
CANADA / JUDGMENT

Kassam v. Wong

2020 BCSC 764

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 764 Kassam v. Wong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kassam v. Wong,

2020 BCSC 764

Date: 20200303

Docket: M194621

Registry: New Westminster

Between:

Saker Kassam

Plaintiff

And

Jane Wong and Sheldon Chu

Defendants

Before: The Honourable Madam Justice Fleming

Oral Reasons for Judgment

Counsel for the Plaintiff:

F. Jiwa

Counsel for the Defendants:

S.P. Murphy

Place and Date of Trial:

New Westminster, B.C.

February 18 - 21, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 3, 2020

- [1] THE COURT: This action arises from a motor vehicle accident that occurred on April 1, 2016, in the parking lot of Kensington Square Shopping Centre in Burnaby. The circumstances involved Jane Wong striking the passenger side front door of Saker Kassam's vehicle as Ms. Wong was pulling out of a parking space, driving a vehicle owned by Sheldon Chu. Liability is not disputed.
- [2] These reasons address Ms. Kassam's claim for damages, including non-pecuniary damages, special damages, damages for loss of housekeeping capacity, and the cost of future care. Ms. Kassam alleges the accident caused ongoing right-sided back pain that has significantly undermined her functioning and her enjoyment of life. Now 80 years old, at the time of the accident Ms. Kassam was entirely independent, busy, and active. She asserts she can no longer do many, if not most, of her previous activities and requires significant help and support from others.
- [3] The defendants acknowledge Ms. Kassam suffers from ongoing back pain and the accident caused some soft-tissue injuries, but they take the position her injuries should have resolved within three to four months of the accident and there is insufficient evidence to establish the accident caused her ongoing back pain. Although they have agreed to her claim for special damages, the defendants oppose her claim for the cost of future care and loss of housekeeping capacity, and propose a small award for non-pecuniary damages.
- [4] In addition to an agreed statement of facts and her own testimony, Ms. Kassam relies on the evidence of her son, Shamsh Kassam ("Shamsh"), the expert opinion evidence of physiatrist Dr. Tony Giantomaso, and the cost of future care report of occupational therapist Rob Corcoran, who also conducted an assessment of Ms. Kassam's functional capacity in relation to daily living tasks.
- [5] The defendants rely upon the expert opinion evidence of orthopedic surgeon, Dr. Randall Loch, and the clinical records of Ms. Kassam's family doctor, Dr. Jetha, for two pre-accident appointments in June and July 2015.

Background

- [6] Born in East Africa in 1939, Ms. Kassam, her husband, and their three children, all sons, moved to Canada nearly 40 years ago. The family operated various businesses, including a poultry farm, a chocolate factory, a cafeteria, and a mini-tune shop. About 30 years ago, they moved to a large, three-level home in Burnaby where Ms. Kassam continues to reside. Since Mr. Kassam's death about 20 years ago, Ms. Kassam has mostly lived alone. Two of her sons, including Shamsh, live locally with their families. The third lives near Dubai.
- [7] Ms. Kassam described herself as very healthy and very happy before the accident, testifying to an active and engaged lifestyle. Apart from the assistance of a cleaner with deeper cleaning twice a month, she did the housekeeping, shopping, cooking and gardening herself. An involved member of the Ismaili community, Ms. Kassam attended mosque twice a day, each time sitting on the floor for about two hours. She also attended yoga classes there on weekdays and helped with cleaning the mosque most days. In addition, Ms. Kassam volunteered at a seniors' home, visiting with Ismaili residents and taking them meals she prepared herself. She also bought groceries and prepared meals for family members and enjoyed spending time with her four grandchildren.
- [8] Ms. Kassam was particularly involved with Shamsh's children, her two youngest grandchildren, now nine and 12, picking them up from school, babysitting regularly, and having them for sleepovers every other weekend. She socialized frequently with close friends and neighbours. Finally, she travelled quite often with friends and to visit family in England and Florida.
- [9] Ms. Kassam denied having any issues with mobility or driving before the accident. She testified to taking almost daily walks and described herself as a fast walk. She also denied any prior health conditions. Acknowledging she was told at one point she had Parkinson's or Parkinson's-like symptoms and prescribed medication for the condition, she and Shamsh testified a specialist subsequently told them that Parkinson's had been ruled out. Not admissible for its truth, their evidence on this point, however, is admissible to establish what was said.
- [10] Asked in cross-examination about hand tremors, Ms. Kassam said she experiences them only when very nervous. Ms. Kassam also indicated she would get aches and pains before the accident if she worked really hard. She did not recall complaining of right-sided low back pain to Dr. Jetha, in June and July 2015. She agreed, however, that she had experienced back pain related to lifting in the year prior to the accident, referring to two occasions, one when she lifted something really heavy and another when she lifted a senior from a bed.

- [11] Ms. Kassam was not able to recall a CAT scan of her low back in 2012, but she did recall one in 2015. She also remembered being referred to a neurologist and Dr. Jetha prescribing Percocet, a narcotic pain medication. Ms. Kassam said she filled the prescription but never took it, indicating she does not like to take medication. She also gave evidence that previous episodes of back pain lasted only a day or two and they were nothing like what she has experienced since the accident.
- [12] Ms. Kassam had some difficulty recounting the circumstances of the accident. She did recall she was about to drive home after grocery shopping and her whole body moving to the right and then the left with the impact, despite wearing a seat belt. She described feeling very shocked, never having been in an accident before. She also recalled many people in the shopping centre coming to ask if they could help, including her hairdresser, who drove her home in her car. Ms. Kassam called Shamsi to let him know about the accident, and perhaps a neighbour, before taking herself to bed.
- [13] Asked when she first felt symptoms after the accident, Ms. Kassam testified that maybe that night she felt pain. She also testified she had aches and pains but did not know where, because she was so shocked. She remembered her neighbour coming to help her, bringing food and water. Ms. Kassam said she was not able to drive for about two weeks. She recalled being seen by Dr. Jetha, about 10 days after the accident, stating her daughter-in-law drove her to the appointment. Ms. Kassam said she told Dr. Jetha about the accident, really bad pain in her back, especially on the right, and not being able to sleep due to aches and pains and nightmares related to the accident.
- [14] According to Ms. Kassam, Dr. Jetha recommended she continue taking extra-strength Tylenol for pain and may have given her a sample of Celebrex. She also recommended Ms. Kassam attend physiotherapy and massage, which she did, regularly.
- [15] The parties agree she also attended other recommended treatments that included active rehabilitation, spinal compression treatment/chiropractic treatment, and injections, the timing and frequency of the treatments, and that the purchases of accident-related equipment are reflected in her schedule of special damages, statements of account, and receipts. Those documents indicate Ms. Kassam's most recent treatment was for active rehabilitation in December 2019. A statement of account for Kensington Square Physiotherapy shows she attended over 50 physiotherapy and massage appointments from June 2016 to May 2019.
- [16] Ms. Kassam described physiotherapy and injections into the painful area, which she has been receiving every six months from a Dr. Dhawan, as providing temporary relief. Ms. Kassam says she manages her back pain with extra-strength Tylenol and gabapentin at night, which also helps her sleep, and yoga at the mosque, which she finds relaxes her mind and therefore her body.

- [17] Asked how she felt in the first months after the accident, she said miserable, adding she could not go out and felt useless. Asked whether her only injury was right-sided back pain, Ms. Kassam indicated that area was so painful, she found it hard to remember other pains.
- [18] Pointing to the right side of her mid to low back area while giving evidence, Ms. Kassam stated the area has remained really painful, she has difficulty sleeping, she cannot sleep on her right side, and she finds she has no energy. Indicating there are stairs from the garage to the main level of her home, and her bedroom is located upstairs, she also said using the stairs is difficult and she only goes up to her bedroom once a day. When her pain is particularly bad, she sleeps on the main floor of the house.
- [19] Since a month or two after the accident, Ms. Kassam has been relying on walking poles outside the home. She said she began using them because she was in so much pain, she was scared to walk and needed something for balance. Even with the poles, she says pain prevents her from walking for more than five or 10 minutes. I pause to note that Ms. Kassam used the walking poles in the courtroom. She walked very slowly to the witness stand and moved very slowly when she changed her position from sitting to standing.
- [20] Since the accident, Ms. Kassam has relied on Shamsh to drive her to the mosque, although she does drive short distances on her own. They attend together in the evenings a few times per week. Ms. Kassam said she has a lot of trouble sitting and has not been able to sit on the floor since the accident. She has not cooked for her family or the residents at the seniors' home, and no longer does her own cooking. Ms. Kassam stated she is scared to hold heavy pots and even small ones are heavy on her back. Her children now grocery shop and cook for her. She indicated she is unable to help with her grandchildren, although they continue to sleep over. Friends, neighbours, and family perform housekeeping tasks, such as vacuuming and cleaning the bathrooms.
- [21] Ms. Kassam also gave evidence that she has not travelled much since the accident due to pain and no energy. Recently, she was the only one not present at a large family gathering in East Africa. She did attend her youngest son's wedding in Dubai about 18 months ago, flying first class so that she could lay down during the flight, but she was unable to do a lot of wedding-related activities while she was there. She also recalled one other trip to Florida for a family wedding, describing herself as in constant pain and not feeling like doing anything.
- [22] Shamsh provided entirely consistent. He explained Ms. Kassam lives only a couple of blocks away from him and his family. Aware she attended morning and evening mosque almost every day, he would see her there when he attended three or four evenings a week, sitting on the floor typically, which she has not done since the accident. He described Ms. Kassam as fairly active and mobile and very involved with his children, the Ismaili community, close friends and neighbours before the accident. She cooked for his family and his brothers at least two or three times a week. Both families also gathered at her home for lunch every weekend. Shamsh also confirmed that apart from the cleaner who came twice a month, she did not require any assistance maintaining her home inside and out.

- [23] Shamsh recalled Ms. Kassam calling him to tell him about the accident the same day. He went to see her and found her in pain. She complained her back and leg were hurting.
- [24] Since then, he said, she has been "nowhere near as active". She is also far less social, seeing friends sporadically at best. She does not drive much, and rather than cooking for others, his wife and sister-in-law cook for her. His wife takes Ms. Kassam grocery shopping. She also relies upon close friends and neighbours to help.
- [25] Shamsh specified he visits three or four times per week and now takes care of Ms. Kassam's garbage and recycling. On the weekends, he and other family members help with laundry and cleaning tasks, particularly upstairs, indicating Ms. Kassam is able to vacuum the main floor with a small, light vacuum. Shamsh estimated helping three to four hours per week and his wife about the same amount. He added his brother and sister-in-law help probably a couple of hours per week.
- [26] Asked to describe how Ms. Kassam moves, Shamsh said with some difficulty and slowly. Inside the home, she walks holding onto the furniture or the walls. There are 15 to 20 steps to the garage, he says, and she grabs onto the railings. He observed none of this before the accident, nor did she use any walking aids.
- [27] Regarding travel, Shamsh said his mother was perfectly fine on trips they took together before the accident. She played with the children, swam, and had no issues with the plane or walking around. Since then, when they travelled to Greece together in 2017, she had significant trouble moving about, mostly stayed inside the suite, and used a wheelchair at times. Before his brother's wedding near Dubai, the rest of the family gathered in Portugal for the Aga Khan's jubilee. Ms. Kassam did not attend, not wanting to be a burden. He confirmed she also missed the large family reunion in East Africa, and was the only one not there.
- [28] Asked about her emotional state before the accident, Shamsh said his mother was strong-minded and someone who gave a lot of herself to her friends, family, and the community. Since then, she has lost a lot of confidence and seems somewhat depressed.
- [29] In cross-examination, Shamsh was asked about his awareness of Ms. Kassam's medical condition before the accident. In addition to specifying he was present when the specialist told her she did not have Parkinson's, he said he has observed tremors in her right hand once in a while. He was also aware medication had been prescribed for low back pain before the accident and that she was referred to a neurologist.

Medical Evidence

Dr. Tony Giantomaso

- [30] Dr. Tony Giantomaso is a physiatrist with particular expertise in chronic pain management. In practice since 2008, Dr. Giantomaso does precisely that: community-based chronic pain management. Dr. Giantomaso assessed Ms. Kassam on April 25, 2019, and prepared a report dated May 10, 2019.
- [31] Along with functional limitations and negative changes in her lifestyle, Ms. Kassam reported pain on most days in the mid to low back, on the right side, and pain with sitting, bending, and lifting, poor sleep that is non-restorative, although gabapentin has really helped. He diagnosed the injuries caused by the accident as including:
1. Posttraumatic cervical sprain/strain injury consistent with a WAD-II injury. Now resolved.
 2. Posttraumatic thoracic sprain/strain injury grade 1-2. Chronic.
 3. Posttraumatic lumbar sprain/strain injury grade 1-2. Chronic.
- [32] He also identified pre-existing or unrelated to the accident diagnoses:
1. Pre-existing history of congenitally small spinal canal combined with degenerative changes. Essentially asymptomatic prior to the accident in question.
 2. Pre-existing history of tremor possibly related to mild parkinsonism. No parkinsonian symptoms noted on examination other than mild gait deterioration.
- [33] On this last point, Dr. Giantomaso clarified that Ms. Kassam's gait did not reflect Parkinsonian symptoms. He also testified that he did not observe any, adding that there are as many as 50 different non-Parkinsonian kinds of tremors.
- [34] In cross-examination, he expressed the view Ms. Kassam's mild gait deterioration was multi-factoral, stating the soft-tissue injuries did not help, but they are not the only cause. In discussing his opinions about diagnosis and causation at pages 9 and 10 of his report, he wrote:

Thus in my opinion the vast majority of her ongoing issues are posttraumatic in origin and should not necessarily be considered pre-existing. Despite a history of pre-existing degenerative changes, studies have been performed on multiple occasions that have not indicated that pre-existing degenerative changes are directly related to chronic pain especially if asymptomatic.

As previously noted she has pre-existing degenerative changes and a congenitally narrowed spinal cord. However, she had no significant documented chronic pain issues. Multiple studies have shown that MRI findings are not directly correlated to chronic pain and should not be used as a factor in determining pre-existing chronic pain or potential for chronic pain. Thus in my opinion her posttraumatic issues are directly causally related to the motor vehicle collision of April 1, 2016 and should not be considered pre-existing.

- [35] Consistent with Ms. Kassam's testimony, Dr. Giantomaso's examination findings included localized pain, hypertonicity, and spasm from the right T6 to the LT region with palpation or pressure. He described her presentation as straightforward and noted no amplification or exaggeration. During cross-examination, Dr. Giantomaso said he specifically recalled Ms. Kassam, because examining her was difficult. He was concerned about her hurting herself getting onto the examination table, given the extent of her pain.
- [36] Cross-examined about his review of pre-accident medical records and specifically those of Dr. Jetha dated June 4 and July 20, 2015, I note the first of those reads in part:

R low back pain

SLR [straight leg raise] equivocal

1 neurologist

2 CT lumbar spine

Percocet.

[37] The second includes:

Ongoing low back pain

CT scan Degenerative Disc

Physio partially helpful

- [38] Explaining "straight leg raise equivocal" means the nerves were not involved, Dr. Giantomaso was critical of Dr. Jetha "jumping to a CT scan" and disapproved of the prescription for Percocet, a highly-addictive pain medication he never prescribes. He denied the entries indicated Ms. Kassam was suffering from chronic right-sided low-back pain by the time of the accident, indicating the records reflected acute pain, 10 and 11 months before the accident, maintaining his opinion about causation and his diagnoses.
- [39] His report includes several recommendations that are discussed below under the cost of future care. Under recommendations 5 and 6, he also discusses symptoms unrelated to the accident, including numbness and tingling in her right hand and decreased balance.

Dr. Randall Loch

- [40] Dr. Randall Loch is an orthopedic surgeon who retired from surgical practice in late 2015. He examined Ms. Kassam on October 30, 2019, and prepared a report dated November 5, 2019. Like Dr. Giantomaso, Dr. Loch found no evidence of amplified or abnormal pain behaviour. Ms. Kassam was, however, able to sit on the examination bench using a stepping stool and lie on her back on her own. Consistent with Dr. Giantomaso's findings, he noted widespread area of tenderness from just medial to the T12 and L1 spinous processes, across to the lateral rib angle/flank with palpation.

[41] In reviewing her history, Dr. Lochter referred to the same June and July 2015 clinical records of Dr. Jetha. A portion of his report also discusses post-accident radiology reports regarding imaging studies, which are not in evidence.

[42] Later on, he wrote:

Ms. Kassam did experience at least intermittent lower trunk/lower back pain prior to the subject accident. This conclusion is based on:

- i. The history of prior documented right-sided lower back pain complaints requiring her physician to order a lumbar CT scan and her attendance at physiotherapy, as described in the June and July 2015 chart notes [see Facts and Assumptions (FA) #5]
 - ii. My clinical experience and understanding of peer reviewed journal published studies that support the natural history of chronic low back pain to be at least a recurrent condition on an indefinite basis.
 - iii. The July 27, 2016 report on lumbar spine imaging studies document degenerative changes having not changed significantly since April 3, 2012, i.e. documenting prior low back imaging presumably for low back symptoms [FA #18]
 - iv. The known relatively high incidence of low back pain in patients with obesity.
 - v. The presence of long-standing degenerative changes on the imaging studies subsequent to the subjective accident [FA# 18-20]. Please note that I am aware that the described bridging calcifications/bone formation also referred to as "DISH" is not a substantial risk factor for low back pain and these findings as well as the pre-existing degenerative changes to the posterior articular spinal joints i.e. facet joints are not established risk factors for sustaining nonspecific soft tissue injuries after a motor vehicle accident similar to this subject accident. I am also aware that these facet degenerative changes do not cause pain in all individuals. Nevertheless, it is also my opinion that Ms. Kassam's pre-existing and current low back pain is likely [>50% chance] related, at least in part to this degenerative facet joint pathology.
- [43] Regarding causation, Dr. Lochter opined that Ms. Kassam sustained non-specific soft-tissue injuries in the right low back and pelvic regions, writing he used the term "non-specific" as a descriptor and not a pathological diagnosis for the actual tissue injuries, because his examination and review of the medical records did not support a specific "pathological entity". He specified it is not probable her current right-sided low back pain is related to the accident, but is due instead to a combination of her pre-existing spine degeneration, deconditioning/aging, and obesity. He went on to state a reasonable expected resolution of her soft-tissue injuries, i.e., tissue pathology, sustained in the accident, as well as any secondary "muscle guarding/splinting along [with] secondary stiffness/reduce tissue pliability, considering [her] advanced age," would likely be no longer than three to four months.

[44] In cross-examination, Dr. Lochter agreed Ms. Kassam had consistently relayed ongoing right-sided back pain since the accident, which he accepted, some patients with soft-tissue injuries do have dysfunctional pain, and some never recover, despite the absence of any pathological physical condition. He also agreed the prognosis for Ms. Kassam's ongoing right-sided back pain is poor, stating she will have it indefinitely.

Rob Corcoran

[45] Mr. Corcoran is as I have indicated an occupational therapist. His cost of future care report is dated May 31, 2019. It also addresses his assessment of Ms. Kassam's capacity for performing the tasks of daily living, which took place in her home over four hours, on January 14, 2019. In his report and during his testimony, he specified his opinions are based on interviews with Ms. Kassam and Shamsh, a review of the medical records, and his own clinical findings based on testing, other measures, and his observations.

[46] Mr. Corcoran's interview findings are consistent with the testimony of Ms. Kassam and Shamsh, although it appears Ms. Kassam was more specific with him about certain aspects of her pre- and post-accident functioning. Her symptoms, for example, dizziness with physical exertion, and pain management, for example, home exercises, head, and an electric bed.

[47] In summarizing his opinion about Ms. Kassam's functional capacity, Mr. Corcoran wrote:

Ms. Kassam was notably anxious, emotional and guarded during this evaluation. As such it was difficult to obtain a reliable baseline for her level of functioning. Nonetheless, it is evident Ms. Kassam functional capacity for her preferred community and home activities has significantly deteriorated since the subject MVA. This was corroborated by her son during a separate interview. Ms. Kassam has difficulty coping with pain and disability related to the subject MVA. She was upset and tearful intermittently, particularly while discussing her losses in previous meaningful routines. Ms. Kassam has poor overall stamina for functional activity and her functional mobility has deteriorated. She is dependent on her family to support her with meals, community routines, and housekeeping. She is at increased risk for falls, and depends on external supports when moving about (furniture, walls, countertops, armrests, Nordic poles etc.). She presented with depressive symptoms and avoids activities for fear of symptoms exacerbation.

Ms. Kassam has benefited from some adaptive aids in her home for supportive positioning, and comfort with sleep. She is prone to symptoms flares when she is unable to safely climb up/down stairs to the second level of her home.

Ms. Kassam is capable of improved functional participation with the support of a community occupational therapist, physical conditioning, and psychological counselling. In my opinion, a return to pre-MVA levels of functioning is not realistic given the medical prognoses, the extent of physical deconditioning, and psychosocial barriers. The cost of future care recommendations itemized below are intended to optimize Ms. Kassam's safety and function within her residence, while reducing the demands placed on her family.

[48] Similarly, regarding housekeeping, Mr. Corcoran opined that Ms. Kassam has the capacity for lighter daily housekeeping activities and the ability to improve her housekeeping and meal preparation with appropriate support.

[49] During his testimony, Mr. Corcoran clarified he was not expressing an opinion about causation, and by "guarded", he meant Ms. Kassam was cautious in her movements and anxious. In cross-examination, he confirmed that Ms. Kassam provided low or not high effort during functional testing and agreed her cautious, anxious behaviour affected the validity of the testing results. He also testified however, this did not prevent him from concluding her functioning had deteriorated after the accident. He further noted that those with chronic pain are often impacted by psychological symptoms.

[50] Mr. Corcoran's specific recommendations relating to future care items are discussed below under damages for the cost of future care.

Causation

[51] The defendants do not dispute that Ms. Kassam has ongoing right-sided back pain. The primary issue, as I indicated at the outset, is the cause of that pain.

[52] Before assessing the evidence and making findings of fact, I set out the well-settled legal principles regarding factual causation found in the seminal case of *Athey v. Leonati*, [1996] 3 S.C.R. 458 and subsequent authorities.

[53] Ms. Kassam bears the onus of proving that but for the defendants' negligence, her injury, that is ongoing or chronic right-sided back pain, and loss would not have occurred. The test for causation however, must not be applied too rigidly. It is essentially a practical question of fact best answered by ordinary common sense: Further, Ms. Kassam is not required to prove the defendants' negligence was the sole cause of her injury and loss. As long as it is part of the cause, they will be liable.

Assessing the Evidence

[54] The defendants do not suggest that Ms. Kassam or Shamsh were not credible. Instead, they argue Ms. Kassam's testimony was unreliable, as were the histories she provided to the medical experts.

- [55] Reliability involves the ability of a witness to accurately observe and recall the events in issue, not his or her honesty. Simply put, an honest witness can be mistaken.
- [56] Specifically, the defendants submit Ms. Kassam's testimony was "marked by episodes of poor memory and some apparent difficulty in processing questions."
- [57] I observed that Ms. Kassam had some difficulty recalling some circumstances on a number of topics. She was also sometimes slow to respond or required prompting or rephrasing to respond. Respectful, polite, and sincere throughout her testimony, Ms. Kassam also appeared emotionally vulnerable. She often seemed on the verge of tears and at times was tearful.
- [58] There is no doubt Ms. Kassam gave some inaccurate evidence about insignificant details, such as the ages of her youngest grandchildren (off by one year for each child). She did not identify a family trip to Greece described by Shamsh when asked about travel since the accident, nor was she able to identify symptoms other than right-sided low back pain and some of the various treatments she has received since the accident.
- [59] I note, however, that none of the expert witnesses expressed a concern about Ms. Kassam's memory or cognitive capacity. She continues to manage all of her own affairs. Neither Ms. Kassam nor Shamsh were asked about her memory during cross-examination.
- [60] Significantly, Ms. Kassam gave consistent evidence about ongoing right-sided back pain and her pre- and post-accident functioning, most of which was not challenged or undermined in cross-examination. In addition, there were no meaningful inconsistencies between the histories she relayed to the experts and her testimony.
- [61] Very significantly, almost all of her material evidence was corroborated by Shamsh, who gave straightforward, reasonable, and mostly unchallenged evidence that I accept. Further, consistent with the observations of Dr. Giantomaso and Dr. Lochter, I was never concerned, nor was it suggested I should be, that Ms. Kassam was exaggerating or embellishing.
- [62] Consequently, although I make findings based on her evidence alone somewhat cautiously, I am satisfied that her core complaint of ongoing significant right-sided back pain and her description of its impact are largely accurate.
- [63] Turning to the conflict in the expert evidence, the defendants argue I can put little to no weight on Dr. Giantomaso's opinion regarding the cause of Ms. Kassam's ongoing back pain, because he accepted her assertion she had no pre-accident back symptoms, despite having access to Dr. Jetha's clinical records, which he did not comment on in his report. They suggest that instead I should accept Dr. Lochter's opinion that Ms. Kassam's chronic back pain was longstanding and predated the accident.
- [64] I disagree.

- [65] Assessing the weight to be given to the expert opinions turns on whether the facts and assumptions underlying those opinions have been established, my assessment of Ms. Kassam's evidence, and the reasonableness of the opinions themselves.
- [66] Firstly, I observe that in his report, Dr. Lochter diagnosed Ms. Kassam with at least intermittent lower trunk/lower back pain prior to the accident, not chronic back pain. To the extent he expressed a more expansive opinion in re-direct, he did so without explanation or any change in the foundation for his original diagnosis.
- [67] Next, I have largely accepted Ms. Kassam's evidence regarding right-sided back pain before and after the accident. Significantly, none of the range of medical documents, including radiology reports discussing degenerative changes to her spine, excepting Dr. Jetha's clinical records for two appointments in June and July 2015, are in evidence. Consequently, there is no evidence establishing degenerative changes to her spine, which the experts appear to agree did not change after 2012, or any further episodes, let alone ongoing back pain, after July 2015 until the accident.
- [68] In these circumstances, Dr. Lochter's opinion fails to provide a reasonable explanation for Ms. Kassam's continuing right-sided back pain, his own examination findings of tenderness to palpation in that same area, and the objective findings of Dr. Giantomaso, which, in addition to localized pain, included muscle spasm and hypertonicity. The notion that Ms. Kassam's soft tissue injuries ought to have healed within four months is essentially of no assistance.
- [69] Further, I reject the suggestion Dr. Giantomaso failed to properly consider Ms. Kassam's pre-accident condition. I accept the opinions he expressed in cross-examination based on the June and July 2015 clinical records. It is also apparent from his report that he carefully considered the pre- and post-accident medical documents. Dr. Giantomaso's opinion about Ms. Kassam's ongoing post-accident right-sided back pain fully accords with the fact evidence and his own examination findings. I accept it, along with his recommendations.
- [70] I also accept the expert opinion evidence of Mr. Corcoran regarding Ms. Kassam's capacity for performing activities of daily living, including light or daily housekeeping activities, and her capacity to improve her functioning with receipt of the recommended services.
- [71] Accordingly, in addition to the findings that arise from my assessment of the fact evidence, I find the accident caused Ms. Kassam to suffer not only the soft-tissue injuries acknowledged by the defendants, but also ongoing right-sided back pain that is now chronic and not likely to resolve. I accept her evidence and the evidence of Shamsh regarding her lifestyle and functioning before and after the accident. I also accept that the deterioration in her physical functioning has been impacted by a deterioration in her psychological functioning that is also a result of the accident. In other words, I accept that in response to her ongoing pain, Ms. Kassam feels anxious, somewhat depressed, and far less confident. Her sleep, although better with gabapentin, also remains less than optimal.

- [72] Based on Dr. Giantomaso's evidence, I find that any balance problems she has are unrelated to the accident and the mild deterioration in her gait is largely unrelated. Unchallenged on this point, I accept Ms. Kassam's use of walking sticks, her very slow pace, and her limited tolerance for walking and standing are pain-related, although not exclusively so. I also accept, however, that given her age, some deterioration in her mobility and physical functioning over time would have been not only possible, but probable.

Damages

- [73] The fundamental principle in assessing tort damages is the requirement to award an amount that returns the plaintiff to her original position, that is, the position she would have been in absent the defendant's negligence: *Athey* at para. 32.
- [74] If there is a measurable risk that a pre-existing condition would have detrimentally affected the plaintiff, even without the defendant's negligence, that risk must be taken into account in reducing the damages award. However, where no such measurable risk is established, the fact that a pre-existing condition may have made her more vulnerable to sustaining the injury caused by the defendant's negligence will not serve to reduce the damage award: *Athey* at para. 35;
- [75] Unrelated intervening events may also be taken into account in the same way as pre-existing conditions. If there is a measurable risk that an unrelated intervening event would have affected the plaintiff's original position adversely, regardless of the defendant's negligence, it may be appropriate to reduce the amount of the award accordingly.

Non-pecuniary Damages

- [76] Ms. Kassam seeks an award of \$120,000 in non-pecuniary damages based on the loss of her previously active lifestyle and high level of function, relying also on the "Golden Years" doctrine and three recent decisions involving older plaintiffs: *Popove v. Attisha*, 2019 BCSC 1587; *Nikkhah v. Batin*, 2019 BCSC 2223; and *Gabert v. Krist*, 2018 BCSC 2109.
- [77] In contrast, the defendants submit an award in the range of \$15,000 to \$20,000 is appropriate, based on a view of the facts regarding her injuries that I have rejected, and three older decisions involving much younger plaintiffs that are distinguishable.
- [78] Non-pecuniary damages are awarded to compensate a plaintiff for her pain, suffering, disability, inconvenience, and loss of enjoyment of life. The amount of the award is determined based on a range of factors that include the nature of the plaintiff's injuries, her age, the severity and duration of the pain, emotional suffering, impairment of family, and social relationships, impairment of physical and mental abilities, and loss of lifestyle, amongst others: *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100. An appreciation of the plaintiff's loss is the key: see *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637. The law requires the compensation to be fair and reasonable to both parties. Fairness is measured against awards made in comparable cases which provide only rough guidance,

given that each case is fact-driven and to some extent unique: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

- [79] The Golden Years doctrine recognizes that the impact of an injury on an older plaintiff can have an especially detrimental effect. In *Fata v. Heinonen*, 2010 BCSC 385, the court explained at paragraph 88:
- [88] The retirement years are special years for they are at a time in a person's life when he realizes his own mortality. When someone who has always been physically active loses his physical function in these years, the enjoyment of retirement can be severely diminished, with less opportunity to replace these activities with other interests in life. Further, what may be a small loss of function to a younger person who is active in many other ways may be a larger loss to an older person whose activities are already constrained by age.
- [80] Previously very engaged with her community, friends, neighbours, and family, Ms. Kassam was active, fulfilled, happy, and entirely independent. She attended her mosque twice daily, sitting on the floor for hours at a time, and was able to enjoy fairly long walks. She travelled frequently without limitation. She spent hours cooking each day for herself and many others. She maintained a large home to a very high standard assisted twice monthly by a cleaner, and the garden all on her own.
- [81] Since the accident, Ms. Kassam has experienced continuing right-sided back pain that has significantly undermined her functioning and her enjoyment of life. Most of her activities have been curtailed, if not eliminated. Her attendance at mosque is much curtailed. She has depended on family and others to do much of the housekeeping and most meal preparation. She no longer gardens. Her ongoing pain, its psychological impact, and her loss of function have also prevented her from venturing far from home and engaging with friends and family in all the ways she did before the accident. She has been unable to help and support others or to enjoy travelling. In other words, she has lost much that made her life before the accident golden.
- [82] Accepting Mr. Corcoran's opinion evidence, although Ms. Kassam will continue to suffer from ongoing pain, I also accept her functioning both physically and psychologically may improve to some extent, and therefore her quality of life, with participation in the recommended services discussed below.
- [83] Based on Ms. Kassam's ongoing significant right-sided back pain, the other Stapley factors, the Golden Years doctrine, the cases she relies upon, but also recognizing some eventual deterioration in her functioning and mobility would have been probable as she ages absent the accident, I award \$80,000 in non-pecuniary damages.

Loss of Housekeeping Capacity

- [84] Ms. Kassam seeks \$40,000 for past loss of housekeeping capacity, based on an estimate of 10 hours per week at \$20 per hour since the accident. The defendants oppose an award for loss of housekeeping capacity beyond six months post-accident, but do not challenge her approach to quantification.
- [85] An award for loss of housekeeping capacity provides compensation for the value of the housekeeping the plaintiff would have done, but was or will be incapable of performing because of the injuries caused by the accident. Loss of housekeeping capacity reflects the loss of personal capacity, which is an asset and is therefore compensable as a pecuniary loss. It is not dependent on replacement costs actually being incurred.
- [86] In some circumstances, however, the loss of housekeeping capacity can be compensated by a non-pecuniary award. The determination is a discretionary one for the trial judge and the defendants have not suggested doing so in this case: *Kim v. Lin*, 2018 BCCA 77.
- [87] Although I accept Shamsh's evidence about the extent to which he and other family members have assisted Ms. Kassam with grocery shopping, housekeeping and cooking since the accident, I also accept Mr. Corcoran's opinion evidence regarding her current capacity. She is capable of light housekeeping tasks. Although she may have done no cooking since the accident, she is also capable of preparing simple meals for herself.
- [88] Ms. Kassam testified there has been no change in her right-sided back pain since the accident. Consequently, I infer her capacity, as assessed by Mr. Corcoran, likely reflects her capacity within several months of the accident.
- [89] Finally, bearing in mind his recommendation for future housekeeping costs, I assessed Ms. Kassam's past loss of future capacity at \$20,000.

Cost of Future Care

- [90] Ms. Kassam is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible, and to preserve and promote her mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55, *aff'd* 2004 BCCA 290; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [91] The test for assessing an appropriate award is an objective one based on the medical evidence. To be recoverable, an item of future care must be medically justified and reasonable, not medically necessary: *Milina*. Assessing future care costs also involves predicting what may happen in the future. The standard of proof is the same as for any future pecuniary loss. All that must be established is a real and substantial possibility of a future loss: *Howell v. Machi*, 2017 BCSC 1806 at para. 395. Hypothetical events are given weight according to their relative likelihood: *Athey* at para. 27.

[92] At page 10 his report, Dr. Giantomaso makes six recommendations, the first four of which address her chronic right-sided back pain:

1. I strongly recommend an active rehabilitation program. Ms. Kassam is significantly overweight and does very little in the way of physical activity. She would benefit from a referral to aquacise and a physiotherapist working with her in the water or with light Pilates would be helpful. Based on her current physical condition, I doubt that she would tolerate a full kinesiology program at this point until she gets a bit more of a foundation in regard to core strength. Normally water exercises are easier to commence.
2. Medication management for her low back pain such as Lyrica, gabapentin or Cymbalta could be considered.
3. Referral to a counsellor or a psychologist could be helpful in regard to coping with chronic pain.
4. If all conservative measures fail, referral to an interventional pain management specialist could be considered. It looks as though she did have some medial branch blocks that gave her some good relief. Followup with Dr. Sudol to arrange rhizotomy in the lower lumbar spine should be considered as usually if patients respond well to medial branch blocks the followup treatment should either be facet injections or rhizotomy. Prolonged relief with medial branch blocks is not a standard of care.

[93] Mr. Corcoran's recommendations regarding future care items and costing, are based on those of Dr. Giantomaso and his own.

[94] Again, relying on a view of the facts regarding Ms. Kassam's injuries that I have rejected, the defendants oppose any award, but made no submissions regarding the recommended care items, their costing, or Ms. Kassam's suggestion that reoccurring costs be awarded to age 90.

[95] I turn to the care items.

Psychological Counselling

[96] Mr. Corcoran concurs with Dr. Giantomaso's recommendation of psychological counselling for chronic pain based on his observations of Ms. Kassam emotionally and behaviourally. Drawing on his clinical experience, Mr. Corcoran recommends 10 to 12 sessions with a psychologist at a cost of \$193 per hour.

[97] Accepting the proposed counselling is medically justified given my own findings regarding the accident-related deterioration in Ms. Kassam's psychological functioning and the estimate of the number of sessions and cost per session for reasonable, I award this amount.

Occupational Therapy

- [98] Mr. Corcoran recommends a 10-week program of occupational therapy to improve Ms. Kassam's functioning at home at a total cost of \$2,010. Again, based on the medical evidence including Mr. Corcoran's, I accept the program and its cost are medically justified and reasonable. Increasing Ms. Kassam's functioning will not only reduce her need for support at home, but may also restore some of her lost confidence and sense of independence.

Custom Active Rehabilitation Program

- [99] Dr. Giantomaso strongly recommended an active rehabilitation program with physiotherapy and access to aquasize or Pilates. Mr. Corcoran opines this is best achieved through a custom active rehabilitation program lasting approximately eight weeks with two or three supervised sessions per week. He recommends a physiotherapist complete an intake assessment, design the program, and monitor progress, and a kinesiologist conduct one-on-one sessions.
- [100] Based on hourly rates for each, four physiotherapy and 20 kinesiology sessions, he estimates a total cost of \$1,990.
- [101] Having accepted Dr. Giantomaso's opinion evidence and that of Mr. Corcoran, this item is medically justified and, in my view, the cost estimate is reasonable. I award the proposed amount.

Medications

- [102] The evidence establishes Ms. Kassam is prescribed gabapentin for pain and to assist with sleep and takes extra-strength Tylenol for pain as well. Given her prognosis, awarding their ongoing cost is medically justified. Based on her current doses and pharmacy-based costing, Mr. Corcoran estimates the annual per-tablet cost of gabapentin at \$18, plus a variable dispensing fee of \$66. He estimates the annual cost of extra strength Tylenol at \$56, all of which are very modest.
- [103] Accepting these cost estimates, I award the present value of \$140 per year until age 90.

Adaptive Aids

- [104] Mr. Corcoran recommends the ongoing use and replacement cost of a sacral belt, cervical pillow, and electric heating pad, describing them as reasonable items for symptom management, postural support, and restorative sleep, and all of which Ms. Kassam currently uses.
- [105] He also recommends the replacement cost of Nordic poles, which Ms. Kassam now depends on to move about the community safely.

- [106] Lastly, he recommends a stair glide, based on his opinion Ms. Kassam is not fit to climb stairs when her pain symptoms flare, and therefore unable to access her bedroom, at a cost in the range of \$12,000 to \$14,500. He explains a stair glide will be more costly to install in her home, given the winding staircase and spindles. Annual repairs and maintenance would be about \$200 once the two-year warranty expires.
- [107] Mr. Corcoran viewed Mrs. Kassam as at risk of falls. I draw the same inference from Dr. Giantomaso's evidence regarding her balance difficulties.
- [108] Given balance issues and the risk of falls are unrelated to her chronic pain, as well as my finding it is probable Ms. Kassam's mobility and physical function would have deteriorated over time absent the accident, although I accept the stair glide is medically justified based on her chronic pain, I am not satisfied awarding more than 50% of the cost is reasonable.
- [109] Therefore, I award her 50% of the cost and 50% of the present value of the annual repair and maintenance fees. I award the whole of the cost regarding the other adaptive aids as recommended by Mr. Corcoran.

Housekeeping

- [110] Based on his opinion that Ms. Kassam's housekeeping capacity has declined since the accident, her ongoing capacity for lighter daily housekeeping, the fact that she was already assisted by a cleaner for six hours per month to manage deep and seasonal cleaning tasks, and the life care planning research which suggests by age 80 participation in deep cleaning tasks ends, Mr. Corcoran recommends three additional hours per month for deeper cleaning, grocery shopping, and meal preparation, at a cost of \$26 to \$27 per hour, or \$1,908 over two years.
- [111] Based on my findings of fact, I accept his recommendation is medically justified and entirely reasonable and I award this amount.

Special Damages

- [112] The parties have agreed Ms. Kassam is entitled to an award of special damages in the amount of \$7,110.86, which I grant.

"Fleming J."

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