

JUDGE FINDS THE DEFENDANT 100% LIABLE AND AWARDS \$1.8 MILLION TO THE PLAINTIFF, DESPITE PRE-EXISTING CONDITIONS.

CHENG V. MANGAL 2021 BCSC 954

The Reasons for Judgment of The Honourable Madam Justice Gerow were given on May 19, 2021, at Vancouver, British Columbia.

The plaintiff, Cheng Cheng, was involved in a motor vehicle accident on November 2, 2016. She seeks damages for the injuries she alleges she suffered in the accident. Ms. Cheng was 46 years old at the time of the accident.

The defendant denies that he is fully responsible for the collision and submits that liability should be apportioned equally.

The defendant concedes that the plaintiff sustained a substantial exacerbation of previous physical and psychological complaints as a result of the accident. There is no issue that the plaintiff is disabled from employment, and has sustained significant changes to her personality, cognition and her ability to function. However, the defendant argues that the plaintiff's pre-existing condition and residual capabilities must be considered in any award for her injuries.

LIABILITY FOR THE ACCIDENT

The Plaintiff and defendant gave different versions of how the crash occurred.

The Plaintiff was driving eastbound on Southeast Marine Drive and was turning left onto Main Street when the accident occurred. The defendant was travelling westbound.

The police attended the scene, and the defendant was required to take a breathalyzer test twice. A fail was recorded both times. The defendant's blood alcohol concentration was between .06 and .099. The defendant's vehicle was impounded, and his driver's license was suspended for seven days.



Following the collision both vehicles were written off. The plaintiff testified that the vehicle in front of her had completed his left turn when the light was amber. When the westbound traffic in the middle and left turn lane had stopped and the light had turned red, the plaintiff proceeded to make her turn. As she was completing her turn the defendant sped into the intersection on the red light in the curb lane of the westbound traffic and hit her vehicle, causing it to spin out of control across the intersection before hitting a lamp post. The plaintiff suffered a loss of consciousness.

The defendant testified that he saw the plaintiff's vehicle at a complete stop in the left-hand turn lane with her left turn signal on when he passed the middle of the median dividing the east and westbound lanes. He does not know if the plaintiff's vehicle was wholly in the left-hand turn lane or had advanced into the intersection when he first saw it. He went on to testify that there were no cars ahead of him and the light was green. As he crossed the crosswalk nearest to him the light turned yellow. He testified that he was well into the intersection when he saw the plaintiff turning left. He slammed on his brakes and the two vehicles collided. According to the defendant the light was still amber at the time of the impact. The defendant submits that the plaintiff's credibility is of central significance to the proceeding. He submits that the plaintiff was inconsistent in her evidence about whether she knew which lane the defendant's vehicle was travelling in.

Madam Justice Gerow states "In my view, the defendant's credibility is in issue." She found his testimony regarding the amount of alcohol he had consumed to be at odds with what he told the police officer at the scene. Similarly, his evidence regarding when the light turned yellow, when he saw the plaintiff's vehicle, and his speed at the time of impact, to be either inconsistent or did not make sense. The court accepted the plaintiff's evidence and "Accordingly, I find the defendant wholly at fault for the accident".

Nature, extend and duration of the injuries suffered by the plaintiff in the accident

The plaintiff submits that she suffered injuries to her neck, shoulder, arms, jaw, back, hips, left knee and a mild traumatic brain injury. She has been in constant pain since the accident. She has suffered post concussive symptoms of headaches, ongoing dizziness and balance issues which result in her having to use canes in order to walk. Her ongoing symptoms affect every aspect of her life. She has been unable to return to work, look after her home or care for her husband who, at the time of the accident had been suffering from cancer for a number of years and required assistance with his care. He passed away in 2018. In addition, Ms. Cheng testified that she has been unable to participate in the same physical, religious or social activities. Despite some improvement in her pain and post concussive symptoms, the plaintiff continues to have persistent ongoing chronic pain, headaches and dizziness that impede her function in all domains. In addition, her cognitive functions have been impaired. She has suffered from confusion and slow thinking and is unable to manage her finances.



The defendant concedes that “the plaintiff sustained a significant and profound reduction in her physical and psychological function as a result of the injuries she sustained.” However, he argues that the evidence suggests that she is capable of doing more than she says she is able to do. Clinical records of the family doctor note that in the months after the accident the plaintiff advised she had been “shovelling snow, riding an exercise bicycle, and doing ‘lots of gardening.’” The defendant also points to the fact that the plaintiff was having regular physiotherapy treatment for elbow and back pain prior to the accident, and that she suffered from depression.

The court stated that “A plaintiff is not required to establish that the defendant’s negligence is the sole cause of his or her injuries. A tortfeasor must take his or her victim as the tortfeasor finds the victim, and is liable even if other causal factors, for which the tortfeasor is not responsible, result in the victim’s losses being more severe than they would be for the average person.”

MEDICAL EVIDENCE

The plaintiff’s family doctor, Dr. Adam Chang, prepared a report and testified. He saw the plaintiff on November 3rd, 2016, the day after the accident. He diagnosed a head injury, most likely concussion, neck, shoulder and back soft tissue strain and left knee contusion. As of November 5, 2020, she was still experiencing daily headaches and having ongoing dizziness. She was suffering from ongoing pain in her neck, upper back and lower back and hips as well as low mood. Dr. Chang opined that the plaintiff’s concussion/closed head injury, concussion related symptoms, soft tissue injuries and knee contusion, were all a direct result of the accident. At the time of the accident she was working full time as a care aid, taking care of her household chores and family including a disabled husband. Dr. Chang is of the opinion that the plaintiff has been experiencing PTSD as a result of the accident and although she had had a history of depression pre-accident, in his opinion her depression had worsened since the accident. She has been quite disabled from her general function and cannot work due to her severe physical and psychological symptoms and he stated as well that it is unsafe for her to drive because of her cognitive impairments and poor insight. Her prognosis is poor and it is unlikely that she will be able to drive safely, nor participate in any employment in the future.

Dr. Neville Schepmyer, treating neurologist, first assessed the plaintiff in December 2017. He is of the opinion that the plaintiff suffered a mild traumatic brain injury (MTBI) as a result of the collision. Her headaches fulfill the diagnostic criteria for chronic migraines. He reported significant worsening of her mood after the accident. In his opinion the accident is the primary cause of the plaintiff’s daily headaches, dizziness, motion sensitivity and neurocognitive symptoms. He noted that she has significant psychiatric symptoms related to her depression and PTSD and suspects that these comorbidities are contributing to her ongoing neurocognitive complaints and her slow and incomplete recovery after the



accident. He is also of the opinion that she will not be able to return to work for the rest of her life and is prevented from social and domestic activities as a result of her injuries sustained in the accident. His prognosis for further recovery is guarded.

Dr. Soma Ganesan is an expert in psychiatry. He provided a report and testified. Dr. Ganesan assessed the plaintiff on May 2, 2019 and October 15, 2020. Dr. Ganesan conducted a mental status examination on October 15, 2020. He noted that she relied on two canes to walk and walked slowly. She frequently cried though the 1.5 hour assessment. Dr. Ganesan notes that at the time of the accident the plaintiff was on a variety of anti-depressants and was taking gabapentin (a pain medication). However, she was able to work full time and functioned at the appropriate level as a nurse aid. Dr. Ganesan's evidence continued as follows:

“[55] Dr. Ganesan's opinion is that as a result of the accident the plaintiff's psychological difficulties have been aggravated. The accident caused severe PTSD, severe anxiety symptoms (particularly related to traffic and being in a car), severe depressive symptoms and post-concussion symptoms. As of October 23, 2020, the plaintiff continued to suffer from PTSD with ongoing moderate symptoms, major depressive disorder, moderate to severe with associated features of anxiety, and a MTBI. Dr. Ganesan noted there had been an improvement in her Montreal Cognitive Assessment (MoCA) score but it was still at a deficit level.

[56] Dr. Ganesan noted that the plaintiff's pain symptoms appear to have progressed to being chronic. If there is no effective intervention to assist her and no findings to explain the pain, the plaintiff would meet the criteria for a diagnosis of Somatic Symptom Disorder. Somatic Symptom Disorder is a new diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) to describe people with ongoing pain symptoms and associated psychiatric symptoms.

[57] In Dr. Ganesan's opinion the plaintiff's cognitive function could be affected by her ongoing PTSD, depression and anxiety symptoms. Dr. Ganesan recommends the ongoing use of medication to help the plaintiff with her sleep difficulty and depressive and anxiety symptoms. As well, he recommends the plaintiff receive continuing psychological support. Dr. Ganesan does not expect any further improvement in her psychological symptoms of PTSD, depression and anxiety. However, the treatment would help to prevent her symptoms from getting worse as the plaintiff is at risk of having an aggravation of her symptoms if exposed to further severe psychological stressors. Dr. Ganesan's opinion is that there is no possibility of the plaintiff returning to any employment.”



The Court also heard testimony from Jessica Mullins, occupational therapist, who provided a functional capacity evaluation and a cost of future care report. She reported that due to her sensitivity to light/noise, low mood, dizziness, pain and anxiety the plaintiff demonstrates low activity tolerance. In Ms. Mullins opinion she does not have the functional capacity to return to her previous full-time employment as a care aide. She would have to improve significantly to entertain a return to work in an alternate occupation.

Dr. Steven Dommann, Neurologist, provided a report and testified. In Dr. Dommann's opinion the plaintiff suffered an MTBI as a result of the collision, however the types of symptoms that the plaintiff is experiencing normally last two months according to Dr. Dommann. In his opinion, many of the plaintiffs symptoms are likely due to her depression, but he would defer to a psychiatrist. His prognosis is dependent on the management of her psychological symptoms.

MADAM JUSTICE GEROW DISCUSSED THE MEDICAL EVIDENCE AND FOUND AS FOLLOWS:

“[65] I find that the plaintiff sustained a MTBI and concussion, and soft tissue injuries to her neck, shoulders, back, pelvis, left hip and left knee in the accident. Insofar as the defendant suggests that the plaintiff's ongoing complaints are the result of pre-existing psychological problems and degenerative conditions in her spine, there is no evidence that the types of symptoms the plaintiff is currently suffering from would have occurred but for the accident.

[66] Although the accident is not the original cause of the plaintiff's depression, there is no evidence that she was unable to function prior to the accident. All of her family and friends who testified said there was a marked change in the plaintiff's mood and personality after the accident.

[67] None of the medical experts suggest that the plaintiff's symptoms will resolve regardless of the treatments she receives or the steps she takes. According to Dr. Ganesan, at best, the psychological treatments will result in the plaintiff not getting worse. [emphasis added]

[68] Accordingly, I find on a balance of probabilities that as a result of the accident the plaintiff will continue to suffer from chronic pain, headaches, and dizziness. As well, she will continue to suffer from psychiatric symptoms of depressed mood and PTSD.”

When discussing an appropriate award for general damages for pain and suffering, Madam Justice Gerow turned to the evidence of the plaintiff and the plaintiff's friends and family. It was apparent from their testimony that she has suffered a dramatic change to her physical abilities, her emotional state, personality and cognition following the accident.



“[76] At the time of the accident, the plaintiff was an active, hardworking and healthy 46 year old woman. She had no limitations or concerns at the time, aside from her low mood stemming from temporary work issues, which had been resolved before the accident, and her husband’s diagnosis of cancer. The plaintiff’s husband was diagnosed with Chordoma cancer in 2008, affecting his brain and spine. Between the time of his diagnosis, and the time of his death in August 2018, he had several surgeries. The plaintiff was her husband’s main caregiver before the accident.

[77] At the time of the accident, the plaintiff was working full time, doing most of the household chores and shopping, and caring for her children and disabled husband. In addition to working, and caring for her family, the plaintiff was socially active prior to the accident. She volunteered at and attended the Buddhist temple in Richmond with her family. The plaintiff also enjoyed gardening, shopping, going to restaurants and playing Mahjong with her friends.”

The plaintiff testified that her memory has been impacted. She used to be able to separate the languages she speaks, being English, Cantonese and Mandarin, but now she gets them mixed up.

The plaintiff’s daughter, Puyee Li (age 26), son, Halliwell Li (age 20), sister Chrystal Ching, and two friends testified about the changes they observed. Ms. Ching said there was a significant change in the plaintiff’s personality. “She went from being smart and alert to being like someone in her 80s who needs constant support.” Ms. Ching has to schedule her sister’s appointments and send her reminders. She states that the plaintiff no longer wants to socialize and becomes irritable and lashes out at her family. Their relationship has become strained as a result.

Ms. Ching, as well as the plaintiff’s children have become concerned about her poor decision making and irrational spending, stating that she was thrifty before the accident, but now she purchases jade from online shops that are not reputable. She apparently took money out of her son’s registered education plan fund even though he needs it to go to school. Ms. Li testified that her mother gave her passport information to a scammer. Both of the plaintiff’s children live with her and they testified to the personality changes they have witnessed, including volatile mood and crying easily. The plaintiff is no longer capable of managing complex paperwork, such as her personal banking and government documents. Ms. Li and her brother have taken over the management of household finances. They are concerned that she may not be able to live on her own in the future. The plaintiff’s friends testified that their social relationships with the Plaintiff have changed drastically, and they confirm the personality changes that the family members have already mentioned. Madam Justice Gerow stated:



“[117] In my view, the medical expert evidence, and the evidence of the plaintiff and her family and friends supports a finding that the accident has had a very profound effect on the plaintiff’s mental and physical capabilities. She can no longer care for her family, drive, or enjoy her pre-accident activities. The evidence is that the plaintiff’s personality has changed, and she has become obstinate and irritable. As a result, her relationships with her family members and friends are strained.”

IN MAKING AN AWARD FOR NON-PECUNIARY DAMAGES MADAM JUSTICE GEROW FOUND:

“[119] Having considered the extent of the plaintiff’s injuries, the fact that the symptoms have been ongoing for four years with little improvement, the plaintiff’s age, the guarded prognosis for any further improvement, and the other factors set out in Stapley, as well as the authorities, I am of the view that the appropriate award for non-pecuniary damages is \$225,000.”

In the matter of future wage loss, the defendant submitted that the plaintiff may have some residual earning capacity that ought to be taken into consideration as a possible contingency. The Court found that the medical evidence supports the finding that the plaintiff will not be able to return to work in the future.

SUMMARY

In summary, Madam Justice Gerow awarded the following amounts.

Non-pecuniary damages	\$225,000.00
Past income loss	\$214,927.00
Loss of future income earning capacity	\$750,000.00
Loss of housekeeping capacity	\$50,000.00
Cost of future care	\$592,758.00
Special damages	\$47,883.24
TOTAL:	\$1,880,568.24

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The full Reasons for Judgment of The Honourable Madam Justice Gerow [CAN BE FOUND HERE:](#)

WRITTEN BY STELLA GOWANS, PARALEGAL

**IF YOU WOULD LIKE TO BOOK AN ASSESSMENT WITH DR. SOMA GANESAN, PSYCHIATRIST,
PLEASE CONTACT US AT INTEGRA**