

CANADA / JUDGMENT

Faizi v. Thandi

2019 BCSC 434

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 434 Faizi v. Thandi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Faizi v. Thandi,

2019 BCSC 434

Date: 20190326

Docket: M157136

Registry: Vancouver

Between:

Farahnaz Faizi

Plaintiff

And

Balvir Kaur Thandi

Defendant

- and -

Docket: M168868

Registry: Vancouver

Between:

Farahnaz Faizi

Plaintiff

And

Shabir Rahimi

Defendant

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

August 27-31, September 4-5, 7, 10, 13, and 14, 2018

Place and Date of Judgment:

Vancouver, B.C.

March 26, 2019

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The Claim

- [1] The plaintiff, Ms. Farahnaz Faizi, was involved in two motor vehicle accidents that occurred on November 16, 2013 (the "first accident" or "2013 accident") and December 7, 2014 (the "second accident" or "2014 accident") (collectively, the "accidents"). Both defendants admitted liability for the accidents.
- [2] The first accident occurred when Ms. Faizi was 19 years old. She was living at home and was working full-time as a sales representative. The second accident occurred when she was 20 years old and living away from home. Ms. Faizi is now 24 years old, is back living with her parents, is enrolled as a full-time student, and works part-time as a certified dental assistant ("CDA").

- [3] The parties agree that the plaintiff suffered indivisible injuries in the two accidents. The issues before me are the extent of those injuries, the degree to which the plaintiff has recovered, and the damages to which she is entitled. The plaintiff seeks an award in the vicinity of \$3,900,000, which is roughly ten times what the defendants submit is appropriate.
- [4] Ms. Faizi sustained a number of injuries in the two accidents, mostly soft tissue injuries. Almost five years later she complains of neck, back, jaw, hip, and knee pain. She also complains that she suffers from tinnitus and frequent headaches. The physical signs of injury are minimal; most of the evidence is based upon the plaintiff's subjective reporting of her symptoms. Consequently, I must review the evidence carefully with respect to the plaintiff's description of pain, the reports and testimony of the experts, and the plaintiff's post-accident conduct in reaching my conclusion.
- [5] Ms. Faizi argues that the lay and expert witnesses confirm that she suffered injuries from the accidents. While the acute injuries somewhat improved in the months following the accidents, and her rib pain has resolved, Ms. Faizi continues to experience significant, functionally limiting, widespread pain. She also has worsening psychological and cognitive symptoms.
- [6] The plaintiff argues that her accident-related injuries and sequelae have impacted her ability to educate herself at the capacity she had prior to the accidents. Her injuries pose significant physical, cognitive, and psychological barriers that limit her ability to obtain a university-level degree which, given her significant symptoms, will limit the number and types of jobs or vocations available to Ms. Faizi.
- [7] Ms. Faizi further argues that her accident-related injuries have rendered her competitively unemployable and have relegated her to low-paying, part-time, or volunteer work for which she requires accommodations.
- [8] The defendants, Balvir Kaur Thandi and Shabir Rahimi, see the case quite differently. They argue that although Ms. Faizi is entitled to some compensation for the accidents, they dispute the severity of the impact her injuries have had over the long term. They ask me to consider whether the plaintiff's position has an "air of reality" when considering what the plaintiff has accomplished since the accidents. She has worked in numerous part-time, albeit low wage, jobs since the accident, she successfully completed schooling to become a CDA, and she is currently enrolled as a full-time student at the Vancouver College of Dental Hygiene. The defendants rely on surveillance evidence of Ms. Faizi at the gym in August 2018, just prior to the trial, in support of their argument regarding her physical abilities.
- [9] The defendants ask that I look at the plaintiff's actions, rather than just her words, in determining the extent of her injuries.

Evidence and Factual Findings

[10] The following is a summary of the evidence of each lay witness who testified at the trial. I set out their evidence in a general way, but leave certain details for discussion under the issues I address. Although I do not detail all aspects of the evidence, I have considered the totality of the evidence in reaching my conclusions.

Pre-Accident History

- [11] Ms. Faizi's mother testified that the family is originally from Afghanistan and came to Canada when the plaintiff was four years old.
- [12] The plaintiff's mother testified that prior to the accidents Ms. Faizi was a high functioning, motivated individual, who wanted to be a dentist. She testified that the plaintiff had good grades up to grade 9. She stated that Ms. Faizi had no physical limitations before the accident and that she was active. They often hiked together and Ms. Faizi regularly went to the gym.
- [13] The plaintiff's father also testified. He stated that prior to the accident Ms. Faizi helped around the house and wanted to become a doctor when she grew up.

Marriage

- [14] Ms. Faizi testified that when she was in grade 10 her mother told her that "they were going to marry her off." She testified that she was very shocked and upset because "it should not be that way in Canada." She testified that she experienced great emotional distress and was very sad for months following this news. The plaintiff testified that she gave up on school because "what's the point" due to her pending marriage. After doing well in school when she was young, she got C and C- grades once she was advised of her arranged marriage.
- [15] Ms. Faizi later testified that when she first heard that she would be married it was hard to take, but she eventually convinced herself that it might not be so bad.
- [16] Ms. Faizi's father testified that they are Sunni Muslims. He testified that his wife found a husband for their daughter in Afghanistan. Ms. Faizi and her future husband talked on the phone prior to the family going to Afghanistan for the wedding. Ms. Faizi and "this man" got married so that she could sponsor him to come to Canada. The father testified that Ms. Faizi was 16 or 17 when she was legally married in Afghanistan. He testified that the marriage was in either 2012 or 2013. She was married under Sharia law.
- [17] Ms. Faizi's mother testified that she arranged to have her daughter marry her sister's son. In the beginning, Ms. Faizi was very upset. She eventually agreed but she wanted to finish high school first. Ms. Faizi's mother acknowledged that the plaintiff could not say no because that it is "how it is done in our culture."

- [18] Ms. Faizi's mother testified that they travelled to Afghanistan twice. The first trip was for the cultural ceremony, akin to an engagement, which she testified was before the 2013 collision. The second trip was for the marriage or "white dress ceremony". When questioned, she could not remember if Ms. Faizi was married before or after the first accident. She thought the white dress ceremony was in 2014. She also testified that it might have been in 2012, but she was not sure.
- [19] Ms. Faizi testified that she became engaged in 2012 at the age of 17. She and her parents travelled to Afghanistan for the ceremony. She testified that she was 18 when she had the white dress ceremony in Afghanistan in 2013. Ms. Faizi testified that after she met her future husband in Afghanistan she was happy. She testified that things would have gone well but for the accidents. I note that in other parts of her testimony, Ms. Faizi stated that her period of happiness post-wedding was brief.
- [20] After her marriage, Ms. Faizi returned to Canada and began the paperwork to sponsor her husband to come to Canada. She sent her husband money and talked to him on the phone.
- [21] When asked whether she is married today Ms. Faizi stated, "it's complicated." She testified that she does not consider herself to be married because the marriage was never consummated. Her father testified that he still considers the young man her husband, "but my daughter does not want that." He testified that Ms. Faizi chose not to sponsor him to come to Canada after all.
- [22] I find that Ms. Faizi was very unhappy about her pending wedding. Although she accepted the marriage for a brief period after she met her husband, she was unhappy about it again not long after the marriage ceremony. Her discontent continues.

Pre-Accident Health

- [23] Ms. Faizi testified that prior to the first accident she had no physical health concerns and no emotional or mental health issues. She testified, "I was happy and working and everything was fine." She acknowledged she had some issues regarding low iron levels prior to the accidents, for which she took iron supplements. She testified that she was not on any prescriptions or over-the-counter medications prior to the first accident.
- [24] Ms. Faizi testified that prior to the first accident she would regularly go to the gym and use the treadmill. She also ran, hiked, played badminton, biked, rollerbladed, and took spin classes. She also prayed five times per day and went to the mosque.
- [25] When questioned in cross-examination, Ms. Faizi admitted she had aching knees and lower back problems when she was working at a car dealership prior to the accidents. She testified that her doctor said the job was not good for her for those reasons. She testified that she was not in excruciating pain.
- [26] Ms. Faizi also testified that she worked at Pizza Hut prior to the first accident.

- [27] Ms. Faizi testified that prior to the first accident she helped her mom with all of the cleaning around the house and assisted with cooking. She testified she enjoyed doing this work because it took her mind off issues relating to her marriage.
- [28] Her father testified that prior to the accidents the plaintiff had no emotional or health problems. He testified that she did not have depression or anxiety before the collisions, nor was she sad. However, he agreed in cross-examination that she had been assessed as having depression and anxiety but said they were due to problems "with that man." He thought the depression was due to the arranged marriage that she did not want to happen.
- [29] Ms. Faizi's father's testimony is consistent with Ms. Faizi's testimony that she experienced great emotional distress and was sad for months when advised of her pending marriage.
- [30] The plaintiff made an employment insurance (EI) claim in March 2013 prior to the first accident due to the physical aspects of her positions at both the car dealership and Pizza Hut.

Accident

- [31] Ms. Faizi testified that she was "getting nervous just describing" the 2013 accident. She stated that "the vehicle t-boned" and that she does not remember anything after that. Ms. Faizi testified that the accident was harsh, scary, and traumatic. She thought she was going to die. She testified that she went to hospital by ambulance and was given painkillers.
- [32] Ms. Faizi also testified about the 2014 accident, which occurred at a rest stop on the Coquihalla Highway. She said it was "the worst day". She "thought the car would explode and [she] would die." She testified that she was traumatized. Her knees, lower back, shoulder and head hurt. She went to hospital in Merritt and was released shortly thereafter.

Post-Accident Health

- [33] Much of the evidence regarding Ms. Faizi's health post-accidents is addressed by the medical experts. Here I simply highlight a few points from the lay witnesses.
- [34] Ms. Faizi's mother testified that after the accidents Ms. Faizi was always upset. She would scream at her husband or would not talk to him on the phone. Her mother testified that Afghan men have certain expectations, but Ms. Faizi would not meet them or listen to him. She would not do the housework that he expected. They no longer talk. She no longer helps around the house.
- [35] Ms. Faizi's mother testified that Ms. Faizi has difficulty with her personal care. She testified that she washes Ms. Faizi's hair and body. Ms. Faizi has not gotten better since 2013; she has gotten worse. Ms. Faizi suffers from depression. She has nightmares. She will not go to the mosque. She has a poor memory.

- [36] Ms. Faizi testified that she can no longer cook or do housework. She feels like she is a burden to her parents.
- [37] With regard to her husband, Ms. Faizi testified that she no longer had the ability to help him in the ways he anticipated. She could not send him money as she had a few times before, which they argued about. She testified that her husband expected her to do the housework. As an Afghan woman, she is expected to cook, clean, and take care of children, as well as work outside the home.
- [38] Ms. Faizi told her husband that she was now "damaged" and no longer capable of performing those tasks. She was depressed and eventually cut contact with him. Ms. Faizi does not plan to see her husband in the future, because she feels that he did not care about her injuries.
- [39] Ms. Faizi testified that she takes Advil and muscle relaxants for her pain. She described pain in her lower back, right knee, and both her hips. Her shoulder burns. She frequently has headaches and ringing in her ears. Ms. Faizi testified that both of her knees swell if she goes to physiotherapy. She tapes her knees to assist with the pain. Talking makes her jaw tender.
- [40] Ms. Faizi testified that she has been getting worse in the last six months. She described vivid nightmares ("violent dying dreams").
- [41] Ms. Faizi and her parents testified that she had suicidal thoughts post-accidents. That testimony is surprising because there are no medical records to support this and there was no family intervention. Ms. Faizi takes sertraline for depression.
- [42] Ms. Faizi's mother testified that her daughter went to the gym one time recently. She was told to go by her doctor and her physiotherapist, but she could not handle it due to her leg pain. She does exercise at home by doing some stretches, which she does slowly. Her mother testified that she sometimes helps Ms. Faizi stretch.
- [43] Her mother testified that she holds Ms. Faizi's head for hours. Her mother, father, and brother massage her almost every day.
- [44] Ms. Faizi drives regularly although she testified that she has some anxiety about driving.

Work History

- [45] The plaintiff testified that growing up she wanted to be a dentist. She wanted to be a professional and become successful. She acknowledged that education for women was not encouraged in her family.

- [46] Ms. Faizi testified that she graduated from high school in 2012 with poor grades. She testified that she worked at Pizza Hut in the evenings from 2010 to 2013 and at a car dealership from September 2012 to 2013. Ms. Faizi testified that she quit the car dealership because it was a further drive from her house, and she had to work evening shifts. At some point she left Pizza Hut because the employer was "hiring employees from overseas".
- [47] Her father testified that Ms. Faizi worked both of her part-time jobs while in high school.
- [48] Ms. Faizi testified that she worked at Visions Electronics ("Visions") full-time prior to the first accident. She started in October 2013. She found her work at Visions to be less physical than her previous part-time jobs because she was working as a sales representative, cashier, and at their cellular kiosk. Physical work, such as helping customers to their vehicles with their purchases, was limited.
- [49] Mr. Arthur Keung, a sales manager at Visions, testified for the plaintiff. He agreed that the plaintiff started working at Visions on October 16, 2013. She was a sales associate, primarily in the kiosk department. She had some light physical duties and was able to meet both the physical and non-physical aspects of her job prior to the accident.
- [50] Mr. Keung testified that he was aware that the plaintiff was involved in a motor vehicle accident in November 2013. She took some time off work from Visions and she asked for a chair when she returned, which was provided to her. He testified that after the accident she was not as outgoing or chatty as she had been before. She told Mr. Keung that she could not lift heavy items and she was accommodated in this regard.
- [51] Ms. Faizi was off work for approximately six weeks following the first accident. She returned on a part-time basis.
- [52] The plaintiff testified that she planned to start her post-secondary dental assistant course in January 2014, but postponed it due to her complicated relationship with her family and the "overseas person", who I interpret to be the man she married. She instead moved to Kelowna to work and to distance herself from her family.
- [53] Ms. Faizi testified that she then planned to begin the dental assistant course in June 2014. She delayed her entry again as a result of the injuries she suffered in the first accident.
- [54] Ms. Faizi continued working at Visions until June or July 2014 when she took time off work due to right lower back pain from the first accident. She testified that she quit working at Visions on October 4, 2014 due to her physical limitations, despite some accommodations provided by her employer. This was shortly before she moved to Kelowna.
- [55] Following the second accident in December 2014, Ms. Faizi took a few days off. She then returned to work for the Christmas season. She used pain killers and a chair to reduce the toll work took on her.

[56] In January 2015, Ms. Faizi was working at a kiosk in Kelowna. She worked four and eight hour shifts, three to four days per week. During this period she also went to the Big White ski resort, the pool, and the gym, but she did not lift weights.

[57] Ms. Faizi testified that besides Visions, she has worked at the following places post-accidents:

- Mad Hatter, in a part-time position as a retail cashier at a kiosk in Kelowna and later in Langley;
- Kia West, in a part-time position as a receptionist making approximately \$12 per hour;
- HealthTeK, in a part-time position as a call centre representative;
- Once Upon a Child, in a part-time position where she was making less than \$12 an hour;
- The Brick, in a part-time position making approximately \$12 an hour;
- Coquitlam Chrysler, in a part-time position as a receptionist making \$11.50 an hour;
- RC Pro, in a seasonal position working in a mall kiosk; and
- Angel Answering Service.

[58] Ms. Faizi testified that she either quit or was let go from these positions, sometimes because she was "slow" and had "a poor attitude".

[59] Ms. Faizi began working as a dental assistant in 2016, after completing her training to become a CDA. She is currently working at a dental office in Coquitlam once a week making \$24 per hour. She has also "temped" at other offices.

[60] Ms. Djana Grabovac, a dental hygienist, testified for the plaintiff. She testified that she is a 28-year-old registered dental hygienist. She testified that she has worked with the plaintiff at least five times. She testified that the plaintiff knows how to do her job although she was possibly a bit slower than the other assistants with whom she has worked. She understands that the plaintiff is currently in dental hygiene school and her future career goal is to be a dental hygienist.

[61] Ms. Grabovac testified that she is currently making \$46 per hour as a dental hygienist, although she can earn up to \$55 an hour when she "temps" at other offices. Ms. Grabovac testified that the duties of a dental hygienist are physically demanding. She testified regarding the positions she is required to hold: hovering over patients, looking down, keeping her arms up and using her feet to control the foot pedal.

Education

[62] As already noted, Ms. Faizi graduated from high school with low grades. Ms Faizi completed the 11-month dental assistant diploma program in 2016. She paid \$20,000 to attend this program. Her attendance was exemplary and she obtained grades in the A to B- range.

- [63] Ms. Mariam Akbari testified for the plaintiff. She is a 22-year-old dental receptionist and a family friend of the plaintiff. They became close in 2015 when they attended the CDA program at CDI College together. She testified that when they started the CDA program there were approximately 50 students enrolled, and by the end there were approximately 10 students left. When she started working as a CDA she found the work to be physically demanding and hard on her body. As a result she decided to become a dental receptionist instead, which pays slightly more.
- [64] Ms. Akbari testified that the starting wage for a dental assistant is \$20-\$21 an hour. She testified that she understands that the plaintiff's long-term career goal is to work as a dental hygienist.
- [65] Ms. Faizi attended Douglas College in 2017 and took courses in English, psychology, chemistry, and anatomy. She achieved similarly good marks in her university transfer courses as she had at CDI College, earning a 3.18 GPA.
- [66] As stated above, Ms. Grabovac testified for the plaintiff. She testified that the hygiene program is a physically and mentally challenging condensed program with few breaks. Classes are Monday to Friday and if there is a clinic, the days can extend to 12 hours.
- [67] Despite this, Ms. Faizi is currently a full-time student in dental hygiene and is working 6 to 7.5 hours on Saturdays as a dental assistant. She is also seeking temporary dental assistant jobs.

Expert Testimony

- [68] The following is a summary of the evidence of the expert witnesses whose reports were filed as exhibits and who testified at the trial. I set out their evidence in a general way but leave a number of details for discussion under the issues I address. In reaching my conclusions, I have considered the totality of the evidence.

Dr. Gurdeep Parhar

- [69] Dr. Parhar testified for the plaintiff. He was qualified as an expert in occupational, disability and family medicine. Dr. Parhar testified that Ms. Faizi suffers from significant physical, cognitive and psychological injuries. His report states that Ms. Faizi's musculoligamentous injuries have reached maximal medical improvement. She has a poor prognosis for her psychological symptoms of depressed mood, anxiety and PTSD symptoms.
- [70] Counsel for the defendants took Dr. Parhar through his clinical records in detail. The following is a summary of this testimony:

- a) Dr. Parhar agreed in cross-examination that the plaintiff suffered from fatigue prior to the accidents. His clinical notes state that as of June 4, 2012, "fatigue is not yet diagnosed." He agreed in cross-examination that Ms. Faizi had a history of iron deficiency before the collisions.
- b) Dr. Parhar's December 3, 2012 clinical notes state that the plaintiff was feeling depressed and had decreased concentration, decreased energy, decreased/increased sleep, decreased/increased appetite, feelings of guilt, lack of interest in previously pleasurable activities, and anxiety. She was assessed with having major depression and anxiety. This was not noted in Dr. Parhar's medico-legal report because, he testified, unless the symptoms are ongoing or chronic in nature he does not find it useful to include them in his report.
- c) On February 25, 2013, the clinical notes again refer to Ms. Faizi's anxiety and depressed mood, noting that these symptoms were quite severe. Dr. Parhar testified that these two entries in the clinical records recorded what Ms. Faizi reported to him that day. However, he did not see her between the visits and so did not consider the symptoms to be ongoing during this period of time.
- d) On March 30, 2013, Dr. Parhar agreed that the plaintiff came in complaining of knee pain. Dr. Parhar signed a note on the same day recommending that the plaintiff take eight weeks off work due to back and knee conditions.
- e) Dr. Parhar agreed in cross-examination that the plaintiff was prescribed an antidepressant medication in October 2012 by a different physician and that the prescription was refilled in August 2013. However, he explained that the dose was too low to act as an antidepressant and was more likely prescribed as a sleeping aid.
- f) On October 6, 2013, the plaintiff went to see Dr. Parhar again complaining of her knee pain. No deformity was noted.
- g) Ms. Faizi saw Dr. Parhar the day after the first accident, November 17, 2013. She reported experiencing neck, shoulder, chest, and jaw pain. She had bruising on her knee, the side of her thigh and on her chest. She advised that she had lost consciousness but could not recall for how long. She also reported feeling dazed and could not remember all the details of the motor vehicle accident. She claimed she had hit her head on the headrest.
- h) On November 30, 2013, the plaintiff again attended at Dr. Parhar's office. She reported that her condition had worsened with increased pain and discomfort in both her shoulders, neck, collarbone, left hand, left knee, jaw and lower back. She had very bad headaches and trouble sleeping. She advised that she had gained five pounds since the accident as she was unable to run or do extracurricular activities. She reported having trouble with personal care activities. She also advised that she could not do household chores or participate in activities with friends. I note that this is 13 days after the accident. Dr. Parhar advised the plaintiff to remain off work for four weeks. In cross-examination, Dr. Parhar testified that the plaintiff was able to do her household chores at that time, but that she had experienced

some difficulty with them.

- i) On February 16, 2014, Ms. Faizi visited Dr. Parhar again. Dr. Parhar testified that the plaintiff experienced tenderness on palpitation in the right, left, and midline regions of her spine during this visit. She was comfortable and in no acute distress, which was reflected in his clinical notes of the same day.
 - j) On June 2, 2014, the plaintiff told Dr. Cochien, an associate of Dr. Parhar's, that she "needs time off work" due to right lower back pain from the motor vehicle accident.
 - k) The September 16, 2014 clinical notes state that the plaintiff reported feelings of worthlessness and Dr. Parhar strongly suggested counselling.
 - l) The March 11, 2015 clinical notes of Dr. Parhar state that the plaintiff had been running and working out at the gym, which had worsened her right knee pain. They also state that she had been off work for six weeks.
 - m) On August 26, 2015, Dr. Cochien's clinical notes indicate that Ms. Faizi had a mood disorder. Dr. Cochien recommended that Ms. Faizi book a counselling appointment at the clinic for a mood assessment. Dr. Parhar confirmed that he advised Ms. Faizi to seek counselling.
 - n) The October 1, 2015 clinical notes indicate that the plaintiff stated her condition was worse with regards to her pain symptoms, but that "no effect on personal, family not social life has been reported." I presume the "not" was intended to say "nor".
 - o) In reference to the November 2017 notes, Dr. Parhar testified that Ms. Faizi's range of motion had significantly improved. He agreed in cross-examination that her lumbar spine range of motion was normal.
- [71] Ms. Faizi testified that she felt rushed and unsatisfied during her appointments with Dr. Parhar. She testified that they lasted only five to ten minutes. This is inconsistent with the testimony of Dr. Parhar and the extensive notes he took.
- [72] Based on the clinical notes and his responses, I find that Dr. Parhar was advocating for his patient, as is understandable with a family doctor who has been treating a patient for many years. However, I find that his report and testimony lacked independence. For example, he minimized symptoms of the plaintiff prior to the accidents, symptoms that were strikingly similar to those she reported after the accidents. He testified that clinical records which reflected Ms. Faizi's medical condition on one day did not indicate that she would have symptoms on any other day. However, he made a number of relevant admissions during cross-examination. For example, Dr. Parhar agreed that before the collisions the plaintiff reported nearly the exact same symptoms as she reported after the accidents. Moreover, despite reporting a mood disorder and ongoing pain, Dr. Parhar agreed that he never referred Ms. Faizi to a specialist.

Dr. Zeesham Waseem

- [73] Dr. Waseem, a physiatrist (a physical medicine and rehabilitation specialist), testified for the plaintiff. He met with Ms. Faizi on October 24, 2016. His report is based on Ms. Faizi's answers during her interview, the redacted clinical records of Dr. Parhar, and his own physical examination. He confirmed that he spent approximately 1.5 hours conducting the interview portion of his exam and he stated he would have spent 15 to 30 minutes conducting the physical exam. He confirmed that the plaintiff was able to sit throughout the approximately 1.5 hour interview.
- [74] I found Dr. Waseem to be a credible witness although he relied heavily on Ms. Faizi's self-reporting of her pain. He conducted a number of tests on Ms. Faizi and found her within the normal range, including her range of motion. He agreed with most of the shortcomings put to him in cross-examination regarding his report.
- [75] Dr. Waseem agreed in cross-examination that he failed to include a number of clinical entries of Dr. Parhar such as the pre-accident references to depression, fatigue, temporomandibular joint ("TMJ") pain and being off work prior to the accidents. Dr. Waseem testified that it was difficult obtaining information from the plaintiff regarding the duration of her workouts or the types of workouts she did. He agreed that he did not ask Ms. Faizi about her high impact exercises at the gym. He agreed he should have asked. Finally, he testified that Ms. Faizi reported her injuries had no effect on her family or social life, which was noteworthy.
- [76] Dr. Waseem testified that at the time of the physical examination, he found no swelling, no deformity, normal flexion, no ligament tears, no instability, no laxity in her knees, and a normal range of motion. He confirmed in cross-examination that she had a normal, mechanical gate. From his physical exam, he confirmed that the plaintiff had a full range of motion in her neck, shoulders, thoracic spine, lumbar spine, hips, and knees. He also did not find any deformity or swelling, no torn ligaments, and normal flexion in her knees. Special testing for impingement, labral tear, rotator cuff pathology, and bicep tendinitis was all negative.
- [77] Dr. Waseem testified that the plaintiff told him that she had intermittent, random occurrences of low back pain. Her mid back pain was also intermittent. Pain in her hips, sacrum, low back, and pelvis were alleviated by heat and pressure. Her knee pain was alleviated by ice, heat, taping and physiotherapy. He testified that not all soft tissue injuries are permanent.
- [78] Dr. Waseem testified that the plaintiff told him that her headaches had briefly worsened following the accident in 2014, but subsequently returned to post-2013 accident levels.
- [79] Dr. Waseem believes Ms. Faizi's has a chronic widespread pain disorder that needs to be addressed, along with any associated psychosocial factors. He recommended that she improve her level of conditioning in the hope that she can get better in the long term.

- [80] Dr. Waseem opined that the plaintiff suffers from chronic myofascial pain syndrome. He testified that the plaintiff is partially disabled in that there are limitations on what Ms. Faizi can do. However, she is not completely incapacitated from employment, household work, or recreational activities.
- [81] Dr. Waseem concluded that Ms. Faizi "is precluded from occupations that involve prolonged standing, frequent twisting and sustained contorted postures on the basis of her physical impairments, and is unable to partake in intense physical activity due to deconditioning." Dr. Waseem considers Ms. Faizi permanently "partially disabled in the domains of employment duties, heavy household chores, and recreational activities." He reached this conclusion while acknowledging that she has no observable functional challenges; her primary obstacle is her self-reported pain.

Dr. Randall Loch

- [82] Dr. Loch, an expert in orthopedic medicine, testified for the defendants. He conducted a physical examination on May 18, 2018. He found the plaintiff to be pleasant and cooperative throughout the interview and physical assessment.
- [83] Dr. Loch opined that Ms. Faizi's standing, alignment, gait and sitting postures were normal, without any asymmetry to her shoulder girdles or upper extremities. Her cervical spine and both shoulders demonstrated a full range of motion.
- [84] Dr. Loch noted that the plaintiff has ongoing depressive and anxious symptoms. He testified that what appears to be psychosocial issues, including documented symptoms of depression and anxiety, were present prior to the accidents. He stated that it is beyond his expertise to provide an opinion with respect to how the psychosocial issues relate to the plaintiff's pain and functional impairment complaints.
- [85] Dr. Loch found that the plaintiff's complaints support the presence of a "central nervous system pain perception pathway sensitization disorder". This has the clinical label of either chronic widespread pain or fibromyalgia. However, he opined that the clinical presentation of chronic widespread pain, reported sleep disorder, and reported cognitive dysfunction could not be explained by the musculoskeletal injuries sustained in the accidents. Dr. Loch noted that central sensitization disorders are usually linked to psychosocial factors. He deferred to other specialists to comment upon Ms. Faizi's prognosis with respect to her chronic pain disorder.
- [86] Dr. Loch opined that the plaintiff likely has some current residual tissue pain generation in both of her knees, probably arising from the anterior compartment or patellofemoral articulation. Ms. Faizi reported the pain to be worse on her right side. Dr. Loch notes that she had a history of knee pain in 2012 and 2013. However, he opined that the mechanism of injury in the 2014 accident "does support some permanent subject accident enhancement of the patellofemoral pathology."

- [87] Dr. Lochter also testified that the plaintiff would probably be experiencing at least some discomfort in the neck and low back area as a result of the two accidents. He concluded that even in the absence of a central sensitization or chronic widespread pain disorder the plaintiff would likely continue to experience activity related discomfort in the neck and low back areas indefinitely, although to a much lesser extent. He opined that this discomfort would not result in any disability relating to the plaintiff's work.

Dr. Joel Epstein

- [88] Dr. Epstein, an expert in oral medicine, testified for the plaintiff. He testified that the plaintiff has temporomandibular disorders ("TMD"), a dysfunction of the jaw. He testified that the plaintiff's joint function is not significantly involved in the restriction; the restriction is primarily muscular. Dr. Epstein relied on the plaintiff's self-report regarding her jaw pain because this issue is muscular and not structural. Dr. Epstein testified that the plaintiff reported to him that diet change and muscle relaxants were very helpful in the management of her pain. He acknowledged that Ms. Faizi most likely meant pain in general and not just her TMD pain.
- [89] Dr. Epstein testified that the plaintiff's jaw does not make any clicking or crunching sounds, which can be indicative of arthritis. Dr. Epstein testified that her jaw opening was narrower than normal, but that this is not a clinical or management concern.
- [90] Dr. Epstein testified that some of the plaintiff's headache symptoms were related to TMD. Ringing in the ears can also be caused by TMD. Presumably if her TMD was managed, this would assist in reducing other areas of pain.
- [91] Dr. Epstein testified that Ms. Faizi had a history of clenching her teeth prior to the accidents. Her dentist had made her a mouth guard, but she did not find it helpful. Ms. Faizi testified that she quit wearing the mouth guard after the accidents because it made her symptoms worse. Dr. Epstein testified that it was possible that the mouth guard she had for clenching was improperly fitted.
- [92] Dr. Epstein testified that the plaintiff was only partially compliant with respect to dental and medication recommendations, likely due to costs. She did not seek treatment with a physiotherapist trained in TMD, as suggested. He testified that she has not had treatment for her jaw pain.

Mr. Russell McNeil

- [93] Mr. McNeil, an expert in occupational therapy with a specialty in functional capacity evaluation and costs of future care, testified for the plaintiff. Mr. McNeil, along with a team of engineers, created a motion capture system which measures biomechanics. Using this system, he testified that although he cannot measure the plaintiff's pain because it is subjective, he can objectively measure the physical effects of her pain. He explained that this is because any experienced pain will affect her range of motion, speed, and quality of

movement.

- [94] Mr. McNeil conducted an assessment of the plaintiff over two days. On January 8, 2018, over 5.25 hours, he assessed how well the plaintiff could do sedentary work. On January 15, 2018, over 2 hours, he assessed how well she could do light activities and standing.
- [95] Mr. McNeil tested for dental assistant and sales clerk positions. Mr. McNeil found that the plaintiff fell within the bottom one percentile of a broad, non-age, non-gender specific cohort, regarding individuals working in the sedentary and light physical demands categories. She was in the very bottom percentile of the same cohort for her two handed carrying. She was in the tenth percentile for her two handed carrying compared to other women. She fell within the second percentile from the bottom regarding her left knee strength and at the very bottom of the cohort regarding her right knee strength. Her flexion was average and the range of motion in her knee was close to average. The plaintiff was able to sit for a maximum of 77 minutes and her walking tolerance was very low.
- [96] Mr. McNeil testified that there is a significant difference between the first two trials regarding the Purdue Pegboard Testing. This is to test the plaintiff's shoulder range of motion. He disagreed that this was due to a difference in effort.
- [97] Mr. McNeil concluded that Ms. Faizi is capable of light work with accommodations. He opined that Ms. Faizi has residual employability. He testified that she could work full-time as a sales representative if provided with accommodations.
- [98] Mr. McNeil agreed in cross-examination that on the testing days, he did not ask any questions of the plaintiff regarding how she slept the night before, whether she had worked or gone to school the day before, what she had written in her pain journal leading up to the testing, and whether she had experienced any traumatic events in the days leading up to the assessments.
- [99] I find that Mr. McNeil overstated Ms. Faizi's limitations. It is implausible that she would be in the first or tenth percentile in two handed carrying, which is measured by an individual's capacity to safely carry a maximum of ten pounds over a distance of 30 feet. This is inconsistent with her post-accident functioning in terms of her ability to work, to attend full-time at school, and to run and work out at the gym. The results bear no resemblance to her vocational achievements, the physical examinations conducted by Dr. Waseem and Dr. Loch, the testimony of Dr. Loch, and the video surveillance of Ms. Faizi at the gym. I therefore place little weight on Mr. McNeil's report.

Dr. Dean Powers

- [100] Dr. Powers, an expert in vocational rehabilitation, testified for the plaintiff. He concluded that Ms. Faizi's chronic pain, anxiety, feelings of being overwhelmed, memory issues, and limited cognitive abilities will impede her progress as a student and have an impact on her employability going forward. He found that she is not competitively employable at this point.
- [101] Dr. Powers saw Ms. Faizi for only 1.5 hours, but she attended over two days. He and his assistant conducted a number of standardized tests. Dr. Powers incorrectly thought the plaintiff had taken her course at CDI College before the accidents. He confirmed that he did not receive any records from CDI College. He requested the plaintiff's resumé by way of letter, but she did not bring it to the assessment. He did not have the plaintiff's high school records and relied on her recollections regarding her grades.
- [102] Ms. Faizi attended Dr. Powers' office in the afternoon on day two to take the standardized tests he had selected for her. Dr. Powers testified that this can take up to 8 or 9 hours. Based on his recollection, the plaintiff completed her testing in about 6.5 hours. That the plaintiff sped through her tests is not noted in Dr. Powers' report. His assistant, Ms. Saffer, noted that the plaintiff moved smoothly when conducting her tests and that she refused breaks. I note that Dr. Powers testified that the Beck tests, regarding mood and depression, went missing on the first day. These tests are administered because mood issues can affect one's vocational functioning. Dr. Powers did not provide any interpretation of Ms. Faizi's mood inventory results. She scored extremely low on these tests. In his report, Dr. Powers concludes that Ms. Faizi placed in the severe anxiety and depression range.
- [103] Based on the test results, Dr. Powers concluded that the plaintiff has memory and concentration issues. Dr. Powers opined that Ms. Faizi could not complete third and fourth year level university courses given her low cognitive abilities. Dr. Powers concluded that she has physical, emotional, cognitive, and mental disabilities. He opined that these disabilities have significantly reduced the number of jobs available to her and that she is not competitively employable at this stage.
- [104] I find that Dr. Powers' conclusions are inconsistent with Ms. Faizi's academic performance in the dental assistant course and her performance at Douglas College. She has clearly demonstrated academic achievement since the motor vehicle accidents. He did not consider what Ms. Faizi has actually accomplished following the two accidents. Ms. Faizi is partly to blame. He requested her resumé but Ms. Faizi did not bring it to the assessment. He also did not have Ms. Faizi's high school grades or her transcripts from her dental assistant course. Dr. Powers opined that occupations that were reasonably available to Ms. Faizi prior to the accidents had been substantially reduced, one of these occupations being a dental assistant. This is of course an occupation for which Ms. Faizi not only trained for, but she has also successfully worked as a dental assistant post-accidents.

[105] I find that Dr. Powers' report is overly pessimistic regarding Ms. Faizi's abilities. He relied on what Ms. Faizi told him without making the effort or having the ability to corroborate her reports by reference to collateral evidence. This undermines the weight of his opinion.

Surveillance Evidence

[106] The defendants tendered a video recording of the plaintiff on August 17 and 19, 2018. The plaintiff was unaware that she was being recorded.

[107] In the video, the plaintiff was able to easily drive her car and walk into her gym. Ms. Faizi walked swiftly on the treadmill, moving easily and with agility. She was able to turn her head both ways when distracted by something. She lifted and carried various weights. She did lunges and knee bends with a heavy weight. She was able to easily put her chin to her chest. She had no hesitation in any move. Not once does she reach for her neck, as she did regularly in the courtroom.

[108] After leaving the gym, before getting into her car, Ms. Faizi returned to the gym presumably to get her keys. On the way home she stopped at a gas station and pumped her own gas. After driving home, she waited in the car for a considerable amount of time before she exited the vehicle and walked towards a residence.

[109] Two days after her gym visit she is recorded arriving at the grocery store with her mother. She walks around without any obvious pain despite the workout two days earlier.

Analysis

Credibility

[110] One of the leading authorities on credibility is *Bradshaw v. Stenner*, 2010 BCSC 1398 [Bradshaw], aff'd 2012 BCCA 296, wherein Justice Dillon summarized the key elements as follows:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of [their] memory, the ability to resist the influence of interest to modify [their] recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes [their] testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to

be in existence at the time (Farnya at para. 356).

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)) .

[111] Ms. Faizi led evidence to support her claim for damages for injuries suffered. However much of this evidence was premised on Ms. Faizi's subjective complaints of pain. In these circumstances, I must exercise caution and examine her evidence carefully. I must take into account the plaintiff's self-interest in the outcome of the litigation.

[112] I note that the medical experts relied, to a large extent, on Ms. Faizi's subjective complaints of pain. To address this, I find the passage of Justice Southin in *Sekhon v. Gill* (1991), 8 B.C.A.C. 164, 61 B.C.L.R. (2d) 273 [Sekhon], adopted by the Court of Appeal in *Samuel v. Chrysler Credit Canada Ltd*, 2007 BCCA 431, helpful:

[49] It is trite law--although I note that what is trite law is frequently brushed aside--that in order for an expert to give an opinion the facts upon which he [or she] gives that opinion must be proven by the person who has personal knowledge of them: see *Enge v. Trerise*, (1960-62), 33 W.W.R. 577 (B.C.C.A.) and *Lenoard v. British Columbia Hydro and Power Authority* (1964), 50 W.W.R. 546 (Wilson, C.J.S.C.), in which that most distinguished judge said (at p. 548):

I now enter into an area in which I must consider subjective as well as objective evidence because both were placed before me without objection by counsel. All physicians must I think, rely to some extent on what their patients tell them. If, for instance, a patient had a pain in his neck and went to a doctor, mum, challenging him to find what, if anything, was the matter with him, then I think that doctor would be in almost as difficult a position as a lawyer would be if all his client told him was that he wanted to sue Tom Jones, and condescended to no further detail. When the doctor relates in court what his patient told him, he may be stating hearsay, but common sense in the courts has long ago rejected the idea that this evidence may not be heard and has accepted the idea that it should be listened to, not because it proves by itself the truth of the thing stated by the patient to the doctor, but because it defines to an extent his area of exploration and, if confirmed by the doctor's objective observations and by the patient's evidence given at the trial, may be convincing. I see no other approach to medical evidence. It is closely allied to the hypothetical question often put to other expert witnesses where the witness is asked: "Well, granting the existence of such and such facts, what is your opinion?" The doctor says he accepted some statements made by his patient as facts and formed an opinion thereon. Such an opinion, I

think, is subject to criticism if the patient does not appear as a witness and corroborate the existence at the time of the symptoms alleged to have been described to the doctor. Such an opinion, in so far as it relies on the credibility of the patient, is subject to rejection by a judge or jury who, having heard the patient, do not find him credible. I do not think they are bound by the doctor's opinion as to credibility but they must pay a considerable regard to it, particularly if it is related to associated objective evidence, such, for instance, as evidence of spasm. But I do not see any reason why a judge or jury, having heard the expert and the patient, should not, in a proper case, reject the evidence of the expert on the ground that the patient is not a credible witness and that, therefore, the hypothesis on which the expert gave his opinion is not established, having, of course, the fullest regard to the expertise of the doctor and to any objective evidence he has propounded. If this were not so then judges and juries would be completely bound by the opinions of experts as to credibility, and this cannot be.

[Emphasis added.]

[113] I apply the principles from Bradshaw and Sekhon to my factual findings.

[114] It is not in dispute that the plaintiff suffered injuries in two separate motor vehicle accidents, approximately one year apart. I am satisfied that the plaintiff suffered injuries as a direct result of the accidents, she has suffered pain, and she is still suffering pain due to the accidents.

[115] However, I found that her evidence, along with the evidence given by her parents, regarding the extent and impact of those injuries was not always reliable. I reached this conclusion because her evidence was inconsistent with some of the documentary evidence, particularly her clinical records pre-dating the accidents, and with her actions and accomplishments in the years post-accident. The defendants drew my attention to some of these discrepancies, including to the video surveillance evidence compared against the plaintiff's testimony at trial about her physical abilities. For these reasons, I have found that Ms. Faizi exaggerated her post-accident symptoms.

Causation

[116] The generally accepted test for causation is the "but for" test. The plaintiff bears the onus of proving, on a balance of probabilities, that but for the defendant's negligent act or omission, the injury would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [*Athey*] and *Blackwater v. Plint*, 2005 SCC 58. Causation is found if the injury would not have occurred without the defendant's negligence: *Ediger v. Johnston*, 2013 SCC 18 at para. 28.

[117] The plaintiff is not required to prove that the defendant's negligence was the sole cause of her injuries. This is articulated by the Supreme Court of Canada in *Athey* at 467:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an

example from Professor Fleming (The Law of Torts (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[Emphasis in original.]

- [118] The plaintiff must establish a substantial connection between the tortious conduct and the injury: *Farrant v. Laktin*, 2011 BCCA 336 at para. 11. However, the robust and pragmatic approach under the "but for" test allows for there to be more than one cause of an injury. As long as the defendant caused or contributed to the injury in a material way (i.e., beyond the *de minimis* range), the defendant is liable: *Chappell v. Loyie*, 2016 BCSC 1722 at para. 5.
- [119] When a plaintiff makes a claim for emotional injury, there is no requirement that they provide evidence of a specific psychiatric diagnosis before damages are awarded: *Saadati v. Moorhead*, 2017 SCC 28 [Saadati] at para. 31 and *Riley v. Ritsco*, 2018 BCCA 366 [Riley].
- [120] *Saadati* does not stand for the proposition that all claims can succeed without expert evidence. As stated by the BC Court of Appeal in *Riley*:
- [54] The Court [in *Saadati*] did not suggest that expert evidence with respect to mental injuries is valueless, nor that all claims can succeed without expert evidence. It did, however, make it clear that there is no legal impediment that obliges a claimant to advance expert medical evidence in order to advance a claim for mental injuries:
- [38] [None] of this [should] be taken as suggesting that expert evidence cannot assist in determining whether or not a mental injury has been shown. In assessing whether the claimant has succeeded, it will often be important to consider, for example, how seriously the claimant's cognitive functions and participation in daily activities were impaired, the length of such impairment and the nature and effect of any treatment . To the extent that claimants do not adduce relevant expert evidence to assist triers of fact in applying these and any other relevant considerations, they run a risk of being found to have fallen short. [W]hile relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not required as a matter of law.
- [121] The plaintiff bears the onus of proving that the defendant's negligence was the cause of her current symptoms: *Warkentin v. Riggs*, 2010 BCSC 1706.
- [122] When determining causation, I must consider the thin skull and the crumbling skull doctrines. The thin skull doctrine requires tortfeasors to take their victims as they find them. If the plaintiff's injury is unexpectedly severe due to a pre-existing condition, the defendant remains liable under the thin skull doctrine: *Athey* at para. 34. That a defendant must take a plaintiff as they find them is the case even if the injury may be perceived as

disproportionate to the tortious conduct. This is because damages flow from the tortious act: *The "Arpad"*, [1934] P. 189, 103 L.J.P. 129. This is due to the "most basic principle of tort law" that "the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence": *Athey* at 472.

- [123] However, the defendant is not liable for damages that were not caused by the injury: *Brewster v. Li*, 2013 BCSC 774 at para. 78. Under the crumbling skull doctrine, tortfeasors need not compensate the plaintiff for debilitating effects of a pre-existing condition which they would have experienced in any event: *Athey* at paras. 32-35.

Factual Findings

- [124] Based on the factual findings I make below, I conclude that the accidents caused indivisible injuries. The defendants are therefore jointly liable.
- [125] That said, I do not accept that Ms. Faizi's injuries are as significant as she argues. Despite her dramatic descriptions of pain, she missed only three days of work following the second motor vehicle accident and rarely saw her family doctor between the time of the 2014 collision and the fall of 2016.
- [126] While the absence of clinical records establishing that the plaintiff sought treatment is not dispositive, when it is considered in the context of the evidence as a whole it is relevant.
- [127] More importantly, post-accidents Ms. Faizi has held many jobs. She testified that she was let go from some of these jobs because she was "slow" and had "a poor attitude". I note that she left Visions just prior to moving to Kelowna in late 2014 "to get away from everything". She wanted to remove herself from the complication "of the person I just left," which I interpret to mean the man she had married. She also left work at a car dealership because she did not like the hours.
- [128] Ms. Faizi attended school, a dental assistant program in September 2015, and subsequently worked as a CDA. She is currently attending school full-time in an 18-month dental hygiene program and working 6 to 7.5 hours on Saturdays. The hygiene program is both physically and mentally challenging. Ms. Faizi testified that she finds this program difficult.
- [129] Ms. Faizi testified that she has paid \$40,000 to attend the dental hygiene program and she anticipates that she will eventually earn approximately \$75 per hour. I note that no expert evidence was tendered on salary figures for dental hygienists in BC. Ms. Grabovac, a dental hygienist at the office Ms. Faizi works at now, testified that she makes \$46 to \$55 per hour.

- [130] Based on her prior history of success in her post-secondary programs and her comments to Ms. Akbari and Ms. Grabovac that she intends to work as a dental hygienist, I find that Ms. Faizi will likely complete this program and become a dental hygienist. While Ms. Faizi may find the work to be difficult, as it is physically demanding, Ms. Faizi testified that this program was a good fit for her because in addition to working as a hygienist she could teach or conduct research.
- [131] Lastly, video evidence showed Ms. Faizi doing a regular gym workout with ease in August 2018. This video bears no resemblance to Ms. Faizi's testimony in court of the intense pain she suffers and her inability to work out. For example, in court she stated, "just trying to bring my right hand up now feels limp." She also testified that her physiotherapist has told her to exercise but she does not know what to do. She made a number of similar statements suggesting that she is largely disabled. This is not what is demonstrated on the video.
- [132] Based on these post-accident activities I find that while Ms. Faizi was injured in the accidents, she is not disabled to the extent stated by herself, her mother, Dr. Parhar, Dr. Powers or Mr. McNeil.
- [133] With regards to the plaintiff's claim that the accidents caused cognitive injuries, I am not able to find that she suffered such injuries on the evidence before me. While Ms. Faizi scored fairly low on the cognitive tests administered by Dr. Powers, Ms. Faizi did not take any similar tests prior to the accidents against which these results can be compared. Ms. Faizi has not been diagnosed with a head injury of any sort. Ms. Faizi did poorly in high school, but has achieved much higher grades post-accidents at Douglas College and at CDI. Ms. Faizi's alleged cognitive decline was put before this Court largely through her self-reports and the reports of her parents, who recounted incidents of her misplacing her keys, for example. The totality of the evidence does not support a finding that Ms. Faizi suffered cognitive injuries in the accidents.
- [134] I accept that Ms. Faizi suffered soft tissue injuries to her neck and lower back in the accidents. I accept that these injuries continue to cause Ms. Faizi some residual pain. Ms. Faizi had pre-existing knee and back pain that was made worse by the accident. Ms. Faizi also has headaches.
- [135] In terms of her TMD, I find that she had clenching prior to the accidents and that her current untreated TMD, which is muscular and not structural, is more likely than not a pre-existing condition that was not exacerbated by the accident. This contributes to her headaches.
- [136] I must take into account that Ms. Faizi had similar symptoms, albeit not as significant, prior to the accidents. As counsel for the plaintiff stated in submissions: "before the collisions she experienced short periods of mild knee pain, non-specific back pain, jaw clenching and psychological symptoms in relation to an arranged marriage that failed." He notes they were minor and "resolved on their own without treatment." I note that Dr. Parhar agreed that Ms. Faizi was off work for approximately eight weeks due to back and knee condition

prior to the accidents, which indicates that these issues were not minor. The evidence also demonstrates that she made an EI claim due to her physical challenges eight months prior to the first accident.

- [137] I find that to the extent that Ms. Faizi experiences chronic widespread pain, much of her pain cannot be explained by the musculoskeletal injuries sustained in the two accidents. Some of Ms. Faizi's pain may relate to a central sensitization disorder unrelated to the accident, as Dr. Lochter opined.
- [138] I accept that Ms. Faizi experiences some compensable residual pain due to the soft tissue injuries she suffered in the accidents and due to the aggravation of some of her pre-existing pain symptoms.
- [139] While I accept that Ms. Faizi continues to suffer some pain due to the accidents, she is functioning at an almost normal level. I found Ms. Faizi exaggerated her pain in her testimony especially with regard to her condition after the 2014 collision, a period during which she was active and had few medical appointments. I also found her mother exaggerated her symptoms. Ms. Faizi's mother testified that she could not remember if Ms. Faizi was married before or after the first motor vehicle accident. If the first accident made her so drastically different than she had been before, it is unlikely that her mother would not remember when the wedding in Afghanistan happened in relation to that change.
- [140] In turn to her psychological injuries. I find it significant that Ms. Faizi was prescribed an anti-depressant prior to the first accident, although Dr. Parhar testified that it was likely prescribed as a sleeping pill due to the low dosage. Regardless, Dr. Parhar recorded her depressed mood multiple times in his clinical notes and assessed her as having major depression and anxiety. As I stated earlier, Dr. Parhar acted as an advocate for his patient so I give less weight to his explanations in Ms. Faizi's favour.
- [141] It is not in dispute that Ms. Faizi faces some psychological challenges. Ms. Faizi's ongoing depressive and anxious symptoms may be related to her marriage, or lack thereof. There is not enough information for me to determine. What is clear is that there were psychosocial issues, including documented symptoms of depression and anxiety, prior to the accidents. I find that Ms. Faizi suffered from these symptoms prior to the accidents and these symptoms have persisted over time. I find that the accidents exacerbated Ms. Faizi's depressive and anxious symptoms for a period of time, but that her psychological issues have now resolved to her pre-accident levels. I make this finding due to the medical evidence pre- and post-accidents and her current achievements and lifestyle.
- [142] In addition, if Ms. Faizi's mental health issues had significantly worsened post-accidents, I assume Dr. Parhar would have referred her to a psychologist or psychiatrist. He made no such referral. It is not necessary that a plaintiff tender expert medical evidence to establish a psychiatric illness: Saadati. Nevertheless, it is open to the court to consider that there was insufficient evidence to support a psychiatric injury: Saadati, at para. 38.

- [143] The plaintiff relied on *Myers v. Leng*, 2006 BCSC 1582 where the plaintiff did not seek medical attention for almost two and a half years after an injury from a motor vehicle accident. Justice Gropper accepted a gap in seeking medical attention based on the plaintiff's explanation. He had concluded that the doctors could only provide temporary relief to him:
- [50] I am not troubled by the gap in the plaintiff seeking treatment. His decision not to continue to see a doctor about his neck and back complaints was clearly based on a reasonable conclusion that the doctors could only provide temporary relief from the pain by prescribing medication and physiotherapy. The plaintiff did not consider either to be helpful. It is a sensible and practical approach to medical treatment. If continuous medical treatment can cure you, or make you feel better, then it is worthwhile to attend on a regular basis. If it cannot, there really is no point in taking the doctor's time. The purpose of a seeing a doctor is not to create a chronicle of complaints for the purpose of proving that you have ongoing pain from an injury arising from a motor-vehicle accident. Rather than detract from the accuracy of the plaintiff's complaint, I consider the plaintiff's course of conduct, in not seeing the doctor on a continuous basis, to enhance his evidence.
- [144] Here there is no such evidence that medical treatments, for any physical or psychological injuries, were of no assistance to Ms. Faizi.
- [145] Ms. Faizi's complaints, and her regular touching of her neck and shifting in her seat during her testimony, were inconsistent with her post-accidents activities. These include attending school full-time and working part-time. It is also inconsistent with the documented objective findings conducted by the various medical experts that established no physical abnormalities and full range of motion. I also emphasize the video recording of Ms. Faizi's workout prior to trial. In that video, Ms. Faizi engaged in a significant workout, with apparent ease. Lastly, Ms. Faizi testified that she has suffered from blurred vision since the second accident. Despite this troubling physical symptom she continues to drive regularly.
- [146] Looking at the evidence as a whole, much of Ms. Faizi's evidence did not harmonize with the objective evidence of her functionality presented at trial.
- [147] I find that the evidence establishes that Ms. Faizi had to take periods of time off work to tend to her soft tissue injuries caused by the accidents and that she worked on a part-time rather than a full-time basis at times when she did return due to her injuries. I also find that she deferred starting the dental assistant course in January 2014 to June 2014 due to personal problems related to her marriage and her family, but that she deferred starting in June 2014 to September 2015 due to the accidents.

- [148] The evidence does not however establish that she was or is unable to work indefinitely. It established the opposite: she is in full-time school, she also works part-time on the weekend, her current resumé states that she is looking for full-time work, and she has communicated to a co-worker and a friend that she plans to work as a dental hygienist once she finishes her dental hygiene program.
- [149] I find that Ms. Faizi will likely need to take breaks and require some ergonomic adjustments in her workplace due to her injuries and ongoing challenges. Ms. Faizi may find that some occupations that were open to her pre-accidents are no longer options, given her limitations. However, I find that she does not have the highly significant limitations put forward by the plaintiff.

Damages

- [150] At the start of trial, the plaintiff was seeking a global damage award between \$1,671,414 and \$2,968,402. By the close of trial, the plaintiff was seeking between \$3,876,044 and \$3,931,044 in damages.
- [151] The defendants submitted that an award between \$344,000 and \$444,000 would be appropriate.
- [152] In reaching my conclusion, I have carefully considered the submissions of both parties on damages and have concluded that an award in the defendants' suggested range is appropriate, given my findings regarding the plaintiff's compensable injuries.

Non-Pecuniary Damages

- [153] Non-pecuniary damages are awarded to compensate the plaintiff for "pain, suffering, loss of enjoyment of life, and loss of amenities": *Trites v. Penner*, 2010 BCSC 882 at para. 188 [Trites]; and *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley] at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100. Non-pecuniary damages must be fair to all parties; fairness is measured against awards made in comparable cases. However, each case depends on its own unique facts: *Trites* at paras. 188-189.
- [154] As set out in *Stapley* at para. 46, common factors that influence an award of non-pecuniary damages include:
- a) age of the plaintiff;
 - b) nature of the injury;
 - c) severity and duration of pain;
 - d) disability;
 - e) emotional suffering;
 - f) loss or impairment of life;

- 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.

[155] In *Lindal v. Lindal* [1981] 2 S.C.R. 629 at 637, Dickson J. (as he then was) stated that an award for non-pecuniary damages does not depend only on the seriousness of the injury, it also depends on the seriousness of the individual's loss:

the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders*, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case"

[156] At 639-640, the Supreme Court of Canada further held that:

The purpose of making the award is to substitute other amenities for those that have been lost, not to compensate for the loss of something with a money value. Since the primary function of the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfill this function, should be moderate.

[157] A fundamental principle of tort law is that, to the extent a monetary award can accomplish it, a plaintiff should be placed in the same position he or she would have been in had the accident not occurred, not in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.

[158] Ms. Faizi submits an award of \$220,000 to \$275,000 is appropriate. The defendants submit that \$100,000 to \$125,000 is appropriate.

[159] I have reviewed the cases to which the plaintiff referred me. They provide guidance but each case turns on its own particular circumstances. The defendants did not refer me to cases on this issue.

[160] Ms. Faizi injuries cause her pain, and that pain reduces her functionality, but her injuries are not severe. As more than one witness testified, Ms. Faizi's injuries have not significantly affected her family relationships or her social life. The plaintiff argued that the accident significantly contributed to her marital breakup. I am not convinced on a balance of probabilities that the loss of the relationship was primarily due to the accident. Ms. Faizi testified that there were significant cultural differences between herself, who was raised in

Canada, and her husband, who was raised in Afghanistan. Except for a brief period, she was deeply unhappy about the marriage. On the evidence before me, I cannot make the factual finding that the accidents materially contributed to the breakup.

[161] I accept that the plaintiff experienced some severe physical discomfort following the accidents and continues to experience some discomfort. I accept that the accidents' exacerbation of her knee pain required her to stop running and modify her exercise regime. I accept that the accidents caused some emotional suffering as well, given their severity and how the plaintiff's injuries affected her daily life in the months following the accidents. Even in the absence of a central sensitization or chronic widespread pain disorder the plaintiff will likely experience some activity related pain in the neck and low back, as well as some knee pain, in the future.

[162] Ms. Faizi is young and has many years ahead of her. She was only 19 years old when the first accident occurred and is 24 years old now. The period of time over which she will experience this pain is significant.

[163] In all the circumstances, I find that an award of \$125,000 is appropriate in this case.

Earning Capacity

[164] Where the court is satisfied that the plaintiff suffered injuries due to the defendant's negligence, the plaintiff is entitled to damages both for the wage loss they suffered from the date of injury to the beginning of the trial, and for the wage loss they will fail to earn in the future due to their injuries.

Past Wage Loss

[165] To determine compensation for past wage loss, I must consider what the plaintiff likely would have earned, not what they could have earned, if the injury had not been sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[166] Ms. Faizi submits she is owed \$130,000 in past wage loss. The defendants submit that her past wage loss amounts to \$25,000.

[167] Ms. Faizi earned approximately \$11,000 each year in 2014, 2015, and 2016. She did not work in 2017.

[168] The first accident resulted in Ms. Faizi taking some time off right after the accident and again in June or July of 2014. At the time of the first accident she was working at Visions, making approximately \$10.33 per hour. She is entitled to eight weeks of pay for missed work due to the first accident.

- [169] Ms. Faizi only missed approximately three days from the second accident and she is entitled to compensation for those three days. There were also times when Ms. Faizi felt that she could not work full-time due to her injuries, and so made less money than she would have otherwise. Ms. Faizi made roughly \$12 per hour, at most, at the part-time jobs she held before becoming a CDA.
- [170] I accept that but for the accidents, Ms. Faizi would have completed her dental assistant program in approximately June 2015, rather than September 2016. She is entitled to past wage loss for that 14 months' gap, wherein she would have had the ability to earn \$24 per hour as she does now as a CDA, which is less than what she actually did earn.
- [171] I accept that she would have worked full-time as a CDA from June 2015 to September 2017, but for the accidents, when she began her full-time dental hygiene program. I am not satisfied that Ms. Faizi suffered any wage loss due to the accidents from September 2017 to present, given that she is a full-time student and works part-time on Saturdays as a CDA. She is in school not because she is physically unable to work, but because she seeks to upgrade her education and career prospects.
- [172] In all the circumstances I award \$70,000 for past wage loss. I leave it to the parties to make the appropriate adjustments to reach the net figure.

Loss of Future Earning Capacity

- [173] In determining a claim for loss of future earning capacity, the court must consider two questions: *Hoy v. Williams*, 2014 BCSC 234 at para. 153 [Hoy]. The first question is: has the plaintiff's earning capacity been impaired by his or her injuries? This is measured by whether there is sufficient evidence that there exists a real and substantial possibility of future income loss. If yes, the second question is: what compensation should be awarded for the resulting financial harm that will accrue over time?
- [174] The law regarding loss of future earning capacity was further expanded upon in *Hoy*:
- [153] The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case.
- [154] The assessment of damages is a matter of judgment, not calculation.
- [155] Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence. The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident.

[Citations omitted.]

- [175] In *Hoy*, Justice Kent explained there are two possible approaches when assessing loss of future earning capacity: the "earnings approach" from *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), and the "capital asset approach" in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), both of which are correct. The earnings approach is more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 [Perren] at para. 32. The capital asset approach is more appropriate where the loss is not measurable in a pecuniary way: *Perren* at para. 12.
- [176] Compensation is to be based on a real and substantial possibility, not on mere speculation. As Kent J. stated in *Hoy*:
- [141] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

Has The Plaintiff's Earning Capacity Been Impaired by Her Injuries?

- [177] The extent to which Ms. Faizi's future earning capacity has been impacted by her injuries was the most central and contentious question at trial. Ms. Faizi seeks \$3,122,044 under this head of damages. The defendants submit that an award of \$175,000 to \$250,000 is instead appropriate.
- [178] It is clear that Ms. Faizi's earning capacity has not been impaired by her injuries to the extent claimed. The plaintiff claims losses "for her inability to have a lifetime career as either [a] full-time (40 hours per week, 52 weeks per year) dental assistant or dental hygienist". The plaintiff submits that she instead "retains a minimal degree of earning capacity", will only able to work half a shift a week to one-and-a-half shifts a week as a dental assistant throughout her working life, and that she will likely have to retire early due to her accident related injuries. These claims are not borne out on the evidence.
- [179] Ms. Faizi suffers from soft tissue injuries to her neck, lower back and right knee from the accidents. She also suffers from headaches and some nightmares. Although I accept that her soft tissue injuries will likely continue to result in some residual pain for Ms. Faizi over the course of her life, I have found the pain to be exaggerated by Ms. Faizi.
- [180] I am not persuaded that Ms. Faizi is not competitively employable, meaning that she can only work part-time and needs accommodation from prospective employers such that her professional opportunities will be significantly impacted. She is certainly not limited to volunteer work, as was also suggested by the plaintiff.

- [181] I am not persuaded that Ms. Faizi would have pursued a different, more rigorous post-secondary education path but for the accident. I have found that she suffered no cognitive injuries in the accidents. Her grades in her later high school years were low and, besides expressions of interest in dentistry as a child, there was no evidence that she was on a path towards a more lucrative career that required education she is no longer able to pursue.
- [182] Mr. Faizi plans to work as a dental hygienist once she completes her course. Perhaps she will teach or do research to put less stress on her soft tissue injuries. I cannot determine that with any certainty. The evidence does support a real and substantial possibility that Ms. Faizi has suffered a loss of earning capacity, but it does not support a loss as significant as she claims.
- [183] I am satisfied that Ms. Faizi may have periods of time over the course of her career where she cannot work full-time due to her accident-related injuries, that she may have to retire earlier than she would have otherwise, and that she may work in environments that are less lucrative, but more accommodating.
- [184] To acknowledge these challenges, I award Ms. Faizi \$200,000 for her future loss of earning capacity.

Cost of Future Care

- [185] A plaintiff is entitled to compensation for costs of future care for the harm caused by the defendant's negligence. These costs are based on what is reasonably necessary to restore the plaintiff to his or her pre-accident condition, according to the medical evidence to preserve and promote the plaintiff's physical and mental health: *Gignac v. Rozylo*, 2012 BCCA 351 at paras. 29-30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.).
- [186] In *Andrews, Dickson J.*, as he then was, discussed the rationale behind cost of future care awards at 241-242:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent [sic] within reason that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

[Emphasis in original.]

- [187] A cautious approach should be taken in assessing loss of housekeeping capacity claims: *Liu v. Bains*, 2016 BCCA 374 at para. 29.

[188] The plaintiff seeks \$400,000 in future care costs, whereas the defendants submit that her claim under this head of damages is worth \$40,000.

[189] Based on the above principles, I find that Ms. Faizi is entitled to limited compensation for her costs of future care. I am not persuaded that she cannot manage all aspects of daily living due to her injuries. I find that she can handle housecleaning chores going forward.

[190] I agree with the plaintiff that she will benefit from physiotherapy and massage therapy, but I agree with the defendants that they are not required to compensate her for these treatments on an annual basis for the rest of her life. She will also benefit from a gym membership.

[191] Based on the estimates of Dr. Epstein and Mr. McNeil, I award Ms. Faizi \$40,000 for these future care costs.

Special Damages

[192] The parties submit that Ms. Faizi is entitled to \$4,000 in special damages. I agree and therefore award \$4,000 in special damages.

Conclusion

[193] I find that Ms. Faizi is entitled to the following damages for the injuries caused by the two motor vehicle accidents:

- a) \$125,000 in non-pecuniary damages;
- b) \$70,000 in past wage loss;
- c) \$200,000 in loss of future earning capacity;
- d) \$40,000 in costs of future care; and
- e) \$4,000 in special damages.

[194] If the parties cannot agree on costs, within 45 days of this judgment either party may file an application to determine costs.

"MacDonald J."

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