IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Panganiban v. Sovdat,*
2023 BCSC 650

Date: 20230421
Docket: SM197366
Registry: New Westminster

Between:

Ma Estella Lean Panganiban

Plaintiff

And

Maria Sovdat

Defendant

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiff:	S.A. Hashmi A. Baboi
Counsel for the Defendant:	A.L. Murray, K.C.
Place and Date of Trial:	New Westminster, B.C. October 3-7 & 11-14, 2022
Place and Date of Judgment:	New Westminster, B.C. April 21, 2023

Table of Contents

I. INTRODUCTION

[1] Estella Panganiban was hit in a marked crosswalk by a car driven by Maria Sovdat while Ms. Panganiban was walking home from school with a friend.

[2] Ms. Panganiban brings this action for physical and psychological injuries, some of which she says persist today. She claims non-pecuniary damages, damages for loss of earning capacity, and damages for the cost of future care.

[3] Ms. Sovdat passed away before the trial. Accordingly, I will refer to the responding party in this action as “the defence”.

[4] Liability is denied. The defence argues that Ms. Panganiban stepped off the curb and into the path of the car when it was so close it was not possible for Ms. Sovdat to avoid hitting her.

[5] Causation and damages are also in issue. While the defence acknowledges that Ms. Panganiban was injured in the collision, it takes the position she fully recovered from these injuries within about six months. It disputes that the back pain, cognitive issues and depression about which Ms. Panganiban testified at trial were caused by the collision. It disputes that she suffered any loss of earning capacity as a result of the collision.

II. LIABILITY

A. Background

[6] The collision occurred shortly after 3:00 pm on February 27, 2015, in a marked crosswalk on 160th Street, approximately 130 metres south of the intersection with 96th Avenue in Surrey. The weather was clear and sunny. The road surface was dry. The speed limit in the area of the crosswalk was 50 km/hr.

[7] Ms. Panganiban was 14 years old. She was a student at North Surrey Secondary School, which is located on 160th Street, just north of the intersection with 96th Avenue.

[8] Ms. Panganiban was walking home from school with Reda Naqvi, a friend and classmate. School had just let out for the day. There were other students in the area, walking home or waiting for a bus.

[9] Ms. Panganiban and Ms. Naqvi walked south on the sidewalk on the west side of 160th Street. They chatted as they walked. Approximately 150 metres from the school, they came to the pedestrian crosswalk where the Green Timbers Greenway crosses 160th Street. They intended to cross 160th Street and walk east along the Greenway.

[10] The crosswalk is staggered: it crosses the southbound lane of 160th to a median; pedestrians must then walk several steps to the south on the median; the crosswalk then crosses the northbound lane. The crosswalk is marked on the roadway with broad white stripes.

[11] Ms. Panganiban and Ms. Naqvi stepped off the curb into the crosswalk in the southbound lane of 160th Street, side-by-side, with Ms. Naqvi on the left, closest to any oncoming traffic.

[12] Ms. Sovdat was driving a 2008 white Ford Focus south on 160th Street.

[13] Ms. Sovdat hit Ms. Naqvi with the front bumper of her car, just to the driver's right of the licence plate. She either hit Ms. Panganiban or else propelled Ms. Naqvi into Ms. Panganiban. One of the girls hit the windshield of the car and bounced off the hood. They both ended up on the ground.

[14] Ms. Sovdat came to a stop just past the crosswalk, with the back end of her car almost exactly at the far south edge of the crosswalk.

B. Lay Evidence

[15] The Court did not have the benefit of any evidence from Ms. Sovdat because she passed away three years before the trial.

[16] Ms. Panganiban acknowledged that she could not remember the exact sequence of events leading up to the collision. She remembered talking to Ms. Naqvi and walking beside her, on Ms. Naqvi's right side. She remembered approaching the crosswalk and not being in a hurry or rushing to get across.

[17] Ms. Panganiban testified that her parents taught her to stop and look both ways before crossing a street. However, she could not remember whether, on this occasion, she came to a stop before stepping into the crosswalk or looked to her left for traffic. She had no memory of seeing the car that hit her. She did not immediately know that she had been hit by a car. The next thing she knew after she stepped off the curb, she was on the ground.

[18] Ms. Naqvi confirmed that she was walking and talking with Ms. Panganiban as they approached the crosswalk; she denied that she was distracted by the conversation. She testified that there was a group of four boys, one of whom was a classmate of hers, ahead of them on the median in the crosswalk.

[19] Ms. Naqvi testified that she looked to her left, looked at Ms. Panganiban who was on her right, and then stepped off the sidewalk side-by-side with Ms. Panganiban. Ms. Naqvi also had no memory of seeing the car or of being hit by the car.

[20] Shauna Stanyer was driving north on 160th Street. She testified that there were a number of students in the area, on both sides of the street and at bus stops. As she approached the crosswalk, she noted that some students had already crossed to the east side of 160. While at a standstill approximately a block south of the crosswalk, she saw two girls step off the west sidewalk into the crosswalk, walking side-by-side. They were walking at a normal pace, according to Ms. Stanyer, and did not appear to be rushing. She saw a car approaching the crosswalk from the north, and observed that the driver did not appear to be slowing down. Instinctively, Ms. Stanyer honked her horn to alert the driver.

[21] Ms. Stanyer testified that she saw the car hit the girl on the left, throwing her up on to the hood, and then knock the second girl to the ground. Ms. Stanyer estimated that the girls were in the middle of the southbound lane when the car hit them. She testified that the girls looked startled when they realized that the car was about to hit them. Her impression was that the car did not slow down until it hit the girls.

[22] William Versteeg was also driving north on 160th Street, several cars ahead of Ms. Stanyer. He observed students walking southbound in groups of two or four on the west side of the street. He also observed traffic approaching southbound, noting that the light at 96th Avenue had just turned green.

[23] Mr. Versteeg testified that he drove through this section of road differently – more carefully and more attentive – because it was a school zone and he knew it was always possible there could be kids crossing the road, and he wanted to make certain the kids were safe.

[24] As he approached the crosswalk on this day, Mr. Versteeg testified, there was no one at the crossing or on the median, and no reason for him to stop.

[25] After Mr. Versteeg passed through the crosswalk, he heard a thud and immediately looked in his large rear-view mirror, where he saw someone fall off the hood of a southbound vehicle. He pulled his pickup truck over to the side of the road and stopped, approximately 50 to 70 feet past the crosswalk.

[26] Mr. Versteeg got out of his truck and approached the scene of the collision. He asked Ms. Sovdat if she was okay, to which she replied “what happened?”.

C. Expert Evidence

[27] The defence tendered a report by Donald Rempel, a professional engineer, and qualified Mr. Rempel as an expert in accident reconstruction. The defence argues that Mr. Rempel's expert opinion establishes that:

a) Ms. Sovdat was driving at between 35 km/hr and 45 km/hr as she approached the crosswalk.

b) Ms. Sovdat reacted within the normal expected reaction time for drivers in a "surprise" scenario (*i.e.*, with the range of reaction times expected of a driver who is driving normally while attentive to the general circumstances).

c) Where Ms. Sovdat stopped indicates that she was attentive to the presence of pedestrians as they walked out into the crosswalk.

d) The car was an immediate hazard when Ms. Panganiban and Ms. Naqvi stepped from the curb.

D. Legal Framework

[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.

[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.

See *Cook* at 203.

[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.

E. Analysis

i. Who Had the Right of Way?

[37] The focus of s. 179 of the *MVA* is on "when the pedestrian *is crossing* the highway" and when the "pedestrian *leave[s]* a curb" (emphasis added). The analysis is also objective: who had the right of way is determined by asking whether the vehicle was so close when the pedestrian left the curb that it was impracticable for the driver to yield the right of way to the crossing pedestrian.

[38] The defence relies on the engineering evidence to argue that Ms. Sovdat had the right of way. Mr. Rempel's opinion requires some explanation to understand properly.

[39] Mr. Rempel was asked to assume that "Ms. Sovdat was travelling at a low speed relative to the 50 km/hr speed limit when Ms. Panganiban and Ms. Naqvi walked (or possibly ran) into the crosswalk into the path of Ms. Sovdat's vehicle."

[40] Mr. Rempel examined a set of photographs taken at the scene and photographs of the damage to Ms. Sovdat's car. He also surveyed the scene of the collision. As part of his survey, Mr. Rempel identified a crack in the road which he matched with a crack in the scene photographs. The location of the crack helped him to establish the rest position of the car.

[41] Mr. Rempel determined that the maximum speed of the car *as it entered the crosswalk* was 40 km/hr. This was because it would be impossible, in his opinion, for the car to stop where it did if it arrived at the crosswalk at a higher speed than 40 km/hr. For the same reason, he concluded that the maximum speed of the car *at the point of impact* in the crosswalk must have been below 40 km/hr, in his opinion 37 km/hr, assuming the two girls were crossing centred in the crosswalk.

[42] Mr. Rempel further opined that the car may or may not have skidded as it came to rest. A car approaching the crosswalk at a speed of 50 km/hr would be expected to leave skid marks of approximately 10 to 11 metres, starting approximately three metres north of the crosswalk. He noted the absence of any

record of skid marks in the police reports or skid marks in a photograph of the crosswalk. While he observed a faint mark on the road in another photograph leading to the right front tire of the car which might be a skid mark, the length of this possible skid mark only supported an approach speed of 35 km/hr in his view.

[43] Mr. Rempel concluded that the collision circumstances and physical evidence were consistent with the assumption he was given that Ms. Sovdat was travelling at 35 km/hr to 45 km/hr when Ms. Naqvi and Ms. Panganiban walked or possibly ran out into the crosswalk.

[44] Mr. Rempel also estimated the time from when Ms. Naqvi stepped off the curb to when she was hit by the car, based on his estimate of the speed of the car, the location of the damage on the car and the distance from the curb. Assuming she was walking at a speed within the normal range for a 14-year-old girl, Mr. Rempel estimated that, when Ms. Naqvi stepped from the curb, the car was less than 2.3 seconds from impact.

[45] Mr. Rempel concluded that the time available for actual braking input was sufficiently short that a driver travelling at 35 to 45 km/hr and reacting with an average reaction time would not have time to stop.

[46] Given the focus of s. 179 of the *MVA* to which I have referred, I accept Mr. Rempel's opinion as evidence that, *when Ms. Naqvi and Ms. Panganiban left the curb*, the car was so close it was impracticable for Ms. Sovdat to stop.

[47] Accordingly, I find that Ms. Sovdat had the right of way.

[48] However, as held by the Court of Appeal in *Pirang* and *Cook,* a finding that the defendant driver had the right of way does not end the analysis. It is still necessary to consider whether the driver and/or the pedestrian breached their respective duties of care.

ii. Did Ms. Sovdat Breach her Duty of Care?

[49] In *Christensen*, Justice Neilson held at para. 50 that, where a pedestrian leaves a place of safety and enters a roadway *outside a crosswalk*, the onus rests on the pedestrian to show on a balance of probabilities that the defendant driver had a reasonable opportunity to avoid hitting them.

[50] Different considerations arise when a pedestrian is struck in a crosswalk. A driver approaching a crosswalk must maintain an ability to yield the right of way to a pedestrian: *Pirang* at para. 7. In other words, the question is not simply whether the driver had a reasonable opportunity to stop when the pedestrian stepped into the crosswalk, but also whether the driver unreasonably put herself in a position where it was not possible to stop in time.

[51] In *Niitamo v. ICBC*, 2003 BCSC 608, Justice Ballance held at para. 22 that a marked crosswalk is precisely the place where a driver could reasonably expect to encounter a pedestrian, and that in approaching a marked crosswalk, a driver assumes a heightened duty to take "extreme care" and maintain a vigilant lookout for those who might be in the crosswalk.

[52] In *Dobre v. Langley*, 2011 BCSC 1315 at para. 43, Justice Brown stated that "[o]ne need not adopt the statement at para. 22 of *Niitamo* that a driver approaching a marked crosswalk must exercise 'extreme care' to concur with the gist of the point that heightened vigilance is expected of a driver approaching a marked crosswalk".

[53] As Justice Barrow noted in *Kaiser v. Williams,* 2015 BCSC 646:

> [75] … [T]he content of the duty of care owed by a defendant motorist will vary according to the extent to which there are circumstances that would put a reasonable driver on notice of potential hazards. There were several circumstances that would have been apparent to a reasonable driver in the defendant's position, which would have put such a driver on notice of the prospect of potential hazards, and specifically pedestrians.

[54] The presence of school children also gives rise to particular considerations. In *Bourne (Guardian ad litem of) v. Anderson* (1997), 27 M.V.R. (3d) 63, 1997

CanLII 1145 (B.C.S.C.) at para. 55 Justice Hood set the standard required of a driver when the presence of a child on or near a road is known or should have been known:

> …[O]nce the presence of a child or children on a road is known, or should have been known, to the driver of a vehicle proceeding through a residential area where children live, that driver must take special precautions for the safety of the child or children seen, and any children yet unseen whose possible appearance or entrance onto the road is reasonably foreseeable. The precautions include keeping a sharp look out, perhaps sounding the horn, but more importantly, immediately reducing the speed of the vehicle so as to be able to take evasive actions if required.

[55] In this case, there are multiple facts indicating the presence of children, and the potential they would step into the crosswalk, that were known or should have been known to Ms. Sovdat as she approached the crosswalk.

[56] First, the crosswalk was clearly marked with white lines and a median dividing the lanes of traffic as it approached the crossing of a “greenway” pedestrian pathway.

[57] Second, Ms. Sovdat was driving one block south of a high school shortly after 3:00 pm, a time when it could be expected that students would be nearby as school had recently let out.

[58] Third, there were students in the area of the crosswalk on the afternoon in question. A group of students may have recently crossed in the crosswalk across the road on which Ms. Sovdat was driving. Ms. Naqvi testified that there was a group of four boys on the median in the crosswalk. Ms. Stanyer testified she saw students on the east side of the road who had just crossed the road. While Mr. Versteeg did not recall seeing any students in the crosswalk or on the median, he confirmed that there were students in the area and that he drove through the crosswalk more carefully and more attentive, given the presence of children.

[59] Fourth, Ms. Sovdat was driving southbound alongside the sidewalk from which Ms. Naqvi and Ms. Panganiban stepped into the path of her car. Ms. Naqvi and Ms. Panganiban would have been in her field of vision before they stepped off

the sidewalk into the crosswalk. There is no evidence the girls ran into the street. Rather, the evidence is that they stepped into the crosswalk at a normal walking pace.

[60] It is therefore not enough for the defence to say Ms. Sovdat was driving below the speed limit of 50 km/hr as she approached the crosswalk and could not stop in time. In my view, Ms. Sovdat should have reduced her speed when approaching to maintain the ability to bring her vehicle to a stop if a child entered the crosswalk.

[61] At the speed at which Mr. Rempel estimates Ms. Sovdat was driving as she entered the crosswalk – 35 km/hr to 45 km/hr – a driver with an average reaction time would not have time to stop. In my view, Ms. Sovdat was driving too fast for the circumstances.

[62] Moreover, Ms. Stanyer's eye witness evidence was that Ms. Sovdat did not react until she hit the children. Ms. Stanyer impressed me as a credible and reliable witness. She watched the entire incident unfold in front of her. She was close enough to observe relevant details. While, as Ms. Stanyer acknowledged under cross-examination, it is difficult to estimate the speed of an approaching vehicle, I find her impression the car was not slowing down is reliable. Importantly, in my view, she reacted in the moment, instinctively honking her horn to alert the driver.

[63] I would not accept Mr. Rempel's opinion as evidence Ms. Sovdat was attentive to the potential presence of pedestrians in the crosswalk. In my view, the most that Mr. Rempel can say on the evidence he collected is that, given the car's estimated approach speed and where it came to rest, Ms. Sovdat stopped within a range of expected reaction times. As Mr. Rempel acknowledges, Ms. Sovdat's actual reaction time is not known.

[64] Notably, Mr. Rempel did not speak to any of the eye witnesses. He testified that it is his standard practice not to speak with eye witnesses. That may be true, but not speaking to Ms. Stanyer in this case about Ms. Sovdat's apparent slow reaction

excluded from his consideration relevant information and limits the weight I can place on his conclusion regarding her attentiveness.

[65] I would also not accept Mr. Rempel's opinion as evidence there was nothing Ms. Sovdat could have done to avoid the collision. In my view, the most that Mr. Rempel can say is that, *once the girls stepped into the crosswalk*, there was insufficient time for Ms. Sovdat to come to a stop without hitting them. This only begs the question whether Ms. Sovdat should have been driving slower or better anticipating the potential presence of children in the crosswalk.

[66] In my view, Ms. Sovdat breached her duty of care by placing herself in a position where she was unable to stop without hitting Ms. Naqvi and Ms. Panganiban.

iii. Was Ms. Panganiban 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.

[70] The defence argues that Ms. Naqvi and Ms. Panganiban left the curb without any regard for their safety. It argues that there is no evidence either girl stopped before they left the curb, looked left or right before they entered the crosswalk or saw the approaching car.

[71] I do not fully agree. I accept Ms. Naqvi's evidence that she looked to the left before she stepped off the curb. I also accept Ms. Panganiban's evidence that she usually follows her parents' instructions to look both ways before crossing a street (recognizing that is not the same thing as evidence she remembered looking for traffic on this occasion).

[72] Importantly, however, neither young woman could remember seeing a car. Based on the engineering evidence, the car was there to be seen. Moreover, Ms. Stanyer testified that the girls looked startled when they realized the car was about to hit them.

[73] Either the girls did not see the car or they assumed incorrectly that the driver would stop for them. Either way, they failed to take adequate care to ensure that it was safe for them to cross. To paraphrase the language of s. 179(2), they walked into the path of a car when it was impracticable for the driver to yield the right of way.

[74] There is no evidence the girls stopped before they left the curb, maintained a lookout after Ms. Naqvi initially looked left or attempted to make eye contact with the driver of the car. There is no clear evidence that Ms. Panganiban actually looked for traffic on this occasion. She may have relied on Ms. Naqvi.

[75] For these reasons, I find that Ms. Panganiban was partially at fault for the collision by failing to take adequate care for her own safety.

iv. Apportionment of Fault

[76] Section 4(1) of the *Negligence Act*, R.S.B.C. 1996, c. 333, requires the Court to determine the "degree to which each person was at fault" for the damages that Ms. Panganiban claims.

[77] Apportionment of liability based on degrees of fault does not depend on who caused the damage, but rather "evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care": *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505 at paras. 45–46.

[78] In *Aberdeen v. Township of Langley, Zanatta, Cassels*, 2007 BCSC 993, varied on other grounds 2008 BCCA 420, Justice Groves identified nine factors that may be useful in assessing the nature and degree of departure from the standard of care in order to determine an appropriate apportionment of fault (at paras. 62–63):

> 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.

[79] In this case, Ms. Sovdat had the right of way under s. 179(2). Ms. Naqvi and Ms. Panganiban entered the crosswalk when it was impracticable for Ms. Sovdat to yield the right of way. Under s.179(2), the obligation shifted onto the pedestrians to yield the right of way to the car, for instance, by waiting for the car to pass before entering the crosswalk, stopping on the edge of the road or attempting a retreat.

[80] Once Ms. Naqvi and Ms. Panganiban entered the path of the car, there was nothing either party could do to avoid the collision. There was both insufficient time for Ms. Sovdat to stop and insufficient time for Ms. Naqvi and Ms. Panganiban get out of the way.

[81] Ms. Sovdat breached her duty of care by failing to maintain an ability to yield the right of way to a pedestrian in the crosswalk. She created the risk of a collision.

[82] Ms. Panganiban breached her duty of care by failing to ensure it was safe to cross the road. She may have been able to avoid the collision.

[83] Ms. Sovdat was an adult driving through a clearly marked crosswalk with school children present in the vicinity. Ms. Panganiban was a 14-year-old girl walking home from school.

[84] It should also be recognized that the defence has the onus of proof on a claim of contributory fault. In this case, it is not clear whether Ms. Panganiban looked left, saw the car or assessed whether the driver would stop. This uncertainty arises because Ms. Panganiban does not have a complete memory of what happened, likely because of the trauma of being hit by a car. As the defence has the onus of proof on this aspect of the case, the uncertainty should not be resolved in favour of a higher allocation of fault to Ms. Panganiban.

[85] In my view, the appropriate result is to allocate 80% of the fault for Ms. Panganiban’s injuries to Ms. Sovdat and 20% to Ms. Panganiban.

III. DAMAGES

A. Causation

[86] The basic rule of causation for negligence is that the plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred: *Clements v. Clements*, 2012 SCC 32 at para. 13. Inherent in the "but for" test is a requirement that the defendant's negligence was necessary to bring about the injury - in other words, the injury would not have occurred without the defendant's negligence.

[87] It is not necessary for the plaintiff to demonstrate that the defendant's negligence was the sole cause of a subsequent medical condition. There may be other potential non-tortious causes. So long as there is a substantial connection between the defendant's negligence and the plaintiff's injury, the defendant is liable for the damages: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17, 44, 1996 CanLII 183; *Farrant v. Laktin,* 2011 BCCA 336 at paras. 9–11.

[88] In this case, the defence concedes that the collision caused Ms. Panganiban to suffer a concussion, a hematoma on her skull, soft tissue injuries to her neck and left shoulder, pain in her left thigh, pain in her jaw and swelling in her left hand as a result of being hit by the car.

[89] The defence argues that Ms. Panganiban recovered fully from these injuries by August 2015. It disputes that the collision caused any injury to her back, cognitive impairment or psychological injury beyond the immediate shock and fright of being hit by a car.

[90] Ms. Panganiban must therefore demonstrate that the back pain and other injuries she alleges beyond August 2015 would not have occurred but for having been hit by the car in February 2015. The collision need not be the sole cause of her injuries so long as it is substantially connected to her injuries.

[91] As the plaintiff, Ms. Panganiban has the burden of proof on a balance of probabilities. Where she relies on expert medical opinion evidence, she must prove

the factual assumptions on which the experts relied before the Court can give weight to those opinions. Ms. Panganiban can meet this burden with her own evidence, so long as the Court is careful to scrutinize the testimony when there is no objective evidence available: *Butler v. Blaylock*, [1983] B.C.J. 1490 at para. 13, 1983 CarswellBC 2066 (C.A.).

[92] The defence submits that Ms. Panganiban has not met her burden of proof, primarily because of problems with her memory (the reliability of her evidence) and inconsistencies in her testimony, both internally and with the contemporaneous medical records (the credibility of her evidence).

B. Ms. Panganiban's Evidence

i. Before the Collision

[93] Ms. Panganiban was born on June 5, 2000, in the Philippines. She grew up in Manila, where she was an active child. Her family immigrated to Canada in 2012, when she was 12 years old.

[94] Initially following the move to Canada, Ms. Panganiban struggled with the English language and making friends with English speakers. She transferred schools three times in the first three years. She participated in ESL classes and, by the time she entered grade 9 at North Surrey Secondary, her English had improved and was improving. At North Surrey Secondary, she began to make friends and participate in extracurricular activities.

[95] The collision occurred during the second term of her first year at North Surrey Secondary, only three years after Ms. Panganiban arrived in Canada.

ii. Immediate Aftermath of the Collision

[96] Ms. Panganiban does not remember being hit by the car. She told a paramedic at the scene that she hit her head on the windshield. She later told her family doctor that she hit her head on the pavement, but could not remember if she hit the windshield. On the whole of the evidence, it was most likely Ms. Naqvi who

was thrown up onto the hood of the car and hit the windshield. Ms. Panganiban was most likely struck to the ground and hit her head on the pavement.

[97] The first thing Ms. Panganiban could remember, she was lying on the ground. She saw her friend, Ms. Naqvi, also on the ground, unconscious. She feared that Ms. Naqvi was dead.

[98] An ambulance crew arrived at the scene and transported Ms. Panganiban to Surrey Memorial Hospital. Ms. Panganiban remembered being in a lot of pain, but could remember the details of how she ended up in the hospital.

[99] The paramedic at the scene recorded that Ms. Panganiban was able to walk to the ambulance and did not report a loss of consciousness, nausea/vomiting, or neck or back pain.

[100] At the hospital, Ms. Panganiban was diagnosed with soft tissue injuries on her left side, a concussion and a scalp hematoma. The admitting nurse noted a headache, no open wounds and no report of a loss of consciousness.
Ms. Panganiban was given a CT scan of her head and spine, ultrasound, chest x-ray and x-rays of the pelvis and left femur, all of which were normal, other than bruising and the hematoma. She was discharged from the hospital at 9 o’clock in the evening.

[101] When she got home, Ms. Panganiban testified, she stayed home, scared to go out and isolated by her injuries. She testified that she experienced pain all along the left side of her body, including in her jaw, neck, shoulder and leg. She testified that initially she could not walk and could not eat on one side of her mouth. She also testified that she suffered frequent headaches and could not sleep.

[102] Ms. Panganiban saw her family doctor, Dr. Eleazar David, about her injuries on March 2, 2015. Dr. David diagnosed soft tissue injuries to the head, neck, left shoulder, left thigh and left hand. He recommended range of motion exercises, warm compresses and Advil. He did not prescribe any other medications. He did not refer Ms. Panganiban to any specialists.

[103] On March 5, 2015, a week after the collision, Ms. Panganiban fainted while brushing her teeth. Her father took her to the hospital. The admitting nurse noted that Ms. Panganiban said she lost consciousness at home, but had not lost consciousness prior to this event. The nurse also noted that Ms. Panganiban complained of headaches on and off “since Friday” (the day of the collision). Ms. Panganiban was diagnosed with a fainting spell and discharged.

[104] Ms. Panganiban missed a week of school after she was hit by the car. She returned to school in late March 2015, following the regular spring break.

[105] Ms. Panganiban testified that she continued to experience pain in her left side after she returned to school. In addition, she testified, she began to experience upper and lower back pain that she attributed to the collision. She testified that she did not tell her family doctor or her parents about the full extent of her pain; instead, she tried to ignore it. She testified that she thought the pain was normal and she did not want to talk about the collision or worry her parents.

[106] Ms. Panganiban also testified that she experienced mood issues following the collision, including depression, anxiety, irritability and feeling lonely. She testified that she was less social and less motivated to participate in activities. In addition, she testified, she had trouble thinking and paying attention in school. Further, Ms. Panganiban testified that she experienced anxiety crossing the street.

[107] In August 2015, Ms. Panganiban told Dr. David that she felt better, with no more pain and no more anxiety. I will return to Dr. David’s records below.

iii. Education and Employment History

[108] Ms. Panganiban graduated from high school on time. She received good grades in high school. She participated in physical education and dance classes, and received good marks for these classes as well. She also played on the volleyball team in grade 10 and joined the break dance team in grade 11, with no particular physical limitations she could recall.

[109] After high school, Ms. Panganiban attended Kwantlen Polytechnic University. She began in general studies and later focused on interior design. She testified that she found the classes hard and struggled, in particular, with math and AutoCAD. She stopped attending Kwantlen without graduating, which she attributed to her difficulties arising from the collision. However, at least part of her reason for leaving Kwantlen was because the courses went online following the outbreak of COVID.

[110] Ms. Panganiban began working at Tim Hortons in November 2017, while she was attending Kwantlen. She was a good employee and received very positive performance reviews. She continued working at Tim Hortons until August 2021.

[111] Ms. Panganiban worked as a hostess and a server at Wings Restaurant from August 2021 until about April 2022. Again, she received positive performance reviews. She left Wings to take a job as a server at Townhall Restaurant. As of the date of the trial, she was working four days a week at an Aritzia warehouse.

[112] Ms. Panganiban testified that her back bothered her when she was working at Tim Hortons and at Wings. However, she also acknowledged that she was physically able to do the work. Under cross-examination, she suggested that her decision to leave Wings was, in part, due to her back problems. However, at an examination for discovery just two weeks before the trial, she testified that she left Wings to get more experience at a different restaurant.

[113] Despite her professed back pain, Ms. Panganiban first attended physiotherapy and massage appointments in February 2019. She also saw a chiropractor in 2019 or 2020. In total, she attended just eight appointments with these providers. She testified that she did not find the treatments helpful.

[114] Ms. Panganiban also testified that she experienced issues with her memory while working as a server. She testified that she sometimes forgot food or drink orders, most recently at Townhall. However, she acknowledged that these errors were rare and not out of line with what she noticed in coworkers. On examination for

discovery, she testified that she did not have any difficulties doing her work at Townhall.

[115] In the late summer of 2020, Ms. Panganiban's brother was seriously injured and lapsed into a coma. He died in September 2020. The entire family was shocked and saddened by his injury and death.

[116] In August 2020, Ms. Panganiban asked her family doctor for a referral to see a psychiatrist. At trial, she denied that she asked to see a psychiatrist because of her brother's injury. She said it was because she was having difficulties with her memory and motivation, which began when she returned to high school following the accident in 2015. However, on examination for discovery, she testified that she first became depressed when her brother died.

[117] In 2021, Ms. Panganiban began a program at Vancouver Career College to become a practical nurse. When she began, she felt that she was physically and mentally capable of completing the program. However, she dropped out after just two months. The courses involved a lot of memorization and technical language with which she struggled. She testified that she experienced headaches and dizziness while studying, as well as pain in her neck and back if she sat too long.

[118] After leaving Vancouver Career College, Ms. Panganiban took a break from education and continued working as a server.

[119] In 2022, Ms. Panganiban began attending a six-month program at CDI College to become a dental receptionist. This program also involved a lot of memorization, but she did well and received high marks. As of the date of the trial, Ms. Panganiban expected to complete the program at CDI successfully and looked forward to a career as a dental receptionist.

iv. Current Symptoms

[120] Ms. Panganiban testified that she still has pain in her neck and jaw sometimes, and pain in her left shoulder and upper and lower back continuously.

She testified that she has continued to experience headaches on a consistent basis since she was hit by the car. She testified that she also continues to experience dizziness that started immediately after the collision, bad enough that, occasionally, she needs to sit down or grab something to steady herself.

[121] The defence argues that this evidence is inconsistent with the clinical records of Ms. Panganiban's family doctor and the evidence of a physiatrist who provided an expert report in this case. I will return to these arguments below.

[122] Ms. Panganiban further testified that she continues to experience mood issues that started shortly after the collision. She testified that she continues to experience the social isolation that began when she was injured, although now she has the courage to tell people how she feels, and, while she still feels depressed, she enjoys time with friends.

[123] Under cross-examination, Ms. Panganiban conceded that she attends parties, smokes cannabis and dates. She reported no difficulty having fun or forming meaningful relationships.

C. The Family Doctor's Records

[124] The defence relies on the records of Ms. Panganiban's family doctor, Dr. David, in large part to challenge Ms. Panganiban's reliability and credibility as a reporter of her own past and present symptoms.

[125] Neither party called Dr. David as a witness. His records were admitted into evidence pursuant to a document agreement in which the parties agreed: the observations, treatments and prescriptions of medical providers are admissible as facts, but not as opinion evidence; and, the notes made by Ms. Panganiban's medical providers of statements she made to them are admissible for the fact the statements were made, but not for their truth.

[126] The terms of the document agreement are consistent with the law on the admissibility of clinical records. It is well-established that clinical records may be

admitted into evidence as business records pursuant to s. 42 of the *Evidence Act*, R.S.B.C. 1996, c. 124. Section 42 makes the records admissible to prove facts such as a doctor's observations of the patient's medical condition, but not for the opinions they contain such as medical diagnoses: *Olynyk v. Yeo* (1988), 55 D.L.R. (4th) 294 at 300–01, 33 B.C.L.R. (2d) 247.

[127] Clinical records of statements made by a patient, including her description of her symptoms, are admissible as evidence of the fact the patient made the recorded statements on those occasions: *Edmondson v. Payer*, 2011 BCSC 118 at para. 29 [*Edmondson BCSC*]. Where the recorded statements are inconsistent with a plaintiff's evidence at trial, they may be used in cross-examination to impeach her credibility: *Edmondson BCSC* at para. 29. The plaintiff's statements may also be tendered by the defence as admissions by the plaintiff for the truth of their content: *Edmondson BCSC* at para. 30.

[128] However, there are limits on the use to which the clinical records can be put, whether as admissions or as prior inconsistent statements. As Justice Smith explained in *Edmondson BCSC* at paras. 34–37:

> [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
>
> [35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:
>
> > ...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

> [36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.
>
> [Emphasis added.]

[129] On appeal from the trial decision in *Edmondson BCSC*, the Court of Appeal clarified that what Justice Smith said about the absence of a clinical record does not amount to a legal principle applicable in every case but, rather, reflects a common-sense response to an argument that the absence of a reference in the clinical records is decisive: *Edmondson v. Payer,* 2012 BCCA 114 at para. 30 [*Edmondson BCCA*].

[130] On their face, in this case, Dr. David's records appear to support the position of the defence. Some of the statements apparently made by Ms. Panganiban to Dr. David appear to contradict some aspects of her testimony at trial.

[131] As stated, Ms. Panganiban first saw Dr. David about the injuries on March 2, 2015. Dr. David recorded that she complained of dizziness, pain on the left side of her head and body, difficulties opening her mouth, pain in her left shoulder, difficulties lifting her left arm, pain in her left thigh and swelling in her left hand. He noted tenderness in her left shoulder rotator cuff, a limited range of motion around her shoulder and swelling in her left hand and fingers. Despite these comprehensive findings, he did not make a note of any back pain.

[132] On March 9, 2015, Dr. David noted that Ms. Panganiban said she was feeling better, but also that she was experiencing occasional headaches, left leg pain, left shoulder pain, anxiety, flashbacks and crying. Again, he did not make a note of any back pain.

[133] On March 30, 2015, around the date she returned to high school, Dr. David noted that Ms. Panganiban said she had no more pain and no more anxiety.

However, he also noted that she was still experiencing left shoulder pain. Again, he did not make a note of any back pain.

[134] On August 8, 2015, Dr. David completed a form for ICBC in which he recorded that Ms. Panganiban said she felt better, with no more pain and no more anxiety. The defence relies on this note as evidence Ms. Panganiban had fully recovered from her injuries by August 2015.

[135] Ms. Panganiban did not see Dr. David again about her injuries until September 10, 2016. On that date, Dr. David noted that she said she was feeling well, with no more flashbacks and no more leg pain or left shoulder pain. He noted that she said she still had occasional headaches that resolved spontaneously.

[136] The next note by Dr. David about the injuries is on March 28, 2017, when he filled out another form for ICBC. On this occasion, he recorded that Ms. Panganiban said she felt well and reported no more fear on crosswalks. He noted occasional dizziness and requisitioned lab tests.

[137] On April 23, 2017, Dr. David reviewed the lab tests with Ms. Panganiban and prescribed an iron supplement.

[138] On June 22, 2017, Dr. David noted that Ms. Panganiban reported that her dizziness was completely resolved.

[139] There are no further notes related to the injuries in Dr. David's records until July 21, 2018. On that date, Dr. David noted that Ms. Panganiban reported that she had experienced headaches once per week for about two years, with the last headache about one week ago at 5/10 on a pain scale.

[140] On October 18, 2018, Dr. David noted that Ms. Panganiban said she had experienced upper back pain "X 2 weeks". This appears to be the first reference in Dr. David's notes to any complaint of back pain.

[141] On February 10, 2019, Dr. David gave Ms. Panganiban a note for physiotherapy for neck and back pain. He also recorded that she said she had headaches.

[142] The next relevant note in Dr. David's records is dated August 9, 2020. Dr. David noted that Ms. Panganiban reported occasional headaches and occasional back pain. This appears to be the first reference to mid back pain. Dr. David also noted that Ms. Panganiban said that she occasionally forgot things. She asked for a referral to see a psychiatrist, but Dr. David told her she did not need to see one and recommended that she do "brain exercises" and remain active.

[143] On August 17, 2020, Ms. Panganiban again asked for a referral to see a psychiatrist, and Dr. David gave her a requisition. He noted that she said she was making mistakes and forgetting things at work, and that she said she had been off school for one year. He noted that she said she was having occasional sadness or flashbacks.

[144] On November 11, 2020, Ms. Panganiban asked for a referral to see a chiropractor about back pain.

[145] On March 28 and April 9, 2021, Dr. David noted that Ms. Panganiban complained about back pain, sometimes in the upper back, sometimes in the lower back. He noted that she said there was no recent trauma, only a motor vehicle accident in 2014 (I take this to have been an error, as the accident was in 2015).

[146] The defence argues that the clinical records show that Ms. Panganiban was able to tell Dr. David when she did have pain and when she felt anxious or wanted to see a psychiatrist or a chiropractor. It points out that, at one point in her cross-examination, Ms. Panganiban agreed that, if she had back pain, she would tell her doctor.

[147] The defence argues that the Court should rely on the clinical records where they contradict Ms. Panganiban or her witnesses. Specifically, the defence argues

that the Court should find that Ms. Panganiban recovered from her injuries by August 2015 and did not experience back pain prior to October 2018.

[148] In my view, the clinical records must be treated with more caution. As Justice Smith explained in *Edmondson BCSC,* clinical records are, by their very nature, unreliable as evidence of the existence or non-existence of a particular symptom or condition.

[149] The defence submits that the Court of Appeal "revisited" *Edmondson BCCA* in *Tisalona v. Easton,* 2017 BCCA 272. If by "revisited", the defence means the Court questioned *Edmondson BCCA*, I do not agree. The Court simply confirmed that what Justice Smith said about the absence of a reference to a symptom in a doctor's note did not amount to a legal principle applicable in every case: *Tisalona* at para. 30.

[150] The caution expressed in *Edmondson BCSC* is particularly important when the patient is a child. A child may not understand or articulate pain in the same way as an adult. Also, a child may be more vulnerable to suggestion by a well-meaning doctor. She may say what she believes her doctor wants to hear. As Justice Smith observed in *Edmondson BCSC,* there is usually no note in the clinical records of the questions asked by the doctor that elicited the statements by the patient.

[151] Ms. Panganiban professed to have no recollection of many of the specific statements attributed to her in Dr. David's notes. She testified that she was never fully comfortable with Dr. David. She testified that she only went to Dr. David at the direction of her parents because he was Filipino and spoke Tagalog. She testified that she did not fully disclose her pain to Dr. David because she thought the pain she was experiencing was normal, she wanted to move on with her life and she did not want her parents to worry.

[152] Ms. Panganiban's evidence at trial of her symptoms after March or August 2015 to about 2020 differs from what Dr. David's notes say she told him about her pain and anxiety at the time. It stands to reason, however, that a young person like

Ms. Panganiban would gain a different perspective on her body and her mind as she matured. This is not to say that Ms. Panganiban's evidence should not be assessed critically, but rather that the statements attributed to her in the clinical records must be considered in the context of her age and vulnerability when she initially reported her symptoms to Dr. David.

[153] The two medical experts who gave opinion evidence as part of Ms. Panganiban's case were both cross-examined extensively by defence counsel on the clinical records. They both stated that, in their opinion, Ms. Panganiban's injuries continued beyond March 2015, when Dr. David noted she said she was "feeling better", and beyond August 2015 when he noted that she said she had "no more pain". I will return to the expert evidence below.

[154] In my view, the clinical records cannot be relied on as decisive evidence of Ms. Panganiban's medical condition at the time or as decisive evidence she did not suffer from symptoms she did not bring to Dr. David's attention.

[155] However, the inconsistencies between the clinical records and Ms. Panganiban's evidence must be considered as a factor in assessing the credibility and reliability of her testimony.

[156] In this regard, the lack of any reference in the clinical notes to back pain prior to October 2018 is significant. I agree with the defence that, despite her relative immaturity, Ms. Panganiban was able to communicate her basic symptoms to Dr. David. Given the numerous other symptoms she communicated, I would have expected her to tell Dr. David that her back hurt, if that was a problem for her in the weeks and months following the collision. In my view, her evidence that she experienced back pain in the weeks and months immediately subsequent the accident is unreliable.

[157] Standing alone, however, the clinical records do not prove that Ms. Panganiban recovered fully from her injuries by August 2015.

D. Lay Witnesses

[158] The evidence of Ms. Panganiban's lay witnesses was of limited assistance. While I accept their observations of her physical condition in the immediate aftermath of the collision, I found their recollection of Ms. Panganiban's mood and activity level following her return to high school unreliable.

[159] Raymund Panganiban is Ms. Panganiban's father. He testified that, when he saw her in the hospital on the day of the collision, his daughter was unresponsive and had a blank look on her face. His evidence confirms that Ms. Panganiban was in a state of shock, which is not surprising.

[160] Mr. Panganiban testified that he noticed his daughter experiencing headaches and back, neck and shoulder pain shorty after coming home from the hospital. He testified that he was sufficiently concerned about her back pain that he asked Dr. David to take an x-ray.

[161] I accept Mr. Panganiban's evidence about the headaches and the neck and shoulder pain at that time, but I think he is mistaken about the back pain. There is no reference in Dr. David's notes to a discussion about an x-ray of the back until October 2018.

[162] At his examination for discovery in March 2019, Mr. Panganiban testified that his daughter had back pain in the preceding year, meaning 2018. The only observation he could recall about her physical condition following her return to high school in March 2015 was that she leaned to the left, which is understandable given the injuries on her left side and not necessarily indictive of a back injury.

[163] Mr. Panganiban testified that his daughter became quiet and withdrawn following the collision and continues to be so today. However, under cross-examination he agreed that, following a period of adjustment, Ms. Panganiban's moods seemed normal for a teenager. He agreed that she was social with her friends, had a boyfriend, played volleyball, participated in dance and took swimming lessons.

[164] Ms. Panganiban's friend, Ms. Naqvi, was asked whether she noticed any difference in Ms. Panganiban after Ms. Naqvi returned to school in grade 10. The only thing that Ms. Naqvi could remember was one incident when Ms. Panganiban became distressed as they were crossing the street.

[165] Bianca Torres was a classmate and the coach of the dance team. She testified that Ms. Panganiban did not participate in any physically intense activities in grade 9. She further testified that Ms. Panganiban was unable to participate on the dance team in grade 11, and that while Ms. Panganiban did participate in grade 12, Ms. Torres took her physical limitations into account when assigning her dance routines.

[166] I am unable to place any weight on Ms. Torres' direct testimony about Ms. Panganiban's condition in grades 11 and 12. In answer to questions from an insurance adjuster before trial, she could not recall the specifics of Ms. Panganiban's physical limitations, only that she was going through a lot in her personal life. Likewise, Ms. Torres was unable to provide specifics under cross-examination.

[167] Another classmate, Ivan Abais, testified that, when Ms. Panganiban returned to school following the collision, she had scratches and bruises on her arms, face, jaw, neck, on her "whole left side". He testified that he noticed Ms. Panganiban rubbing her neck throughout high school. He testified that when Ms. Panganiban spent time with her friends, she would sometimes ask for a break from the conversation and noticed that she would sit down and slump or put her head down.

[168] While I accept his evidence of his observation of Ms. Panganiban's injuries in the immediate aftermath of being hit by the car, I am unable to place weight on Mr. Abais' evidence about her later struggles. In answer to a question from the insurance adjuster, "[a]fter the accident, when you saw [Ms. Panganiban] in the hallways or in class, did you ever observe her struggling physically", Mr. Abais responded "[f]or me, physically speaking and only being able to observe her from the outside, she didn't look like she was injured."

E. Expert Evidence

i. Dr. Russell O'Connor, Physiatrist

[169] Ms. Panganiban tendered an expert report by Dr. Russell O'Connor and qualified Dr. O'Connor as an expert in physical medicine and rehabilitation.

[170] In his report, Dr. O'Connor diagnosed the following injuries as a result of being hit by the car on February 27, 2015: concussion, headaches, neck pain, jaw pain, ringing in the ears, mid back and low back pain, left shoulder pain, soft tissue bruising to the left thigh, swelling in the left hand, and troubles with some anxiety with flashbacks at night and crying at night.

[171] Dr. O'Connor opined that Ms. Panganiban's fainting episode and initial round of headaches were related to the collision. He noted that she gradually and slowly improved from these issues, and seemed to do well in high school.

[172] Dr. O'Connor noted that Ms. Panganiban presented with moderate anxiety and severe depression-type symptoms when he examined her. He acknowledged that it was beyond his area of expertise to determine whether these symptoms are related to the collision.

[173] Noting that she did not report cognitive symptoms or impaired cognitive function in the weeks, months or years immediately following the collision, Dr. O'Connor opined that Ms. Panganiban's current cognitive concerns are more likely related to her present anxiety and mood than the collision or her concussion.

[174] Dr. O'Connor found that all of Ms. Panganiban's soft tissue injuries, with the exception of latent tenderness in her neck and back pain, gradually improved and resolved prior to his examination.

[175] Dr. O'Connor described Ms. Panganiban's current back pain as multifactorial. In his report, he wrote:

> It is likely, given her motor vehicle accident, that she was at increased risk for developing mechanical pains in the mid and low back as a result of the impact. It is also possible she would have developed such problems even

> had the accident not occurred from working two jobs and long hours as a waitress, bartender and server.
>
> The reports of persistent, mild and intermittent mechanical low and mid back pain and headaches since the accident suggest some of the residual intermittent headaches and mid and low back pain are residual effects of the motor vehicle accident.

[176] Dr. O'Connor testified that he understood Ms. Panganiban's symptoms were "fairly quiet" from 2015 to 2018. He was aware that Dr. David did not make a record of back pain over this time period. He testified that it was possible for a person to suffer a back injury, apparently recover and not show symptoms for a period of time, and yet remain more susceptible to pain in that area later on in life.

[177] However, Dr. O'Connor agreed that he would expect a person who suffered an initial injury to their neck or back to have tenderness in that area in the weeks and months following the impact. He also agreed that, in the absence of an initial injury, if someone developed neck or back pain later on, he would not attribute the pain to the original impact.

[178] Dr. O'Connor also acknowledged that, in coming to his opinions, he assumed that Ms. Panganiban experienced pain in her neck and back in the weeks or months following the collision. He also assumed that she had been thrown up onto the hood of the car and hit the windshield.

[179] The only evidence that Ms. Panganiban experienced back pain in the weeks and months immediately following the collision is her own testimony and the testimony of her lay witnesses. As explained above, I find the testimony about her back pain in this time period to be unreliable. As to the mechanism of her injury, the evidence does not establish that Ms. Panganiban was thrown up on the hood of the car and hit the windshield. As stated, it was most likely Ms. Naqvi who was thrown up on the hood, not Ms. Panganiban.

[180] I am therefore unable to place any weight on Dr. O'Connor's opinion that Ms. Panganiban was at increased risk for developing back pain as a result of the collision. The above factual assumptions underlying this aspect of Dr. O'Connor's

opinion – (a) that she experienced back pain in the weeks and months following the collision and (b) that she was thrown up on the hood of the car - were not proven.

[181] I accept Dr. O'Connor's opinion that Ms. Panganiban's persistent neck pain and intermittent headaches are a residual effect of being hit by the car.

[182] In terms of prognosis, Dr. O'Connor's opinion was that Ms. Panganiban is capable of employment, domestic tasks and recreational activities.

ii. Dr. Gueorgui Medvedev, Neurologist

[183] Ms. Panganiban tendered an expert report by Dr. Gueorgui Medvedev and qualified Dr. Medvedev as an expert in neurology.

[184] In his report, Dr. Medvedev opined that Ms. Panganiban's headaches were "probably" caused by her injuries in the collision. He also opined that her back pain is "probably" multifactorial and attributable to the effects of the collision as well as the effects of her work as a server.

[185] Dr. Medvedev further opined that Ms. Panganiban "probably" suffered a concussion and developed post-concussive symptoms. He stated that her cognitive complaints and behavioural changes "possibly" represent the effects of a mild traumatic brain injury.

[186] By "probably", Dr. Medvedev explained that he meant a greater than 50% chance the collision caused the symptom, and by "possibly" he meant less than a 50% chance the collision played a role.

[187] Some of the statements in Dr. Medvedev's report are outside his area of expertise. I place no weight on the following statements: Ms. Panganiban's academic performance is probably below what was expected of her in high school; there is a potentially causative association between her head injury and her drug use; Ms. Panganiban's ability to advance her career is guarded; she has not been able to achieve any academic progress; and she has a life long risk of chronic psychiatric conditions as a result of the collision.

[188] However, I do not regard these statements as an indication that Dr. Medvedev's evidence as a whole is advocacy dressed up as an expert opinion, as was suggested by the defence. In his testimony at trial, Dr. Medvedev readily acknowledged that psychiatry, academic performance and vocational prospects are outside of his area of expertise, and clarified that he was not offering opinions on these matters.

[189] Nor would I reject Dr. Medvedev's report as advocacy because he relied primarily on Ms. Panganiban's self-reporting of her symptoms. While he could have been clearer in his report as to what he reviewed, Dr. Medvedev testified that he took Dr. David's clinical notes into consideration, as well as the initial reports by the paramedic and the nurse at the hospital.

[190] Dr. Medvedev testified that he was aware there were no contemporaneous records that Ms. Panganiban lost consciousness in the collision. He testified that, as a neurologist, he does not put much weight on the statements by an injured person to emergency medical personnel or triage nurses. He testified that he put more weight on the CT scan with a visible hematoma.

[191] Dr. Medvedev also testified that he was not surprised by the lack of neurological symptoms in Dr. David's notes. He testified that, in his experience, a patient can have a head injury that initially goes unnoted by a family doctor, but comes back to bother the patient in several years.

[192] Under cross-examination, Dr. Medvedev agreed that he would only relate the mid or low back complaints to the collision if Ms. Panganiban suffered such symptoms within days or weeks of the collision. He agreed that, if she first complained about mid or low back pain six months later, he would not relate those complaints to the collision. He acknowledged that it would not be possible to relate the back complaints Ms. Panganiban made in October 2018 to the collision.

[193] I am therefore unable to place any weight on Dr. Medvedev's opinion that Ms. Panganiban's back pain is attributable to the collision. His opinion was based on

an unproven assumption that her back pain came on immediately and gradually got worse. As stated, I find Ms. Panganiban's evidence that she experienced back pain immediately subsequent the accident and consistently since then to be unreliable.

[194] Dr. Medvedev also agreed that Dr. David's records indicated that Ms. Panganiban made a full recovery from the concussion by August 2015, which he testified is the usual timeframe expected for a full recovery from a concussion. However, he also testified that an improvement from a concussion can be temporary, and ultimately, the mechanism of later symptoms may still be trauma-related.

[195] Dr. Medvedev agreed that the fact Ms. Panganiban did well academically in high school was inconsistent with her having memory or other cognitive problems relating to the collision. He acknowledged that it would be inconsistent with a head injury for someone to have no noticeable memory issues after the initial trauma, but then develop problems related to the impact sometime later. Rather, he agreed, it would be more likely that the later memory problems were related to other causes, including emotional issues.

[196] I accept Dr. Medvedev's opinion that Ms. Panganiban suffered post-concussive symptoms, including headaches, as a result of the blow to her head. However, the cross-examination of Dr. Medvedev demonstrated that Ms. Panganiban's post-concussive symptoms were likely at their worst in the initial six months following the collision, after which they resolved to intermittent headaches.

[197] Dr. Medvedev recognized that Ms. Panganiban appeared to be suffering from depression at the time he examined her. However, he testified that he would defer to a psychiatrist in diagnosing depression as a cause of Ms. Panganiban's current symptoms.

F. Adverse Inference

[198] The defence asks that the Court draw an adverse inference against Ms. Panganiban for her failure to call Dr. David as a witness or obtain an expert opinion from him.

[199] The defence argues that the circumstances of this case are similar to a number of cases in which adverse inferences were drawn (or included with instructions for a jury) for a failure to call opinion evidence from treating physicians who could have filled "significant gaps" in the evidence: *Andrews v. Mainster,* 2014 BCSC 541; *Willing v. Ayles,* 2009 BCSC 1035; *Hodgins v. Street*, 2009 BCSC 673*; Brar v. Ismail,* 2018 BCSC 1487.

[200] The defence argues that an adverse inference ought to be drawn in this case because Dr. David could fill in significant gaps in the nature, progression and cause of Ms. Panganiban's complaints in the weeks, months and years after the collision. The defence argues that Dr. David's long-term perspective would be a crucial piece of evidence in this trial because there is inconsistency between the clinical records and Ms. Panganiban's testimony and suggestion that Dr. David's records are not an accurate reflection of her condition.

[201] The adverse inference that the defence asks the Court to draw is that Dr. David would not support Ms. Panganiban's evidence that she continued to suffer accident-related symptoms after August 2015, nor would he support her claim that her subsequent complaints of headaches, neck discomfort and back pain were caused by the collision.

[202] In oral argument, the defence also asked the Court to draw an adverse inference against Ms. Panganiban for her failure to call a psychiatrist to give evidence. The defence notes that Ms. Panganiban asked Dr. David for a referral to see a psychiatrist. It further notes that Drs. O'Connor and Medvedev recommended that Ms. Panganiban see a psychiatrist.

[203] In *Andrews* at para. 176, Justice Pearlman summarized the factors identified by the Court of Appeal in *Buksh v. Miles*, 2008 BCCA 318 at para. 35, for consideration on the question of whether a trier of fact can reasonably draw an inference that the witness not called by a party would have given evidence detrimental to that party's case:

a) the evidence before the court;

b) the explanations offered for not calling the witness;

c) the nature of the evidence that could be provided by the witness;

d) the extent of disclosure of the physicians' clinical notes; and

e) the circumstances of the trial, for example, an initial agreement to introduce clinical records that were contrary to the inference, or incorporation of that witness's views or observations in the report of a witness called by the other side.

[204] In *Buksh,* Justice Saunders cautioned that medical care has changed significantly since an earlier decision which held that a plaintiff may be expected to call "all doctors" who attended her for the important aspects of her injuries (at paras. 31–33). Justice Saunders also cautioned that the discovery process now allows the opposite party to be aware of the opinion of a treating physician, whether or not that doctor testifies: *Buksh* at para. 33.

[205] I take from these cautions that courts today must be careful to consider the factors set out in *Buksh* rather than reflexively drawing an adverse inference from a failure to call a treating physician.

[206] More recently, in *Thomasson v. Moeller*, 2016 BCCA 14, in upholding a decision not to draw an adverse inference in a motor vehicle action, the Court of Appeal noted, among other things, that the ability to call the medical witness in question was available to both parties (at para. 38).

[207] In *Zawadzki v. Calimoso*, 2011 BCSC 45, a decision cited with approval by the Court in *Thomasson*, Justice Voith refused to draw an adverse inference because there was "no evidence that the defendants were unable to or, in fact, so much as tried to speak to any of the physicians in question" (at para. 150).

[208] The decisions cited by the defence to support their argument were cases where the plaintiff had pre-existing conditions, causation was in issue and the treating physician who was not called was in a position to fill significant gaps and provide crucial evidence at trial.

[209] In this case, there is no evidence that Ms. Panganiban had any pre-existing medical conditions. While there are issues of causation, those issues are limited to the back pain, memory issues and depression, and when Ms. Panganiban recovered from the injuries the defence acknowledges were caused by the collision.

[210] Ms. Panganiban produced Dr. David's clinical records. The notes are typed and easy to understand. The notes were entered into evidence pursuant to a document agreement. It is difficult to see what, if anything, Dr. David could add factually to his notes. It is unlikely he could remember the detail of office visits that occurred as long as eight years ago. It is unlikely he could provide meaningful insight into the question of whether Ms. Panganiban felt comfortable with him or fully disclosed her pain to him. He could not fill in gaps in the periods of time when Ms. Panganiban did not attend at his office about her injuries.

[211] Apart from an obvious desire to keep costs down, Ms. Panganiban did not provide an explanation for why she did not call Dr. David as a witness. On the other hand, the defence provided no evidence they were unable to speak to Dr. David or obtain his evidence as a fact witness.

[212] While the defence could not compel Dr. David to give an expert opinion on the cause of Ms. Panganiban's complaints, it is unclear why Dr. David, as a general practitioner, would be better able to provide that opinion than an independent medical examiner.

[213] I find that Dr. David was equally available to both parties as a fact witness. Dr. David's records were available to the defendants and it was open to them to require his attendance if they felt he had evidence which would contradict Ms. Panganiban or explain her history in a way different from the doctors who did testify.

[214] On the evidence before me, I see no reason why Ms. Panganiban would be obliged to call Dr. David to testify. While Ms. Panganiban's reporting was less-than-perfect, I am not persuaded that Dr. David's testimony would have improved the picture of her injuries. In the circumstances, I decline to draw an adverse inference against Ms. Panganiban because she did not call Dr. David as a witness.

[215] I also decline to draw an adverse inference against Ms. Panganiban because she did not call a psychiatrist to testify at the trial. It is fair to say that her case lacks qualified expert opinion on the nature and cause of her psychiatric complaints. This lack of evidence may be taken into consideration in determining whether she has met her burden of proof. However, there is insufficient evidence on which to draw an inference that a psychiatrist would have given evidence detrimental to her case.

G. Conclusions on Injuries

[216] Ms. Panganiban suffered a concussion, hematoma, soft tissue injuries to her head, jaw, neck, left shoulder, left thigh and left hand and various cuts and abrasions as a result of being hit by the car. She was shocked and frightened by the experience, including the thought that her friend had been killed. She also suffered psychological anguish and anxiety in the weeks and months following the collision.

[217] I do not consider Dr. David's notes decisive on when Ms. Panganiban recovered from her injuries. I accept Ms. Panganiban's evidence that she continued to experience pain and anxiety beyond August 2015. However, there is no reliable evidence that she suffered any physical limitations from her injuries beyond grade 10 or about one and a half years after the collision.

[218] While I accept that she continued to suffer some residual pain, headaches and anxiety related to the collision, I find that Ms. Panganiban is not a reliable reporter of her symptoms over the years since grade 10. My impression from her evidence as whole is that, without intending to deceive the Court, she tended to merge time periods and attribute every struggle and any setback to the collision.

[219] Ms. Panganiban has not shown a causal connection between the collision and her back pain. I do not accept her evidence that the pain started shortly after the collision and developed into a persistent backache. I find that she has failed to prove that the collision caused the back pain she reported from 2018 onward. For the reasons set out above, I do not put any weight on the expert opinions that attribute the back pain in part to the collision.

[220] Ms. Panganiban has also not shown a causal connection between the collision and her persistent complaints of dizziness, academic struggles, cognitive complaints, memory issues or depression. There is no admissible expert opinion connecting these issues with the collision.

[221] While a medical diagnosis is not essential to prove causation in a personal injury case (*Saadati v. Moorhead,* 2017 SCC 28), in the circumstances of this case, which include concerns about the reliability of Ms. Panganiban's memory and perception of her symptoms, her evidence on its own does not demonstrate on a balance of probabilities that these complaints were caused by the collision.

[222] I find that, with the exception of persistent mild neck pain and occasional headaches, which should not be material problems as she moves on with her life, Ms. Panganiban has fully recovered from her injuries. She has not suffered any lasting physical or psychological impairment of her ability to pursue education, employment, housework, recreational activities or social relationships.

H. Non-Pecuniary Damages

[223] Non-pecuniary damages (or damages for pain and suffering) are assessed based on a non-exhaustive list of factors set out by the Court of Appeal in *Stapley v.*

Hejslet, 2006 BCCA 34. In *Stapley*, Justice Kirkpatrick described the factors as follows:

> [46] The inexhaustive list of common factors cited in [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[224] In *Callow v. Van Hoek-Patterson,* 2023 BCCA 92, the Court of Appeal instructed that determining an appropriate range of non-pecuniary damages "entails ascertaining the upper and lower range for damage awards in the *same class of case*" (emphasis in original): at para. 19. Given no two cases are alike, defining the class is "a generalized exercise that takes place at a high level of abstraction": *Callow* at para. 19.

[225] In *Callow,* the Court described the plaintiff's situation as follows at para. 22:

> A person in their 20s who sustained 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.

[226] Based on this description, the Court in *Callow* found that the range of non-pecuniary damages for a person in the situation of the plaintiff in that case was $50,000 to $60,000 (at para. 23).

[227] At the high level of abstraction recommended by the Court in *Callow*, Ms. Panganiban's situation can be described in the following terms:

> A person in their early 20s who sustained a concussion and moderate soft tissue injuries to the left side of the body when they were hit by a car eight years ago. The worst physical and psychological effects of the collision resolved within six months, with some residual pain, headaches and anxiety continuing for an indeterminate period of time. With the exception of mild neck pain and occasional headaches, which should not be a material problem going forward, the plaintiff was fully recovered on the date of trial.

[228] Ms. Panganiban seeks $85,000 in non-pecuniary damages. In support of her position, she relies on two cases:

a) *Folk v. Folk,* 2020 BCSC 1286: $65,000 awarded; plaintiff was five years old when he was injured in a motor vehicle collision and 17 at the time of trial; suffered a broken collarbone, which resolved within approximately two months; also suffered changes in his demeanour, including symptoms of anxiety and trauma, which resolved within about six years.

b) *Yeung v. Dowbiggin,* 2012 BCSC 206: $85,000 awarded; plaintiff was 28 years old at the time of trial; suffered soft tissue injuries in four minor rear-end collisions, as well as "a mild condition of depression and anxiety" (at para. 103); four years after the collision, she continued to have headaches and shoulder and neck pain, but functioned "fairly well" (at para. 116); these persistent symptoms and the psychological effect of the repeated injuries seriously affected her ability to enjoy life for a protracted period of time.

[229] *Yeung* appears to be an outlier. Updated for inflation using a Bank of Canada inflation calculator, the award would be $111,000 in 2023, which is not in the range of the more recent cases cited by the parties.

[230] The defence submits that an award of non-pecuniary damages should be in the range of $25,000 to $35,000 or $40,000 to $60,000. The lower range might be appropriate if I had accepted the defence's position that Ms. Panganiban fully recovered from her injuries by August 2015. I have not accepted that position; I will therefore focus on the higher range, for which the defence referred to the following decisions:

a) *Wong v. Pannu,* 2020 BCSC 1158: $40,000 awarded; plaintiff was 14 years old at the time of the accident and approximately 17 on the date of trial; experienced immediate discomfort and tightness in her back that increased in the following days and weeks; developed headaches; experienced ongoing back pain, flareups and headaches; was able to participate in previous activities but forced to moderate some activities; a good chance of improvement if she commenced an exercise program, but some risk of long-term pain.

b) *Sharma v. Bhullar,* 2020 BCSC 379: $40,000 awarded, reduced to $38,000 for a failure to mitigate; plaintiff was 21 years old; injured in two rear-end accidents; suffered mild to moderate whiplash with headaches; symptoms improved over time; prognosis for a full recovery was good.

c) *M.R.K. v. T.L.,* 2021 BCSC 1588: $45,000 awarded; plaintiff was an active young woman; struck by a car in a crosswalk five years before the trial; suffered injuries to her neck, back, shoulders, right leg and hip and headaches that resolved over time leaving some flareups and some infrequent back pain; she had mental health issues unrelated to the accident, but the accident also had an emotional impact because she was unable to participate in some activities and suffered low self-esteem.

d) *Jacobi v. Monteith,* 2020 BCSC 218: $45,000 awarded after reduction of 10% for a failure to mitigate; plaintiff was 17 years old; suffered soft tissue injuries to his neck and back; the neck and upper back pain resolved

shortly after the accident, but he was left with persistent low back pain at the time of the trial six years later.

e) *Bagri v. Heran,* 2020 BCSC 2002: $50,000 awarded; plaintiff was 26 years old; injured in three separate accidents; suffered various soft tissue injuries, headaches, disturbed sleep and numbness and tingling in her arm; ongoing pain in her neck and shoulder at the time of trial; the pain was manageable, but might also persist.

f) *Harle v. Williams,* 2021 BCSC 107: $55,000 awarded; plaintiff was 28 years old; suffered soft tissue injuries and severe headaches; some of her injuries resolved, but she was left with ongoing neck and back pain and headaches; the injuries caused a significant change in her personality; she was unable to enjoy being a new mother, her social life was reduced, she was irritable with her family.

g) *Manhas v. Jaswal,* 2020 BCSC 586: $60,000 awarded; plaintiff was 16 years old; suffered soft tissue injuries and headaches; condition improved and then plateaued; still suffering symptoms when she was involved in a second accident which caused further injuries; headaches subsided over time but other pain worsened; she was left with chronic pain and headaches that were unlikely to improve.

h) *Kim v. Dresser,* 2021 BCSC 1032: $60,000 awarded; plaintiff was 20 years old; suffered pain in his neck, shoulders, lower back, a bad headache, sleep disruption, dizziness and driving anxiety; largely functional despite ongoing lower back and shoulder pain by the time of trial six years later; still suffered occasional headaches and sleep disturbance; the prognosis for a full recovery was poor.

i) *Skibeness v. Northway,* 2020 BCSC 1825: $63,750 awarded, which included an amount for loss of capacity to perform housekeeping; plaintiff was 21 years old; some pre-existing whiplash injuries, headaches and

> depression from previous accidents; suffered a concussion, cuts and abrasions, soft tissue injuries to her neck, shoulder, back and an aggravation of her pre-existing injuries; also suffered driving anxiety that was not resolved by the time of trial and would likely continue; injuries limited her ability to work and enjoy life.

[231] In my view, the range for non-pecuniary damages in Ms. Panganiban's type of case is $40,000 to $50,000. Using the mid-point of that range, and having apportioned 80% of the fault to Ms. Sovdat, I award Ms. Panganiban $36,000 in non-pecuniary damages.

I. Damages for loss of earning capacity

[232] In *Rab v. Prescott,* 2021 BCCA 345 at para. 47, Justice Grauer set out a three-step process for considering claims for loss of future earning capacity, particularly where, as here, the evidence indicates no loss of income at the time of trial:

> …The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown Brown* [*v. Golaiy (1985), 26 B.C.L.R. (3d) 353* (S.C.)]).
>
> The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss.
>
> If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* [*v. Silva*, 2021 BCCA 228] at paras 93–95.
>
> [Spaces added for readability.]

[233] A plaintiff must *always* prove that there is a real and substantial possibility they will suffer an income loss. If the plaintiff fails to cross this threshold, the inquiry ends there: *Perren v. Lalari*, 2010 BCCA 140 at paras. 31–33.

[234] Dr. O'Connor's opinion is that Ms. Panganiban is capable of working full-time. Ms. Panganiban also impressed me as a capable young person. She achieved good grades in high school. She demonstrated a strong work ethic, as exemplified by the

positive performance reviews of her employers to date. She showed perseverance in finding the right career path for her interests and strengths. As of the date of the trial, she was working four days a week, while also completing a program at CDI to become a dental receptionist.

[235] In light of this, I cannot find that there is a real and substantial possibility that Ms. Panganiban will suffer any income loss as a result of her injuries. While I accept that she suffers some residual pain and headaches, these have not impeded her development as a young person in any measurable way. There is no basis on which I could find a real and substantial possibility of her career being impeded by her injuries in the future.

[236] Accordingly, I decline to make an award for loss of earning capacity.

J. Cost of Future Care

[237] Future care cost awards are intended to compensate a plaintiff for expenses that are reasonably necessary for their future medical care. These expenses must be reasonable and they must be medically justified: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84, 1985 CanLII 179 (S.C.), aff'd 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (C.A.).

[238] Dr. O'Connor recommended an exercise program. He recommended that Ms. Panganiban avoid passive treatments and focus more on an active exercise program so that she can help self-manage her residual symptoms. He stated that she would benefit from seeing a kinesiologist who could show her a program she could do on her own.

[239] Dr. O'Connor also recommended a trial of antidepressant or anxiety medication if exercise alone does not improve Ms. Panganiban's condition. Finally, he recommended that she be assessed and treated by a psychologist or psychiatrist.

[240] Dr. Medvedev recommended that Ms. Panganiban be seen by a psychiatrist.

[241] Apart from these brief recommendations, there is no evidence of what Ms. Panganiban requires for her future medical care. There is also no evidence of how much the recommendations by Drs. O'Connor and Medvedev would cost Ms. Panganiban. Moreover, it is unclear whether these recommendations would address the residual pain and anxiety I have accepted as a result of the collision, as opposed to the back pain and depression I have not accepted. I am therefore unable to determine whether any expense is reasonable or medically justified in this case.

[242] Accordingly, I decline to make an award for the cost of future care.

K. Special Damages

[243] Ms. Panganiban also claimed special damages in her notice of civil claim, but did not provide any evidence or make any submissions in support of her claim. It was unclear at the conclusion of the trial whether this was a matter in dispute.

[244] If the parties agree on the quantum, Ms. Panganiban may add 80% of the agreed amount to the final order as special damages. If the parties are unable to agree, Ms. Panganiban may submit affidavit evidence of her special damages, to which the defence may respond within 14 days.

IV. CONCLUSION

[245] Ms. Sovdat was 80% at fault for the personal injuries Ms. Panganiban suffered in the collision on February 27, 2015.

[246] Ms. Sovdat is liable to Ms. Panganiban in the amount of $36,000 as non-pecuniary damages for her injuries.

[247] If the parties are unable to agree on special damages or costs, they may make arrangements with Supreme Court scheduling to appear before me to speak to those matters.

"Elwood J."