

CANADA / JUDGMENT

Xiang v. Wong

2023 BCSC 1984

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1984 Xiang v. Wong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xiang v. Wong,

2023 BCSC 1984

Date: 20231115

Docket: M166362

Registry: Vancouver

Between:

Jing Yun Xiang

Plaintiff

And

Siu Kwan Wong

Defendant

- and -

Docket: M166364

Registry: Vancouver

Between:

Diqiu Xiang, an infant, by her litigation guardian, Wen Na Di

Plaintiff

And

Siu Kwan Wong

Defendant

And

Jing Yun Xiang

Third Party

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

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Place and Dates of Trial:

Vancouver

October 23-27, 30, 2023

Place and Date of Judgment:

Vancouver

November 15, 2023

I. Introduction

- [1] Around 7:30 pm, on August 27, 2014, just after her sixth birthday, the plaintiff Diqui Xiang (the "daughter") was struck by the eastbound defendant's car while crossing a marked crosswalk on Sanders Street (running east-west) just east of Marlborough Avenue (running north-south) in Burnaby. It is a T-intersection, with the Marlborough School playground on the north side. The daughter, with her father, the plaintiff Jing Yun Xiang (the "father"), and her then-two-year-old younger brother, were walking east, from their Sanders Street apartment just west of the intersection, to cross the crosswalk to the playground. Conditions were sunny and clear.

- [2] The daughter, through her litigation guardian, her mother, seeks general damages for injuries to her left leg and minor psychological injuries. The father seeks general damages for nervous shock. Neither plaintiff claims for loss of future income, or for other heads of damages typically sought in personal injury claims. The two actions were tried together.

II. The Accident

- [3] Four witnesses described the accident: the two plaintiffs, the defendant driver, and Ms Maxwell, an independent witness.
- [4] Ms Maxwell lived in the same apartment building as the Xiangs. By coincidence, she shared an elevator with the Xiangs, exited the apartment building with them, and then, on the walk toward the crosswalk, walked beside and then passed the Xiangs. She testified that the children appeared "excited" to go to the playground. Ms Maxwell reached the crosswalk curb, where she saw the defendant's approaching car. It was not far down Sanders Street. She saw that it would not stop at the crosswalk. She looked down to secure her dog from entering the crosswalk.
- [5] All four witnesses agree that the daughter was ahead of her father and brother as they were crossing Marlborough towards the crosswalk. It is also undisputed that the father was not holding his daughter's hand, but was hunched over, with his head down, focused on helping his infant son on his push-bike. The daughter described the father and son as walking some distance behind her, on Marlborough, with the father helping the son manage "some complication with his bike."
- [6] The plaintiffs admitted, in testimony and in their documentary recounts of the accident afterwards, that they have little specific recollection of the details of the accident. The father said that his mind "shut down" at the accident; he told the psychiatrist Dr Ganesan that "he has no clear memory about the whole incident." Both plaintiffs repeatedly stated that it was hard to recall because it happened so long ago. Both had to describe the accident through logical reconstructions of what they likely would have seen and done, with phrases such as "I must have because " The father admitted that much of his testimony concerning the accident was based on "reasoning, using logic." For example, both thought, based on what they believed they would have done, that the daughter asked her father's permission to cross the intersection, and that they each looked both ways to confirm that there was no approaching vehicle. The daughter stated on direct that "I remember asking my Dad because that's what we usually do, so I think I did that; I don't remember specifically, but I asked my Dad if I could cross." On cross, she said "I think he probably I think he said OK; otherwise I wouldn't have crossed " On whether she saw an approaching vehicle: "I don't remember what I saw, but if I had seen anything I wouldn't have crossed." She conceded that "I might have seen a car far away, but it's a very slow road and lots of people cross there so I don't think I would have minded " On her speed, she said "I probably didn't run." It is clear that these reconstructions, understandable given the passage of time and her young age at the time of the accident, were based to some extent on her later discussions with her father:

"hearing my Dad talk about it "

- [7] Given the totality of the facts, and, in particular, the evidence of the independent witness, however, it is clear that neither plaintiff adequately looked west towards the approaching car, if at all. The plaintiffs, heading east across Marlborough, would have had to swivel around backwards to check; unlikely given the father's hunched posture and focus on his toddler son, and the daughter's focus on the park. Based on the testimony of Ms Maxwell and the defendant, the defendant's car would have been readily seen had the father or daughter looked west down Sanders.
- [8] I also accept the testimony of the daughter and father that the father told the daughter that she could cross Sanders.
- [9] Both Ms Maxwell and the defendant confirm that the daughter suddenly started across the crosswalk. The defendant believes that the daughter sheered from mid-Marlborough towards the middle of the crosswalk; Ms Maxwell was unsure of the daughter's starting point. Both confirm that the daughter's movement was swift and sudden. In her police witness statements, Ms Maxwell described the daughter as "running", and that she "darted into traffic", as did the defendant in her testimony. The daughter herself confirmed that at that age she was a "bouncy" and "very energetic" child; while she denied running, she acknowledged that she might have "skipped" across the intersection.
- [10] I turn to the defendant's perspective, which evidence I generally accept. She was driving at approximately 50km an hour, the permitted speed limit outside of the 30km limit from 8:00 am to 5:00 pm on school days. Approaching from the west, down Sanders, she noticed Ms Maxwell and her dog, and the Xiangs, to the right, and saw the crosswalk in the distance. The crosswalk was clear. As she approached the intersection, she saw the Xiangs crossing Marlborough towards the crosswalk corner. When she saw the daughter dart out, she jammed on her brakes, honked, and veered slightly left in avoidance. The mid-street position of the vehicle, slightly turned to the left in accident photographs, confirms the left-veer avoidance and shows that the vehicle stopped about two feet into the crosswalk.
- [11] The defendant saw the daughter fall. She did not feel any impact, and was unsure if the car actually hit the daughter.
- [12] I accept the evidence of Ms Maxwell and the defendant that the daughter was not thrown by any impact with the car. I accept Ms Maxwell's recall that the daughter was not even initially knocked down; after impact, she sought to steady herself, and then, after a moment, fell. The impact was very light: a bump, not a hit.
- [13] The father at first testified (and recounted to medical professionals) that he heard the screech of tires, and saw his daughter thrown one or two metres by the impact. He later admitted, however, that he did not see the moment of impact. Further, no other witness heard any braking screech.

[14] It is undisputed that right after she fell, the daughter stood up, on her own power. She was not crying. She did not strike her head. The knees of her tights were partly torn. She had superficial scrapes on her left knee and the front of her ankle, with no bleeding. She also had a bruise on her elbow. A video of the scene shows her bending down and lifting her leg to assist the officer in assessing her injuries. Out of precaution, an ambulance took her to the hospital. She was soon discharged with instructions to take Tylenol and apply Polysporin to the scrapes.

III. Liability

[15] While the defendant acknowledges that she must bear some responsibility for the accident, she argues that all three parties bear responsibility for the accident: fault should be allocated 20 percent to the daughter, 40 percent to the father, and 40 percent to the defendant.

[16] The Court is assisted by Justice Elwood's thorough canvassing of the law in the recent decision of *Panganiban v. Sovdat*, 2023 BCSC 650, which also concerned a young person struck in a marked crosswalk. In that case, the Court found that the driver had the right of way, being sufficiently close to the crosswalk such that it was impracticable to stop, but was nonetheless 80 percent liable for the accident.

[17] *Panganiban* sets out the legal framework, in which determination of who had the right of way informs but does not dictate the negligence analysis:

[28] The starting point for an analysis of liability in a motor vehicle action is a determination of who had the right of way under the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA]. Generally speaking, the party with the right of way is entitled to assume that other users of the road will obey the rules of the road. However, the rights of way in the MVA are not an exclusive or exhaustive code. They are not a substitute for the common law duty to exercise due care for the safety of other users as well as one's own safety. Instead, they supplement the duty of care: *Cook v. Teh* (1990), 45 B.C.L.R. (2d) 194, 1990 CanLII 1077 (C.A.) at 203; *Salaam v. Abramovic*, 2010 BCCA 212 at paras. 18-21.

[emphasis added]

[18] *Panganiban* notes that the Motor Vehicle Act, RSBC 1996, c 318 determines which party had the right of way:

[29] The rights of way between vehicles and pedestrians at a crosswalk are set out in s. 179 of the MVA:

Rights of way between vehicle and pedestrian

179(1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.

- (2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

...

[30] In *Pirang v. Kooy* (1993), 76 B.C.L.R. (2d) 396 at 398, 1993 CanLII 1206 (C.A.), the Court of Appeal endorsed the following statement by a trial judge as the correct interpretation of what is now s. 179 of the MVA:

These subsections place an obligation on a motorist to maintain an ability to yield the right of way to a pedestrian as he approaches the crosswalk. In order to do this he must remain ready and able to bring his vehicle to a stop if the pedestrian elects to exercise her right of way. When the vehicle is so close to the crosswalk that it is impracticable for its driver to yield the right of way to the pedestrian the obligation shifts to the pedestrian to yield the right of way to the vehicle.

[31] The Court found support for this interpretation in the plurality of reasons in *Cook*, where Justice Wallace in his dissenting reasons at 210-211 and Justice Wood in his concurring reasons at 220, accepted the following interpretation of the section:

- (1) A pedestrian who desires to cross a highway in a cross-walk must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close that it is impracticable, i.e. when there is no "time" ("time" being the product of "speed" X "distance") for a driver to yield the right of way and
- (2) Having discharged such obligation both to himself and to the drivers of such vehicles, the pedestrian may then commence his act of "crossing" and the drivers of approaching vehicles (none of whom fall into the category of being "so close") must then yield the right of way to the "crossing" pedestrian. The result is a rational, reasonable and predictable code of conduct for motorists and pedestrians alike .

[emphasis added]

[19] After determination of who possessed the right of way, the court must still consider the driver's common law duty of care to avoid hitting the pedestrian:

[32] The Court confirmed that a right of way does not end the obligation of the driver approaching the crosswalk; a driver still has a common law duty of care to avoid hitting the pedestrian (*Pirang* at paras. 9-11).

- [33] In Pirang, the trial judge had dismissed a claim by a pedestrian against a motorcycle driver, finding that the motorcyclist was travelling at or below the speed limit and the pedestrian stepped onto the crosswalk at a time when the motorcyclist could not avoid striking her. The Court of Appeal agreed the driver had the right of way; however, they found there were several factors which pointed to negligence by the motorcyclist on which he should be found 40% at fault.
- [34] More recently, in Hmaied v. Wilkinson, 2010 BCSC 1074, Justice Dickson summarized the law as follows, at paras. 22-24:
- [22] [D]rivers are ordinarily entitled to expect that adult pedestrians will not jump out directly in front of them as they are proceeding lawfully along their way: [cites omitted].
- [23] Regardless of who has the right of way, however, there is a duty upon drivers and pedestrians alike to keep a proper lookout and take reasonable precautions in response to apparent potential hazards
- [35] A driver's duty of care to avoid hitting a pedestrian, especially a child, is confirmed by s. 181 of the MVA:

Duty of driver

181 Despite sections 178, 179 and 180, a driver of a vehicle must

- (a) exercise due care to avoid colliding with a pedestrian who is on the highway,
- (c) observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.

- [36] A driver ought not to exercise a right of way if the circumstances are such that the result of doing so will be a collision which they reasonably should have foreseen and avoided: Christensen v. Gerber, 2007 BCSC 1397 at paras. 48-49.

[emphasis added]

- [20] In the present case, the defendant had the right of way: there was no practicable way to brake before the daughter suddenly entered the crosswalk, matching the preliminary finding in Panganiban. In contrast to Panganiban, there is no expert evidence on speed or proximity to the crosswalk, or realistic braking time. Ms Maxwell, however, provides an objective benchmark: although she was fully ensconced on the curb corner beside the crosswalk, she did not cross; she, reasonably, considered it unsafe to enter the crosswalk given the proximity and speed of the defendant's vehicle.
- [21] While I accept that the defendant had the right of way, she nonetheless breached her duty of care, and bears the bulk of liability in failing to "keep a proper lookout and take reasonable precautions in response to apparent potential hazards". The driver acknowledged that she saw the father with two young children approaching the crosswalk, leading to a park full of children. It is reasonably foreseeable that a young child might act unpredictably, even if they

lack the right of way. Abundant authorities recognize that children are predictably unpredictable: *Brewster (Guardian ad litem of) v. Swain*, 2007 BCCA 347 at para. 18; *Johnson (Litigation Guardian of) v. Eyre*, 2009 BCSC 1711 at para. 39; *Coghill v. Thomas* (1975), 13 NBR (2d) 675 (KB) at para. 8. The authorities surveyed in *Panganiban* at paras. 49-55 speak to the heightened obligation on a driver, such as this defendant, approaching a crosswalk with children nearby. While the defendant was technically driving within the speed limit, her observation of the family, the crosswalk, the park filled with other children, and the narrow road, ought to have prompted her to drive more slowly as a precaution against potential hazards.

[22] At the same time, both the daughter and her father are also contributorily negligent.

[23] *Panganiban* sets out the analytical framework to determine whether a child has been contributorily negligent:

[67] Ms. *Panganiban* was 14 years old at the time of the collision. The contributory negligence analysis, therefore, has two stages. The first is "whether the child, having regard to [her] age, [her] intelligence, [her] experience, [her] general knowledge and [her] alertness is capable of being found negligent at law in the circumstances under investigation": *Bourne* at para. 57, quoting from *Heisler et al. v. Moke et al.* (1971), 2 O.R. 446 at 448, 1971 CanLII 625 (Ont. H.C.J.). If the child is capable of being found negligent at law, the question is then whether they were negligent and if so, to what degree: *Bourne* at paras. 57-60.

[68] In *Taggart v. Heuchert*, 2013 BCSC 1248 at para. 148, the Court quoted from *Mitchell (Guardian ad litem of) v. James*, 2007 BCSC 878 at para. 54: "'The most common formulation of the test is to ask whether the child exercised the care expected from a child of like age, intelligence and experience.'" (Linden in *Canadian Tort Law*, 8th edition, at p. 153)".

[69] In my view, Ms. *Panganiban* is capable of being found contributorily negligent. As of the date of the collision, she knew the rules of the road and understood that she should not step into a crosswalk without looking to see if a car was approaching and, if she saw a car approaching, attempting to make eye contact and making certain the driver saw her and would be able to stop. Ms. *Naqvi* was also old enough to understand these rules.

[emphasis added]

[24] The Court reaches the same conclusion, and finds that the daughter was partially at fault for failing to take adequate care for her own safety. While the daughter was eight years younger than Ms. *Panganiban*, she and her parents all confirmed that she knew the rules of the road, and knew that she should look both ways and not enter a crosswalk if a vehicle was approaching. This understanding is bolstered by the fact that the daughter was and is a remarkably intelligent child. The defendant's vehicle was there to be seen: had she taken sufficient care to look for it, she would have seen it just as did Ms. *Maxwell*, who prudently opted not to cross as the vehicle approached.

- [25] The father also bears some responsibility for the accident. While one can sympathise with his distracted focus on his toddler son, he should have paid closer attention to the road, and to his daughter, who was known to be bouncy and energetic, and who was known by her parents to sometimes fail to take proper care around roads. The father told his daughter that she could cross the crosswalk. He did so without adequately looking back behind him down Sanders; again, the defendant's vehicle was plain to see.
- [26] The Negligence Act, RSBC 1996, c 333, s. 4(1) requires the Court to determine the "degree to which each person was at fault" for the damages claimed by the plaintiffs.
- [27] Panganiban at para. 78 cites *Aberdeen v. Township of Langley*, Zanatta, Cassels, 2007 BCSC 993 at paras. 62-63, rev'd on other grounds 2008 BCCA 420, where Justice Groves provides a useful list of nine factors to assist in assessing the nature and degree of departure from the standard of care in order to determine an appropriate apportionment of fault:
1. The nature of the duty owed by the tortfeasor to the injured person
 2. The number of acts of fault or negligence committed by a person at fault
 3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault
 4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy. Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis
 5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy
 6. [T]he gravity of the risk created;
 7. [T]he extent of the opportunity to avoid or prevent the accident or the damage;
 8. [W]hether the conduct in question was deliberate, or unusual or unexpected; and
 9. [T]he knowledge one person had or should have had of the conduct of another person at fault.
- [28] The Panganiban Court assigned 80 percent fault to the driver, and 20 percent to the teenaged plaintiff, noting the ability of the adult driver to take simple precautions to avoid an accident in a clearly-marked crosswalk with school children present.

[29] The Court reaches a similar conclusion. While the daughter darted onto the crosswalk, the driver could have largely avoided the accident by decelerating upon seeing the plaintiff family and the playground ahead. The father's ability to avoid the accident, by holding his daughter's hand, by taking better care to check for oncoming traffic, and by not authorising her to cross, distinguish this case from *Panganiban*. The Court ascribes fault at 25 percent to the daughter, 25 percent to the father, and 50 percent to the defendant.

IV. Daughter's claim

[30] The daughter seeks non-pecuniary damages of between \$50,000 and \$60,000 for physical and psychological injuries.

[31] Physically, her primary complaint is her left ankle, which has given out on her on two or three occasions, the first time being one-and-a-half years after the accident. This in turn makes her hesitate to play sports at school, which in turn limits her social activities at school. She also occasionally feels pain in her left thigh: sometimes dull, and sometimes sharp. It is more profound after prolonged sitting, standing, or running. While this pain persists, it is manageable and does not affect her daily activities.

[32] Psychologically, she feels some anxiety about the pain in her left leg. She also feels anxiety in crossing crosswalks, and has her mother accompany her to school.

[33] Neither the daughter nor the parents have followed up with any specific treatments or consultations for these complaints since 2015, despite ready access and regular visits to physicians and clinics for unrelated matters. On her last specific medical consultations concerning the accident--a May 2015 visit for the purpose of completing an ICBC report, and a physiotherapy session--her main complaint was of left knee pain on running or fast walking, and some left leg tenderness, with no complaints of ankle issues or psychological distress.

[34] The daughter relies upon a November 2021 expert report of Dr Waseem, a physiatrist. In his responsible report, Dr Waseem shows that he takes seriously his Rule 11-2(1) duty to the Court to maintain independence and objectivity. He expressly outlines the limitations of his report, which was based on a virtual assessment, without the ability to conduct a physical examination of the daughter, and without her updated medical records. He indicated the desirability of conducting such a physical examination as well as an MRI, and reviewing updated records. In the two years since the assessment, neither the daughter nor her parents nor her counsel have followed up on Dr Waseem's suggestions and requests.

[35] Dr Waseem was unable to link the daughter's complaints of ankle instability with the accident. In fact, based on the limited information provided to him, that condition is likely unrelated to the accident:

On the balance of probabilities, I am unable to say whether the current complaints of left ankle instability are accident-related. Although there was injury to the left leg, ordinarily left ankle instability occurs in the context of intra-articular injury or ligamentous tear/disruption, injuries Ms. Xiang did not sustain in the accident.

[36] Similarly, on a balance of probabilities, this Court cannot draw a causal link between the accident and the predominant issue of ankle instability. Needless to say, rolled ankles are not uncommon in children and adults who have never suffered a motor vehicle injury.

[37] Based on his limited information, Dr Waseem does acknowledge the possibility of soft tissue injuries to the daughter's left leg. The Court similarly believes the daughter's account of her minor left leg pain that comes and goes. The daughter was a credible and well-spoken witness who did not exaggerate her symptoms, and took care to state that she remembered little about the accident.

[38] The Court also believes the daughter's account of her anxiety around crosswalks. In her November 2021 report, Dr Susan Lazar, a psychiatrist, links the daughter's anxiety about crossing roads to the accident, while finding that the conditions did not meet diagnostic criteria for post-traumatic stress syndrome under DSM-5.[1] Based on the mental injury jurisprudence reviewed below, it is reasonably foreseeable and not remote that a child or person of ordinary fortitude hit, even lightly, by a vehicle, at a formative age, would suffer some long-term residual anxiety arising to the level of mental injury.

[39] At the same time, to the credit of the daughter, neither the physical nor psychological conditions have affected her day-to-day life. She has received straight "A" grades throughout school. She participates in many school activities, and could in theory participate in sports and other activities that do not place as much stress on the legs. She describes herself as happy, sociable, and an extrovert.

[40] As is unfortunately not atypical in personal injury litigation, each side advances quantum precedents at either end of the spectrum, with no cases that really speak to the condition of this plaintiff.

[41] The plaintiffs in all of the daughter's quantum comparator cases suffered multifarious injuries that were more painful and debilitating, and were unlikely to resolve: *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 (the plaintiff suffered "moderate soft tissue injuries to their neck, back, and shoulders which, despite treatment, remained symptomatic for years. Although their condition has improved, they will continue to experience some pain flare-ups and the likelihood for future improvement is poor. With caution, can continue to participate in previous activities while monitoring physical exertion for pain": para. 22); *Jacobi v. Monteith*, 2020 BCSC 218 (sharp, tingly, stabbing feeling in the plaintiff's low back multiple times per week, affecting his sleep, his time with his daughter, and, most pertinently, his manual labour employment); *Saunders v. Rempel*, 2019 BCSC 2177 (a plaintiff hockey player suffering chronic back pain).

- [42] The defendant's cases (Schulze v. Strain, 2010 BCSC 1516: \$9,899 adjusted for inflation[2]; Nguyen v. Nguyen, 2003 BCSC 212: \$6,736 with inflation; Sian v. Wong, 2004 BCPC 77: \$5,111 with inflation) are more appropriate, as they concern minor physical and psychological injuries. That said, they can be distinguished by the fact that those injuries were generally of limited duration, in contrast to those of the plaintiff, which persist. I also note that these cases, over a decade old, may be inappropriate quantum comparators, even adjusting for inflation. The Court of Appeal has found that such an approach "ignores that awards for non-pecuniary damages have continued to increase over the years in addition to the inflationary component": Valdez v. Neron, 2022 BCCA 301 at para. 58, leave to appeal to SCC ref'd, 40442 (30 March 2023); Callow v. Van Hoek-Patterson, 2023 BCCA 92 at paras. 17-18; see also Chau v. Farshid, 2023 BCSC 1004 at para. 188.
- [43] As the daughter has not followed up with recommended treatments, it is difficult to determine whether the physical and psychological conditions are likely to resolve.[3] Given their relatively minor nature, and the tenor of the physiatrist and psychiatric reports, one cannot conclude that the conditions are chronic or untreatable.
- [44] The following cases provide additional comparators for non-pecuniary damage awards in respect of minor physical and psychological conditions:
- a) Pond v. Bucsis, 2013 BCSC 2001: the plaintiff was awarded \$30,000 after a motor vehicle accident that caused mild soft tissue neck and shoulder injuries and resulted in modest physical limitations; the pain was not constant or severe, but it was expected to persist;
 - b) Johal v. Bhullar, 2021 BCSC 427: as a result of two motor vehicle accidents, the plaintiff suffered mild soft tissue back and neck injuries with pain lasting roughly 16 months and she was awarded \$25,000;
 - c) Rosso v. Balubal, 2014 BCSC 1786: the plaintiff suffered mild neck and back pain from a motor vehicle accident, and was awarded \$20,000; the pain was likely to persist, but could be managed and had a minor impact on the plaintiff's life;
 - d) Scott v. Hoey, 2015 BCSC 2037: the plaintiff was 13 years old when she was struck by a motorcycle in a crosswalk; the plaintiff fell, but was able to walk away from the scene. The plaintiff suffered minor neck and knee injuries lasting roughly 17 months and was awarded \$20,000;
 - e) Hans v. Volvo Trucks North America Inc., 2016 BCSC 1155, aff'd 2018 BCCA 410: husband and wife plaintiffs were long-haul truckers injured in a serious accident; the plaintiff wife suffered minor neck and shoulder injuries and a concussion for three to four months. She also briefly suffered from driving-related anxiety, which she overcame. She was awarded \$15,000;

[45] In the circumstances, the Court awards the daughter \$20,000 in non-pecuniary damages for the minor albeit ongoing physical and psychological inconveniences inflicted by the accident.

V. Father's claim

A. Introduction

[46] The father seeks \$90,000 to \$100,000 in damages for mental injury arising from the accident. He says that his brain "shut down" at the accident, and that he began to feel anxious soon after. He says that he is constantly worried, has difficulty sleeping, feels fatigued, angers quickly, suffers from a generally low mood, and has lost interest in family and leisure activities. He feels reluctant to drive. He feels considerable guilt and shame arising from the accident. The symptoms were most acute in the two years following the accident, but persist today. He feels that but for the accident, he would be in a higher and better-paying position than his present \$470,000US per annum position as a software engineer.[4]

[47] The father consulted with a psychologist three times in November and December 2014. He has not sought treatment since. Clinical records from 2019 and 2021 include his self-reports that he was not suffering from anxiety or depression.

B. Law: mental injury

[48] In *Ulmer v. Weidmann*, 2011 BCSC 130, the late Justice Truscott usefully distills the law on nervous shock:

[97] A very good analysis of the elements of the cause of action for nervous shock is found in the decision of Mr. Justice Joyce of this Court in *Kotai v. Queen of the North (Ship)*, [2009] 2009 BCSC 1405, B.C.J. No. 2022.

[98] In his judgment Joyce J. recites passages from two decisions of our Court of Appeal, being *Devji v. Burnaby (District)*, 1999 BCCA 599, 180 D.L.R. (4th) 205, and *Rhodes Estate v. C.N.R.* (1990), 50 B.C.L.R. (2d) 273. In addition he also recites passages from the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114.

[99] From the reasoning in these cases and other cases cited therein the following elements of the cause of action for nervous shock have been established:

- (a) the defendant must take reasonable care not to injure those persons who are so closely and directly affected by his/her actions that he/she ought reasonably to have them in contemplation as being so affected;
- (b) proximity factors inform the foreseeability analysis for claims of psychiatric injury where there is no physical injury;

- (c) the relevant proximity factors are the relational proximity (the closeness of the relationship between the claimant and the victim of the defendant's conduct), locational proximity (being at the scene of a shocking event and observing it or observing its immediate aftermath), and temporal proximity (the relation between the time of the event and the onset of the psychiatric illness);
- (d) the claim must be for actual psychiatric injury caused by the actionable conduct of the defendant;
- (e) it must be concluded as a matter of law that a reasonable person should foresee that his/her conduct is such that for it could create a risk of direct psychiatric injury to a person of normal fortitude and thereby give rise to a duty of care to avoid such a result;
- (f) a claimant must prove not just psychological disturbance or upset as a result of the defendant's negligence but also that his/her psychological disturbance rises to the level of a recognizable psychiatric illness. Mere grief or sorrow caused by a person's death is not sufficient to support any compensation. The law does not recognize upset, discord, anxiety, agitation or other mental states that fall short of a recognizable psychiatric illness.[5]

C. Discussion and decision

- [49] The father's claim for mental shock must be dismissed on the foundational principles set out in the leading case of *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27. There, as here, psychiatric expert evidence linked the plaintiff's mental injury to the results of the defendant's negligence. In that case, the defendant water supplier failed to take care before supplying the plaintiff with a water bottle contaminated by a dead fly. The claim failed as the plaintiff's damage was too remote to permit recovery: it was not reasonably foreseeable that a person of ordinary fortitude would suffer serious psychological injury in response to the events caused by the defendant's negligence, and such damage was too remote.
- [50] The Court confirmed that the remoteness inquiry depends not only upon the possibility of mental injury, but also on the foreseeability of whether the objectively reasonable person of ordinary fortitude would suffer the resulting mental injury:
- [14] The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of "ordinary fortitude" or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held -- albeit within the duty of care analysis -- that the question is what a person of ordinary fortitude would suffer: see *White v. Chief Constable of South Yorkshire Police*, [1998] 3 W.L.R. 1509 (H.L.); *Devji v. Burnaby (District)* (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599; *Vanek*. As stated in *White*, at p. 1512: "The law expects reasonable fortitude and robustness of its

citizens and will not impose liability for the exceptional frailty of certain individuals."

- [15] As the Court of Appeal found, at para. 49, the requirement that a mental injury would occur in a person of ordinary fortitude, set out in *Vanek*, at paras. 59-61, is inherent in the notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in *Tame v. New South Wales* (2002), 211 C.L.R. 317, [2002] HCA 35, per Gleeson C.J., this "is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm" (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.
- [16] To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of reasonable foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damage at law.
- [emphasis added]
- [51] In *Saadati v. Moorhead*, 2017 SCC 28, the Court confirmed *Mustapha*, while also confirming that the same analysis for psychiatric injury applies to a primary (that is, the daughter) or secondary (that is, the father) victim:
- [19] This Court has not, however, adopted either the primary/secondary victim distinction, or *McLoughlin v. O'Brian*'s disaggregated proximity analysis. Rather, in *Mustapha*, recoverability of mental injury was viewed (at para. 3) as depending upon the claimant satisfying the criteria applicable to any successful action in negligence -- that is, upon the claimant proving a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage. Each of these elements can pose a significant hurdle: not all claimants alleging mental injury will be in a relationship of proximity with defendants necessary to ground a duty of care; not all conduct resulting in mental harm will breach the standard of care; not all mental disturbances will amount to true "damage" qualifying as mental injury, which is "serious and prolonged" and rises above the ordinary emotional disturbances that will occasionally afflict any member of civil society without violating his or her right to be free of negligently caused mental injury

(Mustapha, at para. 9); and not all mental injury is caused, in fact or in law, by the defendant's negligent conduct.

- [20] Indeed, the claim in Mustapha failed on that last element: the claimant's damage was not caused in law by (that is, it was too remote from) the defendant's breach. Mustapha thus serves as a salutary reminder that, even where a duty of care, a breach, damage and factual causation are established, there remains the pertinent threshold question of legal causation, or remoteness -- that is, whether the occurrence of mental harm in a person of ordinary fortitude was the reasonably foreseeable result of the defendant's negligent conduct (Mustapha, at paras. 14-16). And, just as recovery for physical injury will not be possible where injury of that kind was not the foreseeable result of the defendant's negligence, so too will claimants be denied recovery (as the claimant in Mustapha was denied recovery) where mental injury could not have been foreseen to result from the defendant's negligence.

[emphasis added]

- [52] The Mustapha and Saadati passages above contain an ambiguity arising from the remoteness query: whether "a mental injury" in a person of ordinary fortitude was the reasonably foreseeable result of the defendant's negligent conduct: of particular relevance to the present case where a parent witnesses the aftermath of a light vehicular collision inflicting a minor injury on his child. While it would not be reasonably foreseeable that a person or even parent of ordinary fortitude would suffer mental injury to the degree alleged by the father, it is reasonably foreseeable that a person or parent of ordinary fortitude would suffer some kind of mental injury--"a mental injury"--in contemplating what could easily have occurred but for chance: the death of the child. Put conversely, to use the language in Mustapha at paras. 13-15, one would arguably not consider a parent who developed some form of mental injury after seeing such a minor automobile accident to display "exceptional frailty," nor such a reaction to be "unusual or extreme," nor such a result to be "far-fetched." It would flow that legal causation would be established for many if not most parents witnessing the injury of a child where such an injury was or could have been fatal.
- [53] The specific facts of these authorities do not assist. While Saadati provides a laudably principled and sympathetic approach to mental injury claims, its ratio is that a plaintiff need not prove that the tortious conduct caused a recognizable psychiatric condition: Saadati does not concern a parent or other third party's claim for nervous shock upon witnessing an accident, and its statements in that regard are obiter dicta. Nor do the Mustapha facts offer clear guidance, with its plaintiff's idiosyncratically histrionic reaction to the dead fly.
- [54] Ultimately, Mustapha, however, read as a whole, indicates that remoteness will bar a claim for mental injury even where some kind of mental injury is hypothetically foreseeable: "unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable": para. 15.

- [55] More recent Supreme Court of Canada jurisprudence makes this clear. *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, explains the dual yet different role of the foreseeability of the "kind" or "type" of injury within the negligence analysis:
- [78] We acknowledge that remoteness, so understood, overlaps conceptually with the reasonable foreseeability analysis conducted in the prima facie duty of care analysis (*Mustapha*, at para. 15). But the two are distinct: the duty analysis is concerned with the type of injury that is reasonably foreseeable as flowing from the defendant's conduct, whereas the remoteness analysis is concerned with the reasonable foreseeability of the actual injury suffered by the plaintiff (*L. N. Klar and C. S. G. Jefferies*, *Tort Law*, (6th ed. 2017), at p. 565: "Remoteness questions deal with how far liability should extend in reference to injuries caused to the plaintiff, once a duty relationship . . . [has] been established" (emphasis added)).
- [79] Remoteness, at its core, turns on the reasonable foreseeability of the actual injury suffered by the plaintiff
- [emphasis added]
- [56] In *Nelson (City) v. Marchi*, 2021 SCC 41, the Court reiterated that distinction:
- [96] It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Livent*, at para. 77; *A.M. Linden et al.*, *Canadian Tort Law* (11th ed. 2018), at p. 309-10). First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.
- [97] Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; *Klar and Jefferies*, at p. 565).
- [emphasis added]
- [57] Although *Nelson (City)* dealt solely with physical injuries, our Court of Appeal has indicated that the essential principles underlying the remoteness inquiry are the same for physical and mental injuries: *Maingot v. Wankowicz*, 2023 BCCA 89 at paras. 31-35.

- [58] Counsel were unable to find a case before or after *Mustapha* or *Saadati* where a parent successfully claimed for mental injury after witnessing an accident that blessedly resulted in minor injuries to their child, as here. Of course, personal injury claims for children are not rare; nor are accidents where the parent is physically near the child at the time of the accident. This jurisprudential silence speaks volumes.
- [59] Cases before and after *Mustapha* demonstrate that the severity of the accident and the harm to the primary victim weigh significantly in measuring the foreseeability and remoteness of mental injury. In short, in assessing remoteness and legal causation, it is not foreseeable that a person of ordinary fortitude and robustness will suffer significant and persistent mental injury upon witnessing a minor personal injury.
- [60] For example, in *Deros v. McCauley*, 2011 BCSC 195, the plaintiff witnessed a truck driven by an inebriated driver hit at high speed the vehicle driven by his workmate. The impact of the collision spun the workmate's vehicle and pushed it down the highway. While the plaintiff initially thought his workmate had been killed, it became apparent within minutes that he was not seriously injured: paras. 6-7. Gerow J cites the *Mustapha* passage above, and concluded that it was not foreseeable that a person of ordinary fortitude would suffer a mental injury from witnessing the accident: paras. 16-17.
- [61] At paras. 22-23, Gerow J canvasses the jurisprudence, and notes that cases awarding damages for nervous shock arise from accidents in which someone has died or been seriously injured.
- [62] This would also appear to be the case in the authority relied upon by the present plaintiff: *Marcena v. Thomson*, 2019 BCSC 1287. There, the Court awarded \$125,000 in non-pecuniary damages to the plaintiff, who suffered a chronic major depressive disorder after witnessing a speeding motorcycle strike his wife: paras. 74, 92. The wife's own claim was settled before trial, and *Marcena* does not discuss the subject accident in detail. The reasons do, however, note "the traumatic nature" of the accident that caused "serious injury" to the wife, and that threw the defendant motorcycle driver under a parked vehicle: para. 9.
- [63] In *Deros* at para. 24, Gerow J notes that courts have been careful to limit the circumstances in which injuries for nervous shock are awarded. She quotes the leading British Columbia appellate decision of *Devji v. District of Burnaby et al.*, 1999 BCCA 599 at para. 75, leave to appeal to SCC ref'd, 608 (3 August 2000), to convey the requisite severity of the accident to ground a claim for nervous shock or other mental injury:
- [75] The law in this province, as formulated by Rhodes, requires that the plaintiffs, in order to succeed, must experience something more than the surprise and other emotional responses that naturally follow from learning of the death of a friend or relative. Instead, there must be something more that separates actionable responses from the understandable grief, sorrow and loss that ordinarily follow the receipt of such information. In Rhodes, Taylor and Wood J.J.A. described the requisite experience as alarming and startling (and therefore sudden and unexpected), horrifying, shocking and frightening, and Southin J.A. referred to

a "fright, terror or horror".

[emphasis added]

- [64] In *Devji*, McEachern CJBC conducted a comprehensive and scholarly review of British Columbia, Canadian, and British jurisprudence of nervous shock claims brought by family members based on the death or serious injury of a child or other close relative. The Chief Justice noted that:
- [3] As well, because psychiatric injury is difficult to prove or disprove, and because the line between physical and mental or emotional injury in a particular case may be obscure, it is often difficult to determine the cases in which liability will be imposed, and the class of persons who will be entitled to compensation. As will be seen, this has given rise to an ongoing dialogue, particularly in the United Kingdom, between principle and policy that has not recently been considered by the Supreme Court of Canada. The judges who profess to rely upon principle say that the usual test for liability is reasonable foreseeability of particular harm and that no policy considerations should limit the operation of that hallowed doctrine. On the other hand, there are judges who find difficulty in defining the difference between physical injury and mental or emotional injury and judges who share the concerns of Cardozo J. with respect to indeterminate liability to an indeterminate class. Both have suggested "control mechanisms" designed to limit recovery to persons such as parents and children who are themselves closely connected to the casualty and to the primary victim who has been killed or injured.
- [4] It must be remembered, however, that the claim must be for actual psychiatric or emotional injury caused by (not just resulting from) the actionable conduct of the defendant. Because of the dichotomy between principle and policy, in many cases there have been several sets of reasons for judgments and many significant dissents. This makes the law exceedingly difficult to rationalize.
- [65] The facts in the case before the Chief Justice were more sombre and harrowing than present. The plaintiffs were the parents and sisters of Yasmin Devji. At around 11 pm, a police officer told them that Yasmin had been killed in a motor vehicle collision. They were able to see Yasmin's body in the hospital 13 hours later. Her head was bandaged, but blood was visible. All four plaintiffs alleged that they then and subsequently suffered nervous shock.
- [66] The Chief Justice considered himself bound by *Rhodes v. CNR* (1990), 50 BCLR (2d) 273 (CA), and confirmed this court's dismissal of the claim on a summary basis:

- [67] In this case, we are not required to express a view on the true nature of reasonable foreseeability because we are bound at least in part by Rhodes. It clearly requires not merely foreseeability but also proximity and something more. I have already said that I do not consider Rhodes to require that the alleged psychological injury have occurred at the scene of the accident. In proper cases the aftermath of the accident may be extended to the hospital immediately after the casualty.
- [68] Insofar as reasonable foreseeability simpliciter is concerned, I agree entirely with those judges who have said that emotional or psychological injury on the part of a mother whose child has been killed will often be reasonably foreseeable. I doubt, however, if that result can be applied in cases such as this one.
- [69] I say this because although it is reasonably foreseeable that a mother who learns of her child's injury and rushes to a hospital could suffer emotional or psychological injury, particularly if the child dies in her presence, I doubt if the same can be said where, assuming reasonable fortitude on the part of the plaintiffs, they were told before going to the hospital that Yasmin had died. Without intending in any way to minimize the terrible experience suffered by this family, I am not able to conclude that their psychiatric injury in these circumstances -- i.e. where they attend at a hospital to view and identify the body of a person they know has died -- was reasonably foreseeable by the defendant. Persons view the bodies of deceased persons for a number of reasons on many occasions and psychological injury is not what one expects or would reasonably foresee from such an experience. It must be assumed that the police officers and nurses did not foresee psychiatric injury when they asked or permitted family members to identify Yasmin's body. The bodies of persons killed in accidents are ordinarily identified by a close relative. Common experience demonstrates that the usual fortitude of our citizens protects them from psychiatric injury and makes such injury, if it occurs, not reasonably foreseeable.

[emphasis added]

- [67] Such fortitude, confirmed in Mustapha as the threshold issue for legal causation, is expected not only in the post-mortem viewing of a loved one, but in assessing any experience that allegedly triggers the mental injury:
- [73] The real question, however, is whether the plaintiffs' experience in viewing Yasmin's body in these circumstances -- particularly considering the fact they had been informed that she had died -- is the kind of experience that can give rise to a claim for damages for nervous shock.
- [74] I have already mentioned "usual fortitude" on the part of the plaintiffs, which has been assumed in the cases. For the purpose of determining liability (although not necessarily for fixing damages), I consider it necessary to make that same assumption. The eggshell skull rule has no application until after liability has been determined: see White (supra, at 17).

[75] The law in this province, as formulated by Rhodes, requires that the plaintiffs, in order to succeed, must experience something more than the surprise and other emotional responses that naturally follow from learning of the death of a friend or relative. Instead, there must be something more that separates actionable responses from the understandable grief, sorrow and loss that ordinarily follow the receipt of such information. In Rhodes, Taylor and Wood JJ.A. described the requisite experience as alarming and startling (and therefore sudden and unexpected), horrifying, shocking and frightening, and Southin J.A. referred to a "fright, terror or horror".

[76] The nature of the experience by which an injury is alleged to have been suffered is one of the "controlling mechanisms" that serve to limit the reach of liability for nervous shock in this province. It seems to me that the principle shock suffered by the plaintiffs was in learning of Yasmin's death; after that, grief, sorrow and regret would follow immediately, and would continue for an unlimited period. The experience of viewing the body, however, cannot be equated to the shock and horror that would be experienced, for example, at the scene of an accident witnessed by the plaintiffs because the features of surprise, shock, horror and even fear are absent in a hospital setting. As already mentioned, it might have been different if Yasmin's body had been horribly mutilated or if she had died in the presence of her family. That was the case in *Cox v. Fleming* (1993), 13 C.C.L.T. (2d) 305 (B.C.S.C.) where the plaintiff succeeded. That would be a different case and one that I need not attempt to decide.

[emphasis added]

[68] In *EB v. British Columbia (Child, Family and Community Services)*, 2021 BCCA 47 at para. 63, a claim by parents for, inter alia, mental injury occasioned by the alleged mistreatment of their child while in foster care, our Court of Appeal declined to set aside Devji based on Saadati.

[69] With that preamble, this Court will synthesise and apply the authorities binding upon it, which include Devji and Deros.

[70] Those cases emphasise, as do Mustapha and Saadati, the threshold remoteness requirement of whether the "actual injury" complained of by the plaintiff would be the reasonably foreseeable result of the defendant's negligence in a person of ordinary fortitude. As stated in Saadati at para. 20:

just as recovery for physical injury will not be possible where injury of that kind was not the foreseeable result of the defendant's negligence, so too will claimants be denied recovery (as the claimant in Mustapha was denied recovery) where mental injury could not have been foreseen to result from the defendant's negligence.

[emphasis added]

- [71] In considering whether mental injury would be a foreseeable result of the negligence, one must not read the term in a broad or imprecise sense, but that set out in *Mustapha*:
- [9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; *Linden and Feldthusen*, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.
- [bolded emphasis added; italics in original]
- [72] While this description of mental injury arises under consideration of the negligence enquiry of "Did the Plaintiff Sustain Damage?", it also describes the degree of mental injury that must be reasonably foreseeable as a result of the defendant's negligence in order to establish legal causation, and overcome the remoteness threshold.
- [73] In short, the Court must ask whether it is reasonably foreseeable that the defendant's negligence would inflict a mental injury, as opposed to transient or merely heightened anxiety or upset that the occasional shocks, set-backs, griefs, and near-misses that shape all individuals, and, as a form of warning and armament, better protect them from and prepare them for such future occurrences. The Court must ask whether the degree of mental injury complained of by the plaintiff would be the reasonably foreseeable result in a person of ordinary fortitude. The analysis must also consider all of the circumstances of the defendant's negligence, including the nature of the resulting harm to the individual--child, spouse, or otherwise--whose injury putatively sparks the plaintiff's mental injury.
- [74] The facts of *Deros* are particularly germane to the present case. While the *Deros* plaintiff at first thought the injuries, caused by a much more dramatic accident than the present, were serious or fatal, he learned within minutes that his workmate was not seriously injured: paras. 7, 25.
- [75] The facts in the present case would be even less likely to inflict persistent mental injury onto a person of ordinary fortitude, or even a parent of ordinary fortitude. In the present case, the father did not in fact see the moment of collision. Nor was the accident dramatic or violent, or produce a horrifying or bloody scene, or result in the daughter expressing pain or distress. Rather, the father received almost immediate relieving confirmation that his daughter was not seriously injured, when she stood up by herself, with only two scrapes. It was reasonably foreseeable and proximate that the father in these circumstances would

suffer a second or two of shock, which would quickly dissipate into relief upon confirmation that his daughter had escaped serious injury. It was not reasonably foreseeable and proximate that this minor accident would cause mental injuries to the extent and persistence asserted by the father.

- [76] As indicated above, the father's statements at trial bore little connection to reality. There was no screech of brakes. His daughter was not thrown one or two metres in the air. She was not bleeding. She did not "almost die".
- [77] This dramatically inaccurate recounting of the accident, which the father did not in fact see, further indicates that even if the father could surmount the threshold requirement of legal causation, he has not discharged his persuasive burden of establishing factual causation: that the accident inflicted mental injury on him. The father relies upon the expert report of the psychiatrist Dr Ganesan, who opines that the accident inflicted on the father moderate depression and post-traumatic syndrome disorder. That premise is based, however, wholly upon the father's exaggerated self-reporting of the accident, and its effects on him. Nor did the father provide complete or updated medical records. Nor were the father's many other obvious sources of stressors, set out below, advised or explored. While the Court does not fault Dr Ganesan for reaching his conclusions based on the father's self-report, and incomplete information, it wholly undermines the utility of the report. As this Court noted in *MFSJ862 v. FFSJ862*, 2022 BCSC 1259 at para. 134, speaking of a father's exaggerated and misleading factual reporting to a psychiatrist writing a court report, "[t]o employ a colloquialism, urged by counsel for the mother, the reports were 'garbage in, garbage out,' and of very limited use to the Court." And, again, the father's few medical records at trial -- those of his 2019 and 2021 clinical visits -- include his repeated self-reports, in response to specific questions, that he did not suffer from depression or anxiety, and that he continued to enjoy activities such as hiking and playing badminton.
- [78] The father's trial answers did indicate that he harbours much anger and resentment, but these cannot be attributable in fact or in law to the accident. In his cross-examination answers, he was frequently angry, argumentative, and arrogant. In the closing stages of his cross-examination, he abruptly expressed a lack of confidence in the interpreter. He then launched into a lengthy diatribe about, inter alia, various frustrations he has suffered in life: the litigation and the insurer; pressures from his family in China; having to take a second master's degree upon his immigration to Canada; job-search difficulties; would-be employers expecting him to speak English; and not enjoying a higher-paying and more prestigious position than his half-million US dollar job. His daughter's well-being, and his concern about her health and the accident, were barely mentioned.
- [79] His testimony, coupled with the expert reports, confirm that he does suffer significant feelings of guilt and shame from the accident. To his credit, his pre-accident distraction arose from the responsible parental attention he paid to his toddler. The father in this case was much more responsible and attentive than many Vancouver parents one sees, with a coffee in one hand and an iPhone in the other, walking head-down while their children run

randomly on streets and sidewalks. What happened to the father could happen to any parent. It is hoped that he will follow the advice of Dr Ganesan and seek professional help, going forward, so as to better enjoy his successful family and successful career.

- [80] The mental injury suffered by the father is too remote to be reasonably foreseeable. It was not caused in law, and fails under the threshold test set out in *Mustapha* and confirmed in *Saadati*. It also fails as a matter of factual causation. The father's claim is dismissed.

VI. Conclusion

- [81] The daughter's \$20,000 damages award will be proportioned as follows: the defendant \$10,000; the father \$5,000; with \$5,000 denied, representing the daughter's own contributory negligence.
- [82] The daughter has been successful, if not to the extent sought, in her action. The defendant has been successful in the father's action.
- [83] The successful parties are presumptively entitled to their costs at Scale B. If any party wishes to dislodge this presumption, that party will advise the others within 20 days of these reasons, and schedule a date with the Registry for a date as soon as reasonably practicable to argue the matter, with provision of written arguments to the other side and to the Court at least seven days before the hearing date.

"Crerar J"

- [1] As with Dr Waseem, Dr Lazar specifically requested additional records, including complete medical records, which the plaintiff family has not provided. Nor has the plaintiff family followed any of Dr Lazar's psychiatric treatment recommendations.
- [2] This amount includes a notional \$6,000 for psychological injuries, which the Court declined to order, as they did not constitute a "recognized psychiatric illness". This is no longer necessary under *Saadati*, which, at paras. 2 and 36, confirms a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness.
- [3] No failure to mitigate argument was advanced against either plaintiff. Given the recommendations of Drs Lazar and Ganesan, and the failure of the plaintiffs to follow up on psychiatric treatment, a strong case could be made that they have failed to mitigate, denying or diminishing a damages award.
- [4] His annual remuneration varies based on cash and stock bonuses and options.
- [5] Again, this final point has since been modified by *Saadati*: see footnote 2. A plaintiff seeking damages for mental injury is not required to establish the threshold of establishing a "recognizable psychiatric illness."

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