that the evidence shows Ms. Aquino could suffer loss of capacity to earn income in the future due to her injuries". He summarized the evidence of Ms. Aquino, Dr. Sudol and Mr. Shew on this point, which were generally that Ms. Aquino continued to experience pain, and may require part-time hours. He pointed out that Mr. Shew agreed on cross-examination that it was impossible to tell what Ms. Aquino's work capacity would be like in the future.

[56] Again, the appellant does not allege there was any error in the instruction on the first step.

[57] That being said, I consider it worth observing that where the person's injuries are continuing at the time of trial, and there has been some past income loss prior to trial, the language of the first step in *Rab* could potentially be confusing to jurors.

[58] For example, a juror might wonder what "future event" is the first step of the *Rab* test referring to, given the accident and injury happened in the past, causing a loss of income before trial, and those injuries are continuing at trial. However, here, when the judge explained the first step, he noted the evidence that the appellant's

injuries had not healed and she continued to experience pain from those injuries. He also had just reviewed the evidence of past income loss. Ms. Aquino did not argue at trial or on appeal that the jury was confused about the first step, and so I accept that it was not.

[59] On the second step, the trial judge introduced the analysis by instructing: “[i]f you are satisfied the evidence shows a potential loss of earning capacity you must go on to consider whether the evidence shows a real and substantial possibility that the loss of capacity will occur”. The trial judge explained since this is the future loss, the appropriate standard was not on a balance of probabilities, but the lower standard of a real and substantial possibility. He described this as follows:

Here that means you will need to consider if there is a real and substantial risk that Ms. Aquino will not fully recover from her injuries and that the pain she experiences will prevent her from working full-time hours in her chosen field.

[60] The appellant focuses on the language “in her chosen field” as an error.

[61] On the third step, the judge explained “quantifying future loss of earning capacity involves comparing the likely future Ms. Aquino would have had if not for the injuries she suffered in the accident with the likely future she will now have after the accident and the injuries she sustained”. He explained this involves considering various hypothetical scenarios and assessing their likelihood. He explained the jury must “ask yourselves whether Ms. Aquino’s earning capacity has been impaired to any degree by her injuries...consider the impact of the impairment on this particular plaintiff, given her skills, education and abilities”.

[62] Towards the end of the charge, the trial judge summarized the positions of each side. He explained the appellant’s position that after the accident, she developed chronic pain, and despite treatments, it persists in her neck and back. Under “future loss of capacity”, the trial judge summarized the position of the plaintiff as follows: “Ms. Aquino will continue to live with chronic pain well into the future and will suffer a loss of earning capacity as a result of her inability to work full-time hours”. The judge summarized the defendant’s position that the evidence does not

support Ms. Aquino’s claims of continued neck and back pain, and her reduction in hours in 2022 followed a pattern of many of her nurse colleagues. The judge noted the defence position that Ms. Aquino had not been candid and had not established any damages.

[63] In putting the final questions to the jury, the judge put this question to the jury:

Question 3: Did the plaintiff suffer a future loss of earning capacity?

3A: What damages do you assess for loss of future earning capacity?

[64] The jury circled “no” in response to the first question and wrote nothing in response to the second question.

[65] Counsel were given a draft of the jury charge and the opportunity to make submissions. Counsel for Ms. Aquino raised several issues with the draft jury charge. She sought to: remove an instruction on the duty to mitigate; change the language in the portion on loss of housekeeping capacity; make certain edits in the summary of Mr. Mace’s (Ms. Aquino’s supervisor) and Dr. Sudol’s evidence; and add additional comments to how the civil standard of proof was described. She did not raise any objection to the draft charge on the issue of loss of future earning capacity.

### **Discussion**

[66] The second ground of appeal alleges the judge erred in focusing the loss of future earning capacity claim on the appellant’s career as a nurse. The key challenge for the appellant is that Ms. Aquino’s trial counsel did not object to the charge.

[67] This leads to the question whether there was any error in the charge leading to a miscarriage of justice.

[68] The lack of objection to the charge by the appellant is significant. A plaintiff is not entitled to make strategic choices at trial and if things do not go well, change position on appeal. At trial, the plaintiff’s case on loss of future earning capacity was quite focused. It was not that Ms. Aquino’s ability to work in a variety of fields was

diminished. Rather, the claim was that her ability to work in her chosen field of nursing was diminished by her injuries.

[69] There may have been good strategic reasons for the appellant's approach at trial. For example, it is possible she could make more income as a nurse than she might be able to in other types of employment. On the evidence, Ms. Aquino was dedicated to being a nurse and was determined to continue in that field. The accident had occurred approximately five years before trial, and her career as a nurse had continued during that time, with no evidence she was interested in pursuing other types of employment opportunities.

[70] We cannot know why the appellant chose such a focused approach at trial, but this may have been because her best case for proving the highest loss, was to focus only on her alleged diminished ability to work in the physically demanding but rewarding field of nursing. It is also possible that in light of her evidence of her strong desire to be a nurse, and her proven ability to find work in this field, her counsel concluded there was no possibility she would ever seek a different career.

[71] The concern I have with the jury charge is the manner in which the judge instructed the jury about the potential impact on Ms. Aquino's ability to work in her chosen field. The judge focused on her claim that she would only be able to work part-time and not full-time in nursing. This is no doubt because it is how her counsel framed the loss. In my view, her counsel erred by conflating a simple approach to assessing damages, with the question of whether there was loss in the first place.

[72] There was also evidence some other positions in nursing would be foreclosed to Ms. Aquino due to her physical limitations and she would be at a competitive disadvantage compared to persons without her limitations. The two expert witnesses called by Ms. Aquino supported this conclusion, as did her own evidence. In my view the judge ought to have referred to these other alleged impairments of her future earning capacity, not simply the distinction between full-time and part-time work.

[73] The appellant likens the alleged error here to the error that occurred in *Mazur*. In that case involving a legal assistant who suffered a pain disorder as a result of an accident, the judge instructed the jury (at para. 30):

You must assess the likelihood of Ms. Mazur continuing in her full-time legal assistant job if the accident had not happened, and you must also determine the age at which she would likely retire.

[74] This Court in *Mazur* found “this statement in the jury charge is clearly wrong”: at para. 37.

[75] However, the facts in *Mazur* are somewhat distinguishable. In that case, the plaintiff was not working in her position as a legal assistant at the time of the accident. She had taken a disability leave of absence seven months earlier, due to reasons related to mental health and work-place conflicts. There was a real question of causation: was the fact she was not working at the time of trial due to her pain disorder, or due to her pre-existing mental health challenges and work-place conflicts? The error in the judge’s approach was to focus her career prospects solely on returning to work at the firm. She might never have returned to that employment, regardless of the accident. The proper question was whether her injuries might have affected her ability to return to work more generally.

[76] Despite the error in *Mazur*, the Court found it had no practical impact on the jury award. The appellant did not establish the misdirection amounted to a substantial wrong or miscarriage of justice. This is because the appellant in *Mazur* did not lead evidence of any real possibility she would have pursued any other employment other than returning to the law firm. Her submissions were, but for the accident, she would have returned to the law firm.

[77] In contrast to the charge in *Mazur*, the judge in the present case did not ask the jury to consider whether the appellant would have continued to work at a particular job because of her injuries. Rather, the instruction was more general.

[78] In this case, the trial judge phrased the issue as whether “there is a real and substantial risk that Ms. Aquino will not fully recover from her injuries and that the

pain she experiences will prevent her from working full-time hours in her chosen field". This instruction was not put as a choice of returning to a single job; it was put as whether her work in her chosen field would be affected by limiting her to less than full-time hours. It was a broader instruction than the impugned instruction in *Mazur*.

[79] Nevertheless, in my view the instruction was still potentially too narrow.

[80] On the evidence, the loss of future earning capacity could be framed in other ways, not simply a choice between full-time hours and part-time hours. A loss of earning capacity could be framed as based on the fact fewer nursing positions would be available to Ms. Aquino due to her physical limitations, putting her at a competitive disadvantage in the nursing market. In my view, it was an error for the judge to overlook this alternative approach to the question of whether Ms. Aquino had suffered a future loss of earning capacity.

[81] The question is whether this error results in a substantial wrong or miscarriage of justice.

[82] In awarding some damages for cost of future care, the jury must have concluded Ms. Aquino did have a continuing injury of some sort. But in awarding no damages for loss of future earning capacity, based on the judge's instructions, the jury must have concluded this injury would not cause the plaintiff to limit her nursing hours to less than full-time.

[83] That this was the jury's conclusion can also be deduced from their award for past loss of earning capacity. The jury's award of damages in this category was equivalent to an approximation of her claim for actual lost wages for approximately 40 hours off work in the aftermath of the accident, some \$1,200. However, the claim she advanced was for \$73,000. It is likely from the size of the award that the jury did not assess any damages for her claim that she had significantly reduced her hours of work prior to trial, due to her injuries.

[84] It is clear, therefore, if the jury was indeed focusing solely on the appellant's nursing career and how many hours she could work, this result means the jury must

have rejected the appellant's evidence that her injuries restricted her to working only part-time in nursing. This could mean the jury felt her injuries were quite minor. But it also could mean the jury felt Ms. Aquino's injuries, even if more than minor, could be accommodated in some more sedentary nursing positions that were less physically demanding than other nursing positions. Alternatively, it could mean the jury did not believe she was ever interested in working more than part-time, and would have worked less than full-time hours for other reasons.

[85] The question is whether there has been a miscarriage of justice because the jury was not instructed that another way of looking at Ms. Aquino's loss of future earning capacity was to consider that fewer positions would be available to her and she would be less competitive in the nursing market due to her physical limitations, than she would have been if not injured. She would be limited to looking for nursing jobs that were more sedentary, and less physical.

[86] In my view, based on the evidence and submissions at trial, the jury result would not have been any different had this theory been put to it.

[87] Ms. Aquino's lawyer argued at trial that Ms. Aquino had no difficulty obtaining a job as a nurse, there were plenty of positions. The evidence supported that submission. There was no evidence to suggest a distinction would be made in her pay, or there would be fewer positions available, if her job search was limited to less physically demanding nursing positions. In other words, there was no evidence to support the notion that Ms. Aquino would suffer a financial loss if she was less competitive in the more physically demanding types of nursing jobs.

[88] For these reasons, I am of the view there has not been a miscarriage of justice.

**Disposition**

[89] For the above reasons, I would dismiss the appeal.

“The Honourable Justice Griffin”

I AGREE:

“The Honourable Mr. Justice Butler”

I AGREE:

“The Honourable Mr. Justice Abrioux”