COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Fatla v. McCarthy,* 2024 BCCA 311

Date: 20240828
Docket: CA48271

Between:

Patrycja Katarzyna Fatla

Appellant on Cross Appeal
(Plaintiff)

And

Meghan Emily McCarthy

Respondent on Cross Appeal
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated April 8, 2022 (*Fatla v. McCarthy*, 2022 BCSC 577, Victoria Docket M19029).

Counsel for the Appellant on Cross Appeal:	D.D. McKnight S. Missaghi
Counsel for the Respondent on Cross Appeal:	J.E. Fergusson
Place and Date of Hearing:	Vancouver, British Columbia November 7, 2023
Place and Date of Judgment:	Vancouver, British Columbia August 28, 2024

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Stromberg-Stein

Summary:

The plaintiff was injured in a motor vehicle accident for which the defendant admitted liability. She appeals from the assessment of damages for loss of future earning capacity and loss of housekeeping capacity. She says the judge should have based earnings loss on average income statistics for males (or alternatively, for all people) rather than on her own income. She also contends that the judge arbitrarily discounted the award and that he wrongly concluded that she would work an average of four days per week rather than three days. With respect to loss of housekeeping capacity, she argues that the award was wholly inadequate.
Held: Appeal allowed. The judge did not err in basing the award on the plaintiff's own earnings, which were the best indicator of her loss. The judge did err, however, in arbitrarily discounting the award from the figure he arrived at using a mathematical analysis. The judge's determination that the plaintiff would likely work an average of four days a week going forward was not contrary to the evidence, and he committed no reviewable error in reaching that conclusion. Similarly, the judge was entitled to accept or reject the evidence on the need for compensation for specific housekeeping expenses. After accepting the need for expenditures, however, the judge should not have reduced the compensation for them without explanation. The award for loss of future earnings is increased from $220,000 to $235,000. The award for loss of housekeeping capacity is increased from $6,000 to $22,500.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] The plaintiff, Ms. Fatla, was injured in a motor vehicle accident. The defendant admitted liability, and the matter proceeded to trial for the purpose of assessing damages. The trial judge awarded the following amounts:

Non-pecuniary damages:	$110,000
Income loss to the date of the trial:	$20,000
Future income loss:	$220,000
Loss of homemaking capacity:	$6,000
Special damages:	$6,322
Cost of future care:	$23,220

[2] The defendant initially appealed from the damages assessment, and the plaintiff cross appealed. As the defendant abandoned her appeal shortly after it was filed, the only proceeding before this Court is the cross appeal. The cross appeal concerns only the damages for future income loss and for loss of homemaking capacity.

[3] With respect to future income loss, the judge based his assessment on the premise that the plaintiff's injuries are likely to result in reduced hours of work in the future. He considered that rather than working a five-day week, it was likely that the plaintiff's average work week would be four days in the future. Accordingly, he considered that her future income would be reduced by 20%. Based on statistics provided to him, he considered that the present value of the plaintiff's loss of earning capacity was $235,060. Without providing any explanation for discounting that amount, he rounded it down to $220,000.

[4] The plaintiff alleges three errors in the judge's award for loss of future income earning capacity. First, she says that the judge ought to have assessed the plaintiff's losses by using information regarding average male earnings rather than using her actual income data. Second, she argues that the judge erred in discounting the assessment to $220,000 without providing a rationale for the reduction. Third, she says that the trial judge's finding that she will be able to work a four-day week in the future rather than a three-day week was made without an evidentiary basis.

[5] With respect to the award for loss of homemaking capacity, the plaintiff contends that the award was inordinately low, such as to constitute a "wholly erroneous estimate" of her losses.

Background

[6] The motor vehicle accident occurred during the afternoon rush hour on February 17, 2017. Ms. Fatla was at an intersection, intending to turn left. The defendant's vehicle was behind her, proceeding at 20–30 km/hr. The defendant rear-ended the plaintiff's vehicle. The damage to the vehicles was minor, consisting primarily of damage to the paint. Neither driver required medical attention at the scene of the accident, and both were able to drive away after they exchanged information.

[7] At the time of the accident, the plaintiff was 32 years old. She was born in Poland and immigrated to Canada with her husband in 2010. Their first child was

born in 2014. The plaintiff became pregnant with the couple's second child a couple of months after the accident. She gave birth in early 2018.

[8] The plaintiff trained as a physiotherapist while in Poland, but her attempts to qualify for that profession in Canada were not successful. In 2015, she obtained work at a seniors' home as a rehabilitation assistant.

[9] As the issues on this cross appeal are narrow, I do not intend to fully describe the course of the plaintiff's injuries or treatment. Those topics are dealt with at some length in the trial judgment. Instead, I will simply summarize the diagnoses and describe the injuries and their effects on the plaintiff's work.

[10] When the plaintiff returned home after the accident, she began to experience intense neck pain. She visited a walk-in clinic the next day, and was diagnosed with a whiplash injury, which was consistent with the mechanism of the accident.

[11] The plaintiff continued her work after the accident, with some accommodations from her employer. On March 9, her physician advised her to take a few days off work, which she did, returning to work on March 14. She continued to work full-time until November 2017. She remained on medical leave for the balance of 2017. At the beginning of 2018, just a few days before the birth of her second child, the plaintiff commenced a one-year maternity leave.

[12] Approximately one year after the accident, the plaintiff experienced worsening neck pain and tingling in her left hand. She was diagnosed with cervical scapular pain and thoracic outlet syndrome.

[13] The plaintiff retuned to work in January 2019. She found the work tiring, and required extra breaks. She experienced worsening shoulder pain and headaches. She had some time off work, and it was suggested that she reduce her work to three or four days per week, which she did. In September 2019, she ceased working as a rehabilitation assistant, and took a job as a musculoskeletal injury prevention advisor with the Island Health Authority. In that position, she also worked three to four days per week.

[14] In 2020, as a result of the COVID-19 pandemic, the plaintiff's husband's work was terminated. In order to increase the family income, the plaintiff took a full-time position as an occupational health and safety coordinator at Camosun College. She continued to work full-time at that job at the time of trial, and it is clear that the judge viewed it as a permanent career.

[15] The plaintiff continued to suffer from headaches, and neck, shoulder and scapular pain. She was diagnosed with chronic myofascial pain syndrome, functional thoracic outlet syndrome and cervicogenic headaches. The judge found that those conditions were caused by the automobile accident, and that the plaintiff was likely to continue to suffer pain in the future. He observed that the symptoms would wax and wane, and that the prospects for treatment were not good.

The Judgment Under Appeal

The Judge's Award for Future Loss of Earning Capacity

[16] The judge noted that the plaintiff's income has increased since the date of the accident. Both her hours of work and her hourly rate are higher than they were prior to the accident. For that reason, the defendant took the position, at trial, that the plaintiff had not suffered a loss of earning capacity.

[17] The judge appears to have accepted that the plaintiff's earnings, as of the date of trial, were not impaired by her injuries. He considered, however, that there was a likelihood that she would have to cut back her work hours in the future, and, in accordance with the considerations described in *Rab v. Prescott*, 2021 BCCA 345 and *Anderson v. Steffen*, 2021 BCSC 2248, made an award for loss of future earning capacity.

[18] The judge described the basis for compensation and the evidence of the parties' experts as follows:

> [94] The obvious risk for the plaintiff is that, due to her condition, she will have to work fewer hours in her current position or, at its most serious, will be unable to work in that position at all. Dr. Salvian, the expert in thoracic outlet syndrome for the plaintiff, opined in his report that patients like the plaintiff

> can rarely work full-time, they need time off to be able to recover from working extended periods and part-time work is "best managed."
>
> [95] In contrast, Dr. Berger, the expert for the defendant, commended the plaintiff for working full-time and he described her current position as "more administrative", without any substantial physical component. But he opined that there was no contraindication to the plaintiff continuing to work in her current position. He also said that she will experience waxing and waning pain depending on the stress levels at work but she will not require any significant time off work in the foreseeable future. In cross-examination Dr. Berger accepted that it is unlikely that the plaintiff will have a full recovery in the foreseeable future. He also acknowledged the problems the plaintiff has with sleeping and the relationship those problems have with pain symptoms.

[19] The plaintiff asserted that her future income loss should, in order to conform to values reflected in the *Canadian Charter of Rights and Freedoms* and the concept of gender equality, be based on the average income for men, or, in the alternative, the average income of all persons. This was described as a "gender earning convergence" approach.

[20] The judge rejected that approach, declining to make an award based on "bare statistical evidence". Among his reasons for doing so was the fact that he was unable to determine whether the plaintiff fit the profile of the average income earner:

> [108] … [D]ata based on averages is all well and good at a very general level but the analysis here is very much an individual one. I do not know the similarities or differences between the plaintiff in this case and the profile that is the basis of the averages relied on. For example, the plaintiff took a maternity leave during the materials times and I do not know if that is consistent with or included in the average profile underlying the data.

[21] Instead of starting his assessment with the "average" statistics, the judge used the plaintiff's current earnings as a benchmark. As I have indicated, it is apparent that the judge considered those earnings to represent the plaintiff's full income earning capacity, unimpaired by her injuries.

[22] The plaintiff asserted that her future earning capacity should be assessed on the basis that she will only be able to work three days a week rather than five in the future. She therefore asserted that her earning capacity was reduced by 2/5 or 40%. The judge did not agree:

> [112] I do not agree with the plaintiff's submission that she can only work three days a week now or that the evidence supports that conclusion at some time in the future. Her own evidence is that she was thinking about going to four days a week but she has not done so or raised it with her employer. In my view, no one (including the plaintiff) knows what the future will hold for the plaintiff … What is required is an approach that adequately addresses any real and substantial possibility of a loss of future earning capacity.

[23] The judge found the plaintiff's current employment earnings (including non-wage benefits) to be $72,858 per year. The defendants, citing *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), argued that, if any amount was to be awarded for loss of future earning capacity, it should simply amount to one or two years' earnings. The judge considered that such an award would be insufficient, but was of the view that three years' earnings might be appropriate:

> [115] Using the figure of $72,858 and the defendant's approach to assessing future loss of income capacity, two years of income would total $145,716. I note the relatively young age of the plaintiff (she was 32 years old at the time of the 2017 accident and 36 years old at trial) it seems to me that earnings of two years do not adequately compensate for the possible negative contingencies in the future. She has about 30 years to work and the medical evidence is that she will have to accommodate the physical disabilities caused by the 2017 accident during that time. We do not know the extent of the waxing and waning of the plaintiff's symptoms into the future but some periods of time will be worse than others. Dr. Salvian opined that part-time work would be most appropriate; Dr. Berger believes the plaintiff can continue in her present full-time capacity but with symptoms from time to time. The obvious positive contingency, of course, is that her medical condition will remain the same but we cannot know that either (no one is saying she will recover to what her condition was prior to the 2017 accident). I conclude that, using the approach of the defendant, three years' salary is a more appropriate assessment of future loss of earning capacity. That amount would be $218,574.

[24] The judge also made a calculation based on the average length of the work week that he anticipated the plaintiff would be able to sustain:

> [117] … I do not agree that the plaintiff can only work three days a week. As an assessment of the future loss of income from the injuries in the 2017 accident I conclude that a more realistic figure is four days a week of work. That is, looked at over the number of years the plaintiff will continue working, I conclude that an approximation of the time she will have to take off because of the accident is about one day per week. Some weeks there will be no time off and in other weeks there will be more than one day off. This is a 20% loss

> and, using the plaintiff's calculation of the present value of her future earnings, the present value of the plaintiff's monetary loss would be $235,060.

[25] The judge then made an award of $220,000 for loss of future earning capacity.

The Judge's Award for Loss of Homemaking Capacity

[26] The judge addressed the award for loss of homemaking capacity briefly. The plaintiff had sought an award in the range of $90–100,000, but did not provide a complete pecuniary basis for such an award. Instead, she referred to awards that had been made in other cases. The defendant argued that the award for loss of homemaking capacity should be included as part of the non-pecuniary award.

[27] The judge made a pecuniary award to cover the purchase of a robotic vacuum (and one replacement) and an unspecified number of hours of yard work and home maintenance. The total award was $6,000. It is not clear how the judge arrived at that amount.

Analysis

The Issue of Gender Earnings Convergence

[28] The plaintiff's evidence included an expert report from an economist for the purpose of assisting the judge in quantifying her loss of earning capacity. The report included three scenarios—the first was based on the plaintiff's actual income at the date of trial. The second scenario used average earnings for men with bachelor's degrees and for inspectors in public health and environmental health. The third used average earnings for men and women with those qualifications.

[29] The judge rejected the scenarios based on average incomes and used the plaintiff's actual income to assess future income loss. The plaintiff alleges that the judge erred in doing so, suggesting that his approach ignored case law that accepts that gender earnings are converging. She also argues that failing to use male

averages (or averages for all persons) amounts to a failure to respect the equality values of the *Canadian Charter of Rights and Freedoms*.

[30] The use of gender-specific statistics to assess loss of earning capacity can be problematic. Not only is there an expectation and hope that the gap between men's and women's earnings will diminish in future, but there is also a recognition that individuals may not conform to historic gender norms, such that the use of gender-specific tables may be inappropriate. This latter concern is particularly problematic given the trend toward greater gender fluidity, particularly among younger people.

[31] This Court has made a number of observations on the issue of gender-based statistics in recent years, including considered discussions in *Steinebach v. O'Brien*, 2011 BCCA 302, *Crimeni v. Chandra*, 2015 BCCA 131, *Gill v. Lai*, 2019 BCCA 103 and *McColl v. Sullivan*, 2021 BCCA 181.

[32] These various discussions counsel a cautious approach. Justice Abrioux's summary of principles in *McColl* is helpful:

> [41] In my view, the following principles can be drawn from the above:
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> a. damages for loss of future earning capacity are to be assessed on an individual basis: *Gill* at para. 55;
>
> b. gender-based earning statistics "may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings": *Crimeni* at para. 23;
>
> c. however, gender-based earning statistics require caution because they may incorporate bias: *Steinebach* at para. 55; *Crimeni* at para. 23; *Gill* at para. 54; and
>
> d. it may be reasonable, depending on the evidence, for a court to assume a convergence in earnings: *Crimeni* at para. 23.
>
> [42] What courts should in fact *do* about statistical bias is a difficult question which raises evidentiary issues and issues of principle. Discerning when the statistics reflect "bias" rather than "lifestyle choices" is not necessarily straightforward. This is also the case, as *Steinebach* notes, with projecting convergence. For reasons I explain, however, those issues are not directly before us. I would leave them for another case.
>
> [43] Suffice it to say, gender-specific statistics *guide* rather than *determine* damages. Gender-specific statistics may incidentally align with a plaintiff's gender, but not invariably so. Two examples illustrate this point. To the extent that female economic multipliers reflect a greater likelihood of leaving the workforce to care for children, they may be appropriate for a male plaintiff

> who intends to be a “stay at home dad”. Those same statistics may be inappropriate for a female plaintiff who intends to remain in the workforce without interruption. In every case, the burden is on the plaintiff to demonstrate their future losses.

[33] Perhaps the most important principle is that damages for loss of future earning capacity are meant to be compensatory and are to be determined on an individual basis. A plaintiff may (in an uninjured state) have an earning capacity that is greater or less than the average of earnings of people with their academic or professional qualifications. Tables like those presented to the trial judge are blunt instruments when it comes to assessing losses.

[34] In *Steinebach*, at paras. 47–49, the Court discussed some of the reasons that courts may need to rely on such tables. Where the plaintiff is an infant, or has no established work history, there may be no alternative.

[35] The case before us is not such a case. Ms. Fatla had a fairly extensive work history. Although she only took her current job in 2020, it appears that she sees it as a career. On the evidence, the judge made no error in his finding that the remuneration attached to her current position represents Ms. Fatla’s earning capacity in an uninjured state. That finding is not in any way a product of gender bias or of a failure to consider evidence.

[36] The judge recognized that Ms. Fatla is injured, and that, while she is currently capable of earning the full amount of remuneration attached to her position, she may be unable to do so in the future. He based his assessment on that proposition.

[37] Ms. Fatla’s actual earnings are a much more precise and individualized gauge of her earning capacity than are averages drawn from populations that have little in common with her. The judge made no error in using the plaintiff’s actual earnings as the basis for his assessment.

Improper Discounting of the Award for Loss of Future Earning Capacity

[38] In *Pallos*, the Court described different methods that a court can use to attach a dollar value to a loss of earning capacity:

> [43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income.

[39] The Court's reference to awarding the plaintiff their "entire annual income for one or more years" has, unfortunately, sometimes been read as if it allows a court to arbitrarily assign an amount for the plaintiff's loss. At trial, the defendant's suggestion that an award of a year or two years' salary would be appropriate appears to me to stem from a misunderstanding of *Pallos*. While a court can quantify the plaintiff's damages for loss of future earning capacity in that way, it is required to carefully consider the evidence, and come to a fair assessment of the plaintiff's loss.

[40] It is not clear, in this case, how the judge arrived at a loss amounting to three years' salary. It may simply have been a very rough estimate, based on the judge's appreciation of the evidence. I accept that there are cases in which a rough estimate is all that a court can rely upon.

[41] Where, however, the evidence supports a more precise estimate of the plaintiff's loss, it is incumbent on the court to consider that evidence. In *McKee v. Hicks*, 2023 BCCA 109 at paras. 81–83, the Court emphasized that even where a judge uses the second approach described in *Pallos*, "if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them."

[42] Here, the trial judge used two different approaches to assess the plaintiff's loss. In addition to his estimate of damages as amounting to three years of earnings, he used a mathematical approach based on hours of work. He considered the plaintiff's ability to work and concluded that, on average, a four-day week was realistic. He therefore concluded that the plaintiff's loss was approximately 20% of her income, of $235,060.00.

[43] Having made that finding, and having reached an assessment based on it, it was an error for the judge to ignore the mathematical approach and to award an amount closer to the "rough and ready" approach of awarding 3-years' salary.

[44] The judge did not explain his decision to award $220,000 for loss of future earning capacity when his mathematical assessment suggested an amount of $235,060.00. I agree with the plaintiff's contention that this is akin to applying a negative contingency without providing a reason for doing so (see discussion in *Steinlauf v. Deol*, 2022 BCCA 96 at paras. 89 *et seq*.).

[45] In saying this, I recognize that the "calculated" loss of $235,060.00 was an imprecise number. It was, however, the best the court could do on the evidence, and was not arbitrary. While it would certainly have been acceptable for the court to acknowledge the imprecision of the amount by rounding it (to $235,000 for example), simply reducing or increasing the amount without explanation introduced an element of arbitrariness that was not acceptable.

[46] I would, in the result, substitute an award of $235,000 for loss of future earning capacity in place of the amount of $220,000 awarded by the trial judge.

The Finding that the Plaintiff Could Work a Four-day Week

[47] The plaintiff contends that the judge erred in concluding that she will, on average, be able to work a four-day week. She points out that one expert suggested that it would be difficult for a person with her condition to work back-to-back days.

[48] While there was evidence to that effect, the judge also heard evidence that the plaintiff is, in fact, working five days a week, and wishes to cut back to four days. He also had other expert evidence that suggested that the plaintiff could work a normal five-day week.

[49] The evaluation of this evidence was a matter for the trial judge, and in the absence of a palpable and overriding error, this Court must not interfere with his decision. I have quoted (at para. 24, above) from para. 117 of the trial judgment, in

which the judge provides a rationale for settling upon a four-day week (see also para. 112 of the trial judgment). In my view, the judge made no reversible error in reaching his conclusion.

The Award for Loss of Housekeeping Capacity

[50] The trial judge made an award for loss of housekeeping capacity. While the plaintiff sought an award of $90,000 to $100,000, the judge was not convinced that the plaintiff's needs were as great as she claimed. He made a pecuniary award of loss of housekeeping capacity of only $6,000.

[51] A plaintiff's loss of housekeeping capacity may be compensated through a pecuniary award, a non-pecuniary award, or both: see *McKee* at paras. 95–114. It appears that in this case, the judge considered much of Ms. Fatla's loss to be non-pecuniary in nature. The award of non-pecuniary damages, presumably, includes consideration of the discomfort Ms. Fatla experiences and the extra time she requires to perform certain household tasks; at any rate, no appeal is taken from the non-pecuniary damages award.

[52] In terms of pecuniary damages, the judge considered Ms. Fatla's claim to be excessive. He made an award only to fund the purchase of a robotic vacuum cleaner and to pay for some limited yard and housework that required heavy lifting. It appears that the judge had in mind an annual allotment of hours for such work.

[53] Again, the assessment of the evidence was a matter for the trial judge, and I would not interfere with his finding that Ms. Fatla is disabled from performing only certain limited tasks.

[54] Unfortunately, it is not possible, from the judgment, to discern how the judge assessed the amount of the pecuniary award. He accepted that Ms. Fatla can no longer do heavy lifting or perform the yard work that she has performed in the past. The judge appears to have reached the conclusion that, during the plaintiff's husband's period of unemployment, it is reasonable for him to take over such work

without compensation. The judge did not, however, address the question of what will happen when the husband returns to employment.

[55] The judge's reasons on this head of damages are brief. His conclusions are as follows:

> [125] I am not persuaded that the plaintiff requires the number of hours of housekeeping estimated by Ms. Walker. I assess the one-time present value cost of housekeeping (including a robotic vacuum cleaner and its replacement) and yard work … in the amount of $6,000.

[56] While the summary is not as clear as it might have been, I take it from the judge's reasons that he concluded that a pecuniary award for loss of housekeeping capacity should be confined to the cost of a robotic vacuum cleaner and the cost of home and yard maintenance (which the cost of future care report suggested would be 12 hours per year at $60 per hour).

[57] Those items are listed in the cost of future care report as having a present value of $2,629 for the vacuum cleaner (based on a cost of $500 and replacement every 5 years to the age of 75) and $18,776 for the yard and home maintenance (based on annual expenditures to the age of 75). In both cases, GST will be payable on the expenditures.

[58] It is not clear what the judge meant by "one-time present value", but it is apparent that the award of $6,000 is meant to fund ongoing expenditures.

[59] The cost of future care report estimated those two items to have a combined present value of approximately $22,500 and the judge does not provide any reason for assessing them at only $6,000. While it may be that some rationale could be constructed for a downward adjustment of that figure, the judge's unexplained decision to discount the amount as steeply as he did appears arbitrary, and cannot stand.

[60] In the absence of an explanation and clear findings of fact from the trial judge, this Court would normally send the matter back to the trial court for reconsideration. Unfortunately, the trial judge is now retired, and it is apparent that the cost of

returning to the trial court for a new hearing makes that option uneconomic. The amounts involved, while not totally inconsequential, are not large.

[61] In order to avoid the necessity of sending the matter back for further proceedings in the trial court, I would replace the judge's $6,000 award with an award of $22,500, as set out in the cost of future care report. While this disposition is not completely satisfactory, it is in the best interests of the parties that further litigation expenses be avoided.

Costs

[62] While there is some division of success on this appeal, I am of the view that the plaintiff has achieved substantial success and is entitled to her costs.

Disposition

[63] In the result, I would allow the appeal only to the following extent:

a) I would increase the award for future loss of earning capacity from $220,000 to $235,000.

b) I would increase the pecuniary award for loss of housekeeping capacity from $6,000 to $22,500.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"