
CANADA / JUDGMENT

Chen v. Ma

2021 BCSC 645

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Supreme Court of British Columbia

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2021 BCSC 645 Chen v. Ma

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chen v. Ma,

2021 BCSC 645

Date: 20210409

Docket: M179592

Registry: Vancouver

Between:

Musheng Chen

Plaintiff

And:

Baotian Ma

Defendant

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Plaintiff:

S.W.M. Leung

Counsel for the Defendant:

R.S. Wallia

S. Ali

Place and Date of Trial:

Vancouver, B.C.

September 21-25, 2020

September 28-29, 2020

October 1-2, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 9, 2021

I. Introduction

- [1] This is a personal injury matter arising from a motor vehicle accident on December 4, 2014. The plaintiff, Ms. Musheng Chen, was on her way to work, driving on Highway 91 towards Richmond, when she was rear-ended by the defendant ("Accident"). First responders were not called to the scene, and Ms. Chen drove her car home.
- [2] The defendants admit liability, conceding that Ms. Chen has suffered soft tissue injuries, primarily to her neck and shoulders. The parties have also reached an agreement regarding the quantum of: a) loss of past income, in the amount of \$43,916; and b) special damages, in the amount of \$7,933.76. However, the defendants dispute the severity of Ms. Chen's injuries, as well as both her loss of future income capacity and the cost of her future care. I will address each of these issues, following a review of the factual background and evidence.

II. Factual Background and summary of Evidence

- [3] Ms. Chen is 47 years old and was almost 43 on the day of the Accident. She was born in Vietnam, raised in China, and immigrated to Canada in 1997. She completed 9 years of combined elementary and high school in China. Apart from taking ESL classes for new immigrants, Ms. Chen has no further formal education.
- [4] Ms. Chen was married in Canada. She has two adult children; her first daughter was born in 2000 and her second daughter was born in 2004. Her primary language is Cantonese and she testified with the assistance of an interpreter.

A. Pre-Accident Activities and Pursuits

- [5] Ms. Chen testified that she enjoyed shopping, walking in the park, going out with her family for meals, and exercising at her apartment's gym. She was responsible for almost all of the housework at home and she cooked most meals.

B. Pre-Accident Health

- [6] Ms. Chen testified that she did not have any significant illnesses prior to the Accident. While this is strictly correct, Ms. Chen did suffer a back injury at work, prior to the Accident in 2014, when she was lifting a sofa. She testified that the injury resolved itself. When asked if she had any other injuries, she responded, that other than this one incident, she did not "think" there were any other ongoing health problems "but if there was she could not remember any."
- [7] Ms. Chen did not produce any pre-accident medical records from her family physician, Dr. Chow, or from any other medical physician who may have attended to her.

C. Pre-Accident Work Life

- [8] Ms. Chen worked in a garment factory and as a waitress in China. Upon immigrating to Canada, she worked as a machine operator at an auto parts manufacturing plant in Ontario for approximately two years before moving to British Columbia. She has also worked as a housekeeper and nanny, as well as a driver delivering food for a relative's restaurant.
- [9] Since 2006, Ms. Chen was hired a housekeeper for a Hilton hotel. Initially, she worked part-time but she has worked full-time since 2009. Generally, she and other housekeepers who worked with her were required to clean 14 rooms per shift.

D. The Accident

- [10] At the time of the Accident, Ms. Chen was driving to work around 7 a.m. The vehicle in front of her stopped suddenly. Mrs. Chen also stopped suddenly and she was hit from behind. She recalls her neck and body jerking back and forth and her right leg hitting the side of her car, under the dashboard. She drove home after the Accident but, as described below, she did not return to work until the following June, about 6 months later.

E. Post-Accident Health

- [11] Ms. Chen testified that after the Accident she was scared, dizzy, and felt the onset of neck pain. She stated that over the next month, her neck pain spread from the back of the neck across the top of her right shoulder into her upper arm and into the back of her shoulder and down her back to her waistline ("Right Upper Quadrant Pain"). She also experience right knee pain, said she "lost her mood", and experienced some initial driving anxiety.
- [12] Ms. Chen testified she went to see her family doctor about the symptoms she was experiencing from the Accident, although it is not clear when she did so because no medical records from her family doctor were disclosed. She advised Dr. Bentley, a physiatrist who testified as an expert on her behalf, that she saw her family doctor two weeks after the Accident.

- [13] Ms. Chen testified at trial that her family doctor gave her some medication, although she did not say what it was, and that he referred her to a physiotherapist.
- [14] Before returning to work in June 2016, Ms. Chen attended physiotherapy treatments, initially 3 times a week, which tapered to 2 times a week, and then ended around June or July 2016. She also exercised both in her apartment and in the gym located in her apartment building.
- [15] Ms. Chen testified that physiotherapy helped to decrease the pain and relaxes the muscles in her neck, upper back, and shoulder; however, the effects of this treatment only lasted about 1 to 2 hours before the pain returned. Her other symptoms, such as dizziness and anxiety about driving, resolved within two weeks of the Accident and her right knee injury resolved within a few months. Ms. Chen testified that her Right Upper Quadrant Pain has persisted to this day, particularly when she is at work.
- [16] Ms. Chen confirmed that she has not been taking prescription medication for her injuries. She manages her pain with heat, self massage, over-the-counter pain medication, and exercise. She testified that she might take pain medication if she has difficulty sleeping or sometimes after work. Her evidence was not clear regarding how often she takes over-the-counter medication.
- [17] Ms. Chen testified that when she first returned to work in June 2016, she felt 70% improved as a result of her physiotherapy treatments and rest.
- [18] Ms. Chen was placed on a gradual return to work arrangement at the Hilton. In June 2016, Ms. Chen returned to work 2 days per week, doing half-day shifts. After working for a few days, she found her Right Upper Quadrant Pain returned. She testified that after returning to work the improvement in her condition regressed from 70% improvement to 50% improvement. Ms. Chen also described her pain level after two weeks of work, in June 2016, as severe. She went off work again, this time until September 2016.
- [19] In September 2016, Ms. Chen attempted a second gradual return to work, with 2 days per week, half-day shifts, and fewer rooms to clean per shift. By the beginning of 2017, she was working 3 days per week, 8 hours per shift, and cleaning 11-12 rooms per shift, rather than the usual 14.
- [20] Mr. Chen testified that she worked with an occupational therapist, Ms. Jennifer Woo, between March and December 2017, who taught her exercises and techniques to increase function and prevent increased pain. Ms. Chen implements these techniques while performing her job duties.
- [21] When she first began her 3 days per week shifts in 2017, Ms. Chen did not work consecutive days; her schedule was designed to alleviate and manage her pain level. She eventually proceeded to working 3 consecutive days per week.

- [22] The increased pain from working part-time caused sleep difficulties for Ms. Chen. She used to sleep about seven hours a night but her sleep reduced to 5-6 hours a night. She testified that she will wake due to pain and at times will have to leave her bed in order not to wake her husband. Ms. Chen was vague as to the frequency of her sleep loss.
- [23] In the summer of 2017, Mrs. Chen injured her right elbow while at work. At the time, she was working 3 days a week. She explained that when she first injured her elbow, she ignored the pain but after 2 weeks the pain worsened. She testified that her doctor told her she had "tennis elbow." She testified that she "took a break" starting in July 2017 and returned to work in March 2018.
- [24] In 2018, towards the end of her time off for the right elbow injury, she testified that she, once again, felt a 70% improvement in her Right Upper Quadrant Pain. She still did her normal cleaning around the home, but with some difficulty, and received assistance from her family with heavier tasks.
- [25] Ms. Chen's returned to work after her right elbow injury starting at 3 days per week, working half-day shifts, later increasing to 6-hour shifts. By June 2018, Ms. Chen returned to working a schedule of 8-hour shifts, 3 days per week. Ms. Chen then progressed to working 8-hour shifts, 4 days per week on a "2 days on and 2 days off" schedule.
- [26] Ms. Chen described how a burning sensation in her right shoulder would be triggered after cleaning the first room of her shift and the pain level would increase as the day wore on. She found a hot shower after work at home would reduce her pain level but it persisted. She would also roll tennis balls against the wall along her right upper quadrant to alleviate her discomfort, and she requested help from her daughter for meal preparation and cleaning. She received massages from her husband, as well.
- [27] Ms. Chen started working full-time, 5 days per week in May 2019. Her employer continued to accommodate her condition by reducing the number of rooms she had to clean from 14 down to 11 per shift. Two weeks into her full-time work schedule, Ms. Chen injured her left arm while working. She took time off again and began working full-time in August 2019. She testified that while her Right Upper Quadrant Pain persisted, she was able to complete her job duties.
- [28] Ms. Chen continued to work full-time until her hotel was closed in March 2020 due to the COVID-19 pandemic. The Hilton hotel at which Ms. Chen worked, re-opened in June 2020. From the time of its opening until the trial, the hotel's occupancy rate has significantly reduced. Consequently, Ms. Chen's hours of work have also been reduced, along with the hours of her other co-workers.

- [29] Under cross-examination, Ms. Chen stated that, on average, she is able to clean a checked-out room in 30 minutes and a guest-occupied room in less time. She explained that she does not have to change the bed linens in occupied rooms. She may require more time to clean a checked-out room if the guest has used more amenities, moved furniture, or left the room in a particularly messy condition.
- [30] Ms. Chen explained that she manages her work-day by breaking up her tasks into parts, taking micro-breaks and implementing other workplace techniques and strategies that she learned from her occupational therapist, Jennifer Woo. She explained that her micro-breaks last for a couple of minutes.
- [31] Ms. Chen testified that she will sometimes need to push furniture that weighs more than 50lbs or 75lbs. She also confirmed that since the Accident she has completed job duties that require lifting more than 50lbs or pushing 75lbs. Under cross-examination, Ms. Chen affirmed that she is able to complete all aspects of her current job duties.
- [32] Ms. Chen gave evidence that is she is concerned about her job security due to a combination of her limited education, poor English-speaking skills, and her injuries. She worries that if her position is terminated, she may not be able to find alternative employment. Ms. Chen testified that she is satisfied with her job performance and confirmed she has not received any complaints from her employer regarding her work performance. Ms. Chen confirmed that she has never been laid-off work due to her injuries; her employer has accommodated her recovery time.
- [33] Ms. Tam, the Human Resources Manager at the Hilton hotel where Ms. Chen works, confirmed that Ms. Chen had been accommodated at her work place as a result of her injuries. She testified that Ms. Chen had a 0% chance of losing her job due to her Accident-related injuries and that the Hilton will continue to accommodate Ms. Chen for as long as her doctor provides a note recommending she be accommodated at work, which he continues to recommend.
- [34] Ms. Chen acknowledged in her cross-examination that during her vocational assessment by Dr. Quee Newell on June 9, 2020, she told Dr. Quee Newell that she had no problems with walking, sitting, standing, forward bending, squatting, or kneeling while at work. She also acknowledged being truthful during this assessment.

F. Post- Accident Activities and Pursuits

- [35] Ms. Chen testified that although the Accident occurred in 2014 and she has returned to work, her Right Upper Quadrant Pain continued to affect her self-care activities in 2017, such as dressing and showering. She also continued to have difficulties performing household activities such as chopping food, mopping, taking out laundry from the dryer above the washing machine, and buying groceries. Ms. Chen testified that her husband assists with carrying groceries, and her daughter assists primarily with cooking. She testified that her daughter developed an interest in cooking after attending some cooking classes at school.

However, on cross-examination, Ms. Chen confirmed that she is now able to complete all her housekeeping tasks.

- [36] Under cross-examination, Ms. Chen testified that in December 2016 she went on vacation to China for one month. She has also travelled to Seattle since the Accident for both overnight and same-day trips.
- [37] Ms. Chen also confirmed that she continues to engage in all her pre-accident leisure activities. In addition to her pre-accident leisure activities, she also enjoys exercising with YouTube videos and jogging.
- [38] Mr. Chen's evidence was consistent with that of Ms. Chen.

G. Diagnosis and Prognosis of Dr. Bentley

- [39] Dr. Bentley was qualified as an expert in physical medicine and rehabilitation, including chronic musculoskeletal conditions. He assessed Ms. Chen on two occasions, January 17, 2018 and June 15, 2020, and produced two reports dated February 26, 2018, and June 26, 2020, respectively.
1. January 17, 2018 Assessment; Report Dated February 26, 2018
- [40] In his January 17, 2018 assessment, Dr. Bentley gave the following Accident-related diagnoses in relation to Ms. Chen's right upper quadrant symptoms:
- Whiplash Associated Disorder Type II - impairment in cervical spine range of movement; normal neurological examination
 - Right shoulder impairment - overlap of right acromioclavicular joint arthropathy and suspected cervical spine spondylosis
 - Right lateral epicondylitis - not temporally associated with Accident
 - Cervicogenic headaches - resolved
- [41] Dr. Bentley explained there are four types of Whiplash disorders, ranging from Type I to Type IV and that Ms. Chen was at Type II on the continuum because her range of motion was impaired but she had a normal neurological assessment.
- [42] Dr. Bentley found "no indication of pain-focused behaviours, and/or non-organic signs". He explained this meant Ms. Chen did not over-amplify her pain responses.
- [43] As regards the "right lateral epicondylitis", Dr. Bentley opined that this condition, involving pain around the elbow, was not caused by the Accident.

- [44] Dr. Bentley's February 26, 2018 Report states that at the time of his examination on January 17, 2018, Ms. Chen advised him that she was experiencing a "constant dull pain located over the right posterolateral region of her neck, right upper trapezius, and right posterior shoulder in the interscapular region." Ms. Chen also reported to Dr. Bentley that her other Accident related symptoms had fully resolved, and that she was "experiencing an overall 70% improvement in her accident related symptoms."
- [45] For treatment, Dr. Bentley recommended a home traction unit, anti-inflammatory topical gel, and a home TENS unit.
2. June 15, 2020 Assessment; Report Date June 26, 2020
- [46] In this report, Dr. Bentley notes that he was provided with some clinical notes from Dr. Chow; most of these comprised numerous quarterly notes indicating that Ms. Chen could either not work or that her work schedule and duties needed to be accommodated. Dr. Bentley's June 26, 2020 report states that "Ms. Chen denied any prior [pre-Accident] musculoskeletal injuries," although she did advise Dr. Bentley of her elbow injury at work in 2017.
- [47] Dr. Bentley's diagnosis in June 2020 was:
- Whiplash Associated Disorder (WAD) II - impairment in cervical spine range of movement, normal neurological examination, presumed right C5/6 spondylitic referral
 - Right shoulder impairment - resolved
 - Right lateral epicondylitis - resolved
 - Cervicogenic headaches - resolved
- [48] Further, while Dr. Bentley's prognosis for "complete symptom resolution" is guarded, he also opined that "her overall functional prognosis remains favourable" while also acknowledging continued "activity limitations" indefinitely relating to "heavier housekeeping duties and employment".

H. Evidence of Mr. Cheesman

- [49] Mr. Cheesman was qualified as an expert in occupational therapy, including expertise in work capacity evaluations, work function, and future care needs. He assessed Ms. Chen on April 8, 2020. He performed a number of tests on Ms. Chen to determine her various functional parameters relevant to her current job.
- [50] Mr. Cheesman opined that the outcomes of functional testing indicate that Ms. Chen effectively engages in and completes reaching and handling activities that she would encounter at work. He noted, however, that she does so with slowed productivity over time.

- [51] Mr. Cheesman stated in his Report that Ms. Chen told him "she has felt better since she stopped working at the end of February given the pandemic crisis." Ms. Chen reported that her symptom levels on the day of this evaluation were better than usual given that she had stopped working for a month; Mr. Cheesman relied on Ms. Chen's self-reporting, in this (and other) respects. He also concluded that Ms. Chen's workplace accommodations would likely be a "permanent need."
- [52] Interpreting her material handling results contextually, Mr. Cheesman opines that Ms. Chen "does not have any reserve capacity to spare," He postulated that this represents a tenuous situation because Ms. Chen is required to operate at her peak functional capacity at work. He explained that because Ms. Chen is just managing what her job demands are now, with time her muscles will weaken. As a result, not only will she be at risk of future injury (which she is already had in the past in the form of her right tennis elbow injury), there may be a point in the future when she is no longer capable of meeting her job demands.
- [53] Mr. Cheesman opined that "she may be required at some juncture to retrain or move into an alternate vocation that reduces the regular functional stress on her impaired region."

I. Evidence of Dr. Colleen Quee Newell

- [54] Dr. Colleen Quee Newell was qualified as an expert in vocational assessment and vocational rehabilitation. She performed a vocational assessment of Ms. Chen on June 9, 2020 and authored an expert report dated June 18, 2020.
- [55] Dr. Quee Newell opined that Ms. Chen demonstrated an average capacity for new learning "as it relates to education and employment." Ms. Chen was found to have limited English literacy such that she would be "ill suited to occupations requiring more than rudimentary English literacy skills". Dr. Quee Newell concluded that she anticipated "Ms. Chen would be limited to a narrow range of direct-entry, unskilled occupations not requiring English literacy abilities or strong oral communications skills."
- [56] Absent the Accident, Dr. Quee Newell anticipated that Ms. Chen would have continued to work as a room attendant for Hilton or in a similar capacity with another employer. She could also have accessed alternate direct-entry occupations.
- [57] Dr. Quee Newell stated that given Ms. Chen's ongoing need for workplace accommodation, she would likely experience difficulty competing for, and maintaining, alternate employment as a room attendant in the hotel industry. She also opined that if Ms. Chen were to change jobs in the future, she would likely "have greater vocational success if she pursued less physically demanding jobs where she would not require workplace accommodations in order to manage her ongoing right-side neck and upper extremity symptoms".

J. Evidence of Mr. Peever and Mr. Szekely

1. Mr. Peever

- [58] Mr. Peever was qualified as an economist, able to give opinion evidence on the issues of past and future earnings, as well non-age benefits. Mr. Peever also provide income multipliers to assist, where applicable, in assessing lump sum present values of future losses, at the date of trial.
- [59] Mr. Peever acknowledged his multipliers took into account "risk only" contingencies and did not include contingencies that would include voluntary reasons for someone to remove themselves from the workforce. He testified this was because he was instructed to do so by counsel for the plaintiff.
- [60] Mr. Peever was also qualified to provide a second report that provided multipliers that could be used to calculate the present values of the costs of future care.

2. Mr. Szekely

- [61] Mr. Szekely was qualified as an economist, able to give opinion evidence on the issues of past and future earnings, as well non-age benefits, like Mr. Peever. Mr. Szekely was also qualified to provide multipliers relating to past and future earnings and the costs of future care. He provided a rebuttal opinion to Mr. Peever's calculations on income multipliers.
- [62] Mr. Szekely opined that Mr. Peever's "risk only" contingencies assumed labour force attachment significantly stronger than the average for individuals who were similarly educated as Ms. Chen. Specifically, Mr. Peever assumed that Ms. Chen "would never have voluntarily chosen to retire or work part-time hours at any time before her 65th birthday.
- [63] Mr. Szekely opined that even if Mr. Peever's assumption that Ms. Chen would never have chosen to retire, or to reduce her working hours at any time before the age of 65, was correct, Mr. Peever's method of projecting the "risk only" labour force participation rates and part-time factors was arbitrary. He also noted that Mr. Peever's estimate of the percentage of contingencies attributable to "risks" (rather than choices) was based on interpretation of data from another survey that Mr. Szekely has several concerns about; though these need not be repeated here. As a consequence, Mr. Szekely was not able to support Mr. Peever's analysis.
- [64] Accordingly, Mr. Szekely provided his own multipliers to estimate the present value of future income loss. I found Mr. Szekely's analysis and conclusions more persuasive on the facts before me.

III. Factual findings and Legal Analysis

A. Accident-related Injuries and Symptoms

- [65] I have reviewed the evidence of each of the lay and expert witnesses, and I have carefully considered the evidence of Ms. Chen herself. I found Dr. Bentley's assessment and opinion particularly helpful.

- [66] I am satisfied that Ms. Chen suffered a soft tissue injury in the Accident. . Specifically, I find that she suffered a "Whiplash Associated Disorder (WAD) II" which impaired her range of movement and caused her pain, although there is no nerve damage or impairment as a result of the Accident. I accept Ms. Chen's evidence that the whiplash injury caused not only neck pain but also pain that spread from the back of the neck, across the top of her right shoulder and into her upper arm. I accept that from time to time, her symptoms caused some sleep loss; however, the evidence does not support a chronic disturbance condition. I accept that at its worst, the pain in the back of Ms. Chen's shoulder spread down her back to her waistline. I also find that Ms. Chen's right knee was injured, she experienced some headaches, and she had a bout of driving anxiety.
- [67] Considering the evidence as a whole, I find that Ms. Chen's whiplash injury has significantly improved but that it has not yet fully resolved. I accept Dr. Bentley's favorable diagnosis of Ms. Chen's whiplash injury, and also accept that she continues to experience some pain. However, I find that her right knee injury, headaches, and driving anxiety resolved, most likely within a few weeks after the Accident.

B. Non-Pecuniary Damages

- [68] Non-pecuniary damages compensate plaintiffs for their pain, suffering, loss of enjoyment of life, and loss of amenities: *Sehra v. Randhawa*, 2020 BCSC 752 at para. 110. In determining non-pecuniary damages, each case must be assessed based on the particular facts before the court: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189. When making that assessment, the following factors delineated in *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley] are key considerations:

- [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and

(i) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[69] Further, as noted by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260, the amount of the non-pecuniary award should compensate for more than just direct injuries:

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries [citations omitted]. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury". In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case".

[70] I have examined each of the factors in *Stapley* and our Court of Appeal's functional analysis in *Moskaleva* in light of the circumstances of this case. Furthermore, I have considered the authorities relied upon by the parties, giving due consideration to what guidance they offer and their relative comparability to the facts before me, keeping in mind that the compensation awarded must be fair to all parties.

[71] I have taken into account the specific submissions of the parties on the factors that ought to inform my assessment of non-pecuniary damages, in light of the evidence before me. In doing so, I have considered the nature and scope of the injuries Ms. Chen's sustained as a result of the Accident, discussed earlier in these reasons. I have also considered how Ms. Chen's overall health, recreational activities, work life and general lifestyle have been impacted by the Accident. As well, I have included in my assessment, compensation for Ms. Chen's loss of capacity to perform housekeeping tasks at home as a result of her Accident-related injuries, although I have also found that she has now recovered substantially in this regard.

[72] Ms. Chen seeks non-pecuniary damages in the range of \$100,000 to \$120,000. Counsel for the defendant submits that a fair and reasonable range for Ms. Chen's non-pecuniary damages would be in the range of \$70,000 to \$75,000. I am of the view that the cases relied on by the defendant are, generally, more aligned with the facts of this case than those relied on by Ms. Chen, although I remain mindful of the axiom that each case must be decided on its own particular facts: see *Dhugga v. Poirier*, 2020 BCSC 914; *Tsai v. Murdoch*, 2019 BCSC 179; *Mills v. Graham*, 2019 BCSC 641; *Abraha v. Suri*, 2019 BCSC 1855; and, *Johnson v. Randhawa*, 2020 BCSC 708.

[73] In light of all the evidence and the applicable authorities, I am of the view that non-pecuniary damages of \$75,000 is reasonable and fair in this case.

C. Future Loss of Income Earning Capacity

[74] Compensation for future loss of earning capacity is to be based on the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[75] In *Gao v. Dietrich*, 2018 BCCA 372, our Court of Appeal provided guidance on the applicable standard of proof when assessing this loss:

[39] The rationale for distinct standards of proof for past actual events and past hypothetical events was explained by Madam Justice Rowles in *Smith v. Knudsen*, 2004 BCCA 613 at para. 29:

What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[40] These principles have been reiterated by this Court recently in *Grewal* at paras. 43-46, and *Rousta* at paras. 14-17. To the extent that other decisions could be read to hold that a past hypothetical event must be proven on a balance of probabilities they must be regarded as *per incuriam*: *Grewal* at para. 47.

[76] Accordingly, in order to receive an award for loss of earning capacity, a plaintiff must prove that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[77] In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81[Pololos], Justice Voith, as he then was, conveniently summarized the applicable first principles as follows:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;

- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37;
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.
- [78] Counsel for the defendants' primary argument is that Ms. Chen has failed to prove any loss of future earning capacity, as she is currently able to work full-time in her job as house-keeper at the Hilton. Ms. Chen asserts that her marketability has nonetheless been diminished in the eyes of future employers, and that her income earning capacity has also been diminished, as a result of the Accident. I agree.
- [79] Notwithstanding Dr. Bentley's favourable functional diagnosis, Ms. Chen's symptoms have limited her productivity at work. The evidence before me indicates that there is a real and substantial possibility that Ms. Chen's injuries and symptoms are such that they will continue to require her to be accommodated in the workplace for an indeterminate period of time. Accordingly, I find that there is a real and substantial possibility that her future income earning capacity has also been impaired.
- [80] Where a loss of capacity is established, there are two common approaches to the quantification of the loss. The plaintiff may prove the quantification of the loss of earning capacity, either on an earnings approach, as in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.), or through a capital asset approach, as in *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353 (S.C.). The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) and *Romanchych v. Vallianatos*, 2010 BCCA 20.
- [81] Counsel for Ms. Chen submits that a capital asset approach is appropriate in this case and would yield the fairest and most reasonable result. I agree. As the Court reasoned in *Perren*, at paras. 12 and 32, the capital asset method of assessment is more appropriate in cases such as these where the loss is not easily measurable. I am not persuaded that a strict

mathematical assessment of Ms. Chen's earnings potential is appropriate. Nor am I persuaded that such an approach would yield a reasonable or just result in this case. A capital asset approach is appropriate in this case because even though Mrs. Chen is capable of working full-time, as discussed above, her capacity to work has been impaired.

[82] When applying a capital asset approach, as in *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10, courts consider the following factors from *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.):

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

[83] An application of these factors, affirms my conclusion that Ms. Chen has suffered a loss of future income capacity that must be compensated. The unresolved nature of Ms. Chen's ongoing physical limitations arising from the Accident has rendered her less capable overall of earning income in all types of employment. As well, her limited education, age, and lack of English language proficiency further limit her marketability and her competitive position in the marketplace.

[84] Nevertheless, I accept Ms. Tam's evidence that the Hilton hotel at which she works will continue to accommodate Ms. Chen's physical symptoms and limitations so long as medically required and that her employment is not in jeopardy. Furthermore, I am not persuaded that the evidence before me supports a finding that there is a real and substantial possibility that she will not be able to work in the future as a consequence of the Accident. Again, I have also accepted Dr. Bentley's favourable functional diagnosis. These factors have also informed my assessment of Ms. Chen's loss under this head of damages.

[85] In cases where the capital asset approach has been applied, courts have awarded the plaintiff's annual income for one or more years: *Devito v. Watson*, 2020 BCSC 1106 at para. 103; *Da Silva v. Pollard*, 2019 BCSC 2249 at para. 151; *Pallos* at para. 43. Awarding a single year of income is consistent with this case law.

[86] I have assessed Ms. Chen's future loss of earning capacity by using a reasonable and fair assessment of her annual income, as previous cases have done. I find that one year's income is an appropriate measure of loss in light of the evidence as a whole; this assessment includes the significant improvement in Ms. Chen's symptoms, her unresolved symptoms and physical impairment, and her favourable functional diagnosis.

[87] Currently, Ms. Chen's annual income is approximately \$45,739.20, not including benefits. Mr. Peever opined that, on average, employers currently expend about 10% of gross payroll on non-wage benefits, which would amount to \$4,539.92. Recognizing that this calculation ought not to be a strictly mathematical one, I am of the view that compensation in the amount of \$52,000 for the loss of future earning capacity is fair and reasonable in the circumstances of this case.

D. Cost of Future Care

[88] In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 [Krangle], the Supreme Court of Canada provided the following guidance on assessing damages for cost of future care:

[21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present costs of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

[22] The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require

[89] The test for determining the appropriate award for cost of future care is an objective one based on the evidence and on costs reasonably and medically necessary to restore plaintiffs to their pre-accident condition, insofar as possible. Such costs must also be reasonable in the sense that they are costs the plaintiff will likely incur: *Pololos* at para. 144 and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63. Each case must be determined based on its own unique circumstances. Further, the assessment of damages for cost of future care is not a precise accounting exercise: *Krangle* at para. 21; *Peters v. Ortner*, 2013 BCSC 1861 at para. 144.

[90] In *Dzumhur v. Davoody*, 2015 BCSC 2316, Justice Kent provided further guidance, as follows:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;

- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

I have also considered that the costs awarded must be fair to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-42.

[91] Ms. Chen testified that she has just restarted physiotherapy, also wishes to purchase a TENS unit, and also would like to exercise at an outside gym as it would provide better equipment. Accordingly, Ms. Chen seeks the following future care costs for the remainder of her working life, mainly to assist with symptom management and to enable better functional endurance at work:

- TENS unit - \$100

- 10-20 acupuncture/massage/physical therapy treatments per year: \$800 to \$1,600 per year until age 65

- o $\$800 \times 15.509 = \$12,407$

- o $\$1,600 \times 15.509 = \$24,814$

- Gym membership less 50% contingency for the fact that the plaintiff will likely be using it as a supplement to her current apartment gym: $\$415.15/2 = \$207.58$ per year until age 65

- o $\$207.58 \times 15.509 = \$3,219$

Total amount claimed: \$15,726 to \$28,133

[92] The defendant submits that Ms. Chen has failed to establish the necessity of any future care. In the alternative, counsel assert that, should the court find that there should be a cost of future award, then an award between \$12,407.20 and \$24,814.40 is appropriate.

[93] The expert evidence before and the evidence as a whole justifies an award for the cost of future care, but not in the amounts sought by Ms. Chen.

- [94] The request for the cost of \$100 for a TENS machine is medically justified and reasonable. It is supported by the evidence of Dr. Bentley.
- [95] While Ms. Chen has benefited from exercising in her home, or going to the gym in her apartment building, there is no evidence that she used gyms outside her apartment before the Accident, and I find it is unlikely she would do so in the future if such a cost of care were to be awarded. In any event, I am satisfied that the gym in her apartment building is sufficient for purposes of improving her strength and conditioning, as well as the further amelioration of her symptoms. In sum, I have concluded that the sum of \$3,219 for the cost of future gym memberships is not medically justified and ought not to be awarded.
- [96] I am of the view that acupuncture, massage or physical therapy treatments would likely assist Ms. Chen in managing her ongoing symptoms. Considering her current condition and the level of her significant improvement over the years, the lower-end of the cost spectrum suggested by her counsel is more reasonable than the higher-end of the suggested range. However, I find it is not likely such treatments will be medically justified to the age of 65, particularly given Dr. Bentley's favourable diagnosis. While difficult to assess the medically justified amount with precision, I am of the view that the sum of \$10,000 for the cost of future care for acupuncture, massage or physical therapy treatments is reasonable in the circumstance of this case.
- [97] Accordingly, the total award for cost of future care is \$10,100.

E. Special Damages

- [98] As noted at the outset, the parties have agreed on special damages in the amount of \$7,933.76 for treatment and other expenses incurred as a result of the Accident.

IV. Disposition

- [99] Ms. Chen is entitled the following damage awards:

1.

Non-pecuniary Damages:

\$75,000.00

2.

Loss of Past Earning Capacity:

\$42,916.00

3.

Loss of Future Earning Capacity:

\$52,000.00

4.

Cost of Future Care:

\$10,100.00

5.

Special Damages:

\$7,933.76

TOTAL:

\$187,949.76

[100] Subject to any submissions, the parties may wish to make on the question of costs, and absent any circumstances of which I am unaware, Ms. Chen is entitled to his costs at Scale B.

"MORELLATO J."

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