

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chen v. Lam*,  
2017 BCSC 2073

Date: 20171116  
Docket: M124440  
Registry: Vancouver

Between:

**Chiu Lien Lucy Chen**

Plaintiff

And

**Richard Ying Kien Lam**

Defendant

- and -

Docket: M164350  
Registry: Vancouver

Between:

**Chiu Lien Lucy Chen**

Plaintiff

And

**Dam Phan and Piroska Sandor**

Defendants

Before: The Honourable Mr. Justice Groves

## **Reasons for Judgment**

Counsel for Plaintiff:

J.S. Stanley

Counsel for Defendants Richard Ying Kien  
Lam and Dam Phan:

L. Harris

Counsel for Defendant Piroska Sandor:

E. Kotsaboikidis

Place and Date of Trial/Hearing:

Vancouver, B.C.  
November 21-25 and 28-30, 2016;  
December 1-2 and 5-6, 2016;

Place and Date of Judgment:

Vancouver, B.C.  
November 16, 2017

**Introduction**

[1] The plaintiff, Chiu Lien Lucy Chen, who I will refer to as “Chen”, was involved in two motor vehicle accidents, the first being on the 9th of April, 2012 and the second being on the 29th of November, 2014. In regards to the first accident, the action against Richard Lam, liability is not in dispute and all parties agreed that the damages incurred by the plaintiff were significant.

[2] In regards to the second accident, there are two defendants Dam Phan, who I will refer to as “Phan” who is Ms. Chen’s husband, and Piroska Sandor, who I will refer to as “Sandor” who is a non-related individual. Liability for that second accident is in dispute as between the two defendants and they were represented by different counsel at the trial. It is conceded by all that the damages suffered by Chen in the second accident where she was a passenger were not of a significant nature. At best, the damages can be expressed as causing an exasperation of injuries from the first accident for a period of a few weeks.

[3] In this judgment I have assessed the damages suffered by the plaintiff collectively, attributed them between the two accidents as the evidence suggest, and have determined that Sandor is liable for the second accident.

**The Accidents**

[4] As noted, the first accident occurred on April 9th 2012. This accident occurred on East 1st Avenue in Vancouver. The plaintiff was walking on the sidewalk and the defendant, who was attempting to park his vehicle, lost control, drove onto the sidewalk and hit the plaintiff, and pinned her against a wall.

[5] The second accident occurred at the intersection of 33rd Avenue and Victoria Drive in Vancouver. The plaintiff was a passenger in a vehicle driven by Phan, who was parked behind the vehicle driven by the defendant Sandor. The vehicles collided in a minimal way.

**Liability for the Second Accident**

[6] Having heard the evidence of Phan, Sandor, Chen and the independent witness, Sofia Sorin, who I will refer to as “Sorin”, I have concluded that Sandor is responsible for the second accident.

[7] Both Chen and Phan gave consistent evidence about the second accident, that being that they were in their vehicle behind the Sandor vehicle. The Sandor vehicle rolled back down a slight incline and the back of the Sandor vehicle impacted with the Phan vehicle. The reasons for this are uncertain, either the effects of gravity or desire to change lanes, but it was the consistent evidence of Chen and Phan that the vehicle in front of them, the vehicle driven by Sandor, moved back and impacted with the front of Phan’s vehicle. The damage was minor. The evidence suggest that a small piece of plastic was broken on the Phan vehicle which was never repaired and that there may have been some damage to the exhaust pipe of the Sandor vehicle.

[8] The combined effect of the Sandor evidence and the evidence of Sorin leaves questions as to the veracity of Sandor’s evidence. I do not doubt that Sandor was sincere in her evidence and was attempting to recall events accurately. Her memory however appears faulty.

[9] Sandor was in her vehicle near the corner of 33rd and Victoria Drive with her daughter-in-law Sorin in the front seat. Sandor said that she was simply stopped at the intersection and her vehicle was on a slight incline. She says she was stopped behind a few vehicles at the red light. She says that when she moved her foot from the brake to the accelerator the collision occurred but she did not feel the collision and in fact was only notified of it by Phan’s flailing of his arms outside her vehicle and his stating that her vehicle had hit his.

[10] On this point, her daughter-in-law Sorin gave different evidence. Sorin stated in her evidence that she was aware of the impact, in that she felt the impact. She further stated that she felt a nudge from behind and told Sandor that she thought the vehicle from behind, the Phan vehicle, had struck theirs.

[11] In addition to this inconsistency of the evidence, it is of note that Sandor was adamant that she did not provide a note to Phan, contrary to an admission that she had to later make once the note was produced.

[12] As indicated, it is clear that Sandor was attempting to be truthful in her evidence but she simply forgot about the note, and it is fair to conclude as suggested by counsel for the plaintiff that she was careless in describing the number of photographs she took at the scene of the accident. This, coupled with the different evidence as to a conversation in her vehicle between her and Sorin, suggest that her recollection of events from the time of the accident is subject to question.

[13] When compared with the straightforward and consistent evidence of Chen and Phan, I am satisfied on a balance of probabilities that what happened on the 29th of November, 2014 was that the Sandor vehicle rolled back and impacted, ever so slightly, the vehicle driven by Phan in which Chen was a passenger.

[14] As for the damages, I agree with counsel for the plaintiff that in assessing the damages arising from this accident, the evidence is suggestive that damages arising from this second accident is most modest, and only damages for non-pecuniary loss. The evidence suggests that the effect of the accident was to set-back any recovery that Chen was on the road to by a period of approximately two weeks. The suggested amount of non-pecuniary damages of \$2,500 for the second accident is reasonable and I make that order.

### **The First Accident and Damages Generally**

[15] Having considered the evidence which I will cover in some detail later in these reasons, it seems clear that the parties are in agreement that the first accident was significant and caused significant damages to the plaintiff. The position of the defendant Lam at trial, a position that differs from that of the plaintiff, is that Chen, by the time of trial, should have made close to a full recovery. They argue that the non-pecuniary loss should be assessed on that basis and the cost of future care and lost opportunity costs should be minimal to reflect their perception that the plaintiff should

have recovered from her injuries by the time of trial and, having not done so, needs minimal assistance to get to the stage of full recovery.

[16] On the other hand, Chen believes that her injuries are permanent and the losses should be assessed on the basis of permanent injuries in regards to non-pecuniary loss, a permanent need for assistance in terms of cost of future care, and a considerable claim for lost opportunity based on no ability to return to work.

[17] At the end of the day, it is fair to conclude and I do conclude that Chen has not recovered from the accident but equally true, it is fair to conclude based on the evidence before me that with some additional time, and the intervention of psychological or psychiatric assistance, some of the suffering and loss that Chen continues to claim should successfully be ameliorated.

[18] In that regard, there are a number of factors in evidence which lead to this conclusion. The first is the video evidence provided by the defendant. This video evidence, though perhaps of a limited duration, shows a plaintiff actively involved in physical activity including walking a distance to the gym, walking around the gym, and exercising at the gym all the while maintaining what appears to be a relatively normal gait, and walking without the assistance of a cane or any other aid. It shows a plaintiff interacting with others, performing normal yet limited exercise functions, without any assistance.

[19] This stands in sharp contrast to the evidence of Chen and the representations she has made to the medical witnesses that she regularly requires the assistance of a cane and struggles while doing physical activity. It is of note that in addition to this gym activity in the video evidence which she confirms she regularly undertakes, she also testified to swimming on a regular basis.

[20] It is fair to conclude from this evidence that though still injured, some of what Chen said about the extent of her injury is catastrophized or perhaps modestly exaggerated.

[21] The second important aspect of her evidence relates to her volunteer work. It is a credit to Chen that she has undertaken volunteer work, working with children at a daycare. Prior to the accident, she had worked as a teacher's assistant with the Burnaby School District, and despite an attempt to return to work program, she has been unsuccessful in returning.

[22] The fact that Chen is able to do significant volunteer work with children suggests that she does have some residual earning capacity and some ability to work even in the conceded damaged mental and physical state which she currently suffers from, attributable to the accident. It is reasonable to conclude that with additional supports in place, notably psychological counselling, and with the passage of time, this current limited capacity can and should be expanded to the stage where she is able to do more physically and able to earn part-time income.

### **The Evidence**

[23] Chen testified on her own behalf at trial. As of the date of trial, she was 49 years of age. She was born in China and moved to Canada in 1982 when she was 15 years old. She completed highschool in British Columbia, took some education related to computers in Toronto, and returned to British Columbia when she married in 1992. She has two children who at the time of trial were university students ages 22 and 19.

[24] Her recent work history began in 2000 when she started towards a return to work after spending time with her children during their tender years. She initially returned to the area of computer work but decided to take an early childhood education course as she wanted to work with children. She began working part-time with the Burnaby School Board in 2002, spent some time working at a daycare centre and then returned to the Burnaby School District in 2008 part-time. By 2010 she had a regular job with the School District. She spoke at length in her evidence about how much she enjoyed her work and particularly working with one special needs child. Her work hours were 9 a.m. to 3 p.m. daily earning \$27.50 an hour. It

was her evidence that as a result of the injuries from the accident in 2012, she could not return to work.

[25] Her recollection of the first accident was that she was on a day off school shopping when she saw a car coming towards her, had no possibility of exiting, of getting away from the car, and was struck. She was immediately in much pain arising from her leg, her head was bleeding and her whole body ached. She was stuck between the car and a wall. She says she still thinks about the accident. She has scars on her legs and head which remind her of it. Her first two to three months after an initial surgery were spent in a wheelchair. She had a total of three surgeries. The first was immediately after the accident and was on both her legs. The second was on her right leg. The third related to a removal of hardware from the earlier operations, as well as dealing with a possible pinched nerve. She complains of continuous pain. She states that if she goes for any walks, which is rare, she needs a cane although she does not need a cane at the gym. She says that it is painful in her back when she sits and stands and that because of the breaks in her left ankle, she cannot stand for more than 15 minutes. She also complains of shoulder pain radiating to her neck and back.

[26] In terms of cognitive difficulty, she testified to headaches and inability to remember very well. She is on medication for headaches. Her energy level fluctuates. She has good and bad days but she states she is never pain-free.

[27] As noted earlier, her evidence regarding the second accident was to increase her level of anxiety and to some degree her pain for approximately two weeks.

[28] She recalls after the accident there was a psychotic episode in which she was hospitalized for a period of time in regards to mental health concerns. She has recovered from this though she still suffers from anxiety. She described herself as easily angered, tearing and yelling and that she argues much more with her husband than she did before.

[29] As for work, she attempted a gradual return to work doing administrative work for the Burnaby School District. This was unsuccessful. She had back and hip pain, an increased anxiety level. She could not concentrate on the tasks that she was being asked to do. She does do volunteer work at three hours on average once a week on a drop-in basis at a one-to-one literacy program at a daycare. The most she is able to volunteer is 4 to 5 hours a week.

[30] As for treatment, she continues to take physio. She attended at a kinesiologist to develop an exercise program. She goes to the Renfrew Community Centre to exercise 3 times a week and swims 3 to 4 times a week. She says that if she does not exercise her pain increases.

[31] She has concerns about her psychological limitations. She testified that she does not go out of the home without her husband as she is scared. She described herself as a high anxiety passenger, one who screams at the driver if pedestrians get too close. She complains of a lack of socializing as she feels ashamed and somewhat limited due to her perceived need of a cane and her inability to stand or sit for any length of time.

[32] Prior to the accident, she states that she looked after the home with some assistance from her family members. She did about 60% of the household activities in the home and now she does 20%. She cannot do things like vacuuming and laundry and she cannot do things that require her to stand for a lengthy period of time.

[33] Phan took off time from work to assist her. He took one month off after the initial accident, one month off after the second surgery, and attempted to get time off after the third surgery but was unable to do so, so he left his job. He no longer works. This has had a great impact on their family finances. She says that they now continue to operate a homestay business that they had prior to the accidents but it is Phan who undertakes most of the activities associated with the homestay residents. It seems they have bought a second home to perhaps expand this homestay business, perhaps to potentially replace Phan's lost income.

[34] In cross examination, the noted video was put to Chen which she admits is accurate, though she clearly questions the conclusions the defence wish to draw from the video, conclusions that were suggestive of a greater ability to walk unassisted by a cane than she describes in her evidence, a greater ability to do physical activities, such as the gym activities shown in the video.

[35] When questioned about the various doctors and assessments, she seemed confused and unable to answer. She did not recall much of the specifics of the various doctors that she had attended.

[36] In terms of the plaintiff's work activities prior to the accident three people testified. Anne Kang, a resource teacher, Shirley March, a teacher from the Burnaby School District who ran the class that the plaintiff worked in, and Jennifer Baumbusch, a nursing professor whose daughter was a special needs child that Chen worked with both prior to her formal education, in a daycare, and later in the elementary school in which the plaintiff worked, all testified as to the plaintiff's pre-accident work ethic and disposition. All spoke glowingly of the plaintiff's dedication to her job, of her dedication to the child Eleanor who she worked closely with, and of her ability to meet both the mental and physical demands of working as an educational assistant with a severely handicapped child.

[37] These three witnesses also testified to seeing Chen post accident and described her as appearing traumatized, in rough shape, and someone who has appeared to have aged considerably.

[38] Phan, the husband of Chen, also testified. He confirmed that he was the primary caregiver for Chen post accident and that after the accident he initially took 1 to 2 months off work, took time off work after her second surgery, and when he could not take time off work after the third surgery, quit his job. He testified that he stays at the parties' homes, (there appears to be two) where he works in the homes with the homestay students who are their current source of income, but is also at the homes to care for his wife. He drives her to her appointments and to her exercise activities at the community centre and he does much more work around the home

than he used to. He essentially appears to run the family business of homestay students and provides care and assistance to his wife. He testified that he has undertaken the vast majority of household responsibilities that used to be the responsibility of Chen.

[39] Turning to the medical evidence, there is substantial agreement that the serious physical injuries suffered by the plaintiff, were as a result of the first accident. The orthopaedic surgeon called on behalf of the plaintiff, Dr. Donald Garbuz described the pain that Chen suffers from as chronic in nature and he viewed her as someone who will be left with residual pain and substantial disability.

[40] Upon review of the video, he did not resile from his opinion and expressed a lack of surprise in her ability to do the exercises that she appears to be doing in the video.

[41] Dr. McCallum provided a report. He did not testify at trial. The report concludes that Chen could not return to work in her former capacity but he was of the opinion that there may be an option for her to return to a less physically demanding position though he was uncertain as to whether further education would be required to accommodate this.

[42] Dr. Kevin Bush, a plastic surgeon, testified on behalf of the plaintiff. He described the scars on both her scalp and her leg. He described reduced sensation in the area of the scar locations due to the disruption of nerves. He described that after approximately one year from surgery, the scarring will remain constant though there is the possibility of further revisionary surgery or injections to ameliorate the visual effects of scarring. He did confirm that the scarring was more nuisance or inconvenience than anything else.

[43] Dr. Shao-Hua Lu, a psychiatrist, prepared a report and testified on behalf of the plaintiff. The testing on Chen confirmed that she suffers from Post Traumatic Stress Disorder to a mild or moderate level. She scored moderately on the pain catastrophizing scale. Dr. Lu commented on her psychotic episode which led to her

hospitalization under the *Mental Health Act*, and she viewed this psychotic episode as a predictor of future unfavourable outcomes.

[44] Dr. Elsie Cheung, a psychologist, wrote a report and testified about the five treatment sessions that she had with the plaintiff. She testified that she identified problems of lack of coping strategies, memory problems and distress about getting back to work. She described her mood as anxious and tearful when she spoke about these issues. She recommended anxiety management, a pain management course and stated that if she continued to provide treatment, she would work towards cognitive behaviour therapy to improve her Post Traumatic Stress Disorder.

[45] Dr. Sovio, an orthopaedic surgeon, testified on behalf of the defence. On the whole, his balanced evidence suggested that the pain she claims to suffer from and his review of the injuries are consistent. He stated there is no test that can be performed to determine whether the pain is real or imaginary. He agreed that referring to a psychiatrist in terms of the issues of pain is an appropriate consideration.

[46] Dr. Hirsch, a physiatrist, provided a report and testified. He confirmed the pain is a subjective experience and pain can cause memory, concentration, and sleep-related issues. As such, pain could be the cause of the plaintiff's reported cognitive decline. He was skeptical of the plaintiff's use of a cane in light of the surveillance video which he found confirmative of his view. He was not of the belief that there was any functional use for the cane after the plaintiff's recovery from the accident. He noted the plaintiff brought her cane with her to his assessment but did not use it during the assessment.

[47] Other experts testified who are not medical practitioners. These include Mr. Wayne Enright, who is a functional capacity evaluator. He confirmed in his report and his testimony that Chen presents with multiple physical limitations that "restrict her from recreational activities". He described her pre-accident leisure activities as being affected by her limitations after the accident, limitations which he further suggested affect her ability to participate in a competitive labour market. He was of

the view that any employer will be reluctant to hire Chen. This is somewhat inconsistent with the Chen that is viewed in the gym on the video in evidence.

[48] Alice Jackson, an occupational therapist with vocational experience, testified on behalf of the plaintiff. She and a similar expert testifying on behalf of the defence, Dr. Quee Newell, agreed that the plaintiff in her current state was not competitively employable. Jackson felt she would present poorly in an interview and that the assistance of a job coach or the training program suggested by Dr. Quee Newell would not be of assistance to her in terms of achieving a level of competitive employability. She described Chen as facing numerous barriers to returning to work and felt that with her physical restrictions and her cognitive restrictions, there were really no jobs that existed for her.

[49] Jessica Leung is an occupational therapist who worked with the plaintiff in order to assist in a gradual return to work program. She was able to arrange, it appears, a job placement with the Burnaby school district as an office administrator doing desk work and light filing. Chen was unable to manage her pain during this test-run at returning to work and the Burnaby school board was unable to provide other options to try in terms of a return to work program. On cross examination, she was able to confirm that Chen was able to successfully interact with children at a one-to-one literacy program as a volunteer. She worked, it appears, in stints up to three hours but in the work that she was doing she was able to move or adjust herself, reposition herself, every 30 minutes or so.

[50] Phil Towsley is an occupational therapist. He conducted a number of tests during an independent medical examination of the plaintiff. During the walking test, he observed the plaintiff to complain of a painful gait and to use a cane during the test. However, at the lunch break he observed her walking 800 metres to a grocery store, approximately 10-15 minute walk, and observed her walking and crossing the street at a non-controlled intersection. He noted that her gait was improved and she was less reliant on a cane.

[51] Dr. Quee Newell provided evidence for the defence. In her report she suggested that Chen's "well-entrenched" disability conviction was a significant barrier to vocational rehabilitation. She felt the plaintiff might improve through a specified program entitled PJAP Program, with a cost of \$1,300. As I understand in evidence this is a program that assists people with PTSD and depression.

### **Conclusions to be drawn from the Evidence**

[52] There is no doubt that Chen was significantly injured in the first motor vehicle accident which occurred on the 9th of April, 2012. As of the date of trial, she still has some physical limitations but a fair assessment of her injuries and her prognosis suggests that the majority of her disability affecting her future relates to a combination of post-traumatic stress disorder, catastrophizing, and the cumulative effect of pain on her general outlook on life and her perception of herself as a disabled person. I do not doubt however she still suffers pain.

[53] What stands out from the evidence is the complete lack of any significant psychiatric or psychological assistance provided so far to this plaintiff, or undertaken by this plaintiff on her own, which a number of the experts suggest would limit her disability and potentially get her to the stage where she has some prospect for work, as well as improved function and capacity, even with the pain.

[54] I disagree with the suggestion of the defence that Chen will get to the stage in her life where the physical effects of this accident no longer affect her. Their suggestion that there will be improvement is, on a balance of probability, a hopeful expectation but the evidence is clear that many of the physical limitations that the plaintiff suffers from are chronic or permanent. They are simply not going to go away.

[55] What I find likely to improve would be her ability to deal with these difficulties and improve her function and improve her outlook on life. This realistic improvement is predicated on her getting what she appears to have lacked to date, which is significant psychiatric or psychological assistance.

[56] On that basis, I cannot accept the plaintiff's total claim in regards to future loss of capacity and the cost of future care as appears to be predicated on the provision of additional services to the plaintiff, including significant costs for psychiatric and psychological services, but with no prospect of these additional supports providing an amelioration of the current difficult situation that Chen finds herself in.

[57] Based on those findings drawn from the evidence, I now turn to the assessment of damages.

### **Non-Pecuniary Loss**

[58] The plaintiff suggests non-pecuniary loss in a range of \$200,000 for the first accident and \$2,500 for the second accident, a position in regards to the second accident which I agree with. The defence suggests an award in the neighbourhood of \$125,000.

[59] The plaintiff at the time of trial was 49 years of age. As a result of the injuries in the first accident she was required to have three surgeries primarily on her legs. She still suffers from pain in her legs and her back which are chronic and unlikely to improve. The pain manifests itself in an inability to stand for more than 15 to 30 minutes. The pain also results in headaches. There is significant scarring on her legs and her head which cause her a high level of anxiety.

[60] In addition to these physical symptoms, the plaintiff currently suffers from Post Traumatic Stress Disorder and is a very anxious individual who, as a result of the injuries suffered in the accident, has a tendency towards catastrophization. She suffered a psychotic episode shortly after her first surgery which resulted in hospitalization. She describes herself as easily angered, and this has affected her relationship with her husband and her inability to socialize generally. She believes she has a significant reduction in her cognitive ability which the expert evidence suggests may have its source in the Post Traumatic Stress Disorder or as a side-effect of the pain she deals with, or both.

[61] I find her to currently be a considerably damaged individual but I also accept the suggestion of the defence experts that with time and psychological or psychiatric intervention, her ability to cope should improve.

[62] Having reviewed the cases provided by the plaintiff, I note particularly the decision of *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 where a similarly aged plaintiff suffered injuries which prohibited him from working and resulted in pain, anxiety and depression and also resulted in an inability to provide care for his children and created a situation of limited social interaction with friends. There was a negative prognosis for both physical and psychological improvement and the court ordered damages in the amount of \$180,000.

[63] The case of *Farand v. Seidel*, 2013 BCSC 323 involved a younger plaintiff who was seriously injured and required surgery involving the insertion of a plate with metal screws. Similar to Chen, she was in a wheelchair for a number of months after the accident, she initially walked with a cane and was eventually able to walk unaided. Post accident she suffered from an anxiety disorder and did not resume driving for two years after the accident. She had had some psychological treatment and counselling. She was unable to return to her previous employment. She found bending and stooping required to work with young children to be difficult. The court awarded damages of \$130,000.

[64] In my view Ms. Chen's circumstances fall within the range of these two cases though I find that her injuries are more significant than the plaintiff in the *Farand* case, they are longer lasting and provided greater level of disability. I note as well that Ms. Chen has undertaken three surgical interventions as a result of the injuries occurred in the accident.

[65] In all the circumstances, I award non-pecuniary loss at \$170,000, of which \$167,500 is attributable to the first accident and \$2,500 is attributable to the second accident.

**Past wage loss**

[66] The past wage loss articulated by the expert Darren Benning, economist, calculated past wage loss at \$131,225. In their closing submissions, the defendants viewed this calculation as “fairly calculated”. I accept that the past wage loss suffered by Chen is \$131,225 and I make that order for past wage loss.

**Special Damages**

[67] The parties have agreed that \$13,914.07 is an appropriate award for special damages and I make that award.

**In Trust Claim**

[68] The plaintiff’s husband Phan gave up his job when his wife required the third surgery in order to assist her in her recovery. He has maintained his lack of outside work because of the necessity at least in part, of assisting his wife and the joint financial decision for him to spend his hours running the home-stay business the parties have operated, a business which appears less significant while run by Chen prior to her accident. In addition to running this family business and undertaking the lion’s share of the household domestic responsibilities including housekeeping, Phan also assists Chen in her care in that he is available to drive her to her doctor’s appointments and of note drives her to the community centre and the pool which all experts agree are crucial for the plaintiff’s physical and mental well being.

[69] I agree with the plaintiff’s submission that an In Trust claim of \$50,000 is appropriate and I make such award in trust for Phan.

**Loss of Future Capacity and Cost of Future Care**

[70] These are clearly the two most contentious issues between the parties at trial and in their closing submissions in terms of quantum of damages.

[71] Speaking generally, and only generally, the plaintiff’s position in regards to these areas of damages is again predicated on Chen being in the continued damaged state that she is with no prospect of improvement and no prospect of

contribution towards her future earnings and limited prospect of contribution towards her future care.

[72] That is not the circumstance that I find Chen to be in.

[73] On the converse, the calculation of these losses suggested by defendant is on a formulatic scale which suggest that by 2021, five years after trial, the plaintiff would be in a position to earn income at the rate she did prior to the accident and would have a limited need for care from that point on. That in and of itself is somewhat naïve suggestion and not based on the evidence before me.

[74] Again, what struck me in this case is that we have a plaintiff who is clearly suffering from post traumatic distress disorder, catastrophization, and generally poor mental health who has not, despite this being several years post-accident, received significant treatment for these clear disabilities. To suggest that she will never improve is naïve but to suggest she will fully recover is equally naïve. The proper approach, in my view, is to start from a prospect of non-recovery and add a significant contingency for the realistic prospect that, with intervention, Chen's circumstances would likely improve.

### **Loss of Future Capacity**

[75] The Benning Report estimates the loss of future earning capacity on the mathematical formula on which it is based at \$473,621. As I read the report, this report is an extrapolation of what her income was prior to the accident including the benefits of her loss of pension, extrapolated to her estimated date of retirement. It is a mathematical approach which I find to be appropriate in this circumstance. This figure was already reduced for one contingency, in the amount of \$80,000, to reflect the possibility that she might become unemployed or voluntarily withdraw from the workforce.

[76] The plaintiff argues that this withdrawal from the workforce possibility or contingency should be substantially reduced because of the evidence presented

which suggests that Chen has a strong attachment to her work and was someone who was most unlikely to voluntarily leave work.

[77] Despite this assertion, I accept the Benning contingency as reasonable. I agree then that a complete loss of earning capacity is fairly calculated at \$473,621.

[78] This figure however does not take into account the fact that I find that there is some residual earning capacity in Chen. At the time of trial, she was 49 years of age and without significant psychiatric or psychological counselling, she is able to do volunteer work with young children though on a limited basis. This is clearly an activity she enjoys. It is most similar to the work she did without the physical needs associated with working with young handicapped children in a school setting. This volunteer work could, with respect, be turned into a remunerative employment though that would be modest under her current circumstances. There is a likelihood, with psychiatric and psychological intervention, that this would further improve.

[79] In all those circumstances I would add a further contingency to the calculated loss of \$473,261 which is based on the reasonable prospect that with psychological assistance, Chen will be able to better deal with her PTSD and would be able to earn some modest future income.

[80] Noting that this is an assessment, not a formulatic calculation, I will assess loss of future earning capacity at \$325,000.

### **Cost of Future Care**

[81] The claim for cost of future care is \$670,500. The most significant of this cost relates to counselling and psychologist's intervention. Absent any psychological therapy, the claim for cost of care is \$433,390.

[82] In terms of the non-psychological therapy claims, the attendance at the pain clinic is a reasonable request save and except for the cost of the taxi fares. I would reduce the present claim for this attendance at a pain clinic by the \$1,401 claimed for taxi, insert the cost of \$200 for gasoline for her husband to drive her as he does,

thus reducing the claim from \$18,466 to \$17,265. This pain clinic is suggested by the health care professionals who testified and is reasonable to assist her in getting over the effects, to some degree, of her constant pain.

[83] The claim for assistance with domestic tasks is most considerable.

[84] The first aspect of the claim is for household equipment and this totals \$5,217. The claim for robotic vacuum, long-handle duster, and kitchen stool are reasonable claims. They will assist in allowing Chen to do more in the house, or replace what she had earlier been able to do. A slow cooker however is, in my view, a standard kitchen appliance, not necessitated due to the accident or crucial to any recovery. I would not allow that aspect of the claim which is \$506. As such, I would allow household equipment at \$4,711

[85] In terms of the claim for household cleaning to age 75, this is predicated on, in my view, an excessive number of hours claimed, being 8 hours per week. I note the evidence that Chen can't do laundry and vacuuming that she used to do. I further note she can't do food prep that involves long periods of standing. The claim for appliances noted above assist in this.

[86] Additionally, there are apparently 4 adults in the home at the time of trial, and I do not accept her evidence that she did housework 3 hours per day prior to the accident as that seems excessive.

[87] As such, for domestic assistance, I would allow \$150,000 for house cleaning to age 75, roughly 4 hours per week, and \$23,016 from age 75 to 85 is claimed. These claims total \$173,016 for household cleaning assistance for the balance of her life. That total, with the household equipment noted above, totals \$177,727 for domestic task performance.

[88] In terms of therapeutic exercise, I would allow the fitness pass claim at \$9,699 and the kinesiology support of \$11,406 for a total of \$21,105. There is insufficient evidence that the plaintiff would benefit or is inclined to take yoga, meditation or tai-chi and I would not allow those claims.

[89] The claim for the TENS machine and electrodes is a modest claim at \$3,861 and is medically justified, I would allow those claim.

[90] Further, the claims for improved mattress and reclining living room chair and lightweight back support which total, over the course of the claimant's life, the sum of \$28,017 are all reasonable claims, justified on the evidence and I would allow that claim. Tylenol is regularly used by this plaintiff to provide relief from her chronic pain, that claim of \$4,188 is allowed.

[91] In terms of the psychological intervention, I believe that this is crucial to the plaintiff's recovery. A psychological assistance averaging, for the remainder of her life, twice per month, is a reasonable assessment. I would anticipate that in the early years, the next three to four years, this intervention would likely be weekly, and in the latter portion of her life it would be monthly or even less. Twice per month on average is a reasonable assessment in light of the clear need and I would assess those costs of future care at \$122,380.

[92] As such, I assess the total cost of future care at \$374,543.

**Conclusion**

[93] Based on what I have said above, I have determined damages of Chen as follows:

Non-pecuniary loss	\$170,000.00
Past Wage loss	\$131,225.00
Special Damages	\$13,914.07
In Trust Claim	\$50,000.00
Loss of Future Capacity	\$325,000.00
Cost of Future Care	\$374,543.00
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Total Amount	\$1,064,682.07

[94] As also noted above, of this total, \$2,500 is attributable to the second accident for which I have found Sandor to be liable. The balance, \$1,062,182.07 is the responsibility of the defendant Lam.

### **Costs**

[95] The plaintiff has been successful in establishing liability against Sandor in regards to the second accident. In regards to the first accident, Chen has seemingly been successful in her claim for damages.

[96] It would seem to me that Chen is entitled to costs on Scale B but if parties need to make further submissions in that regard, or in regards to any issues arising from this judgment, they should arrange with trial scheduling in Vancouver within the next 45 days to set the matter before me at some point in the near future.

“Groves, J.”