

CANADA / JUDGMENT

## Kaur v. Tse

2021 BCCA 137

### COURT

British Columbia Court of Appeal

### DECIDED

1 April 2021

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2021 BCCA 137 Kaur v. Tse

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kaur v. Tse,

2021 BCCA 137

Date: 20210401

Docket: CA46966

Between:

Ranjit Kaur

Appellant

(Plaintiff)

And

Kin Man Tse and Jody Quan Lin Wong

Respondents

(Defendants)

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia,

dated July 22, 2020 (Kaur v. Tse, 2020 BCSC 1072,  
Vancouver Docket M177123).

Counsel for the Appellant

(via videoconference):

R. Mogerman, Q.C.

M. Kazimirski

Counsel for the Respondents

(via videoconference):

C.C. Godwin

Place and Date of Hearing:

Vancouver, British Columbia

March 5, 2021

Place and Date of Judgment:

Vancouver, British Columbia

April 1, 2021

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Butler

Summary:

The appellant brought a claim for damages for injuries incurred in a motor vehicle accident. The appellant appeals from a trial judge's assessment of damages on the basis that the judge erred in finding she failed to mitigate her loss, in failing to award her damages for loss of future earning capacity, and in setting her quantum of non-pecuniary damages lower than what was proposed by either party at trial. Held: appeal allowed in part. The judge's findings on mitigation and loss of future earning capacity were available on the record before her, but the judge's award for non-pecuniary damages was inordinately low in the context of the judge's findings of fact and law. The award for non-pecuniary damages is increased, maintaining the judge's deduction for the appellant's failure to mitigate.

Reasons for Judgment of the Honourable Chief Justice Bauman:

## I. Introduction

- [1] Ranjit Kaur appeals from a damages assessment made in the context of motor vehicle accident litigation. Ms. Kaur was the plaintiff at trial. The accident was a relatively minor rear-end collision. Liability was admitted.
- [2] Ms. Kaur was awarded a total of \$29,692.46.
- [3] Ms. Kaur appeals the judge's award for non-pecuniary damages, the judge's finding that Ms. Kaur failed to mitigate her loss, and the judge's refusal to make any award for her loss of future earning capacity.
- [4] Ms. Kaur faces a significant hurdle on appeal given the judge's conclusion concerning her credibility. In reasons indexed as 2020 BCSC 1072, the judge said:
- [100] I find Ms. Kaur's testimony extremely problematic. On several critical points her testimony in court differed significantly from that given at her March 2019 discovery, and her court testimony was then reluctantly walked back by her after being confronted with her earlier statements.
- [101] Further, while Ms. Kaur testified that she knew and understood that it was important to provide full and accurate information to Dr. Waseem, and testified that she had done so, I find she did not.
- [5] I have concluded that the judge's findings on mitigation and loss of future earning capacity are sound, but that the award for non-pecuniary damages is inordinately low given the judge's findings of fact and law.
- [6] In the circumstances, I would increase the award for non-pecuniary damages (maintaining the deduction for the failure to mitigate) to \$29,750. I would not disturb the remainder of the judge's award.

## II. Background

- [7] Ms. Kaur was 45 years old at the time of trial. She has been working at Vancity Credit Union since immigrating to Canada in 2007. She has had a successful career at Vancity both before and after the accident in 2016. Indeed, Ms. Kaur received a significant promotion within Vancity after the accident.
- [8] Ms. Kaur missed little, if any, work after the accident, save for a period in 2019 when she took a leave of absence because of her mother's terminal illness and passing.
- [9] Ms. Kaur currently works from home two days per week. The primary reason for this arrangement is in some dispute, and it figures in the judge's assessment of Ms. Kaur's claim for loss of future earning capacity.

[10] Prior to the accident, Ms. Kaur regularly attended chiropractic treatments for "alignment maintenance" and received massage therapy. She was in good health and enjoyed regular walks. She did have problems with plantar fasciitis before the accident and it has been symptomatic since, although not as a result of the accident.

### III. The Trial Judgment

[11] The trial took place over five days in June 2020.

[12] As to Ms. Kaur's physical condition at the time of trial, the judge concluded:

[43] In direct, Ms. Kaur testified that she has difficulty sitting or standing for long periods of time, as well when bending over and that pain from the accident was impacting virtually every aspect of her life.

[44] On cross-examination, and only after being faced with her March 7, 2019 discovery testimony, the plaintiff conceded that, at present, her neck causes her pain a few times a week, her lower back causes her pain every few weeks, and that she takes Advil or Celebrex a couple of times a month. I find this to be an accurate description of her symptoms and condition at the time of trial. I also find it to have been an accurate description of her symptoms and condition at the time of discovery (i.e., her March 2019 Position).

[13] Dr. Zeeshan Waseem, a physiatrist, testified at trial as a witness for Ms. Kaur. He provided two expert reports dated April 2019 and February 2020.

[14] In Dr. Waseem's April 2019 report, he recommended a course of active rehabilitation, two to three times per week, over a three month period. Dr. Waseem called active rehabilitation "the cornerstone of treatment" for Ms. Kaur's injuries. In that regard, he offered this diagnosis:

Based on the history obtained and review of provided medical records, Ms. Kaur appears to have initially sustained sprain/strain soft tissue injuries of the cervical and lumbar spines and right clavicle as a result of the subject motor vehicle accident.

These injuries have resulted in chronic myofascial pain of the cervical spine, chronic lower back pain secondary to coccydynia and generalized deconditioning.

The injury to the right clavicle has resolved and she no longer experiences right upper extremity symptoms.

As left heel pain secondary to plantar fasciitis arose non-contemporaneously following the accident without any apparent documented injuries to this anatomic area in the accident, this complaint would not appear to be accident-related.

[15] In his February 2020 report, Dr. Waseem opined:

Ms. Kaur's clinical course since my previous assessment has been complicated by serving as a caregiver to her mother. The need to tend to her terminally ill mother in 2018/2019 increased her neck and lower back pain and served as a barrier to attending rehabilitation.

I would have expected either temporary relief of symptoms or long-term improvement with the interventions as listed in my previous report. However, given her diagnosis of chronic pain and her overall trajectory post-accident, more likely than not, pain would have persisted despite these treatments.

I would continue to recommend the treatments as outlined in my earlier report. Namely, active rehabilitation, use of a coccyx donut, assessment with a mental health specialist, ongoing medication use and intermittent access to pain-relieving modalities.

With the above interventions, I am hopeful she will improve to the extent that she can work more from the office, increase her involvement in her household chores and return to most of her usual recreational activities.

[16] The latter report was found by the judge to have been influenced by Ms. Kaur's lack of frankness in reporting her progress. The judge noted:

[95] On cross-examination, Dr. Waseem was advised that Ms. Kaur had testified in court that the physiotherapy taken after her mother's death had been very beneficial and that she had, in fact, regained her March 2019 Position by mid-November 2019. Asked whether that information would have been material to his opinion, Dr. Waseem agreed that it would have.

[17] In the result, the judge concluded that the misleading information given to Dr. Waseem by Ms. Kaur deprived the February 2020 report "of evidentiary value": at para. 114.

[18] The judge, however, accepted Dr. Waseem's evidence that Ms. Kaur suffers from chronic myofascial pain and chronic mechanical pain localized in her coccyx and caused by the accident: at para. 112. The judge concluded:

[115] As above, I have also concluded that the plaintiff did not provide Dr. Waseem with full and accurate information for Report #1. However, I accept the prognosis set out in Dr. Waseem's Report #1 is nonetheless of general application. Ms. Kaur has yet to complete a course of active rehabilitation, which Dr. Waseem described as the cornerstone treatment for her injuries and which he opined could eliminate some or all of her symptoms. Dr. Waseem's Report #1 indicates significant potential for symptom improvement by active rehabilitation. (As does, for that matter, even his Report #2.)

[116] With regard to her localized coccyx pain, Ms. Kaur has not tried the coccyx donut recommended by Dr. Waseem. The recommendation is easily enough followed. While Ms. Kaur claims an inability to sit for extended periods as a core impairment to her lifestyle, she has not seen fit to try the donut. In my view, this reflects poorly on her assertion that sitting does, in fact, cause anything more than quite modest discomfort.

- [117] Finally, I note again the plaintiff's admission on cross-examination as to the frequency of her pain at present: i.e., neck pain a few times a week and lower back pain every few weeks, for which pains she takes Advil or Celebrex a couple times each month. On the evidence that Ms. Kaur's symptoms are presently mild and there is significant potential for improvement from there.
- [19] The judge further concluded that there is a real and substantial possibility ("easily 50%") that Ms. Kaur's symptoms will significantly improve in the future.

#### Mitigation

- [20] The judge noted the two-part test mandated by this Court in *Chiu v. Chiu*, 2002 BCCA 618 [Chiu].
- [21] The defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment; and (2) the extent, if any, to which the plaintiff's damages would have been reduced had they acted reasonably: *Chiu* at para. 57.
- [22] The judge referred to the physiotherapy recommendation made by a walk-in clinic physician in 2016 after the accident. The judge found that it was unreasonable for Ms. Kaur not to have undertaken physiotherapy earlier than she did. The judge also noted that Ms. Kaur had only attended two active rehabilitation sessions since April 2019 and found that it was unreasonable for Ms. Kaur not to have pursued active rehabilitation by at least mid-2018: at paras. 125-127.
- [23] After so concluding, and referring to the second step of the mitigation analysis, the judge said: "I will discuss the impact of Ms. Kaur's failure to mitigate under the relevant heads of damage": at para. 128.

#### Loss of Future Earning Capacity

- [24] The judge cited the law on this head of loss as set out in *Perren v. Lalari*, 2010 BCCA 140, and made the following findings:
1. "There is no evidence that Ms. Kaur was, is or will be unable to perform full-time work duties at the office. During the first year following the accident - her most symptomatic period - Ms. Kaur continued to work in the office" (at para. 131); and
  2. "There is no convincing evidence that Ms. Kaur needed to work from home, as opposed to found it convenient" (at para. 132) and thus "it is unnecessary to consider whether working from home part-time might impair her career advancement" (at para. 135).
- [25] The judge declined to make an award under this head of loss:

[136] The evidence does not establish a real and substantial likelihood that Ms. Kaur's career will be stifled as a result of the accident. It similarly fails to establish a real and substantial possibility that she has been rendered less able to continue to work or less valuable as an employee as a result of her injuries.

### Loss of Housekeeping Capacity

[26] The judge declined to make a discrete award under this head concluding that in the circumstances here, "That is a matter for non-pecuniary damages": at para. 142. No appeal is taken from this finding.

### Non-Pecuniary Damages

[27] This brings me to the second head of loss that is subject to complaint on appeal: the award for non-pecuniary damages.

[28] The judge noted Ms. Kaur's submission in support of an award in the range of \$80,000 to \$100,000 and the cases she cited in support of that claim: at para. 154. The judge then related the defendants' submission for an award in the range of \$30,000 to \$50,000. The judge summarized the considerations relevant to her assessment of Ms. Kaur's entitlement to non-pecuniary damages so:

[160] In total, Ms. Kaur suffered unrelated foot pain over at least two and a half years of the four year period between accident and trial. I find that pain would have negatively impacted her participation in recreational and other activities (e.g., walking, tennis, and snowshoeing) irrespective of the accident.

[161] Ms. Kaur can perform household duties, although presently not in the same manner and on the same schedule as prior to the accident. I accept that Ms. Kaur is very particular about the state of her home and that her inability to keep house as she did before causes her frustration. However, the amount of time she was called upon to dedicate to looking after her mother in 2019 would also have been a contributing factor.

[162] I have concluded Ms. Kaur has no emotional issues as a result of the accident, and that the accident has had no impact on her relationships.

[163] Overall then, Ms. Kaur's injuries were minor from the outset and she currently has only intermittent pain at significant intervals. Further, her present symptoms - such as they are - are likely to be significantly improved by taking recommended treatment.

[29] The judge concluded that an award of \$20,000 was appropriate, although she deducted 15% on account of Ms. Kaur's failure to mitigate, resulting in a total award of \$17,000 under this head of damage.

#### IV. On Appeal

- [30] The appellant impugns the award for non-pecuniary damages and the failure to make an award for loss of future earning capacity. She also submits that the judge's mitigation analysis is flawed by her failure to return to and resolve the second step of the Chiu test: the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably.
- [31] The judge's conclusions on the two heads of loss, in the appellant's general submission, are undermined by her palpable and overriding errors of fact in respect of two principal issues: the nature of Ms. Kaur's injuries and the need for her to work from home, currently for at least two days per week.
- [32] As for the nature of Ms. Kaur's injuries, the appellant maintains that the judge fundamentally misunderstood the concept of "chronic pain" and effectively concluded that it possibly could be resolved, as distinct from managed, with treatment. And the error in characterizing the essential nature of Ms. Kaur's injury tainted the judge's assessment of non-pecuniary damages.
- [33] As for Ms. Kaur's desire to work from home, the appellant suggests the judge palpably erred in concluding that convenience and choice, rather than need, largely dictated Ms. Kaur's desire to work from home. This error, says the appellant, undermined, in particular, the judge's loss of future earning capacity analysis.

#### V. Analysis

- [34] As I intimated in my introduction, the appellant is faced with a daunting credibility analysis impacting her entire case. That very critical assessment of Ms. Kaur's credibility affected, in particular, the judge's review of the medical evidence and her assessment of Ms. Kaur's subjective complaints. The judge's credibility findings are not questioned on appeal and properly so, in my view.
- [35] I will deal first with the judge's conclusion as to the nature of Ms. Kaur's injuries. I do not accept that the judge fundamentally misunderstood the chronic nature of Ms. Kaur's pain syndrome. The appellant refers to paras. 83 and 84 of the judge's reasons. In particular, she highlights the judge's statement at para. 84 that "Dr. Waseem was of the view that active rehabilitation had the potential to alleviate, in whole or in part, the plaintiff's symptoms". However, later in her reasons the judge made clear she appreciated the "chronic" nature of the pain. At para. 112, the judge said:

I accept Dr. Waseem's evidence that Ms. Kaur suffers from chronic myofascial cervical pain and chronic mechanical pain localized on her coccyx. Dr. Waseem testified these injuries were caused by the accident and the defendants did not dispute the assertion.

- [36] At para. 115, the judge said: "Dr. Waseem's Report #1 indicates significant potential for symptom improvement by active rehabilitation. (As does, for that matter, even his Report #2.)". The judge ended this review by concluding:
- [117] Finally, I note again the plaintiff's admission on cross-examination as to the frequency of her pain at present: i.e., neck pain a few times a week and lower back pain every few weeks, for which pains she takes Advil or Celebrex a couple times each month. On the evidence that Ms. Kaur's symptoms are presently mild and there is significant potential for improvement from there.
- [37] In my view, the judge had a clear and accurate view of Ms. Kaur's injuries and no palpable error in her findings has been demonstrated.
- [38] However, I do agree with the appellant to this extent: given the conclusion of the judge on the nature and impact of Ms. Kaur's injuries, an award of \$20,000 for non-pecuniary damages is inordinately low. It is striking to note that it is substantially below the range submitted by the defendants at trial, namely \$30,000 to \$50,000.
- [39] Of course, a judge is not to be constrained in her assessment of damages by ranges suggested by the parties in final submissions. However, here the judge accepted that two of the cases cited by the defendants were "similar" or "akin" to the facts of this case: at para. 164. The judge summarized the two decisions so:
- Pond v. Bucsis, 2013 BCSC 2001 - award of \$30,000 (\$33,000 today): the plaintiff was a 45 year old part-time care aide at the time of the accident. After the accident she moved to Alberta and obtained a similar employment position. The plaintiff sustained persistent soft tissue injuries to her neck and shoulder area that were neither severe nor constant, but were chronic and permanent. The injuries had a modest effect on her recreation activities and family relationships. There were no significant changes to her lifestyle.
  - ...
  - Cegielka v. Grace, 2020 BCSC 115 - award of \$40,000: the plaintiff was 32 year old male carpenter with mild ongoing neck and back pain resulting from the accident. The court found that the plaintiff had overstated the impact of the accident and understated the impact of other unrelated events in his life, including his wife's difficult pregnancy and his first child's illness.
- [40] In light of these observations and the judge's acceptance of the essential conclusions in the medical evidence, I can only conclude that the award of \$20,000 is inordinately low.
- [41] I feel able to make a proper assessment and it is appropriate to do so.
- [42] In my view, an award of \$35,000 for non-pecuniary damages is warranted, although I would nonetheless make the 15% mitigation adjustment as found appropriate by the judge. I do not accept the submission that the judge failed to properly conclude the mitigation assessment.

- [43] While it is arguable that the judge did not expressly address "the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably", she did so implicitly by accepting Dr. Waseem's views in this regard and reducing the award for non-pecuniary damages accordingly.
- [44] Dr. Waseem noted the need for a course of active treatment, "the cornerstone treatment for her injuries", that offered "significant potential for symptom improvement": at para. 115. Clearly, the judge concluded that had Ms. Kaur acted reasonably, her damages would have been reduced to a not insignificant extent. I would therefore not accede to this ground of appeal.
- [45] This brings me to the judge's refusal to make an award for loss of future earning capacity. Again, it was founded on a critical finding of fact:
- [136] The evidence does not establish a real and substantial likelihood that Ms. Kaur's career will be stifled as a result of the accident. It similarly fails to establish a real and substantial possibility that she has been rendered less able to continue to work or less valuable as an employee as a result of her injuries.
- [46] As the judge applied the proper legal test (and no issue is taken in this regard), can the judge be palpably wrong? In my opinion, this finding was driven generally by the judge's conclusions that Ms. Kaur suffered a minor injury, currently had only intermittent pain at significant intervals, and her present symptoms were "likely to be significantly improved by taking recommended treatment": at para. 163. This finding was also driven specifically by the judge's observation that Ms. Kaur worked full-time in the office during the first year following the accident, which was also "her most symptomatic period" (at para. 131), and the judge's conclusion that Ms. Kaur failed to establish on the evidence that she needed to work from home due to her injury: at para. 135.
- [47] Here the appellant says that the judge palpably erred by misapprehending the evidence of her former supervisor, Ms. Russell. Counsel highlights this portion of Ms. Russell's testimony:

Q And following the motor vehicle accident, did Ms. Kaur speak with you about requiring any further accommodations?

A In time what we initially decided was because of appointments, and I would do this still today, is if you have an appointment close to home, you could work at home for snippets of the day, you know, part of the day, go to your appointment. So there was some need immediately for that sort of flexibility, and then over time, the commute and the desk environment, we - I believe we moved to a situation where it was one or two days a week she worked at home as a trial, while I was still managing her. It sort of evolved over time.

Q And what was your understanding of why she needed to be able to work from home?

A Generally appointments played a role, as well as some comfort, just access to ability to move around, and ease of the strain of commuting as well.

[48] This does give some support for the view that Ms. Kaur, in part, needed to work from home because of symptoms arising out of the accident. But this view is moderated by the judge's observation that Ms. Kaur successfully worked full-time in the office in the year immediately after the accident. And I note that Ms. Russell went on in her evidence to say this:

Q And initially, how often was she permitted to work from home?

A It was based on business needs, and her needs, and it was - I believe it was one to two days a week, and the real need was to - to arrange around appointments, and make it work for her so that it was a time that we could have - like let's say every Monday we knew that Ranjit wasn't in the office, and we would plan accordingly. So it wasn't the majority of time.

[Emphasis added.]

[49] In my view, it was open to the judge on the record before her to conclude as she did that Ms. Kaur's convenience largely drove the decision to work from home for part of each week. I would not accede to this ground of appeal.

## VI. Disposition

[50] In summary, I would allow the appeal only to the extent of increasing the award for non-pecuniary damages to \$29,750. I would otherwise dismiss the appeal.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Mr. Justice Butler"

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