IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Raikou v. Spencer,*
2014 BCSC 1

Date: 20140102
Docket: M115495
Registry: Vancouver

Between:

Georgia Raikou

Plaintiff

And

Lois Elaine Spencer

Defendant

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for Plaintiff:	G. T. Kosakoski
Counsel for Defendant:	W. R. Chalcraft K. H. Yee
Place and Date of Trial:	Vancouver, B.C. September 23 - 27, 2013
Place and Date of Judgment:	Vancouver, B.C. January 2, 2014

Introduction

[1] The plaintiff, Georgia Raikou, claims damages for injuries sustained in a motor vehicle accident that occurred on April 15, 2011 (the "accident"). Liability for the accident is admitted.

[2] The central issue in the case is the extent to which the accident caused the various symptoms complained of by the plaintiff or whether the symptoms are largely the result of pre-existing factors unrelated to the accident.

The Plaintiff

[3] Ms. Raikou was born on May 30, 1961 and was 52 years old at the time of the trial.

[4] She was born in Greece but moved to Canada in 1980 when she was 19 years old.

[5] She has three children with her former husband who she married in 1980 and from whom she separated in 1998. Ms. Raikou married her current husband in 2012. They live together along with Ms. Raikou's son.

[6] Following her arrival in Canada, Ms. Raikou worked at a number of jobs, including selling women's fashions, arranging flowers and as an administrative assistant with Canadian Airlines.

[7] In 1997 Ms. Raikou obtained her grade 12 equivalency and began taking various evening courses. Ultimately, when Canadian Airlines was purchased by Air Canada, she lost her job and so returned to school and obtained her medical office assistant certificate.

[8] In the early 2000s she had a number of jobs in various clinics around the lower mainland. At some point she was hired by Vancouver Coastal Health on a casual basis and then she transferred to the Three Bridges Community Health Centre where she continues to be employed.

[9] Three Bridges is a community health centre within Vancouver Coastal Health that provides a variety of services to communities located in downtown Vancouver.

[10] Ms. Raikou's formal job title is clinical service clerk. She said that she not only has traditional medical office assistant duties but does other things like set up and reschedule appointments, deals with patient in-take and administrative tasks such as faxing, filing and data entry. Switchboard relief was recently added to her duties.

The Accident

[11] Ms. Raikou testified that on the afternoon of April 15, 2011, she was driving east on 54th Avenue in Vancouver. She was heading home from the hairdresser's. The defendant's car was travelling south on Duff Street towards 54th Avenue. The defendant failed to stop at a stop sign at the intersection of Duff Street and 54th Avenue and her vehicle struck Ms. Raikou's vehicle on the passenger-side door. The impact caused Ms. Rakou's vehicle to spin into oncoming traffic.

[12] Ms. Raikou says that on impact she started shaking all over, her head hurt and she felt flashes of pain in her neck and back. She says she managed to get her car to the side of the road and then, after exchanging information with the other driver, she drove slowly home.

[13] When she got home, she called an ambulance but says that she had difficulty speaking to the dispatcher because her jaw had locked. The firemen arrived and she was taken to Burnaby General Hospital emergency department where she was prescribed Tylenol and then told to follow up with her family doctor.

Pre-Accident Health and Activities

[14] Ms. Raikou was involved in a previous motor vehicle accident in 1990 in which she suffered an injury to her jaw as well as low back pain and severe headaches. She was also diagnosed with depression and was prescribed anti-depressants.

[15] At that time, she was treated by a jaw specialist, Dr. Epstein, who diagnosed her as suffering from chronic orofacial pain and temporomandibular disorder ("TMD"). Ms. Raikou says that she was treated by Dr. Epstein up until 1996 when she decided that she did not need further treatment. However, he did recommend that she wear a mouth guard going forward. She also says that her depression resolved by 1996 and that she stopped taking anti-depressants around that time.

[16] In 2005, Ms. Raikou experienced a recurrence of her depression. She says that she was under considerable financial stress at that time as a result of threats by her ex-husband to cut her off support.

[17] She says that her symptoms resolved but then returned in 2008 when she once again came under financial stress due to her ex-husband actually cutting off her support. She ended up having to sell her house and move to a co-op. Ms. Raikou says that this led to conflict with her children, particularly her youngest daughter. In 2009, her daughter attempted suicide and was committed to hospital.

[18] These various stresses and pressures resulted in an increase in Ms. Raikou's depression symptoms, as a result of which in July or August of 2009 she took a leave from her job. She was on short term leave or salary replacement through the fall of 2009 then commenced receiving long term disability benefits for her mental health condition in early 2010. Ms. Raikou remained on long term disability leave until February 2012. She was on long term disability at the time of the accident in April 2011.

[19] Ms. Raikou has undergone three foot surgeries to address problems with bunions. The first surgery took place in July 2010 before the accident but while she was on long term disability. The second surgery was done in March 2011 and the third in February 2013.

[20] In terms of activities and lifestyle prior to the accident, Ms. Raikou was quite involved in Greek dancing, which she described as being a very intense, physical style of dance. Ms. Raikou says that prior to the accident, she would engage in

Greek dancing as many as four nights per week. However, this activity was subject to periodic interruptions due to the various pre-existing medical conditions described above.

[21] Ms. Raikou testified that prior to the accident, she also enjoyed other types of dance, such as belly and Latin, and that she enjoyed various other activities such as running, hiking, swimming, gardening, reading and interior decorating.

Post-Accident Complaints

[22] Following the accident, Ms. Raikou says that she experienced pain in the back of her skull and radiating across her upper back, severe headaches, neck pain, jaw pain, confusion and memory loss and increased depression.

[23] Ms. Raikou says that the pain has largely continued unabated since the accident. She describes the pain as being constant, chronic and debilitating.

[24] According to Ms. Raikou, as a result of her ongoing pain, she is unable to participate in many of the activities that she did prior to the accident, most notably her Greek dancing. She also says that she cannot run or hike, garden, swim and is also unable to cook or clean for which she now has to rely on her husband and son.

[25] Ms. Raikou also testified that her condition has adversely affected her relationship with her husband and son in that she is irritable and short tempered, as a result of which she argues with them often.

[26] Ms. Raikou's description of her condition and its effects was supported by the evidence of her husband Steve Fakiolas. He testified that prior to the accident Ms. Raikou was a vibrant and happy woman and that they enjoyed numerous activities together including dancing, running, hiking and going out with friends. Since the accident, Mr. Fakiolis describes Ms. Raikou as being grumpy and often confused and forgetful. He confirmed that he and Ms. Raikou's son now do all of the cooking and cleaning and that he and Ms. Raikou no longer participate in any of the

activities that they enjoyed prior to the accident. Mr. Fakiolis also testified that Ms. Raikou's injuries have had a very negative impact on their intimate life.

[27] In terms of her post-accident employment, as noted, Ms. Raikou remained off work on long term disability until February 2012. She returned to work when her disability benefits expired.

[28] Ms. Raikou says that since returning to work, she has missed "maybe" 15 days due to accident-related pain and fatigue. She says that she is unable to attend to the usual tasks required in her job due to her constant pain and memory issues. She is concerned that she will be fired if she continues on in this way. She believes she would benefit from taking time off to get better but she cannot afford to do so.

Medical Evidence

[29] As noted above, since the accident Ms. Raikou has complained of both physical pain and psychological distress.

[30] Looked at in isolation, the medical evidence is quite consistent that the physical injuries suffered by Ms. Raikou in the accident were relatively minor in nature.

[31] For example, Dr. Ryan, Ms. Raikou's family physician, stated in his report dated May 9, 2012 that while the accident caused a partial disability because of soft tissue strain to the cervical and lumbar spine, there was no permanent injury or permanent disability. Dr. Ryan also noted that Ms. Raikou's return to full ambulation and exercise is highly probable.

[32] Dr. McGraw, a specialist in orthopaedic medicine, examined Ms. Raikou on March 21, 2013 at the request of counsel for the defendant. Dr. McGraw's findings are set out in a report dated May 13, 2013 that was entered into evidence.

[33] In his report, Dr. McGraw noted Ms. Raikou's current accident-related symptoms as ongoing severe headaches, neck pain and intermittent low back discomfort. Dr. McGraw diagnosed Ms. Raikou as having sustained musculoligamentous soft tissue injury to her cervical and thoracolumbar spine regions. In terms of prognosis, Dr. McGraw opined that it was unlikely that Ms. Raikou would suffer any long-term complications from the injuries and that the prognosis for recovery was good.

[34] Ms. Raikou was examined by Dr. Epstein on May 16, 2011 with respect to her jaw issues. Dr. Epstein had previously treated Ms. Raikou for her jaw injury suffered in the previous 1990 motor vehicle accident. He had last seen her on June 18, 1999 at which time she complained of chronic orofacial pain and TMD.

[35] When Dr. Epstein examined Ms. Raikou on May 16, 2011, after the more recent accident, she had complaints of jaw pain, jaw joint clicking, popping and occasional locking. According to Dr. Epstein, her symptoms were similar to the symptoms she exhibited previously, but were aggravated by the more recent trauma.

[36] In Dr. Epstein's view, Ms. Raikou will require appliance therapy going forward meaning some form of mouth guard to manage her TMD issues. Dr. Epstein notes in his report that treatment of her jaw issues will have to occur as part of the multidisciplinary treatment of her complaints. He suggests that her prognosis is guarded given her past history of pain.

[37] In cross-examination, Dr. Epstein agreed that he has not seen Ms. Raikou since January of 2012 and that it would have been useful to have more updated information.

[38] Notwithstanding the relatively minor nature of the physical injuries suffered by Ms. Raikou, the duration of her symptoms and their impact on her have been extended due to her ongoing psychological issues.

[39] In terms of those issues, Ms. Raikou's psychiatrist Dr. Dryer, in her undated report (likely prepared in May of 2013), noted Ms. Raikou's current symptoms as depressed mood, insomnia, continuing pain in her head, neck and back and ongoing anxiety and cognitive difficulties.

[40] Dr. Dryer further stated in her report that:

> …As these symptoms all occurred directly after the MVA on April 15, 2011 the overwhelmingly likely cause would be the MVA. Ms. Raikou had some anxiety symptoms and some occasional pain symptoms as a consequence of a previous MVA in 1990 but these had stabilized to a great degree many years ago.

[41] Dr. Dryer offered a guarded prognosis about the likelihood of Ms. Raikou's condition improving:

> Because of the multiple co-morbidities, chronicity, complicated pain syndrome, and financial stress, Ms. Raikou's prognosis is guarded. She is likely to have most of these pain, depression, and anxiety symptoms for a long time into the future and be limited and disabled in much the same way as she is now. She would need intensive physical and emotional support, which is not available to her presently, to be able to more substantially recover.

[42] Mr. Raikou was examined by another psychiatrist, Dr. Solomons, on April 16, 2013 at the request of counsel for the defendant. Dr. Solomons' assessment is summarized in a report dated May 1, 2013.

[43] In his report, Dr. Solomons opined that Ms. Raikou's pre-existing depression was mildly aggravated by the motor vehicle accident of April 15, 2011. In his view, the severity of her depression following the accident has been mild and not impairing. Dr. Solomons further opined that Ms. Raikou did not develop either new or recurrent psychiatric complications from the accident.

[44] There are problems with both of the psychiatric reports as canvassed in some detail in the cross-examination of the two doctors. As pointed out by counsel for the defendant, Dr. Dryer's report does not address in any detail the fact that Ms. Raikou had significant previous psychiatric issues and that she was in fact on long term disability for those problems at the time of the accident.

[45] Particularly surprising is Dr. Dryer's failure to mention that she had been treating Ms. Raikou for at least a year prior to the accident and that on February 28, 2011 Dr. Dryer had increased Ms. Raikou's anti-depressant medications on the basis of Ms. Raikou reporting that she felt like she was "going backwards." Dr. Dryer's explanation in cross-examination for not addressing Ms. Raikou's past history was that she had understood her task to be to focus on the depression and anxiety that followed the accident.

[46] In terms of Dr. Solomons' report, he does not consider the relationship between Ms. Raikou's current physical complaints and her ongoing psychological issues. Further, in his report, he does not address any of the established DSM-IV criteria for major depressive disorder but nonetheless opined during his testimony that Ms. Raikou was not suffering from depression at the time of his assessment. Further, as pointed out by counsel for Ms. Raikou, Dr. Solomons had no reliable baseline against which to measure Ms. Raikou's current condition.

[47] In my view, the most accurate medical assessment of Ms. Raikou's condition was provided by Dr. Ryan, her family physician. He was the one doctor who considered both her pre and post-accident conditions as well as the relationship of her ongoing psychological issues to her pain symptoms.

[48] In his report, again dated May 9, 2012, Dr. Ryan diagnosed Ms. Raikou as suffering from a "Major Depressive Disorder, Recurrent, moderate severity, in partial Remission" and suggested that this condition was "Pre-existing, Exacerbated." He further diagnosed a panic disorder with agoraphobia which he also characterized as "Pre-existing, Exacerbated."

[49] Essentially, it was Dr. Ryan's view that Ms. Raikou had significant pre-existing psychological issues that were exacerbated and prolonged by the injuries suffered in the accident. Whereas prior to the accident, the principal causes of her condition were the various personal stresses in her life, after the accident, the pain she experienced from her injuries was a significant cause of her ongoing emotional and psychological problems. At the same time, Dr. Ryan suggested that Ms. Raikou's

depression and anxiety also likely prolonged her recovery from the physical injuries suffered in the accident, which, as noted above, he characterized as relatively minor.

[50] Of note, both in his report and in his testimony at trial, Dr. Ryan suggests that it is likely that Ms. Raikou would have suffered a recurrence of her depression even without the accident due to her history and her vulnerability to social stresses such as financial, family and marital concerns.

Analysis

Findings as to Ms. Raikou's Condition

[51] I find that as a result of the accident, Ms. Raikou suffered a mild to moderate soft tissue injury to her neck and low back. In the normal course, these injuries would have resolved in relatively short order. However, I accept that she continues to experience ongoing symptoms and that her pain has been prolonged by her emotional and psychological issues. With respect to those issues, it is apparent that Ms. Raikou continues to experience symptoms of emotional distress, which results in mood swings, irritability and some interruption with her memory.

[52] The relationship between her physical and psychological complaints will be addressed below under the heading "Causation".

[53] Before turning to that issue, I should note that while I found Ms. Raikou generally to be a credible witness, in my view she had a tendency to overstate or exaggerate her condition somewhat. This is particularly so in her description of her pain as being constant and unremitting.

[54] By way of example, Ms. Raikou travelled to Greece in July and August of 2011. When she returned, she posted the following entry on her Facebook page on August 20, 2011:

> From the airport to Eleni's and Nick's wedding. Missed the ceremony but made it to the reception. From the airport home to change and off to the reception. Made it through and had an awesome time. 48 hours without sleep, jet lagged and still partying.

[55] I agree with counsel for Ms. Raikou that caution must be applied when considering the relevance and import of Facebook entries in that they are but a mere "snapshot in time" and do not necessarily shed light on a person's overall condition or ongoing complaints: see *Guthrie v. Narayn,* 2012 BCSC 734 at para. 30.

[56] Nonetheless, this particular snapshot is inconsistent with Ms. Raikou's testimony that her pain condition is continuous and unrelenting and that it has effectively precluded her from enjoying any of her pre-accident activities.

Causation

[57] A central issue in this case is whether Ms. Raikou's ongoing psychological symptoms were caused by the accident or are a continuation of her pre-existing condition that is related to other non-accident related stresses. Also in issue, as noted, is the interrelationship of her pain complaints and her psychological condition.

[58] It is well established that the plaintiff must prove on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation need not be determined by scientific precision: see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 13-17 [*Athey*].

[59] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: see *Resurfice Corp. v. Hanke*, 2007 SCC 7, at paras. 21-23; *Clements v. Clements,* 2012 SCC 32 at para 8 [*Clements*].

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

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

[61] As is also noted in *Clements* at para. 9, the "but for" test must be applied in a robust common sense fashion.

[62] Where, as here, a plaintiff has pre-existing conditions, the court must consider the relationship of those conditions to the current complaints. A defendant tortfeasor is liable for all injuries caused by the tort even if those injuries are more severe than might otherwise be the case due to the pre-existing condition (the "thin skull rule"). However, the defendant is liable only for the injuries actually caused by the accident and not for any effects of the pre-existing condition that the plaintiff would have experienced in any event (the "crumbling skull rule"). Put another way, the defendant is liable for the additional damage but not the pre-existing damage (*Athey*, at paras. 34-35).

[63] In *Zacharias v. Leys,* 2005 BCCA 560, the Court of Appeal said the following about the crumbling skull rule:

> [16] The crumbling skull rule is difficult to apply when there is a chance, but not a certainty, that the plaintiff would have suffered the harm but for the defendants' conduct. Major J. addressed this issue in ***Athey*** when he wrote, at paragraph 35, that damages should be adjusted only when there is a "measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence." Such a risk of harm need not be proved on a balance of probabilities, which is the appropriate standard for determining *past* events but not *future* ones. Future or hypothetical events should simply be given weight according to the probability of their occurrence. At paragraph 27, Major J. wrote that "if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk." In the same paragraph, he went on to say that a future event

> should be taken into account as long as it is a "real and substantial possibility and not mere speculation."
>
> [17] Because in ***Athey*** the Supreme Court found that there was no basis for finding a "measurable risk", it is of limited assistance when applied to cases in which there is not clearly an absence of a measurable risk. A number of decisions in this Court have struggled with that issue. In ***York v. Johnston*** (1997), 37 B.C.L.R. (3d) 235 (C.A.), the plaintiff suffered a relapse of her multiple sclerosis after a car accident. Newbury J.A., for the Court, held that it was a "thin skull" case, but that, nonetheless, it was appropriate to reduce the plaintiff's damages in recognition that she might have relapsed anyway. At paragraph 6, Newbury J.A. contrasted the standards used to assess liability and damages:
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> > Of course, the judgment as to the measure of damages is a much more subtle one than that as to causation, not only because it involves a consideration of mere contingencies as well as probabilities, but because of the range of results available in the discounting of the award, as opposed to the "all or nothing" choice that must be made with respect to causation.
>
> The trial judge reduced the damages to reflect the risk of relapse that pre-existed the accident. Newbury J.A. held that the trial judge was entitled to make such a reduction, even though there was only a weak evidentiary foundation on which to conclude that the plaintiff would have remained symptom-free for just five years.

[64] On the evidence, I find that the accident caused the soft tissue injuries to Ms. Raikou's neck and back. While she had suffered similar injuries in the previous 1990 motor vehicle accident, those injuries had resolved. However, the duration of Ms. Raikou's injuries and related complaints is due in part to her pre-existing psychological condition which was still present at the time of the accident. I also note Dr. Ryan's evidence that Ms. Raikou's decision to have further foot surgery after the accident, for problems unrelated to the accident, "markedly" interfered with her recovery.

[65] I am not satisfied on the evidence that the accident caused Mr. Raikou's ongoing complaints of dizziness and headaches. On this point, I refer to Dr. Ryan's report in which he notes that these symptoms are "reminiscent of somatization symptoms that have been investigated in the past by an ear nose and throat specialist."

[66] With respect to her ongoing jaw complaints, I accept Dr. Epstein's opinion that the accident caused an aggravation of her pre-existing TMD symptoms.

[67] In terms of Ms. Raikou's psychological issues, I find that Ms. Raikou was still experiencing symptoms of depression at the time of the accident which were then aggravated by the accident. I accept that the nature of her depression has changed somewhat following the accident from being focussed on social stresses, such as family and financial concerns, to now being largely related to her ongoing pain, although many of the social stresses remain, as reflected in her self-reporting to Dr. Dryer. Nonetheless, her current complaints are a continuation, albeit in an aggravated state, of her pre-existing condition.

[68] I also find that it is likely that, even without the accident, Ms. Raikou would have suffered a recurrence of her depression given that she has had three previous episodes of major depression. Again, to quote Dr. Ryan in his report:

> It is highly probable that there will be a recurrent major depression [footnotes omitted]. The basic reasons for this are that she has already had three episodes of depression, she has a second Axis I diagnosis of Anxiety with Agoraphobia and there are dysfunctional family issues.

[69] Considering the evidence in its entirety, I find that the accident caused 60% of Ms. Raikou's post-accident complaints and symptoms with the balance being attributable to her pre-existing condition.

Non-Pecuniary Damages

[70] Non-pecuniary damages are awarded to compensate an injured person for pain, suffering, loss of enjoyment of life and loss of amenities. The principles governing the assessment of such damages are well known and have been discussed in numerous cases: see *Stapley v. Hejset,* 2006 BCCA 34 at para. 46.

[71] Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered as any award of damages is intended to compensate that individual for the pain and suffering experienced by that person: see *Trites v. Penner*, 2010 BCSC

882 at para. 189. Moreover, the compensation award must be fair and reasonable to both parties: see *Miller v. Lawlor,* 2012 BCSC 387 at para. 109 citing *Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229.

[72] Ms. Raikou relies on a number of authorities in support of her submission that non-pecuniary damages should be in the range of $120,000-125,000. She submits that her circumstances are particularly close to those of the plaintiff in *Zhang v. Law,* 2009 BCSC 991 [*Zhang*], where the court awarded $125,000 to a plaintiff who suffered serious injuries, including depression that was subsequently exacerbated by tragedy in the plaintiff's personal life.

[73] Ms. Raikou also relies on *Morlan v. Barrett,* 2012 BCCA 66, where the court upheld an award to a 46 year old plaintiff of $125,000 for her ongoing chronic pain; and *Eccleston v. Dresen,* 2009 BCSC 332, where the court awarded the 43 year old plaintiff $120,000 for her chronic pain, reduced by 10% because of the plaintiff's predisposition to depression and related somatoform pain conditions.

[74] For her part, the defendant submits that an award of $50,000 for non-pecuniary loss is appropriate. The defendant cites *Pavlovic v. Shields - and Pavlovic v. Dickinson,* 2009 BCSC 345 where the plaintiff was awarded $50,000 discounted by 20% to reflect pre-existing chronic back pain, and *Chamberlain v. Giles,* 2008 BCSC 171 where the award of $50,000 reflected the court's finding that 60% of the plaintiff's injuries were attributable to the accident and 40% to her pre-existing injuries, depression and anxiety disorders.

[75] The defendant says that this is a similar "crumbling skull" case in which the accident aggravated Ms. Raikou's various pre-existing mental and physical complaints.

[76] I have found that the soft tissue injuries complained of by Ms. Raikou were caused by the accident but that their relatively minor nature was complicated by her pre-existing, ongoing psychological issues. The degree of that aggravation and the corresponding impact on Ms. Raikou are, in my view, more extensive than the

circumstances addressed by the courts in the cases cited by the defendant. I do note, however, that the *Chamberlain* case is instructive, particularly as it deals with pre-existing depression and anxiety disorders the nature of which were altered by the accident.

[77] I do not agree with Ms. Raikou that her circumstances are similar to those of the plaintiff in *Zhang*, as the plaintiff in that case did not suffer from any pre-existing depression or anxiety disorders. The issue before the court in *Zhang* was whether the plaintiff's later major depression, aggravated by subsequent tragic life events, was casually related to the defendant's original negligence and the minor depression the plaintiff suffered as a result. Further, the debilitating effects of Ms. Raikou's injuries are not as severe as those found in *Zhang* or in *Eccleston,* as illustrated by, for example, her ability to travel to Greece and to Hawaii for her daughter's wedding. In the circumstances, I find that $100,000 is an appropriate award of non-pecuniary damages. That amount must be discounted by 40% to reflect my finding that only 60% of her ongoing complaints and symptoms were caused by the accident, with the balance attributable to her pre-existing conditions.

[78] I therefore award Ms. Raikou $60,000 in non-pecuniary damages.

Past Wage Loss

[79] Ms. Raikou alleges that she missed 15 days of work due to pain arising from the accident which amounts to $2,136.45.

[80] The defendant notes that Ms. Raikou was already on long term disability at the time of the accident and that on the expiry of her benefits, she had a graduated return to work. The defendant says as well that the evidence does not clearly establish the reasons for the 15 days of work missed following Ms. Raikou's return.

[81] Ms. Raikou's evidence about the missed days was somewhat vague. As noted above, she testified that she missed "maybe" 15 days of work due to symptoms related to the accident.

[82] Nonetheless, I accept that Ms. Raikou did miss some work as a result of her injuries and, in the circumstances, I find that $1,500.00 net is a reasonable figure.

Loss of Future Earning Capacity

[83] The principles governing an assessment of damages for lost earning capacity are well described by Mr. Justice Voith in *Brewster v. Li*, 2013 BCSC 774 at para 142:

> [142] The legal framework for the assessment of the plaintiff's future wage loss claim has been described numerous times. The decision of *Reilly v. Lynn*, 2003 BCCA 49, 10 B.C.L.R. (4th) 16 contains a useful summary of some of the principles and approaches that are to be used when assessing future earning capacity:
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> > [100] An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in ***Andrews v. Grand & Toy Alberta Ltd.***, [1978] 2 S.C.R. 229 at 251:
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> > > 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 for which compensation must be made: ***The Queen v. Jennings***, *supra*. A capital asset has been lost: what was its value?
> >
> > [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: ***Athey v. Leonati***, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: ***Athey v. Leonati***, *supra*, at para. 27, ***Steenblok v. Funk*** (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: ***Milina v. Bartsch*** (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: ***Rosvold v. Dunlop*** (2001), 84 B.C.L.R. (3d) 158, 2001 BCCA 1 at para. 11; ***Ryder v. Paquette***, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: ***Mulholland (Guardian ad litem of) v. Riley Estate*** (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: ***Milina v. Bartsch***, *supra*, at 79. In adjusting for contingencies, the remarks of Dickson J. in ***Andrews v. Grand & Toy Alberta Ltd.***, *supra*, at 253, are a useful guide:

> First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small[.][Underlining added in *Reilly v. Lynn*.]

[84] In *Morgan v. Galbraith,* 2013 BCCA 305, the Court of Appeal, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge when assessing a claim for loss of future earning capacity. Madam Justice Garson stated at para. 53:

> …in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach…or the capital asset approach…

[85] The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what his/her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43 [*Pallos*]; *Gilbert v. Bottle,* 2011 BCSC 1389 at para. 233. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment not mere calculation.

[86] The capital asset approach, which is typically used in cases in which the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff: i) has been rendered less capable overall of earning income from all types of employment; ii) is less marketable or attractive as a

potential employee; iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8 [*Brown*]; *Gilbert v. Bottle,* 2011 BCSC 1389 at para. 233.

[87] In support of her claim, Ms. Raikou relies on the evidence of Samantha Gallagher, a vocational rehabilitation consultant, and Robert Carson, a consulting economist, both of whom provided expert opinions concerning the loss of earning capacity claim.

[88] Ms. Gallagher met with Ms. Raikou for approximately six hours on November 16, 2012. Her assessment of Ms. Raikou involved a detailed interview and subjecting Ms. Raikou to a number of vocational tests. Ms. Gallagher also reviewed various medical records pertaining to Ms. Raikou, including the medical reports of Dr. Ryan and Dr. Epstein. Ms. Gallagher's findings are set out in her report dated February 14, 2013.

[89] In her report, Ms. Gallagher suggests that, based on Ms. Raikou's reported symptoms and difficulties with her current work situation, Ms. Raikou may be better suited to a slower paced environment where there are fewer physical and cognitive demands. She says that Ms. Raikou's best vocational option would be to look for alternate medical office assistant positions that meet those criteria either elsewhere within Vancouver Coastal Health or at a private clinic.

[90] Ms. Gallagher notes in her report postings on the Vancouver Coastal Health website for booking clerk positions paying a starting wage of $20.26 per hour, compared to Ms. Raikou's current wage of $18.39. She also refers to posted positions at various private clinics with starting wages between $16-25 per hour depending on experience.

[91] Ms. Gallagher also opines that if Ms. Raikou's symptoms persist and she continues to miss work, she may wish to consider part-time employment.

[92] In cross-examination, Ms. Gallagher agreed that she did not do an assessment of Ms. Raikou's physical capabilities as that is beyond her area of expertise. She also acknowledged that she was not aware of any warnings that had been given to Ms. Raikou about job performance that might suggest that Ms. Raikou's current employment is in jeopardy.

[93] Mr. Carson authored a report dated June 3, 2013 in which he provides a methodology for calculating the present value of any future income losses established by Ms. Raikou. Having established the methodology, Mr. Carson then provides a series of calculations reflecting scenarios, provided by counsel for Ms. Raikou, under which Ms. Raikou is unable to do full time work in the future and/or that she will retire from paid employment sooner than she otherwise would have.

[94] In his submissions, counsel for Ms. Raikou, using Mr. Carson's calculations, postulated three possible scenarios:

a) She is unable to work in any capacity in which case her loss is $383,789;

b) She would have worked full-time until age 65 but, as a result of the accident, is only able to work half-time to age 60, in which case her loss is $249,437; and

c) She would have worked full-time until age 70 but, as a result of the accident, is only able to work half-time to age 65, in which case her loss is $236,437.

[95] Ms. Raikou submits that taking all of the circumstances into account, and bearing in mind that the court's function is to assess damages rather than apply a mathematical formula, a reasonable award is $275,000.

[96] The defendant takes the position that Ms. Raikou has not established any loss of future earning capacity. She notes the medical evidence concerning Ms. Raikou's soft tissue injuries, including the evidence of Dr. Ryan, that those injuries should not have prevented a return to work. She notes further that Ms. Raikou was in fact able to return to work with minimal interruption and that there was no evidence that her job was in jeopardy due to performance issues. Finally, she notes that even if I accept Ms. Gallagher's recommendation that Ms. Raikou should consider alternate employment, the range of salaries identified by Ms. Gallagher for such positions is very close to what Ms. Raikou is currently earning.

[97] In my view, Ms. Raikou has met the burden of establishing a real and substantial possibility that her ability to earn income has been impaired by the accident, although the degree of the impairment is not to the extent that she claims. As noted, the medical evidence suggests that her physical injuries are not permanent and should not be disabling going forward. Her psychological prognosis is more guarded but again is complicated by the fact that the accident exacerbated a pre-existing condition. Nonetheless, I accept Dr. Ryan's prognosis that, with appropriate treatment, Ms. Raikou should be able to manage her condition and re-establish employment, albeit she will remain vulnerable to further recurrences of her depression for reasons unrelated to the accident.

[98] In light of the fact that Ms. Raikou to date has suffered minimal actual income loss and, as noted by Ms. Gallagher, alternative positions which might better suit her would pay a similar salary, this is not an appropriate case in which to apply the earnings approach to assessing income loss. Rather, the capital asset approach is more suitable in that, on her own evidence, Ms. Raikou's claim is essentially that her ability to earn income has been diminished and that she is less able to take advantage of job opportunities that might otherwise have been available, in keeping with the factors outlined in *Brown.*

[99] In *Pallos* the court applied the capital asset approach and held that one method of assessing damages under this approach is to award the plaintiff the equivalent of one or more years of his or her current income to compensate for the diminished earning capacity: See *Miller v. Lawlor,* 2012 BCSC 387 at paras. 136-140, and *Mackie v. Gruber,* 2010 BCCA 464 at paras. 14, 18-20. That approach is reasonable in the circumstances of this case. Ms. Raikou currently earns approximately $35,000 per year. Using two years' earnings as a guide, I award her $70,000 for loss of future earning capacity.

Pension and Employment Benefits

[100] Ms. Raikou also advances a claim for lost pension and other employment benefits.

[101] With respect to the pension, through her employment Ms. Raikou is a member of the Municipal Pension Plan, which is a public sector defined benefit pension plan. Under the terms of the pension plan, pension benefits on retirement are calculated according to a formula based on the employee's years of service and average salary in his or her best five years.

[102] Relying on calculations provided by Mr. Carson, Ms. Raikou claims a loss in the value of her pension benefits of between $8,000-15,000, depending upon what findings the court makes with respect to her projected future employment and related income loss. Each of the figures in the range provided by Mr. Carson is premised on the notion that Ms. Raikou will be limited to part-time work and the alleged losses are calculated based on the difference between what her pension benefit would be working part-time versus what the benefit would be working full-time using different retirement age scenarios.

[103] However, I have found that Ms. Raikou's complaints resulting from the accident are not likely to disable her from working full time into the future. Further, if she were to change jobs to a slower-paced position, as suggested by Ms. Gallagher, many of the possible jobs are within Vancouver Coastal Health which suggests that she would continue her membership in the pension plan. Further, many of the

possible jobs provide equal or better compensation which would mean no diminution in the value of her pension benefit.

[104] I therefore find that Ms. Raikou has not established that she has suffered a loss with respect to her pension benefits.

[105] In terms of other employment benefits, in her current employment, Ms. Raikou's employer funds 100% of the premiums for employees for provincial health, extended health and dental benefits, group life and long-term disability plans. According to Mr. Carson, those fully paid benefits would continue even if Ms. Raikou continued as a part-time employee. However, if Ms. Raikou were unable to continue to work in any capacity for Vancouver Coastal Health, Mr. Carson estimates that the value of the lost employee benefits would equal approximately 7% of lost future full-time income.

[106] Again, I have found that Ms. Raikou is not totally disabled from working nor is she precluded from working in any capacity for Vancouver Coastal Health, and therefore, based on the evidence, she has not established a loss of employment benefits.

Cost of Future Care

[107] Ms. Raikou claims $58,538.92 in damages for cost of future care comprising:

a) $6,000.00 for cognitive behavioural therapy based on Dr. Dryer's estimate of 24 sessions at $200 per session with the possibility of further sessions being required. Dr. Solomons agreed that Ms. Raikou would benefit from such therapy, although he suggested 6-10 sessions would be appropriate;

b) $21,102.32 for treatment by an oral medicine specialist plus a mouthguard at a cost of $850.00. The estimated cost of treatment is based on Dr. Epstein's opinion that Ms. Raikou should see an oral medicine specialist every two to three months on an indefinite basis at a cost of approximately $175-200 per session;

c) $11,436.60 for kinesiology and/or physiotherapy. This is based on Dr. Epstein's recommendation that Ms. Raikou undertake a physiotherapy regime and Dr. McGraw's recommendation that she participate in a kinesiology-supervised exercise program. Dr. Epstein suggests 12 physiotherapy visits per year at a cost of approximately $50 per visit; and

d) $20,000 for psychiatric medication. There was little evidence about the cost of such medications but Ms. Raikou relies on the decision of the Court of Appeal in *Morlan v. Barrett,* 2012 BCCA 66, where the court substituted an award of $35,600 for medication costs relating to chronic pain.

[108] The figures put forward for oral medicine and physiotherapy treatments reflect the present value of future payments over Ms. Raikou's lifetime and are calculated using a multiplier supplied by Mr. Carson which is not contested.

[109] In my view, the evidence supports the view that Ms. Raikou will benefit from ongoing cognitive behavioural therapy as well as continued use of anti-depressant medications. Keeping in mind that Ms. Raikou's current psychological symptoms were not all caused by the accident and Dr. Ryan's prognosis that future incidents of depression would likely be due to her recurrent social stresses, I think a reasonable award for the future cognitive behavioural treatments and psychiatric medications is $15,000.

[110] With respect to physiotherapy, I note that Dr. Epstein is a specialist in oral medicine and as such, any recommendations for treatment of Ms. Raikou's soft tissue injuries, other than her jaw complaints, are outside of his sphere of expertise. As noted, Dr. McGraw, the independent orthopaedic specialist, recommended a supervised exercise program, although he did not indicate the duration of such a program. Dr. Ryan in his report recommends a self-directed exercise program involving regular stretching activities as well as regular aquatic activity. Of note, Dr. Ryan specifically recommends against developing a dependence on physiotherapy or massage therapy.

[111] Based on the evidence, I accept that some additional physiotherapy or personal training is warranted to assist Ms. Raikou in developing the self-directed program recommended by Dr. Ryan. Using a cost estimate of $50 per session, I find that $1,000.00 covering 20 sessions is a reasonable award.

[112] With respect to future treatment of Ms. Raikou's jaw issues, the evidence establishes that she would benefit from a new mouth guard or similar appliance at a cost of $850.00. The evidence of the need for or benefit from further treatment by an oral medicine specialist is not as clear. In his report, Dr. Epstein recommends against treatment of Ms. Raikou's jaw position using orthodontics, surgery or other similar modalities and says that she will require ongoing multidisciplinary treatment for her various complaints plus appliance therapy for her jaw.

[113] In his oral testimony, Dr. Epstein suggested that Ms. Raikou should consult an oral medicine specialist every two to three months with the interval between visits lengthening over time. He also suggested that such visits should continue indefinitely. In cross-examination, he agreed that he had not seen Ms. Raikou since January of 2012 and that it would have been helpful to have seen her more recently.

[114] I do not take Dr. Epstein's reference to "indefinite" consultations to mean that such treatments will be required for the balance of Ms. Raikou's life but rather that they should continue for a reasonable, albeit undefined, period of time. Further, I took from Dr. Epstein's evidence that Ms. Raikou's jaw complaints are likely to improve as her physical and psychological issues progress. Lastly, I note again that the accident did not cause Ms. Raikou's jaw problems but rather aggravated a pre-existing condition. Taking all of these factors into account, I find that $5,000 is a reasonable award, inclusive of the cost of the dental appliance.

Special Damages

[115] Ms. Raikou provided a list of special damages totalling $2,232.00 comprising physiotherapy treatments, dental treatments and mileage for travel to medical appointments. I did not understand the defendant to seriously challenge this claim thus I award the sum of $2,232.00 for special damages.

Summary

[116] In summary, Ms. Raikou is entitled to the following:

a)	Non-pecuniary damages	$60,000.00
b)	Past wage loss	1,500.00
c)	Loss of future earning capacity	70,000.00
d)	Cost of future care	21,000.00
e)	Special Damages	2,232.00
	Total	$154,732.00

[117] Unless there are circumstances of which I am unaware, Ms. Raikou is entitled to her costs of the action.

"Skolrood J."