

CANADA / JUDGMENT

Rajan v. Budrugeac

2020 BCSC 1056

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Supreme Court of British Columbia

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2020 BCSC 1056 Rajan v. Budrugeac

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rajan v. Budrugeac,

2020 BCSC 1056

Date: 20200716

Docket: M140445

Registry: Vancouver

Between:

Soraya Rajan

Plaintiff

And

Valentin Budrugeac and

Yen Bros. Food Service (2011) Ltd.

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

December 2-6, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 16, 2020

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I. Introduction

- [1] In January 2012, Ms. Rajan was 33 years old and looking for a full time teaching position in Vancouver. On January 24 she was driving on Alma Street in Vancouver when she was hit on the driver's side of her car by the defendant Valentin Budrugaec, a driver for the defendant Yen Bros. Food Service (2011) Ltd. Ms. Rajan suffered a number of myofascial injuries. The defendants have admitted liability for the accident. In this action Ms. Rajan seeks compensation for her injuries sustained as a result of the accident, and for the impact those injuries have had on her life.

II. Issues

- [2] This case raises the following issues:
- a) Is Ms. Rajan a credible witness?
 - b) Did the accident cause or exacerbate Ms. Rajan's injuries?
 - c) What is Ms. Rajan's prognosis?
 - d) Is Ms. Rajan entitled to any damages?
 - e) Are Ms. Rajan's damages limited by Rule 15-1?

III. Analysis

A. Credibility and Reliability of Evidence

- [3] The defence challenges the credibility and reliability of Ms. Rajan's evidence. In particular, the defence challenges Ms. Rajan's evidence relating to certain aspects of her injuries, and much of her evidence relating to her employment history and claim of loss of future earning capacity. The defence relies on the law in *Gichuru v. Smith*, 2013 BCSC 895, *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, and *Faryna v. Chorny*, [1952] D.L.R. 354 (B.C.C.A.) which describe the factors the court must consider in assessing credibility. In particular, the court must consider the trustworthiness of a witness' testimony based upon:
- a) the veracity or sincerity of the witness and the accuracy of the evidence she provides,

- b) the witness' ability and opportunity to observe events, and the firmness of her memory,
 - c) the witness' interest in modifying her recollection, or whether she has a motive to lie,
 - d) the witness' evidence in relation to independent evidence that has been accepted,
 - e) changes in the witness' testimony during direct and cross-examination,
 - f) whether the witness' testimony seems unreasonable, impossible, or unlikely, and
 - g) whether the evidence is harmonious with the probabilities affecting the case as a whole and shown to be reasonable in the circumstances.
- [4] I find Ms. Rajan to be generally credible. However, there were instances in her testimony where credibility concerns do arise. I will deal with those points as they arise in my analysis, in accordance with the factors set out above.

B. Did the accident cause or exacerbate Ms. Rajan's injuries?

- 1. Ms. Rajan's abilities and health pre-accident
 - a) Work and social life
- [5] Ms. Rajan qualified as a teacher in 2006, and worked as a TTOC (teacher teaching on call) for the West Vancouver School District from 2006 to 2009. In 2009 she moved to Abu Dhabi, where she taught until the summer of 2011. At the time of the accident, Ms. Rajan was back in BC and was looking for teaching work.
- [6] Before the accident, Ms. Rajan was an active, athletic person. She was a keen figure skater as a young person, and continued to teach figure skating as a young adult. She continued recreational skating up until her accident. In addition to skating, she did high intensity workouts, walked, hiked, skied, and snowshoed. She loved yoga, and attended yoga sessions 4-5 days a week. She had ambitions of becoming a yoga teacher.
- [7] Ms. Rajan was also very social and active in her community. She had lots of friends that she socialized and did activities with. She volunteered on the Downtown Eastside serving food, was on boards and committees, held a reading club at the Lions Gate community centre, participated in a skating club and, while in Abu Dhabi, participated in a program to deliver care packages to workers living in camps.
- [8] At the time of the accident, Ms. Rajan lived with her parents and grandmother and shared in daily household tasks.
- b) Health
- [9] In 1998 Ms. Rajan was in a motor vehicle accident on the Coquihalla Highway and was treated by her family physician, Dr. Hayward, for her injuries. She received significant injuries to her back, spine, neck and right quadriceps muscles in the 1998 accident. In addition, her injuries required surgery on her right wrist. Ms. Rajan testified that by 2007 or

2008 she had recovered from her injuries. Under cross examination, Ms. Rajan agreed that she did have symptoms in her lower back, spine, arm, and right leg before the 2012 accident, but she said her symptoms were infrequent and manageable. She agreed that she continued to have pain in her wrist, including numbness and tingling, but said this was also infrequent. She used splints for her wrists before the 2012 accident and continues to do so.

- [10] Dr. Hayward said he did not see her for any of these prior injuries in the 3 years before the accident. However, Ms. Rajan was out of the country for 3 years prior to the accident, so this evidence is of limited assistance. Dr. Hayward agreed that Ms. Rajan had pre-existing right wrist pain prior to the accident at issue, but did not agree that she had any other pre-existing pain at the time of the accident at issue.
- [11] Under cross examination Ms. Rajan agreed that she had headaches before the 2012 accident.
- [12] Following the 1998 accident, Ms. Rajan was referred to Dr. Taylor, who developed a rehabilitation program for Ms. Rajan's injuries. Ms. Rajan continued to see Dr. Taylor until November 2007. In November 2007 she told Dr. Taylor that she was still experiencing pain in her neck, and upper and lower back. Dr. Taylor discharged her into a community active rehabilitation program at that point. He did not see her again until 2013 when she was referred to him after her 2012 accident.

2. Ms. Rajan's abilities and health post-accident

a) Injuries and health

- [13] Ms. Rajan was taken to the hospital from the scene of the accident. No scans or tests were done, and she was released to follow up with her family doctor. Ms. Rajan says that she experienced pain on the left side of her body, including in her neck and left thumb.
- [14] Ms. Rajan visited Dr. Hayward on January 31, 2012, a week after the accident. He noted she had tenderness in the left shoulder, left side of her neck, left trapezius muscle, lumbar region and sacroiliac joints.
- [15] On a visit in March 2012, Dr. Hayward noted Ms. Rajan complained of numbness and tingling in the second, third and fourth fingers of her left hand. On this visit he noted the AC joint of her shoulder was no longer tender. The left side of her neck and left trapezius muscle, and both sides of her lumbar spine and sacroiliac joints, were still tender.
- [16] In October 2012, Dr. Hayward noted that Ms. Rajan's symptoms in the left side of her neck and left trapezius muscle, and both sides of her lumbar spine and sacroiliac joints, were unchanged. She complained of a flexor tendon cyst in her wrist which she said occurred in the accident.

- [17] Ms. Rajan testified in direct evidence that over the course of the next year, she began to experience pain in her neck, ribs, mid back, hips, groin, knees and left leg, and ringing and decreased hearing in her left ear. She also experienced intermittent headaches. She testified that she had often had numbness from her neck down her arms, and lost feeling in both hands such that she could not pick up utensils, write on boards, or wash her hands.
- [18] In January 2013, one year after the accident, Ms. Rajan attended Dr. Hayward and complained that her left knee would lock after flexing. She complained of ongoing tenderness in her back and neck.
- [19] In April 2013, Ms. Rajan was referred to Dr. Taylor for chiropractic treatments. She complained to him of cerico-thoracic and low back pain. She did not state to him that she had any knee pain.
- [20] By August 2013, Ms. Rajan saw Dr. Hayward complaining of numbness, pain and tingling down her left arm and left leg, pain on the left side of her spine, and sensitivity and loss of hearing in her left ear.
- [21] In March 2014, Ms. Rajan saw Dr. Hayward complaining of pain in her right shoulder and neck, numbness in left hand, and weakness in her right hand. Dr. Hayward noted she had some pinched nerve sensation in her lateral right side.
- [22] In 2015, Dr. Taylor noted that Ms. Rajan's injuries were improving.
- [23] In April 2015, Ms. Rajan reported to Dr. Hayward that she had had intermittent buzzing in her left ear since the accident three years earlier. This was the first time Ms. Rajan reported this symptom to Dr. Hayward. He referred her to an ear, nose and throat specialist but, as of the date of trial, Ms. Rajan had not attended the specialist.
- [24] In March 2016 Ms. Rajan attended Dr. Hayward who noted that she complained of numbness in her palms and hypersensitivity in her hands. She continued to have tenderness in her back, and thoracic and lumbar spine. She complained of pain in her right trapezius muscle. She said the buzzing in her ears continued. She suffered from headaches accompanied by neck pain.
- [25] In the fall of 2017 Ms. Rajan suffered an injury to her ankle during an exercise class. She tore the ligaments in her ankle, and was off work for several days to deal with this injury.
- [26] In January 2018 Dr. Hayward saw Ms. Rajan. At that time Ms. Rajan noted her bad headache the previous October, and stated that she was experiencing headaches a couple of times a week. She told Dr. Hayward that the buzzing in her left ear continued. She complained of pain and swelling in her right knee, pain and sensitivity in her right hand, and pain in the joints of both hands. She had tenderness in the spinal muscles of her neck, thoracic and lumbar spine, and her right trapezius muscle.

- [27] After the accident, when Ms. Rajan drove a car and encountered a large truck she would feel anxious and claustrophobic. She would also have nightmares and night sweats from the anxiety she experienced when driving.
- [28] She continues to suffer from intermittent hearing loss in one ear, which can last up to three hours. When this happens it affects her listening and concentration, interferes with her ability to hear what is happening in the back of the classroom, and affects her ability to be "present and mindful" in her work.
- [29] Ms. Rajan feels like her headaches have increased since the accident, that she has more migraines, and her lower back pain has increased.
- [30] Dr. Ballard, a physiatrist, provided an independent medical opinion for Ms. Rajan. She examined Ms. Rajan on July 26, 2019. At this examination, Ms. Rajan reported she was experiencing intermittent migraine like headaches with associated neck stiffness, constant neck pain, bilateral shoulder pain, pain in both wrists, and constant pain over the paravertebral muscles of the cervical, thoracic and lumbar spine radiating into her entire back and towards her legs. Ms. Rajan also reported right knee pain, and intermittent pain over her right lower ribs.
- [31] Dr. Ballard was of the opinion that Ms. Rajan suffered from whiplash associated disorder type II with cervicogenic headaches, thoraco-lumbar spine strain/sprain with myofascial pain, left shoulder strain, bilateral wrist pain and hand numbness, right knee patellofemoral pain syndrome, and right rib pain.
- [32] Dr. Simon Horlick, an orthopaedic surgeon, provided an independent opinion for the defence. Dr. Horlick examined Ms. Rajan on February 8, 2018. Dr. Horlick noted that Ms. Rajan was experiencing right knee pain, which began several years after the accident, and left knee pain which began a few months after the right knee pain. He noted that Ms. Rajan reported intermittent neck pain, with some pain referral to her left shoulder. She has occasional numbness in her hands and feet, but this is infrequent. She had some intermittent pain in her lumbar spine that worsened with prolonged sitting.
- b) Work and social life
- [33] Ms. Rajan is no longer able to participate in sports as she had before. She is able to do some sports, but only on a more limited basis. Before the accident she performed yoga at a high, athletic level; now she does yoga primarily for pain management - to stretch and strengthen her spine. She is no longer able to skate or hike.
- [34] Ms. Rajan no longer has the energy to do all she did in the past; things take her longer to complete and when she completes a task she needs time to recover before she can go on to the next thing.

- [35] Ms. Rajan is no longer able to participate in volunteer activities as she did before the accident. She finds that her work takes up most of her energy, and her time and energy outside of work must be spent on continuing education related to her job, with not much left over for the range of activities she enjoyed before the accident. She has continued to do some fundraising for the World Partnership Walk, teaching children how to fundraise and giving workshops for children. She no longer does the reading program at Lion's Gate community centre.
- [36] In her work, Ms. Rajan experiences stiffness with neck and back pain, along with headaches. Her hands and wrists continue to be affected, and she has to modify day to day tasks such as picking up things like a cup or a pen, or using a computer.
- [37] Ms. Rajan continues to live with her parents, and says that her mother assists her with cooking, groceries and cleaning. Ms. Rajan imagined that she would be a principal by this stage of her career, had hoped to complete a PhD, and had hoped to be married with a family. She says she is no longer the lively, energetic, athletic person she was before the accident. Her confidence is diminished and she is no longer able to take on commitments because of her physical limitations.

3. Causation

- [38] Mr. Justice Kent, in *Kallstrom v. Yip*, 2016 BCSC 829 [Kallstrom], summarized the law of causation:

- [318] The basic legal principles respecting causation are found in the seminal case of *Athey v. Leonati*, [1996] 3 S.C.R. 458, repeated many times since, and which include:

1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury, the defendant is liable; and
4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

[Emphasis in original.]

- [39] In assessing damages, the court must ensure that the plaintiff is not put in a better position than her original position. As stated in *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey] at para. 35, the "defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage."
- [40] Therefore, if I find that there is a realistic chance that some or all of Ms. Rajan's present injuries or conditions would have occurred at some point in the future even had the accident not occurred, then I must reduce the overall damage award to reflect this possibility.
- [41] On the other hand, if I find that any of Ms. Rajan's pre-existing conditions were not likely to worsen, but for the accident, but those conditions rendered her more vulnerable to the effects arising from the accident, she is to be compensated. The defence is liable for any damages arising from his negligence, "even though the plaintiff's losses are more dramatic than they would be for the average person": *Athey* at para. 34.
- [42] The defence alleges that Ms. Rajan suffered an injury to her right knee a number of years after the accident. They argue that the right knee injury is divisible from the other injuries Ms. Rajan suffered in the accident. That is to say, they argue that the right knee injury is capable of being separated out from the other injuries, and that they are only liable for injuries arising from the accident at issue.
- [43] The plaintiff argues that the right knee injury either, arose at the time of the accident, or resulted from a susceptibility to injury that resulted from the accident and, therefore, all of the plaintiff's injuries, including the knee injury, are indivisible, and cannot be separated out with damages assessed to exclude the knee injury.
- [44] Dr. Hayward has been Ms. Rajan's physician since she was a child. Dr. Hayward saw Ms. Rajan many times before and after the accident. He was of the opinion that Ms. Rajan sustained the following injuries in the accident:
- a) Intermittent hearing loss from trauma to the internal left ear,
 - b) Musculoligamentous strain to both wrists,
 - c) Musculoligamentous strain to neck, thoracic, lumbar spine, and sacroiliac joints, and associated chronic pain, and
 - d) Residual driving anxiety.

- [45] Dr. Ballard was asked to provide her opinion on both her diagnosis and whether the symptoms and injuries she experienced were consistent with the accident in 2012. Dr. Ballard stated that Ms. Rajan suffered soft tissue injuries with myofascial pain in her neck, upper and lower back, and left shoulder which were chronic now, seven years after the accident.
- [46] Her opinion is not clear as to whether she concluded the wrist pain, knee pain or rib pain resulted from the accident.
- [47] Under cross examination, Dr. Ballard seemed to relate the right knee injury to the accident, based on one entry in a chart from a massage therapist who noted Ms. Rajan's knee was sore with squatting. However, Dr. Ballard agreed that the first time Ms. Rajan mentioned knee pain to her physician was 6 years after the accident.
- [48] Dr. Ballard also agreed that Ms. Rajan reported to her that during her examination she was experiencing the worst pain imaginable in her ribs, although rib pain had not been reported previously to her family doctor. Dr. Ballard was unable to diagnose the rib pain or explain the reported pain.
- [49] Dr. Hayward did not do diagnostic testing on Ms. Rajan's ear and, while he referred her to an ear, nose and throat specialist on two different occasions, Ms. Rajan chose not to attend this specialist.
- [50] Dr. Horlick was of the opinion that Ms. Rajan's knee problems were not the result of the car accident, primarily because of a lack of temporal association between the accident and the onset of pain.
- [51] Dr. Horlick found no measurable impairment of her cervical spine (neck) and left shoulder region; however, he accepted her myofascial pain complaints in these regions and agreed they resulted from the 2012 accident.
- [52] There is no dispute between the three medical experts that in the 2012 accident Ms. Rajan suffered injuries to her cervical spine (neck) and left shoulder region with resulting ongoing myofascial pain complaints in these regions. In addition, both Dr. Hayward and Dr. Ballard agreed that Ms. Rajan suffered a strain to her thoracic and lumbar spine, and these complaints were consistently noted by Ms. Rajan since the accident. I have no difficulty finding that Ms. Rajan's ongoing myofascial pain in her cervical, thoracic and lumbar spine and left shoulder region was caused by the accident.
- [53] Dr. Ballard was the only medical practitioner who described rib pain in her report. She noted that Ms. Rajan said the rib pain was excruciating - 10/10 on a pain scale. However, Ms. Rajan did not mention rib pain in her direct evidence at trial, and her treating physician Dr. Hayward did not diagnose any rib issues in either his 2016 or 2019 reports. She also did not report rib pain to Dr. Horlick, the independent orthopedic surgeon who examined her on behalf of the defence. I find Ms. Rajan's reports of ongoing rib pain associated with the accident are not credible.

- [54] With respect to the complaints relating to Ms. Rajan's right knee, these complaints did not seriously materialize until almost 6 years after the accident. While there was one mention of a knee complaint in the records of Dr. Hayward in March 2012, I am not satisfied this is sufficient to establish the origin of any present knee injuries in the accident at issue.
- [55] Dr. Hayward, who was in the best position to assess Ms. Rajan over the years before and after the accident, did not attribute a right knee injury to the accident. Dr. Ballard did not clearly identify a right knee injury with the accident. Dr. Horlick was of the opinion that Ms. Rajan's knee problems did not result from the accident. On balance, I find the medical evidence before me insufficient to establish a causal relationship between the accident and Ms. Rajan's knee injuries. As such, I find that Ms. Rajan's knee injuries did not arise as a result of the accident, and that Ms. Rajan has not met the legal burden to establish causation.
- [56] I accept that Ms. Rajan's pre-existing wrist injury was exacerbated by the accident. The accident has caused an acceleration of degenerative changes in her wrists, which will cause intermittent pain, numbness and tingling into the future. I am satisfied that Ms. Rajan has met the legal test to establish the present wrist injuries were caused by the accident.
- [57] Dr. Hayward's diagnosis of a driving anxiety and his opinion that this arose as a result of the accident were not seriously challenged. I find that Ms. Rajan did develop a driving anxiety as a result of the accident.
- [58] With respect to Dr. Hayward's diagnosis of intermittent hearing loss, however, I am not satisfied that the medical evidence before me is sufficient to decide that Ms. Rajan's hearing loss is causally related to the accident at issue. No imaging or diagnostic testing was done of Ms. Rajan's ear. Ms. Rajan was referred to a specialist to better understand the problem with her hearing, but she chose not to attend. I am not satisfied, on the balance of probabilities, that Ms. Rajan's intermittent hearing loss is causally related to the accident at issue.

C. What is Ms. Rajan's prognosis?

- [59] Since the accident, Ms. Rajan has undertaken a full regime of active rehabilitation, massage therapy, yoga, chiropractic treatments, physiotherapy, and medication. She has complied with the recommendations of her treating professionals. Notwithstanding her efforts, her pain remains.
- [60] Dr. Hayward was of the opinion that Ms. Rajan had reached her maximum level of improvement for her accident related injuries. These include hearing loss, wrist strain, and chronic pain in her neck, thoracic and lumbar spine and sacroiliac joints. Further, he was of the opinion that the wrist strains she experienced in the accident aggravated underlying scar tissue and accelerated degenerative changes in her wrists, and she will suffer intermittent pain, numbness and tingling in the future as her condition has plateaued.

- [61] Dr. Horlick was of the opinion that Ms. Rajan's injuries would resolve with non-surgical measures, including physiotherapy for her knees and self-directed exercises for her myofascial pain. He opined that she would have no progressive impairment or disability. He recommends physiotherapy and massage therapy, and possibly IMS therapy, for her myofascial pain in her lumbar region.
- [62] With respect to her numbness in her extremities, Dr. Horlick noted her neurologic examination was unremarkable and there were no indications of progressive neurologic impairment.
- [63] Dr. Ballard was of the opinion that Ms. Rajan's pain in her neck, upper and lower back, and left shoulder was now chronic and will flare up from time to time. She was of the view that Ms. Rajan was more susceptible to re-injury in the future from an accident, but that she was not at risk for arthritis or degenerative changes as a result of her injuries. Dr. Ballard noted that her injuries did not prevent her from performing her occupational duties.
- [64] On balance, I find that Ms. Rajan's chronic pain in her neck, left shoulder, and upper and lower back will continue throughout her life, as will her residual driving anxiety. She may be able to better manage her pain with active rehabilitation and passive therapies, but her pain will not completely resolve. Ms. Rajan will also continue to suffer pain, numbness and tingling in her wrists, and can expect degenerative change in her wrists to be accelerated.

D. Is Ms. Rajan entitled to damages?

- [65] The plaintiff claims non-pecuniary damages, and the following pecuniary damages: loss of income earning capacity (past and future), cost of future care, loss of housekeeping capacity, and special damages.
1. Non-pecuniary damages
- [66] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:
- [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

- [67] Ms. Rajan seeks \$110,000 in non-pecuniary damages. The defence agrees some non-pecuniary damages are properly awarded, but submits the correct award is between \$50,000 and \$60,000.
- [68] I have found that Ms. Rajan's myofascial pain in her cervical, thoracic, and lumbar spine, and left shoulder region, the exacerbation of her pre-existing wrist injury, and her driving anxiety, are causally related to the accident. I have also found that her knee and rib pain and hearing loss are not connected to the accident. I will assess her general damages in relation to the injuries that I have found to be causally related to the accident.
- [69] Ms. Rajan relies on *Kelly v. Kalra*, 2019 BCSC 1305, *Kam v. Van Keith*, 2015 BCSC 1519, and *Jaehrlich v. Kuechler*, 2019 BCSC 1126, where awards ranged from \$110,000 to \$125,000 for plaintiffs suffering chronic pain and soft tissue injuries.
- [70] The defence relies on *Rogalsky v. Harret*, 2014 BCSC 1255 and *Erwin v. Buhler*, 2017 BCSC 362 where awards ranged from \$35,000 to \$40,000 for non-pecuniary damages in cases with a range of soft tissue injuries.
- [71] Each case is unique. Non-pecuniary damages must be assessed taking into account the unique factors arising in the case at bar. While the cases referred to by counsel are helpful, none of them are directly comparable. The injuries in the cases referred to by the plaintiff are more severe than those of Ms. Rajan, while the injuries in the cases referred to by the defence are less severe.
- [72] Ms. Rajan was in the prime years of her life at the time of the accident. Ms. Rajan feels that the injuries she received have prevented her from reaching her full potential. She had hoped to be married with children, and feels the accident took that dream away from her. There is no question the accident has had a serious impact on her personal life. Her previous busy and active social life is diminished. She cannot enjoy the wide range of sports which she did before the accident. She requires help with housekeeping chores.

[73] While she had been able to continue working, she does so with ongoing, chronic pain which is likely to continue throughout her life. Her hopes to complete further post-secondary schooling are unlikely to be realized because she no longer has the energy outside of work which she needs to take on this additional work. She is unlikely to be able to take on the pressures of becoming a principal, as she had dreamed. She is restricted in the amount of work and activities she can participate in outside normal school hours.

[74] I find that an award of \$80,000 is an appropriate award for Ms. Rajan's non-pecuniary damages.

2. Loss of earning capacity

[75] The purpose of an award for loss of earning capacity is to restore the plaintiff, as best as possible, to the position she would have been in had the accident not occurred. The plaintiff must establish an impairment in her earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[76] The court in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8 set out the factors to consider in assessing a loss of earning capacity:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[77] Both past and future loss of earning capacity address the same loss. However, there are differences in how this loss is assessed before trial and after trial. To the extent past loss of capacity relies on facts which are capable of proof, those facts must be proven on the balance of probabilities; to the extent past loss of capacity relies on hypothetical facts, the court must be satisfied that there is a real and substantial possibility of such facts occurring. The court may assess the likelihood of such hypothetical facts occurring, and discount or increase an award to reflect such contingencies. Future losses are almost always based on hypothetical facts, and are assessed on the standard of real and substantial possibility with consideration of relevant contingencies: *Rousta v. MacKay*, 2018 BCCA 29 at para. 14.

a) Pre-trial loss of earning capacity

- [78] Ms. Rajan claims past loss of earning capacity for the period January 2013 to September 2015. Ms. Rajan argues that, but for the accident, she would have started working full time by no later than January 2013.
- [79] Ms. Rajan worked part time in 2013 and 2014, earning \$28,086 in 2013 and \$20,561 in 2014. She did not start full time teaching until September 2015, when she began teaching full time at Bodwell High School ("Bodwell").
- [80] In the 2013-14 school year Ms. Rajan worked as a TTOC for both the Sea to Sky School District No. 48 and West Vancouver School District No. 45. In 2013 she worked 66.7 hours at Sea to Sky, and 49.5 hours at West Vancouver.
- [81] Ms. Rajan bases her loss of capacity claim on the earnings she said she would have made working full time in the public school system. Her daily rate at Sea to Sky was \$253.81. Using that as a base, she claims \$253.81/day for 36 weeks, or \$45,685.80.
- [82] Ms. Rajan worked as a TTOC after obtaining her qualifications in 2006 until 2009, but then interrupted her trajectory by moving to Abu Dhabi. She returned to Canada in the summer of 2011. Ms. Rajan did not begin working as a TTOC in the fall of 2011, but did sign on to a freelance tutoring service. She got her first tutoring hours in January 2012 and worked a few hours in January, February and March 2012. Her total earnings from tutoring in 2012 were \$260. Under cross examination, Ms. Rajan agreed that she did not lose tutoring hours because of the accident.
- [83] Under cross examination Ms. Rajan also agreed that it was difficult to get a TTOC contract and only after the accident was she able to get on the Sea to Sky TTOC list. She also agreed that she continued to look for work after the accident just as hard as she did before the accident. She agreed that she believed she was capable of full time work, and honestly presented herself of such capability when she applied for positions after the accident.
- [84] In 2013 she worked 116 days under a TTOC contract, which was more than she worked as a TTOC before she left for Abu Dhabi. Ms. Rajan agreed under cross examination that her busiest and most lucrative years as a TTOC were after her accident.
- [85] Ms. Rajan testified that her driving anxiety caused her to give up her work with the Sea to Sky School District beginning in the 2014-2015 school year. She maintained her TTOC contract in the West Vancouver School District until she started full time work at Bodwell. In each of 2014 and 2015 she worked an average of 56 days at West Vancouver. In the 2014-2015 school year, she testified she missed 9 full and 6 half days of teaching as a result of accident related injuries.

- [86] I accept Ms. Rajan lost the Sea to Sky work because of her driving anxiety, and that she lost an equivalent to 12 full days of work in the 2014-2015 school year due to her injuries. I find that if she had been able to maintain her contract with Sea to Sky, there is a real possibility that she would have worked approximately 50 days in each of 2014 and 2015 at Sea to Sky, for a total of 100 days. If she had not been injured, I find there is a real possibility she would not have missed 12 full time equivalent days in the 2014-2015 school year.
- [87] Ms. Rajan claims \$135,000 in past loss of earning capacity, which she says represents the difference between what she would have earned working full time, and what she actually did earn, in the years before she was hired full time at Bodwell. I am not satisfied that Ms. Rajan has proven that her injuries prevented her from working full time prior to 2015. Her inability to work full time resulted from the vagaries of on-call work, and not her injuries.
- [88] I find that there is a real possibility that she would have worked an additional 113 days between January 2013 and September 2015 if she had not been injured in the accident at issue. I assess Ms. Rajan's past loss of earning capacity in the gross (pre-tax) amount of \$29,000.
- b) Loss of future earning capacity
- [89] Ms. Rajan seeks compensation on the basis of an impairment of her capital asset - namely her capacity to take full advantage of all earning potential she had before the accident. She seeks an assessment of her damages roughly equivalent to one year's salary, net of taxes, in the amount of \$69,000.
- [90] Ms. Rajan relies on the opinion of Dr. Hayward, who stated in his opinion that it was reasonable that she had missed 10-15 days of work a year because of headaches and chronic pain, and that her wrist pain slows some of her work such as grading and typing.
- [91] I have found that Ms. Rajan will continue to experience chronic pain and has experienced accelerated degenerative changes in her wrists.
- [92] However, with the exception of the days in the 2014-2015 school year, to date Ms. Rajan has not proven that she missed 10-15 days of lost work each year due to her injuries.
- [93] While in direct evidence, Ms. Rajan claimed that she missed a number of days for accident related injuries, her evidence did not hold up under cross examination when she was taken through her detailed reports of time off from work. She agreed that her sick days included days when she was off for things unrelated to the injuries. In 2015-2016 she took 3.33 sick days, but could not say how many resulted from her injuries in the accident. In 2016-2017 she took a total of 7.08 sick days, but could not say how many related to her injuries. In 2017-2018 she took 14 sick days, but agreed that at least 7 of those days related to an accident in November 2017 when she tore the ligaments in her ankle; of the remainder she could not say how many days related to the injuries she received in the accident. In the 2018-2019 school year, she agreed that at most 3 sick days related to the accident. In 2019 up to the date of trial, she had taken 3 sick days but could not say if they were related to the accident.

- [94] Ms. Rajan's performance at Bodwell has been excellent. In her reviews, her evaluation results show that she exceeds expectations in most categories.
- [95] I find Ms. Rajan did not establish that she missed a significant amount of work at Bodwell as a result of her injuries. While Dr. Hayward relies on Ms. Rajan's self reporting of 10-15 missed days of work per year, this is not supported on the evidence before me. Dr. Ballard was of the opinion that Ms. Rajan's injuries no longer prevent her from her occupational duties as a full time teacher. I accept the opinion of Dr. Ballard in this respect.
- [96] Ms. Rajan urges me to find that her future earning capacity has been impaired and to assess that loss, using the capital asset approach, as equivalent to one year's income. Ms. Rajan argues this amount will compensate her for the fact that she is no longer as valuable in a competitive work environment.
- [97] While I accept that Ms. Rajan has days where she is in pain, and she cannot do as much as she would like, I not satisfied that the accident has rendered her less valuable overall as a full time teacher. She has worked as a full time teacher on a consistent basis since 2015, with very few days off work related to her injuries, and has obtained glowing reviews for her work. I find that Ms. Rajan is not less competitively employable as a full time teacher.
- [98] In addition to her full time teaching, Bodwell provides an opportunity for additional teaching hours on Saturdays. In 2017 Ms. Rajan agreed to teach a Saturday course at Bodwell, in addition to her normal teaching load. This involved teaching on 10 Saturdays over the fall, for a total of 34 hours. She was paid an additional \$1,950 for this work.
- [99] Ms. Rajan has not repeated these Saturday contracts because she found it was too much for her due to her injuries. Ms. Rajan did not lead any evidence about how frequently the Saturday courses would have been available to her, if she had been physically able to teach them. However, Ms. Rajan did testify that she was asked to teach an international class on Saturdays, but had to decline. While the frequency of such opportunities was not clarified in the evidence, I am satisfied that there is a real possibility that Ms. Rajan would have been able to teach additional Saturday classes in the future to some extent. Her inability to taken on such work does represent a loss of opportunity to take on all job opportunities which might otherwise be available to her. This is a loss with economic consequences which supports an award for future loss of earning capacity.
- [100] I award Ms. Rajan damages for loss of future earning capacity in the amount of \$2,000/year to age 65, to reflect the fact that she can no longer take on work outside of her normal full time teaching contract. As the likely frequency of such job opportunities has not been established, I reduce this award by 50% to reflect my conclusion that the likelihood of such contracts being awarded on an annual basis for her entire career is not more than 50%.

c) Present value

[101] Any award for loss of future earning capacity must be assessed as a lump sum, which takes into account the present value of the plaintiff's future loss. By calculating the present value of the future loss, the court accounts for the fact that money received today will be invested and produce the appropriate income stream for the plaintiff's expected earning life.

[102] Applying the 1.5% discount rate required by B.C. Reg. 74/2014, as amended, I find that the present value of Ms. Rajan's future earning capacity loss is \$41,439, which I discount to \$21,000 to reflect my contingency finding set out above.

3. Cost of future care

[103] Any claim for cost of future care must be medically justified, and must be reasonable to both parties: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.). The plaintiff is entitled to services, medications and other items of care that are reasonably necessary to preserve and promote her mental and physical health, and which she is likely to access in the future: *Sendher v. Wong*, 2014 BCSC 140 at paras. 192-195; *Peters v. Ortner*, 2013 BCSC 1861 at paras. 141-144.

[104] Ms. Rajan claims the cost of 4 yoga sessions a month, and massage therapy twice a month, for a combined claim, after applying the 2% discount rate, of \$55,200.59.

[105] The defence takes the position that there was no evidence of medically necessary treatments and, therefore, no costs of future care should be awarded.

[106] A plaintiff does not have to establish that a future care item is medically necessary; a plaintiff must establish that a future care item is medically justified. There is a difference: *Kallstrom* at para. 429. To the extent that a future care treatment is recommended by a medically trained professional to assist a plaintiff in promoting her physical or mental health, that treatment is medically justified. The plaintiff must also establish that it is reasonable, and that the plaintiff is likely to access the treatment in the future.

[107] Dr. Horlick, who was retained by the defence, recommends Ms. Rajan participate in physiotherapy, exercise, massage therapy and, possible, IMS therapy. Dr. Hayward recommends Ms. Rajan attend massage, physiotherapy, acupuncture, yoga, pilates, and rehabilitation exercise. Dr. Ballard recommends active rehabilitation.

[108] To date Ms. Rajan has accessed massage therapy approximately once a month, and attends yoga on a frequent basis - far more than 4 times a month. While Ms. Rajan may have attended yoga before the accident, this does not diminish the fact that after the accident yoga provides her with a therapeutic benefit which is consistent with the recommendations of the medical professionals. I am satisfied that Ms. Rajan will access both massage and yoga in the amounts sought by Ms. Rajan, and that these treatments are medically justified and reasonable. I award Ms. Rajan a present value of \$55,000 for her costs of future care.

4. Loss of housekeeping capacity

[109] A plaintiff who can no longer perform housekeeping duties as she did before the injury is to be compensated for that loss: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63. This loss can be assessed as an independent head of pecuniary loss, or it can be assessed within the non-pecuniary damage claim. The latter is sometimes appropriate where the evidence does not permit a quantification of the loss: *Travelbea v. Henrie*, 2012 BCSC 1532 at paras. 77-78.

[110] I find that the evidence in the case at bar does not allow me to quantify Ms. Rajan's loss of housekeeping capacity. In making my non-pecuniary award, I have taken her loss of housekeeping capacity into account. I decline to make a separate award under this heading.

5. Special damages

[111] Ms. Rajan has submitted a claim for special damages which includes mileage, treatments (massage, chiropractic treatments, MRI, physiotherapy) and yoga expenses. The defence disputes these expenses on the basis that she would have required some of the treatments anyway given her pre-existing injuries, and her massage costs are excessively expensive.

[112] I am not satisfied that the mileage claims are reasonable. The appointments are all within Metro Vancouver. It is my view that it is not reasonable to require the defence to pay 50 cents/km for treatments within the city. I disallow the mileage claimed.

[113] I find the remainder of the claims are reasonable and I award special damages in the amount of \$12,700.

E. Are Ms. Rajan's damages limited by Rule 15-1?

[114] The defence argued that I should limit damages to \$100,000, in accordance with the guidelines under Rule 15-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which states that the Rule should generally be applied to claims of \$100,000 or less.

[115] Rule 15-1(3) specifically states:

(3) Nothing in this rule prevents a court from awarding damages to a plaintiff in a fast track action for an amount in excess of \$100,000.

[116] I decline to limit my award of damages to \$100,000.

IV. Conclusion

[117] Ms. Rajan is awarded the following damages against the defendants, jointly:

a)

Non-pecuniary damages

\$80,000

b)

Past loss of earning capacity (gross)

\$29,000

c)

Loss of future earning capacity (present value)

\$21,000

d)

Cost of future care (present value)

\$55,000

e)

Special damages

\$12,700

[118] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment.

"Baker J."

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