CANADA / JUDGMENT

Fatin v. Watson

2020 BCSC 1880

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2020 BCSC 1880 Fatin v. Watson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fatin v. Watson,

2020 BCSC 1880

Date: 20201201

Docket: M162885

Registry: Victoria

Between:

Maureen Anne Fatin

Plaintiff

And

Adam Watson and Canada Joint Ocean Sea Management Co. Ltd.

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:

D.D. McKnight

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Place and Dates of Trial:

Victoria, B.C.

October 26-29, 2020

Place and Date of Judgment:

Victoria, B.C.

December 1, 2020

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I. Introduction

[1] This action arises from a motor vehicle accident that occurred on July 25, 2014 along Highway 4 near Sproat Lake on Vancouver Island. At the time, the plaintiff, Maureen Anne Fatin, was riding as a passenger in a minivan driven by her husband, Dr. Neil Fatin. The Fatins were heading westbound toward Tofino and had decided to stop for a break. As Dr. Fatin attempted to make a left turn off the highway, the left rear corner of their minivan was struck by a westbound truck driven by the defendant, Adam Watson, who had accelerated into the opposite (eastbound) lane of the highway in a failed attempt to pass them. The force of the collision spun the Fatins' minivan 180 degrees and damaged it so severely that it could no longer be driven.

[2] Both Dr. Fatin and Ms. Fatin were injured in the accident. In separate actions, both sued Mr. Watson and his employer for damages arising from their injuries. Dr. Fatin's action has already gone to trial. In his decision dated February 8, 2018 (indexed as Fatin v. Watson, 2018 BCSC 306), Grauer J. (as he then was) apportioned fault for the collision at 75% to the defendants and 25% to Dr. Fatin. That means that the defendants' liability vis-à-vis Ms. Fatin is not in issue in this action. What is in issue in this action is the quantum of damages that will suffice to compensate Ms. Fatin for the injuries and losses that she sustained as a result of the accident.

[3] Ms. Fatin claims to have suffered the following injuries:

a) soft tissue injury to her neck, back and knee;

b) a Type 1 SLAP [superior labrum anterior posterior] tear to her right shoulder;

c) a Type 2 SLAP rotator cuff tear to her left shoulder;

d) dizziness;

e) loss of sleep; and

f) ongoing headaches.

[4] She seeks damages as follows:

a) non-pecuniary: $175,000 - $200,000;

b) loss of homemaking capacity: $100,000;

c) cost of future care: $200,000; and

d) special damages: $53,072.81.

[5] The defendants do not dispute that Ms. Fatin was injured in the accident, more or less as she alleges. They do not impugn her credibility, although they argue that in her trial testimony she unintentionally understated her pre-accident state of health. In particular, they say that she suffered from pre-existing degenerative conditions that must be accounted for in assessing her damages. On that basis, they submit that damages should be awarded as follows:

a) non-pecuniary damages: $100,000 (said to be "the upper end of the range");

b) cost of future care: $24,500-$30,600; and

c) special damages essentially as claimed (the defendants urge me to deduct only the housekeeping costs claimed for 2015 and the first half 2016, a difference of about $1,115, on the basis that Ms. Fatin was incapacitated in that period for reasons unrelated to the accident).

[6] For the reasons that follow, I have concluded that Ms. Fatin is entitled to damages totalling $271,957.81.

II. The Facts

A. Ms. Fatin's Life Prior to the Accident

[7] Ms. Fatin is currently 68 years old. She grew up in Australia and the United Kingdom. She has been married to her husband, Dr. Fatin, for 36 years. She has two step-children.

[8] After graduating from high school, she attended college and then worked as a secretary in Australia and Northern Ireland. She moved to Canada twice, first in 1975 and again in 1987, with Dr. Fatin.

[9] She and Dr. Fatin have, for many years, been spending between two and five months each winter in Mexico. They obtained permanent resident status there.

[10] In the late 1980s, Ms. Fatin's career shifted toward the non-profit world. She took a course in volunteer management and fundraising and eventually came to work extensively with volunteers in areas such as health-care, education and the arts. She retired from full-time work in 2006 but continued to work part-time as a volunteer for many years after that.

[11] She recalls having a strong social life and a generally positive outlook prior to the accident. She liked to cook. She and Dr. Fatin would often entertain. She walked their two dogs regularly. She liked to sail and to ski. She played golf. She enjoyed playing piano and she sang with a chorus. While she and Dr. Fatin were in Mexico, she volunteered for various artistic and charitable causes. She also enjoyed outdoor activities there, such as boogie boarding and bocce ball.

[12] Both Ms. Fatin and Dr. Fatin testified that, before the accident, they divided housework between them by generally allocating to him the outside and to her the inside of the house. There were some exceptions. Ms. Fatin did some gardening outside and Dr. Fatin did some heavier housekeeping, such as carpet cleaning, inside. In his testimony, Dr. Fatin described Ms. Fatin as a "neat freak" prior to the accident. In cross-examination, Ms. Fatin acknowledged that there were times prior to the accident that she avoided doing housework due to episodes of back pain that she experienced from time to time.

[13] Ms. Fatin testified that her medical condition prior to the accident was excellent. She recalled having no issues with her back in the preceding two years. She acknowledged having suffered occasional headaches and low blood pressure leading to dizziness. She also acknowledged having suffered from some neck and shoulder pain in 1998 and again in 2010, which she attributed to spending too much time working at a computer. She recalled having low back and leg pain associated with cervical scoliosis (an abnormal curvature of the spine) in 2009 but that issue had, she said, completely resolved with stretching and exercise soon after that.

[14] I agree with the defendants that the contemporaneous medical records suggest that her pre-accident medical problems were more serious than that. They show that because of ongoing back, arm, neck and leg pain in October 2010, she was referred to a neurologist (Dr. Kemble), who referred her to a neurosurgeon (Dr. Reid) the following year. Her pain symptoms appear to have persisted during that intervening year.

[15] After her appointment with Dr. Reid, Ms. Fatin tried a home inversion table but found it too painful and discontinued that form of treatment.

[16] Ms. Fatin had another episode that led her to seek medical assistance in July 2011. At that time, she reported having "severe low back pain with pain in right buttock, into groin, occasionally into right leg." She had another such episode in December 2012. In 2014, prior to the accident, she injured her chest in a fall.

B. The Accident and its Aftermath

[17] The accident felt to Ms. Fatin like an earthquake. She recalled that her right arm hit the car door, the bridge of her nose hit the sun visor and her right knee hit the console. She had a bruise on her right arm between her shoulder and her elbow.

[18] Their minivan was not driveable after the accident. She recalled the tow-truck driver dropping her and Dr. Fatin off at the art show that they had planned to attend that day. While there, Ms. Fatin felt a throbbing pain in her neck, shoulders and upper back. She remembered feeling "shaken up." They did not stay long at the art show.

[19] In the days that followed, Ms. Fatin's pain symptoms persisted. On August 1, 2014, she went to see her family doctor in Victoria. He initially prescribed Robaxacet and Ibuprofen, which only made her nauseous and did not resolve her pain. She tried physiotherapy but found it

too painful. She was referred to a physiatrist who saw her on October 4, 2014. He prescribed acupuncture and massage. She was also referred to a chiropractor who recommended traction therapy but she found it too painful and did not continue with it. She tried injections of lidocaine and cortisone and intramuscular stimulation, with limited effect. In 2015 and 2016, she was seen regularly by an occupational therapist.

[20] Ms. Fatin has been dealing with other medical issues since the accident. She fell and broke her hip in February 2015, while in Mexico, requiring the surgical insertion of a pin and plate into her hip. Later that same year, in August 2015, she developed pericarditis (an inflammation of the fibrous lining around the heart causing anemia), the cause of which was never explained. That episode required her to be on prednisone for more than a year, a drug that aggravated her osteopenia. She continued to have hip pain for more than two months in the spring of 2020.

[21] An ultrasound on June 20, 2017 revealed that both of her rotator cuffs tendons were torn, requiring surgery. In 2018, she underwent two surgical operations to reconstruct her rotator cuffs, among other things. The first, on April 10, dealt with her right shoulder and the second, on October 2, her left. She saw some improvement in her symptoms after recovering from those procedures but they have since reached a plateau.

C. The Medical Evidence

[22] I received expert reports from two orthopaedic surgeons, one from each side. Their conclusions are similar.

[23] The defendants' report, the earlier of the two, is dated November 29, 2018. The defendants' expert, Dr. Brenda Markland, saw Ms. Fatin for an independent medical examination on August 29, 2018, between Ms. Fatin's two shoulder operations that year.

[24] Dr. Markland diagnosis was as follows:

Mrs. Fatin has osteoarthrosis of the cervical spine which was rendered symptomatic due to her motor vehicle accident

Osteoarthrosis as severe as was found on the cervical x-rays performed on 6 July 2016 would not develop in only 2 years, and must have been mostly present at the time of her motor vehicle accident. It is difficult to say when Mrs. Fatin might have become symptomatic from her cervical spondylosis, as she might have been able to live for years without symptoms, or have started to have symptoms sooner, either with or without any trauma.

Her right rotator cuff tear may have predated the accident, or may have been a partial tear that was converted into a full tear during the accident, or could be due to the accident.

[25] On the question of causation, Dr. Markland's opinion was as follows:

Mrs. Fatin [sic] cervical spondylosis has been symptomatic since the time of the motor vehicle accident, and thus her symptoms can be said to be caused by the accident. It is more difficult to say to what degree the motor vehicle accident contributed to her shoulder symptoms. As mentioned previously, it is probable that Mrs. Fatin had asymptomatic rotator cuff tendinopathy prior to the accident, but may have had a partial right rotator cuff tear converted to a complete tear due to the blow to her right arm. Her cervical spine may have contributed to a deterioration in her shoulder mobilization and muscle strength, leading to increasing symptoms from her rotator cuff tendinopathy.

[26] In answer to the question "What is the likelihood of Mrs. Fatin having her current complaints and limitations even if the accident had not occurred due to pre-existing issues, progressive disease, or for any other reason?" Dr. Markland responded as follows:

Mrs. Fatin could have become symptomatic from her cervical spondylosis or rotator cuff tendinopathy at any time, but could have lived for years without any symptoms.

[27] Dr. Markland's prognosis was as follows:

Given the persistence of Mrs. Fatin's complaints and the severe osteoarthrosis of her cervical spine on radiological examinations, she is likely to continue to experience neck pain. She told me that she had an improvement in her right shoulder symptoms from the surgery, and should by now had [sic] her left shoulder surgery, so her shoulder symptoms may improve over time.

...

Mrs. Fatin will have a permanent loss of the range of motion of her cervical spine. Given the persistence of her cervical pain, she is likely to continue to experience pain. She has not had symptoms of radiculopathy but may develop them in the future. There is a period of temporary disability for her shoulders, which can be estimated at 6-12 months postoperatively, at which time if there is any continuing disability, it would be considered permanent.

[28] Ms. Fatin has adduced the June 5, 2020 report of Dr. Patrick Chin. Dr. Chin saw Ms. Fatin on May 15, 2020. He summarised Ms. Fatin's injuries as follows:

1. Chronic neck and shoulder girdle pain secondary to:

a. Severe myofascial pain syndrome of the right more than left shoulder girdle, involving multiple muscle compartments of the shoulder girdle, chest wall and cervical spine extending into the upper extremities.

b. Symptomatic mechanical neck pain secondary to multilevel cervical stenosis with degenerative disk disease without focal neurologic dysfunction or central myelopathy.

2. Chronic bilateral right worse than left shoulder pain status post rotator cuff repair surgery due to:

a. Residual post-surgical scarring.

b. Anterior right shoulder pain secondary status post biceps tenotomy.

[29] Dr. Chin expressed the opinion that, with the shoulder surgeries behind her, Ms. Fatin is unlikely to see any further improvement in her condition. His conclusion in that regard was as follows:

In her own estimation, she feels she has improved about 70% in her right shoulder and 80% to 85% in her left shoulder. At almost two years post-surgery, the writer is of the opinion that she likely has reached maximum medical improvement in both shoulders.

[30] Dr. Chin also referred to Ms. Fatin's pre-existing conditions. Although she told him that, "she was 100% physically healthy with no pre-existing pain conditions in her neck, upper back and both shoulders" before the accident, he made the following observations based on her medical records:

It should be noted that Ms. Fatin also has severe multilevel degenerative disk disease with cervical spinal stenosis [which] cannot be discounted or ignored. These degenerative changes in her neck are more likely to be a pre-existing condition pre-dating the subject accident.

Ms. Fatin likely had arthritis in her neck prior to the subject accident that was asymptomatic

[31] His overall conclusion on causation was as follows:

As a result of the subject accident, the writer is of the opinion that Ms. Fatin was rendered symptomatic due to the flexion, extension, and distraction forces of her neck at the point of impact. These forces significantly jarred an already arthritic neck, to cause significant muscle spasm and soft tissue reaction that has now resulted in chronic soft tissue pain about her neck, upper back, and shoulder girdle areas. It is the writer's opinion that it would not be surprising that Ms. Fatin actually has diffuse spinal degenerative arthritis from her cervical, thoracic to lumbar spine region.

The writer is of the opinion that Ms. Fatin absent the subject accident could have remained asymptomatic for a longer period of time despite this pre-existing degenerative arthritis of her neck and/or attritional age-related wear in her rotator cuff tendons.

[Emphasis added.]

[32] Unlike Dr. Markland, who was not called to testify at the trial, Dr. Chin testified in person and was cross-examined.

[33] He was asked, among other things, about the November 24, 2010 report of Dr. Reid. He had not seen that document before preparing his report. Dr. Reid's report contained the following information:

a) Ms. Fatin's "chief complaint" at the time was "low back pain and numbness, right greater than left, as well as neck pain and occasional arm and hand numbness";

b) she told Dr. Reid that she had been experiencing "symptoms in her low back and legs for greater than 10 years" with "increasing discomfort in her right leg" over the previous month or two;

c) the pain "seems to impair her significantly for weeks on end, and then will spontaneously resolve without significant medical intervention";

d) she complained of "occasional neck pain and crepitus sensation when ranging her neck" as well as "occasional numbness and tingling in both hands ";

e) she had experienced "numerous minor traumas to her neck over the years that may be contributing to her neck symptoms";

f) a CT scan of her lumbar spine revealed a rotary scoliosis centered in the upper lumbar spine;

g) she had "mild foraminal compromise at L5-S1 and L4-5 on the right neuroforamen affecting the L4 and L5 nerve roots"; and

h) she had "facet arthropathy at multiple levels in her lumbar spine at L3-4, L4-5 and L5-S1".

[34] Dr. Chin explained that "rotary scoliosis" is a curvature of spine that can lead to back pain as degeneration progresses. A "foraminal compromise" is a narrowing of the holes (foramin) where the nerves roots exit the spinal canal, a condition which, although mild at the time, could be expected to worsen over her lifetime as it waxed and waned. The term "facet arthropathy" refers to arthritis in the facet joints, a progressive degenerative condition that can lead to partial disability.

[35] With respect to Ms. Fatin's rotator cuff tears, Dr. Chin accepted that:

a) 10% of the population aged 50-60 may have a tear that is asymptomatic;

b) that figure rises to 15% for those aged 60-70, to over 25% for those in their 70s and 35% for those in their 80s; and

c) such tears may be caused by degenerative disease as well as trauma.

III. Discussion

A. Ms. Fatin's Pre-Existing Conditions

[36] The defendants submit that Ms. Fatin's damages should be reduced to reflect the real possibility that she would have suffered similar symptoms in any event of the accident, given her pre-existing conditions as described above.

[37] The defendants rely in this regard on Bouchard v. Brown Bros. Motor Lease Canada Ltd, 2012 BCCA 331. In that case, Newbury J.A., writing for the Court, had occasion to consider the proper approach in assessing the impact of a pre-existing degenerative condition of the spine on an award of damages to compensate an injured plaintiff for the effects of chronic back pain:

[1] The vagaries of analyzing and predicting the deterioration of the human spine as it ages are a source of difficulty not only for the medical profession but for anyone involved in resolving personal injury claims. This appeal reflects that difficulty: it involves a plaintiff who at the age of 20 was diagnosed with a narrowing of the L5-S1 disc, then experienced a period of apparent recovery, and then suffered an injury in a motor vehicle accident in 2005 that was found to have been a "significant factor contributing to the herniation of [his] disc at L4-L5, and the development of ... symptoms of severe and disabling lower back pain". No challenge is made to this finding of causation. Rather, the plaintiff challenges the trial judge's conclusion that there was a "very significant risk" he would have "gone on to suffer serious low back problems" in the absence of the injury in 2005, and that therefore, all the damages that would otherwise have been awarded against the defendants should be reduced by 40%.

[38] In that case, the Court allowed the appeal in part and reduced the contingency reduction applied by the trial judge from 40% to 20%, in light of the plaintiff's relatively young age (20) at the time of the accident. Newbury J.A. explained her reasoning in that regard as follows:

[20] I agree that it was open to the judge to reduce those damages which were awarded in respect of future loss, to reflect the possibility that "ultimately", Mr. Bouchard would in any event have experienced serious lumbar problems. There was, however, no evidence to suggest that absent the 2005 accident, Mr. Bouchard would have experienced serious and symptomatic degeneration of the spine at the age of 31 (his age at the date of trial) or within a brief time thereafter. Indeed, all the expert evidence suggested such deterioration occurs gradually, subject to specific incidents such as the one that occurred in October 2007. Dr. Hepburn used the word "ultimately" and was not asked to elaborate. Had he been asked, I expect he would have said that one cannot predict with certainty at what age disc degeneration would (or might) have become symptomatic and disabling to Mr. Bouchard, or even that it would necessarily have done so by a particular age.

[21] Similarly, the trial judge did not describe any time line over which he found there was a 40% chance Mr. Bouchard's spine would have degenerated to its present state. Obviously, the process could not be projected with exactitude, but the reduction of damages by 40% suggests a very steep upward line on a graph. That line is contrary to the notion of gradual deterioration. If there was a 40% chance Mr. Bouchard would have deteriorated to his present condition by, say, age 50, the chance between ages 31 and 50 would have been less than 40%. This must as a matter of logic be reflected in the percentage by which the damages are reduced.

[22] I am doubtful the experts could be any more specific than they were concerning what might have happened but for the accident. In the absence of statistical evidence, the trial judge was required to do the best he could on the evidence. Doing that in this court, I propose to set aside the 40% reduction and substitute therefor a 20% reduction.

[23] I am also of the view that the trial judge erred in applying the 40% reduction to all heads of damage, including those that refer only to past loss and expenses. Obviously, the damages given for past income loss and special damages would not be affected by the future contingency posited by the trial judge. As for non-pecuniary damages, since the trial judge did not consider the contingency in his initial assessment of the award of $160,000, I am of the view that this court's comments at para. 25 of York v. Johnston (1997) 37 B.C.L.R. (3d) 235 are not applicable. There is authority for reducing damages under this head to reflect a pre-existing condition: see Zacharas v. Leys 2005 BCCA 560, at paras. 25-6. I would therefore also reduce the award for non-pecuniary damages by 20% rather than 40%.

[Original emphasis.]

[39] More recently, in Clayton v. Barefoot, 2018 BCSC 239, two pre-existing conditions (depression and a genetic predisposition to Huntington's disease) were found not to amount to a "measureable risk" sufficient to justify a contingency reduction. Justice Forth summarised the test to be applied in this context as follows at paras. 96-98:

[96] In Athey at para. 35, the Court discussed the "crumbling skull" doctrine, and noted that if there is a "measurable risk" that a pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award.

[97] In Gabor v. Boilard, 2015 BCSC 1724 at para. 545, Ballance J. neatly summarized the application of this principle:

[545] A pre-existing condition, whether latent or active, is part of the plaintiff's original condition. However, a deduction in certain heads of damages will not necessarily follow from the mere existence of a plaintiff's pre-existing symptoms. The evidence must establish the existence of a measurable risk that the pre-existing condition would have resulted in a loss to the plaintiff in the future without the defendant's negligence. Only then is that risk of loss taken into account in the assessment and will serve to reduce the award of certain heads of damages: Athey at para. 35; Sangha v. Chen, 2013 BCCA 267; Bouchard v. Brown Bros. Motor Lease Canada Ltd., 2012 BCCA 331; Moore v. Kyba, 2012 BCCA 361, at para. 43. The contingency of a pre-existing condition manifesting on its own to cause a loss at some point does not have to be proven to a certainty; it is given weight according to its relative likelihood: T.W.N.A. v. Canada (Ministry of Indian Affairs), 2003 BCCA 670.

[98] In addition, the pre-existing condition "does not have to be manifest or disabling at the time of the tort to be within the ambit": Gohringer v. Hernandez-Lazo et al, 2009 BCSC 420 at para. 92, citing Barnes v. Richardson, 2008 BCSC 1349 at para. 89, aff'd 2010 BCCA 116 [Barnes].

[40] In reaching that conclusion, Forth J. distinguished Barnes on the basis that in that case there was medical evidence demonstrating that the pre-existing condition carried a 15% chance of becoming active apart from the defendants' negligence.

[41] I agree with the defendants that a substantial contingency reduction is warranted in this case to account for the measurable risk that Ms. Fatin may have developed similar symptoms regardless of the accident. This case is, in that sense, more like Bouchard and Barnes than Clayton. Unlike Mr. Bouchard, however, Ms. Fatin was much older (62, rather than 20) at the time of her accident. Her pre-existing conditions had, unlike those of Mr. Bouchard or Mr. Clayton, already been symptomatic intermittently for over a decade by the time of the accident and would have been likely to progress over time. Both experts agree that the accident may only have hastened the onset of her symptoms.

B. Non-Pecuniary Damages

[42] General damages are intended to compensate a plaintiff for pain and suffering and the loss of enjoyment of life and its amenities. The factors to be considered in assessing damages in this category were set out by Kirkpatrick J.A., writing for the Court, in Stapley v. Hejslet, 2006 BCCA 34. She held the following factors to be relevant to the analysis:

a) age of the plaintiff;

b) nature of the injury;

c) severity and duration of pain;

d) extent of the disability;

e) emotional suffering;

f) loss or impairment of life;

g) impairment of family, marital and social relationships;

h) impairment of physical and mental abilities; and

i) loss of lifestyle.

[43] The authorities mandate that a plaintiff's stoicism should not lead to any reduction in the damages awarded.

[44] In Hanger v. Shin, 2019 BCSC 99, Branch J. conveniently summarised the applicable legal principles as follows at para. 80:

[80] ... The compensation awarded [for non-pecuniary loss] should be fair and reasonable to both parties: Trites v. Penner, 2010 BCSC 882 at para. 188. Fairness is measured in part against awards made in comparable cases: Beaton v. Perkes, 2016 BCSC 2276 at para. 51. Other cases are helpful but serve only as a rough guide. Each case still depends on its own facts: Trites at para. 189.

[45] In Tzotzolis v. Wyman, 2019 BCSC 2026, Saunders J. stated as follows at para. 45:

[45] Assessments of non pecuniary damages all turn on their facts, and inevitably each case provided as a comparator will have distinguishing features which differentiate the basis for the non pecuniary damages claim. The assessment of non pecuniary damages is not a mathematical exercise based on comparing hard numbers such as days of total disability from employment, days of hospitalization, numbers of surgeries or treatment sessions or the number of pills that have been prescribed. The aim is to arrive at an award that holistically captures degrees of disability and impairment of functioning and that is as consistent as possible with similar cases, adjusting for inflation.

[46] In this case, as a result of the accident, Ms. Fatin experiences daily pain in her neck and shoulders. The rotator cuff reconstruction surgeries that she underwent in 2018 were only partially successful. Her condition is likely to be permanent. She experiences headaches if she overexerts herself. Her mood has become more irritable. She has gained 10-15 pounds since the accident. Her sleep has been adversely affected.

[47] The chronic pain has affected her life in many ways. She has difficulty performing basic household tasks such as lifting and sweeping. She tries to prepare breakfast and lunch but her husband, who is ten years older than her, must now do most of the cooking in the home. He has taken on responsibility for most of the household chores. He now walks the dogs and does most of the driving. This has left her feeling guilty about the extra burden he now carries.

[48] Ms. Fatin has difficulty reading books as she used to do and is now restricted to reading newspapers. She can play piano for only 5-10 minutes at a time. She finds it difficult to play cards for hours at a time as she used to do. She is concerned that travel to Mexico and elsewhere is now more difficult for her because she cannot sit for long hours on an airplane. She has had to curtail her volunteer work due to her physical impediments. This has left a big hole in her life.

[49] Ms. Fatin seeks non-pecuniary damages of between $175,000 and $200,000 relying on the following authorities: Noftle v. Bartosch, 2018 BCSC 766, Wells v. Kolbe, 2020 BCSC 1530, Kim v. Lin, 2016 BCSC 2405, aff'd 2018 BCCA 77 ($175,000), Sebaa v. Ricci, 2015 BCSC 1492, Conarroe v. Tallack, 2020 BCSC 626 ($180,000), Chaudhry v. John Doe, 2017 BCSC 1895, Tougas v. Mostat, 2020 BCSC 1281.

[50] I agree that those cases are helpful in that they display many parallels to this one. On the other hand, there are important distinctions. For example, the plaintiffs in those cases were injured earlier in life. They appear, in some cases, to have suffered more severe psychological impacts than those demonstrated in this case.

[51] The defendants submit that an award of $100,000 would be more fitting, relying on the following authorities: Buckle v. Raworth, 2015 BCSC 989, Wendt v. Pantages, 2017 BCSC 2428, Petrovic v. Stetsko, 2017 BCSC 741, Flore v. Jongkind, 2018 BCSC 721, Randall v. Boettger, 2020 BCSC 802.

[52] Those cases likewise offer many parallels to this one, but also important differences. The plaintiffs in those cases were not required, as a result of the accident, to undergo two surgical operations with only partial success, as was Ms. Fatin. In some of them, the injuries were not as extensive or the prospects for recovery were better than in this case.

[53] All things being equal, I would have concluded that the pain, suffering and loss of life's amenities at issue in this case justify an award lying somewhere between the ranges suggested by the parties. But I must also account for the measurable risk that Ms. Fatin's pre-existing degenerative conditions may have led, sooner or later, to the same or similar results, regardless of the accident. Adjusting for that factor, I am awarding Ms. Fatin $100,000 in non-pecuniary damages.

C. Loss of Homemaking Capacity

[54] Ms. Fatin seeks damages to compensate her both for a loss of homemaking capacity ($100,000) and for the homemaking services that she expects to require as a result of her injuries (as a component of her broader claim for the cost of future care). The defendants argue that to award her both would amount to double recovery. I agree.

[55] Dr. Fatin advanced similarly overlapping claims in his action. Although, at para. 46, Grauer J. recognised that the two heads of damages are "analytically different", he agreed with the defendants that awarding damages under both heads in Dr. Fatin's case would amount to double recovery (at para. 49). Instead, he opted (at para. 54) to award damages for the loss of past and future homemaking capacity as measured by the cost of the replacement services sought, after accounting for certain adjustments and contingencies (including the fact that past homemaking services were included as part of the uncontested claim for special damages, as in this case).

[56] I have concluded that Ms. Fatin's loss in this category is, like Dr. Fatin's, more appropriately compensated through an award of damages for loss of past and future capacity.

[57] Like Dr. Fatin, Ms. Fatin relies in quantifying her claim for the cost of future care primarily on the June 9, 2020 report of Claudia Walker, an occupational therapist. Ms. Walker has calculated that cost on the basis of her recommendation that Ms. Fatin will need five hours of household cleaning until age 85, at an annual cost of between $6,500 and $9,100. Ms. Fatin has also adduced the report of an economist, Nicholas Coleman, who has calculated the present value of that cost at $80,000 to $120,000.

[58] The defendants urge me to reject Ms. Walker's conclusions because she did not gather objective data or measure the consistency of Ms. Fatin's degree of effort in the tasks that Ms. Walker observed her perform. I agree with the defendants that Ms. Walker's conclusions are, in light of those concerns, of limited assistance to me in assessing the extent of Ms. Fatin's loss of capacity.

[59] But the defendants do not dispute that Ms. Fatin has lost at least some capacity and that some replacement services have become necessary as a result of her injuries. They argue that the cost of those services is far less than the amounts that Ms. Walker has calculated because the following factors are not reflected in her analysis:

a) the Fatins actually require less than five hours of assistance per week;

b) some of those hours would replace the heavier work that Dr. Fatin used to do, a loss for which the Fatins have already been compensated;

c) it is unlikely that Ms. Fatin would have continued to do housekeeping work herself to age 85 (the defendants suggest 80 is more realistic, in which case the cost would be 25% less using Mr. Coleman's multipliers);

d) the Fatins spend several months each year in Mexico, where their housekeeping costs are much less;

e) Ms. Fatin's pre-existing and new conditions that are unrelated to the accident, including natural aging, would have caused her to need housekeeping assistance in any event; and

f) Ms. Fatin may move to a smaller house when she is older, which would reduce her housekeeping costs further.

[60] I agree that some of these and other factors justify an award for loss of capacity that is considerably less than the replacement cost as calculated by Ms. Walker.

[61] First, like Grauer J., I must account for the fact that Ms. Fatin will be at least partly compensated for her past loss of housekeeping capacity through the housekeeping component of the uncontested special damages claim ($12,267.50, of which only the $1,115 incurred during 2015 and the first half of 2016 is contested).

[62] Second, with respect to future loss of housekeeping capacity, while I accept Ms. Walker's estimate of five hours per week as a reasonable one, I agree with the defendants that the value of Ms. Fatin's lost homemaking capacity must also reflect the likelihood that she would have required at least some of that housekeeping assistance prior to reaching 85 in any event, due to factors such as:

a) the impact of her pre-existing and other conditions unrelated to the accident;

b) the time that she and Dr. Fatin spend in Mexico each year;

c) Ms. Fatin's inability or disinclination, regardless of the accident, to continue to do housework with the same level of intensity as she aged; and

d) the possibility that the Botox injection treatment recommended by Dr. Chin will alleviate her symptoms to some degree, thereby reducing the extent of her loss in this category.

[63] In light of those considerations, I am awarding $65,000 for loss of homemaking capacity.

D. Cost of Future Care

i. General Principles

[64] The principles to be applied in assessing damages for the cost of future care were set out by McLachlin J. (as she then was) in Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (S.C.) as follows:

[187] The "additional expense" approach is preferable where the plaintiff will continue to lead basically the same life as she would have led had she not been injured, with the aid of additional assistance and physical facilities. In such a case, the simplest way of calculating the loss caused by the accident is by totalling the cost of the extra assistance facilities which the plaintiff will require.

[198] The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

[199] These authorities establish that (1) there must be a medical justification for claims of cost of future care; and (2) that the claims must be reasonable.

[65] Compensation for costs of future care must be based on what is reasonably necessary to put the plaintiff in her pre-accident condition according to recommendations in the accepted medical evidence: Langille v. Nguyen, 2013 BCSC 1460 at para. 231 and Tsalamandris v. McLeod, 2012 BCCA 239 at paras. 62 and 63.

[66] The amount of the compensation awarded must be based on the medical evidence and what is considered to be reasonable: Langille at para. 232.

[67] The court must determine whether there is a medically substantiated link between the injuries and the recommended care: Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at para. 32.

[68] There should also be evidence that the plaintiff is likely to partake of the recommended care: Langille at para. 233; O'Connell v. Yung, 2012 BCCA 57 at para. 68.

[69] I have already concluded that it would be duplicative to award housekeeping costs in addition to the award I have made for loss of homemaking capacity. The remaining items in Ms. Walker's report fall into the following categories:

a) medical Interventions;

b) psychological intervention;

c) aids and equipment; and

d) physical rehabilitation.

ii. Medical Interventions

[70] In this category, Ms. Fatin seeks to be compensated for the cost of a Botox injection trial (three sessions at $900-$1,000 per treatment, for a total of $2,700 to $3,000) and, if they are successful, ongoing Botox treatment (three treatments per year, for which Mr. Coleman ascribes a present value of between $38,600 and $42,000).

[71] The defendants do not oppose the claim for the trial sessions. With respect to the cost of the ongoing treatment, they argue that the claim should be reduced to reflect the possibility that the trial will not succeed: Jenkins v. Irving, 2020 BCSC 391 at para. 235(b). If the trial is successful, they suggest that the claim for housekeeping services should be reduced commensurately.

[72] Because I am making no award for the cost of future housekeeping services, I will treat the possibility that the Botox injections will be discontinued as a contingency to be factored into the quantum of the overall award. I have already considered the possibility of a successful course of treatment in assessing the damages payable for loss of homemaking capacity.

[73] The midpoint of the range calculated by Mr. Coleman based on Ms. Walker's recommendations can be calculated as follows: $41,300 + $45,000 / 2 = $43,150.

iii. Psychological Intervention

[74] Ms. Fatin seeks to be compensated for 28 sessions with a psychologist at $200 per hour, or $5,600. Ms. Fatin testified that since receiving Ms. Walker's report in June 2020, she has tried to follow up with a psychologist but has been unable to secure an appointment for various reasons. The defendants argue that this item has not been shown to be medically justified, and in any event that the number of sessions recommended is excessive.

[75] This aspect of the claim is based entirely on the recommendation of Ms. Walker, who assessed Ms. Fatin over the course of one day (May 8, 2020). Before that, there is no evidence that either Ms. Fatin herself, Dr. Fatin or any of the many professionals who have treated her since the accident noted any cause for concern in this respect. In 2015 and 2016, Ms. Fatin regularly saw another occupational therapist, Heidi Hatch, who had a much more extensive opportunity to observe her. As Ms. Fatin acknowledged in cross-examination, Ms. Hatch consistently reported Ms. Fatin's mood as "euthymic" during that period. In May 2015, Ms. Hatch noted that Ms. Fatin was then reporting "no issues or concerns with attention, concentration or memory." Ms. Fatin also told Ms. Hatch at the time that "her husband has not noticed any changes since the MVA." When those notes were put to Ms. Fatin and Dr. Fatin in cross-examination, they were unable to explain them satisfactorily. Dr. Fatin eventually confirmed in his testimony that he had indeed noticed nothing untoward.

[76] In light of the frailties in the evidence advanced in support of this aspect of the claim, I am not persuaded that this item has been shown to be justified.

iv. Aids and Equipment

[77] In this category, Ms. Fatin seeks to be compensated for the cost of acquiring aids and equipment, the present value of which has been calculated by Mr. Coleman at $8,474. The defendants take issue with two of those items: the "zero gravity chairs" valued at $5,133 (indoor, every ten years) and $689 (outdoor, every three years), on the basis that it had never occurred to Ms. Fatin before receiving Ms. Walker's report that the chairs that she currently uses are inadequate.

[78] I do not find the defendants' objection compelling. The fact that Ms. Fatin was previously unaware of equipment that will alleviate her symptoms is no reason not to compensate her for the cost of acquiring it, now that she has been made aware and intends to avail herself of it.

[79] I am therefore satisfied that it is appropriate to compensate Ms. Fatin for the amounts claimed, but with one exception. I have concluded that it is appropriate to award the cost of one indoor and one outdoor chair only, rather than for new chairs every ten years and three years. In that regard, I prefer Ms. Walker's estimate of the cost of such a chair ($2,500 per unit) rather than the quote obtained by Ms. Fatin from a medical supplies store ($5,822.88), given the lack of any evidence to explain the difference.

[80] My gross award in this category is therefore $5,302.

v. Physical Rehabilitation

[81] In this category, Ms. Fatin seeks the following, as calculated by Mr. Coleman based on Ms. Walker's recommendations:

a) kinesiology to age 80 ($5,287);

b) gym and pool membership ($4,926); and

c) physiotherapy/massage ($12,688).

[82] The defendants take issue only with the last item, on the grounds that Dr. Chin testified that he did not believe that such activities would improve Ms. Fatin's condition in the long term. I do not find the objection compelling. It is sufficient if the activities in question will substantially alleviate Ms. Fatin's pain, even if the relief she receives is only temporary.

[83] My gross award in this category is the amount claimed, or $22,901.

vi. Conclusion on Cost of Future Care

[84] My gross award for the four categories claimed is $43,150 + $5,302 + $22,901 = $71,353. After accounting for the contingency reduction arising from Ms. Fatin's pre-existing conditions and allowing for her transportation costs, I have concluded that the appropriate award in this category is $55,000.

E. Special Damages

[85] Ms. Fatin claims a total of $53,072.81 in this category. As I noted earlier, the defendants only object to a small part of this award, or $1,115. I agree that the reduction of the claim by that amount is appropriate, given that Ms. Fatin would have incurred the housekeeping costs during that period in any event.

[86] My net award in this category is therefore $53,072.81 - $1,115 = $51,957.81.

IV. Summary and Conclusion

[87] I am awarding Ms. Fatin damages as follows:

a) non-pecuniary: $100,000;

b) loss of homemaking capacity: $65,000;

c) cost of future care: $55,000; and

d) special damages: $51,957.81.

[88] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of my decision.

"Milman J."

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