

CANADA / JUDGMENT

Shehzeda v. Shahzeda

2021 BCSC 659

COURT

Supreme Court of British Columbia

DECIDED

12 April 2021

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2021 BCSC 659 Shehzeda v. Shahzeda

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shehzeda v. Shahzeda,

2021 BCSC 659

Date: 20210412

Docket: M158775

Registry: New Westminster

Between:

Maqsood Ahmed Shehzeda

Plaintiff

And

Jeremy James Horner, Iram Shahzeda and Asad Maqsood Shahzada

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiff:

A. Baboi

Counsel for the Defendants, Iram Shahzeda and Asad Maqsood Shahzada:

L.J. Mackoff

S. Horricks

J. Greville

Place and Date of Trial:

New Westminster, B.C.

January 4-8 and 11, 2021

Place and Date of Judgment:

New Westminster, B.C.

April 12, 2021

INTRODUCTION

- [1] This action concerns the claims of the plaintiff, Maqsood Shehzeda, for damages arising from a motor vehicle accident.
- [2] On April 12, 2012, Mr. Shehzeda was a passenger in a vehicle driven by his daughter, the defendant, Iram Shahzeda. The vehicle was owned by Mr. Shehzeda's son, the defendant Asad Shahzada (collectively with his sister, the "Shehzeda Defendants"). For ease of reference, I will refer individually to the Shahzeda Defendants as "Iram" and "Asad".
- [3] The Shehzeda Defendant's vehicle was struck by an oncoming vehicle driven by the defendant, Jeremy Horner (the "Accident"). This occurred when Iram made a left hand turn when it was unsafe to do so. The Shehzeda Defendants have admitted liability for the Accident. The action has been discontinued against Mr. Horner.
- [4] The only remaining issue is the determination of Mr. Shehzeda's claim for damages. He now seeks non-pecuniary damages, cost of future care and special damages. During argument, Mr. Shehzeda abandoned his claims for past earning capacity and loss of future earning capacity.

BACKGROUND FACTS

- [5] In January 1956, Mr. Shehzeda was born in Pakistan. He is now 66 years old. He completed a Grade 5 education there, after which he worked on his family's farm. During the 1980s, Mr. Shehzeda also worked in a convenience store and drove a truck. In 1985, Mr. Shehzeda married.
- [6] Around 1990, Mr. Shehzeda went to England to visit but ended up staying there for about 19 months. While there, he worked in a grocery store stocking shelves. In 1992, Mr. Shehzeda immigrated to Canada. He landed initially in Toronto, where he worked for about a year installing wall tiles.

- [7] Around 1993, he moved to BC. For the next five years, Mr. Shehzeda worked at a variety of intermittent labour intensive jobs: seasonal farming or packing work (about six months); renovation work (about two years); loading/unloading trucks for a kitchen cabinet company; and, factory work making pipes (about 6-7 months).
- [8] In 1995, Mr. Shehzeda's family (his wife, Asad and Iram) joined him in BC. The children were only 2-3 years old at the time. Over his first years in BC (1995-2000), Mr. Shehzeda only worked about 50% of the time.
- [9] In 2000, Mr. Shehzeda moved to Saskatoon with his family. There he worked on a poultry farm as a machine operator and at a business raising lambs.
- [10] There is no evidence that Mr. Shehzeda sought to upgrade his work skills while in Canada. His English is clearly limited, despite having undertaken some courses after his arrival in Canada, a factor that would affect his employability. For the most part, his efforts to gain employment were in the South Asian community, where he did not need a command of the English language. Mr. Shehzeda's English skills remain limited, since he spoke through an interpreter at this trial.
- [11] In December 2002, the Shehzeda family moved back to BC. Upon his return, Mr. Shehzeda's work history remained, as before, sporadic and within the South Asian community. For about 1-2 years, he worked helping framers, by fetching items or moving wood products. After that ended, he collected unemployment benefits. In about 2005/2006, he picked berries on a farm for about six months.
- [12] Since the berry picking job in 2005/2006, Mr. Shehzeda has not worked at any job. He claims he was looking for work, including with the assistance of an employment organization that assists immigrants. He states that due to his age at that time (around 50), he was looking for "lighter work" such as in security or driving a truck. He claims he sent resumes to some employers during this time.
- [13] Since at least the 2005/2006 timeframe, Mr. Shehzeda has been financially supported by social assistance, the circumstances of which I will discuss in more detail below.
- [14] Over the ten-year period after Mr. Shehzeda's return to BC and to the time of the Accident (between 2002 and 2012), he only worked about 1.5-2 years.
- [15] Mr. Shehzeda lived with his family until about 2014. Although the evidence is unclear, the family appears to have been unhappy with Mr. Shehzeda's behavior at that point. Sometime in 2014, Mr. Shehzeda separated from his wife and he moved into a basement suite either by himself or with a friend.
- [16] After 2014, Mr. Shehzeda was estranged from his family and they saw little of each other.

- [17] Some years ago, around 2018, Mr. Shehzeda moved back in with his family, which then included his wife, Iram, Asad and Asad's wife and child. They all live in a two-story house in Delta. Mr. Shehzeda occupies a separate basement suite; the rest of the family occupies the remainder of the house.

THE ACCIDENT

- [18] The circumstances regarding the Accident are not in dispute.
- [19] Iram was driving the vehicle. Mr. Shehzeda, then 56 years old, was in the front passenger seat. Iram was trying to make a left turn when their vehicle was hit on the right passenger side by Mr. Horner's vehicle. The impact was sufficient to employ the air bags on both sides and spin the Shehzeda vehicle around.
- [20] Mr. Shehzeda was able to exit the vehicle and then attend to Iram by getting her out of the vehicle. The police and a fire truck arrived. An ambulance also arrived, although Mr. Shehzeda and Iram did not go to the hospital.
- [21] The Shehzeda vehicle was written off.
- [22] I agree that the circumstances support that the Shehzeda vehicle suffered a significant impact in the collision.
- [23] Mr. Shehzeda alleges that, arising from the Accident, he suffered injuries to his neck, left shoulder, upper back, lower back and left hip. He alleges that these injuries caused and continue to cause him pain in those areas. He also refers to now having regular left sided headaches and difficulties with sleeping.

CREDIBILITY ISSUES

- [24] The defence has referred to the well-known authorities from BC courts in relation to the assessment of a witness' credibility. Those authorities include, in the usual fashion, the statements from *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at paras. 11-13. In that case, the court referred to a consideration as to whether a witness' evidence is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (para. 11).
- [25] Similarly, relevant to the assessment of credibility is *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-188 which is often cited and need not be repeated here.
- [26] As a general observation at this stage, I conclude that Mr. Shehzeda was far from either a reliable or credible witness. I agree with the defence that most, if not all, aspects of his testimony were successfully challenged and contradicted by the documents introduced at this trial.

- [27] I will discuss all of these matters in more detail below. However, at this time, I emphasize that Mr. Shehzeda's evidence is considerably unhinged from the documentary evidence concerning his pre-Accident condition. In particular, his evidence mirrored the opening statements of his counsel in contending that, prior to the Accident, he was a very active person with no symptomatic medical conditions and that the Accident "completely changed" that. He refers only to having some back pain on his right side in 2005/2006, which completely resolved that year. As other, more credible and reliable evidence emerged, it was clear that all of this evidence was anything but the truth.
- [28] I have unfortunately come to the conclusion that either Mr. Shehzeda intentionally misled this Court on the major issues at this trial, or alternatively, he had no regard for the truth. In either event, his testimony is completely lacking as a means of assessing the issues at this trial. In fact, even assuming the accuracy of his evidence as to his pre-Accident history at this trial, Mr. Shehzeda can only be described as dishonest, in claiming government and insurance benefits during that time when he now says he was in good health and able to work.
- [29] I have similarly concluded that Asad and Iram's evidence as to their father's condition, both pre- and post-Accident, is also unreliable. I do not place any weight on their evidence, save as confirmed by other evidence that I accept.

PRE-EXISTING MEDICAL CONDITION

- [30] Substantial clinical records were put into evidence by agreement of the parties. The parties agreed that they were business records and could be taken as proof of the contents stated in those records: s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124.
- [31] In the years preceding the Accident, those clinical records are replete with reference to Mr. Shehzeda's significant and ongoing physical ailments relating to his low back, neck and shoulder and some reference to hip pain. Those records also indicate medical treatment for those conditions. A brief summary of the most significant evidence is:
- a) In 2008, Mr. Shehzeda was referred to a neurosurgeon, Dr. Heran, in respect of his ongoing low back pain and radiation into the buttock, presumably for a surgical opinion and for the purposes of making a disability insurance claim. Mr. Shehzeda did not recall the visit being in respect of possible surgery but did concede that he was seen by the doctor for the purpose of making a disability claim;
 - b) Dr. Pardeep Rai, Mr. Shehzeda's family doctor, began seeing him in 2010. In 2010/2011, Dr. Rai refers to Mr. Shehzeda having spinal stenosis and degenerative disc disease. Throughout this time period, Dr. Rai or other doctors in his office were also regularly prescribing large amounts of Tylenol #3, a significant medication with codeine (an opioid), to Mr. Shehzeda for his pain management;

- c) During the summer 2010, Mr. Shehzeda was also seeking treatments from Dr. Perthpal Saran, a chiropractor. Dr. Saran treated him throughout that time frame commencing July 29, 2010 and recorded left sided neck pain with spasm in the trapezius commencing two weeks before the appointment. There is also a reference to the pain was causing sleep disturbance;
 - d) On August 14, 2010, Mr. Shehzeda attended the Delta Hospital Emergency with a multi-week history of pain in his left shoulder;
 - e) In 2011, Mr. Shehzeda's condition continued to be sufficiently disabling in his lower back that, in May 2011, Dr. Rai signed a Medical Report to support Mr. Shehzeda's claim that he could not work so that he could receive government benefits;
 - f) There are records of Mr. Shehzeda having complained to Dr. Rai of headaches at the back or left side of his neck in November 2011 and February 2012;
 - g) On March 20, 2012, three weeks before the Accident, Mr. Shehzeda's lower back condition (degenerative disc disease) continued to be sufficiently disabling such that Dr. Rai signed a Medical Report to support Mr. Shehzeda's claim for insurance benefits;
 - h) Post-Accident, in September 2012, Dr. Saran's record indicate that Mr. Shehzeda attended then, complaining of left hip pain that began one year earlier (i.e. seven months before the Accident) which had been mild until the night before the appointment when he awoke with severe pain; and
 - i) Post-Accident, on April 2013, Dr. Rai's Medical Report to ICBC referred to Mr. Shehzeda as having a "history of chronic back pain".
- [32] Mr. Shehzeda was cross-examined extensively on those medical records, particularly those of Dr. Rai. Mr. Shehzeda professed to have a poor memory of the matters raised and, in general, did not seek to contradict the statements found in those records.
- [33] Even without reference to the records, Mr. Shehzeda's recollection of his overall medical condition prior to the Accident changed from answer to answer. One incredible statement arose from Mr. Shehzeda when he was asked on cross-examination why he was receiving all this medical treatment and consuming large amounts of opiate pain medication in that period of time. He responded that only the doctors could say whether or not he was in pain.
- [34] All of the above points to the fact that Mr. Shehzeda's evidence as to his pre-Accident medical condition is entirely unreliable and completely lacks credibility. Mr. Shehzeda did not call any independent witnesses to support that matter, electing instead to only call his children. There is no evidence from Mr. Shehzeda's wife, an adult who could potentially have provided valuable information on both his pre- and post-Accident medical condition.

- [35] Further, I agree with the defence that, many times, Asad and Iram purported to testify as to their father's condition when they had no personal knowledge of or ability to observe his condition. They appeared to have no knowledge of their father's significant medical issues prior to the Accident or even that his unemployment arose from a reported disability, even when they had become teenagers and would have a better appreciation of matters.
- [36] In argument, Mr. Shehzeda's counsel conceded that there was chronic back pain prior to the Accident arising from spinal stenosis and degenerative disc disease. This is self-evident and was an appropriate admission, no doubt leading to the withdrawal then of Mr. Shehzeda's claim for past earning capacity and loss of future earning capacity.
- [37] All of the above supports that, prior to the Accident, Mr. Shehzeda continued to have significant back issues and pain, contrary to his specific assertion at this trial that his only ailment was back pain in 2005/2006 that completely resolved years before the Accident. I conclude that the degenerative disc disease was and remained the primary cause of Mr. Shehzeda's disability and pain at the time of the Accident. I also conclude that, prior to the Accident, and in particular, in the months leading up to the Accident, Mr. Shehzeda also suffered regularly from neck and shoulder pain and headaches and, less frequently, some hip problems. Finally, while under cross-examination, Mr. Shehzeda admitted as much but claimed that he simply "didn't recall the details".

EVIDENCE RE INJURIES/TREATMENT

- [38] Mr. Shehzeda's evidence concerning his Accident related injuries and treatment was supplemented by the evidence of Iram and Asad.

Mr. Shehzeda

- [39] Mr. Shehzeda says that he started to feel pain, mostly on his left side, about two days after the Accident. He says his left hip hit the small storage box in the middle of the front seat of the Shehzeda vehicle during the Accident.
- [40] Mr. Shehzeda saw Dr. Rai the next day. Dr. Rai diagnosed him with soft tissue injuries and told him to take Ibuprofen.
- [41] Later, in May 2012, Dr. Rai recommended that he start physiotherapy. Mr. Shehzeda did attend some physiotherapy sessions throughout the summer 2012.
- [42] By October 2012, some five months after the Accident, Dr. Rai was again prescribing Tylenol #3 for Mr. Shehzeda's pain. Those regular and substantial prescriptions would continue for the ensuing years, although not at the frequency of use that Mr. Shehzeda had of this medication before the Accident in 2010/2011.

- [43] In May 2013 and May 2015, Dr. Rai continued to provide medical reports to the BC government and ICBC in support of Mr. Shehzeda's continuing receipt of disability benefits. In his government reports, Dr. Rai indicated that persistent back pain arising from degenerative disc disease that predated the Accident continued to be the primary basis of his ongoing disability. In the May 2015 record, this condition was said to have existed for over ten years.
- [44] As above, Mr. Shehzeda's evidence at this trial is that his neck, left shoulder, left hip and lower back remain as painful now as he experienced after the Accident. He also says that he continues to have sleep difficulties, particularly on his left side, that were not present before the Accident.
- [45] As a result of his injuries, Mr. Shehzeda says that his activities have been significantly curtailed. He says he no longer goes to the mosque to pray, no longer plays soccer and socializes with friends, no longer goes to the pool and gym and he cannot ride his bicycle as much. He tries to pray at home but he has difficulty with the position and it causes him pain. He claims that he used to help the family a lot with household chores, such as cooking and cleaning, but he is not able to do that anymore because of his left shoulder and left hip pain. He refers to have undergone a personality change, in that he gets upset and angry more often, something that causes conflict in the family. He claims that he is no longer able to pick up his granddaughter.
- [46] Mr. Shehzeda also claimed that, but for the Accident, he would have been able to work.
- [47] As I have described above, Mr. Shehzeda's evidence in direct was directly and substantially dismantled during cross-examination, particularly in the face of substantial documentation proving otherwise. His evidence was more often than not conflicting, confusing, vague and, at times, an outright falsehood. More often than not, Mr. Shehzeda claimed to have no memory of critical events in his life. A prime example is that he claimed that his back problems were not serious enough to prevent him working, even in the face of his disability claims that said otherwise.
- [48] Mr. Shehzeda's claims as to the effect of his injuries on his personal life are also not worthy of any weight. He initially claimed that he was now essentially a shut in, save for venturing from his residence for a few blocks. Yet, Mr. Shehzeda regularly travelled to Pakistan in 2016-2019 for extended visits with his relatives. He also then admitted that it was "possible" that he was riding his bicycle regularly within one year of the Accident.
- [49] For all of the above reasons, I place no weight on Mr. Shehzeda's claims of pain and disability in the years after the Accident; nor do I accept any of his evidence concerning the course of recovery of his admitted injuries from the Accident and the effect of those injuries on his lifestyle since April 2012.

Asad and Iram

- [50] Asad and Iram are 28 and 27 years old respectively. At the time of the Accident, Asad was 20 years old and Iram was a teenager.
- [51] Generally, Asad and Iram's testimony as to their fathers' pre- and post-Accident lifestyle and medical condition was of little assistance to the Court. Their testimony was largely based on their father's statements to them, and therefore suffers from the same reliability and credibility problems faced by Mr. Shehzeda. They both claimed to have significant personal knowledge of their father leading up to the Accident, an assertion that was successfully challenged on cross-examination as not true and ultimately conceded by Mr. Shehzeda's counsel in argument.
- [52] For example, Asad and Iram claimed that their father only suffered from high cholesterol prior to the Accident, that he had no other health issues and that he was not disabled. Asad was aware that his father was taking medication in 2005/2006, including Tylenol #3, but claimed no knowledge of his father's continuing and regular use of that strong medication in later years. Asad also claimed to have detailed personal knowledge of his father's social and recreational life pre-Accident. Similar to Mr. Shehzeda, Asad said that the reason his father didn't work before the Accident was his language skills and that he had no knowledge that his father had claimed to be medically disabled.
- [53] Iram similarly asserted that she had personal knowledge of her father's pre- and post-Accident lifestyle and medical condition. Iram knew that her father didn't work but never asked him why. In cross-examination, she acknowledged that she had no knowledge of her father's activities at the mosque prior to the Accident or his visits at his friends' homes. She conceded that her father's friends would be a better source than her. Similarly, she had no personal knowledge of his recreational activities before the Accident, in terms of bicycling, soccer or swimming.
- [54] Both children had virtually no communication with their father from 2014 to 2018 as to his condition or activities in that time frame.
- [55] From all of the above, I conclude that Asad and Iram's testimony is undeserving of any weight in supporting their father's evidence and his claims of injury and ongoing difficulties arising from the Accident.

EXPERT MEDICAL EVIDENCE

- [56] With a shaky evidentiary foundation for Mr. Shehzeda's claims, as above, I now turn to consider the extensive medical evidence.

Plaintiff's Experts

- i. Dr. Pardeep Rai

- [57] On March 3, 2019, Dr. Rai, Mr. Shehzeda's family doctor, prepared his report in the field of family medicine. He was asked to opine on a diagnosis, causation and future prognosis. He diagnosed soft tissue injuries to Mr. Shehzeda's left shoulder, left neck and upper back. No mention is made of any injury to Mr. Shehzeda's hip.
- [58] Unfortunately, Dr. Rai's report is lacking in many respects. Strangely, he does not provide any details of Mr. Shehzeda's pre-Accident history so as to gauge any changes, or causation, in respect of the Accident. This is of some concern since Dr. Rai had access to clinical records from before 2010, and he treated Mr. Shehzeda for years before the Accident. Dr. Rai also assisted Mr. Shehzeda in seeking benefits by certifying that he was disabled arising from his degenerative disc disease of the lower back, which he confirmed in cross-examination, not in his report.
- [59] Dr. Rai simply refers to probable forces to those areas of Mr. Shehzeda's body arising from the Accident and causing that soft tissue injury. As I discuss below, his opinion on the shoulder injury is at odds with that of other experts with more expertise in the area (Dr. James Douglas and Dr. Steven Helper). On the issue of the etiology of the ongoing pain after six months, Dr. Rai was only able to speculate that it arose from the theory of central sensitization, of which he is a proponent.
- [60] I do not doubt that Dr. Rai is a busy practitioner. However, the lack of detail in his report and superficial consideration of the issues to be addressed by him have led me to the conclusion that little weight should be placed on his report.

ii. Dr. Deepak Grover

- [61] On October 12, 2020, Dr. Grover, a joint replacement and general orthopaedic surgeon, prepared his report. Dr. Grover completed an independent medical examination of Mr. Shehzeda that day.
- [62] One difficulty that arises with Dr. Grover's opinion is that it is based in part on Mr. Shehzeda's self-reporting. One critical fact relied on was Mr. Shehzeda's falsehood that, prior to the Accident, he was working as a framer doing demanding physical work. This gave rise to Dr. Grover concluding that there was a substantial "vocational disability". Another falsehood from Mr. Shehzeda to Dr. Grover was that he was unable to return to this work because of his left shoulder and lower back pain. Mr. Shehzeda also falsely told Dr. Grover that he was unable to do heavier household chores or yard work, when he did neither prior to the Accident.
- [63] Dr. Grover did note pre-existing lower back problems and left shoulder pain. He was aware of the extensive use by Mr. Shehzeda of pain medication from 2010 to the date of the Accident, and that this use continued after the Accident.

- [64] Dr. Grover diagnosed myofascial injuries arising from the Accident to Mr. Shehzeda's neck and lower back. He also diagnosed aggravation of the pre-existing degenerative disc disease and left shoulder problems, although he was unable to determine the degree of aggravation caused by the Accident. Finally, he diagnosed chronic pain syndrome. His opinion was that the Accident caused myofascial injuries to his neck and lower back on the basis that trauma would be the likely cause of the pain.
- [65] Dr. Grover diagnosed left hip bursitis as caused by the Accident. However, Dr. Grover was unaware that Mr. Shehzeda had, in September 2012, reported to Dr. Saran that the hip pain came on before the Accident and was mild in nature until approximately five months after the Accident when it was suddenly dramatically worse. Dr. Grover then said the hip problem may be a flare-up of the pre-existing condition.
- [66] Dr. Grover could not attribute the headaches to the Accident.
- [67] The defence suggests that, in the absence of an accurate and reliable history related by Mr. Shehzeda, Dr. Grover's opinion, like the other experts, rests on a shaky foundation. I agree that this is a valid assessment.

iii. Dr. Steven Helper

- [68] On October 18, 2020, Dr. Helper, a physiatrist, prepared his report in the field of physical medicine and rehabilitation. As did Dr. Grover, Dr. Helper examined Mr. Shehzeda on October 12, 2020.
- [69] Mr. Shehzeda reported left hip pain, low back pain and left neck and shoulder pain, all said to arise from the Accident.
- [70] As with Dr. Grover, Mr. Shehzeda falsely claimed to Dr. Helper that he was working at labour jobs in 2011 but had not worked since the Accident. Mr. Shehzeda also falsely reported that his pre-existing low back pain was "mild and of limited functional relevance". Dr. Helper stated that after a review of the medical records, he was unable to confirm Mr. Shehzeda's description of improved low back pain leading up to the Accident. Dr. Helper was left with the impression that Mr. Shehzeda was undervaluing the degree of limitation prior to the Accident. Dr. Helper did note some pre-existing left shoulder pain but found that it was not functionally limiting him.
- [71] Dr. Helper diagnosed pain in Mr. Shehzeda's left hip, left low back and left neck and shoulder. He concluded that the low back pain was a pre-existing condition and only minimal effect could be said to arise from the Accident. He further concluded that the left hip and left neck and shoulder pain could be attributed to the Accident, based on a lack of documented pain in those areas prior to the Accident.
- [72] Dr. Helper's opinion was that the pain was enhanced by cognitive/emotional factors to a greater degree than what would be felt by an average patient with similar injuries. He noted non-anatomical complaints of pain relating to virtually every part of Mr. Shehzeda's body

under examination. Dr. Helper referred to Mr. Shehzeda as a "hot mess" and having a "weird presentation". Dr. Helper said Mr. Shehzeda seemed to have genuine pain but "things didn't add up". Dr. Helper stated that, in both the back and the hip, there was no logical structural diagnosis.

- [73] Dr. Helper agreed that the differential diagnoses for the low back and hip were either myofascial pain or radicular pain from the lumbar spine. While he did not resile from his conclusion of myofascial pain, Dr. Helper conceded at numerous points in cross-examination that the quality of Mr. Shehzeda's history and the fact that he was not aware of significant pre-Accident problems impacted his opinion. Dr. Helper stated that, if he had known of Mr. Shehzeda's full disability for years before the Accident impacting his ability to work, his opinion could have changed.
- [74] Dr. Helper also admitted that he was unable to rely on his physical examination of Mr. Shehzeda to a significant degree since there was conflicting information coming from Mr. Shehzeda during that examination. Dr. Helper acknowledged that this affected his analysis of causation, prognosis and function.
- [75] I agree with the defence that Dr. Helper was a careful, competent and straight forward physician who made a significant effort to assist the Court based on what he knew or discerned through his own examinations. His report also indicates that he carefully reviewed all of the medical records toward attempting to gain an understanding of Mr. Shehzeda's condition, both pre- and post-Accident. However, I am left in doubt as to the validity of his conclusions as to what injuries were caused or aggravated by the Accident in light of the untruthful history relayed by Mr. Shehzeda and Dr. Helper's own admissions as to his lack of knowledge of key events. None of these issues were, of course, caused by Dr. Helper.
- [76] Dr. Helper suggested that Mr. Shehzeda's prognosis was poor. He did expect, however, an improvement in Mr. Shehzeda's symptoms if there was improvement in his emotional/cognitive aspects of his pain.

Defence Expert

- [77] The only medical expert called by the defence was Dr. James Douglas, an orthopaedic surgeon. Dr. Douglas provided his medical/legal report dated July 1, 2019 arising from an independent medical assessment on May 6, 2019.
- [78] As did Dr. Helper, Dr. Douglas diagnosed myofascial pain by way of exclusion. Like Dr. Helper, he points to psychological and emotional factors at play that are central to Mr. Shehzeda's presentation. Like Dr. Helper, he did not find anatomical correlation with his physical examination and complaints of pain.

- [79] Regarding complaints of pain in the left shoulder and neck, Dr. Douglas opined that Mr. Shehzeda is suffering from Whiplash-Associated Disorder (WAD). A WAD diagnosis is typically made when all other anatomical causes for a person's pain have been ruled out. Because no musculoskeletal structural damage exists, Dr. Douglas opined that symptom resolution is possible at some point.
- [80] Regarding the left posterolateral hip, Dr. Douglas opined that Mr. Shehzeda has myofascial pain syndrome.
- [81] Dr. Douglas stated in his report that Mr. Shehzeda likely had cervical spine osteoarthritis before the Accident and was not caused by the Accident. With respect to the left shoulder, Dr. Douglas opined that the small partial thickness rotator cuff tear and glenohumeral joint arthritis were not caused by the Accident. Dr. Douglas also said that Mr. Shehzeda's complaints of pain due to lumbar spine stenosis and nerve root impingement were unrelated to the Accident.
- [82] Dr. Douglas opined that Mr. Shehzeda's pre-Accident injuries have had an additive effect on the severity of his symptoms following the Accident. Dr. Douglas noted that Mr. Shehzeda's documented history of lumbar stenosis and nerve root impingement could pre-dispose him to weakness in the left leg which may increase the chance of left hip pain. In addition, Dr. Douglas stated that pre-existing shoulder pain and headaches were similar to post-Accident symptoms which could suggest that his neck and head pathology "sensitized" Mr. Shehzeda to have a more severe pain reaction following the Accident.
- [83] Dr. Douglas stated that chronic opioid use of Tylenol #3 with codeine can sensitize a person to painful stimuli. Dr. Douglas concluded that this is likely contributing to why Mr. Shehzeda's pain is not resolving.
- [84] Dr. Douglas had guarded optimism in respect of Mr. Shehzeda's prognosis and concluded that it was more likely than not that his neck, left shoulder, and hip pain will improve.

CONCLUSIONS RE INJURIES

- [85] It is trite law that the Shehzeda Defendants are responsible for the damages that will, as much as possible, put Mr. Shehzeda in his original position as existed pre-Accident. The fundamental difficulty in this case is discerning what that pre-Accident condition was. Mr. Shehzeda bears the onus in that respect. The large degree of uncertainty that arises from the quality of his evidence drives the conclusion that he has not met that onus in respect of his claims as to his pre-Accident condition.

- [86] As I have stated above, the evidence of Mr. Shehzeda and his collateral witnesses have been of little assistance in supporting his claims. The lack of reliability of Asad and Iram's evidence and Mr. Shehzeda's lack of credibility and poor recall of his actual history have made the assessment of the issues before the Court more difficult, particularly in determining Mr. Shehzeda's pre-Accident condition and the nature and extent of the claimed aggravation of the pre-Accident conditions.
- [87] The medical evidence is not consistent or conclusive. Save for Dr. Rai, all of the other experts' opinions were put in some doubt since they were relying in part on Mr. Shehzeda's pre-Accident reporting to them that he was in fine physical condition, capable of working and was working up to the date of the Accident. None of these doctors knew that Mr. Shehzeda had been certified as completely disabled from work years before the Accident. In that event, the foundation for all of the medical opinions is put into question to a degree, as conceded by both Dr. Grover and Dr. Helper.
- [88] On balance, I place greater weight on the opinions of Dr. Helper and Dr. Douglas, both of which came to similar conclusions.
- [89] I conclude that, as a result of the Accident, Mr. Shehzeda sustained injuries that resulted in an aggravation of his pre-existing injuries to his neck, left shoulder and low back. I am also prepared to accept that Mr. Shehzeda's hip was injured or aggravated in the Accident, causing soft tissue injuries and ongoing pain. There is no expert medical evidence that supports that Mr. Shehzeda's post-Accident headaches were caused by the Accident.

DAMAGES - DISCUSSION / ANALYSIS

- [90] As already stated, it was only in argument when Mr. Shehzeda's counsel advised that he was no longer seeking a damage award for past earning capacity and loss of future earning capacity. Accordingly, the only remaining issues for determination are Mr. Shehzeda's claim for non-pecuniary damages, cost of future care and special damages.

Non-Pecuniary Loss

- [91] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, disability, inconvenience, loss of enjoyment of life and loss of amenities: *Dikey v. Samieian*, 2008 BCSC 604 at para. 139. The compensation awarded should be fair to all parties and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [92] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal refused [2006] S.C.C.A. No. 100, the court outlined the non-exhaustive factors to be considered when assessing non-pecuniary damages: (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. The court also added as factors: (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).

- [93] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.
- [94] Mr. Shehzeda seeks a damage award between \$60-90,000.
- [95] In the usual fashion, Mr. Shehzeda's counsel has referred to a number of cases as guidance from previous awards in what are said to be similar circumstances. Those cases include: *Larlee v. Shier*, 2008 BCSC 1610 (\$60,000); *Kondraczynski v. Rai*, 2013 BCSC 1061 (\$60,000 before mitigation); *Mir Tabatabaei v. Kular*, 2015 BCSC 295 (\$75,000); and, *Thompson v. Choi*, 2015 BCSC 1283 (\$90,000).
- [96] I find that Mr. Shehzeda's authorities are distinguishable. In *Larlee*, the plaintiff was found to be a credible witness as to her ongoing and daily pain which severely impacted her daily life. In *Mir Tabatabaei*, the plaintiff was also found to be credible and reliable (para. 62). In *Kondraczynski*, the plaintiff's evidence was also suspect, but the Court relied on supporting medical evidence (para. 121). In *Thompson*, the accident had a significant impact on the plaintiff's working and personal life (paras. 136-139).
- [97] The Shehzeda Defendants submits that an appropriate award is in the range of \$35-40,000. Their cases include: *Tisalona v. Easton*, 2015 BCSC 565, *aff'd* 2017 BCCA 272; *Vintila v. Kirkwood*, 2016 BCSC 930 (\$35,000); *Erwin v. Buhler*, 2017 BCSC 362; and, *Repin v. Aam Ventures Ltd.*, 2020 BCSC 227.
- [98] In *Tisalona*, the plaintiff sustained similar soft tissue injuries and aggravation of other prior injuries. After an acute phase of six months, she returned to work with some ongoing discomfort for about three years. At the time of trial, she continued to suffer occasional pain. The award was \$32,000.
- [99] In *Vintila*, the plaintiff had a similar background to Mr. Shehzeda. She had a pre-accident history of severe, long-term and chronic disabling conditions and pain, for which she was deemed unemployable. She also was in receipt of a CPP disability pension arising from those medical conditions. The Court found that the accident caused a temporary aggravation of pre-existing severe chronic pain in her neck, back, trapezius and leg. The award was \$35,000.
- [100] In *Erwin*, the plaintiff sustained injuries to his neck, shoulders and lower back which continued to cause intermittent, albeit "troublesome", pain at the time of trial. It was likely that his injuries would continue to be bothersome and exacerbated by his work. The award was \$40,000.

[101] The circumstances in Repin are also similar to those here. In that case, the plaintiff had credibility problems, in that her evidence was inconsistent, vague and there were contradictory documents as to her pre-existing medical conditions. The plaintiff did not call any independent collateral witnesses. In addition, similar to Dr. Rai's report, the plaintiff relied on a medical legal report from a doctor that had many failings, including a failure to even mention and address the substantial pre-existing medical problems that were present and known to the doctor. The award was \$40,000.

[102] Justice Crerar's comments in Repin ring equally true here:

[159] As none of the plaintiff's medical experts were provided meaningful medical records or the plaintiff's self-reports for the period before the accident, and as they were largely reliant upon the plaintiff's own unreliable self-reports of her present condition, none were able to convincingly opine that the accident significantly worsened her already poor pre-existing physical and psychological conditions. Given the plaintiff's complex interplay of physical and psychological pre-conditions, it is doubtful that the plaintiff's experts could meaningfully quantify the extent to which the accident exacerbated or aggravated her existing physical and psychological conditions. The difficulty of this exercise was further complicated by evidence that the plaintiff's conditions were naturally declining before the accident, both for reasons unique to her and because of the general aging process.

[160] As set out above, I have preferred the medical opinions of Drs. Muir and Leith based on their own balanced analyses as well as the frailties of the plaintiff's expert reports. Based on the Muir and Leith reports, and the evidence as a whole, I find that the accident inflicted minor soft-tissue injuries on the plaintiff physically, and marginally aggravated some of the physical and psychological conditions which dated back to the workplace injury and earlier. But the plaintiff has failed to acquit her evidentiary burden of proving that any significant additional harm is attributable to the accident.

[161] In other words, I find the accident only slightly worsened the plaintiff's physical and psychological condition beyond what it would have been in any case, had the accident not occurred. The differential between her post-accident state and her pre-accident state, with its ongoing trajectory of poor mental and physical health and unemployment, is modest. Although the plaintiff has demonstrated causation to this limited extent, the assessment of damages, to which I now turn, will reflect this relatively modest differential.

[Emphasis added.]

[103] I have accepted that, for years before and at the time of the Accident, Mr. Shehzeda was completely disabled from working arising from his medical conditions, having either regular or intermittent complaints in the same areas as after the Accident. This complete disability is what he represented to the government, as confirmed by Dr. Rai. Mr. Shehzeda's current assertions that he was without complaint prior to that time are entirely lacking in credibility. I have also rejected the picture that Mr. Shehzeda has attempted to portray of himself to the Court, in that he was a physically active and socially engaged

individual. In sum, Mr. Shehzeda's pre-Accident lifestyle was already significantly compromised by his significant medical conditions and disabilities, which negatively affected his quality of life in many other respects.

- [104] I accept that the Accident aggravated Mr. Shehzeda's pre-existing conditions. However, given Mr. Shehzeda's evidence at this trial, it is not possible to determine, on the usual standard, how the aggravation of those injuries progressed in terms of their severity and how they affected his lifestyle. The medical evidence strongly suggests that there is a psychological component to his current complaints of pain, aided in part by his chronic use of opioids, a situation that existed prior to the Accident.
- [105] Any conclusion that the aggravation was more significant and long lasting would be rewarding Mr. Shehzeda for his misrepresentations both to this Court and to the medical experts who were intended to assist this Court, something that cannot be countenanced.
- [106] By his own account, Mr. Shehzeda was back to regularly bicycling about a year after the Accident. He also regularly travelled to visit his relatives in Pakistan for lengthy periods of time, a journey that was no doubt rigorous given the distance to travel. There is no credible evidence that his injuries stopped him from going to the mosque to pray; in fact, his pre-existing back pain likely had more to do with his inability to pray in the usual position. The narrowing of his social circle also cannot be tied to the Accident based on the evidence. Finally, there is no credible evidence that Mr. Shehzeda's injuries have affected his home life, in that he never did yard work and he continues to prepare some meals and care for his residence with the assistance of his family, seemingly just as he did before.
- [107] Doing the best I can, I can only conclude that any aggravation was minor in all of the circumstances and had a minimal affect on his overall lifestyle.
- [108] I award \$40,000 for non-pecuniary damages, having considered the above circumstances and the authorities referred to by both counsel.

Cost of Future Care

- [109] Mr. Shehzeda seeks an award for cost of future care of \$4,000. This amount is calculated by reference to what is said to be the cost of ten psychological counselling sessions at \$200 per hour and \$2,000 for pulse shock wave therapy.
- [110] Mr. Shehzeda is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition insofar as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote his mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104.

- [111] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (i) there must be a medical justification for claims for cost of future care; and (ii) the claims must be reasonable: Milina at 84.
- [112] The award of damages is thus a matter of prediction of what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award: Izony v. Weidlich, 2006 BCSC 1315 at para. 74.
- [113] An assessment of damages for cost of future care is not a precise accounting exercise: Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21.
- [114] The Shehzeda Defendants accept that Mr. Shehzeda is entitled to a very modest award for cost of future care.
- [115] Dr. Grover recommended further investigation of the left shoulder though an updated MRI scan, a procedure that would be covered by MSP. He further recommended pulsed, shockwave ultrasound therapy for the hip problem, stating that this treatment is not covered by MSP. However, Dr. Grover did not indicate the cost of this treatment and no evidence was led by Mr. Shehzeda on the point. In that event, I have no evidentiary basis upon which to assess that cost.
- [116] Dr. Helper recommended assessments by experts in psychiatry and neuropsychology. Dr. Helper also recommended further medical investigations and potential treatments in respect of Mr. Shehzeda's left hip, left low back and left neck and shoulder. All of those matters would be covered by MSP.
- [117] Dr. Douglas recommended that Mr. Shehzeda see a mental health specialist and that he be weaned off the opioid medication with the assistance of a chronic pain specialist. Dr. Douglas also recommended that Mr. Shehzeda see a physiotherapist for the WAD and for assessment and an exercise plan that is perhaps aquatic-based. Dr. Douglas recommended that further investigation of the left hip pain be investigated by MRI and a referral to a spine surgeon.
- [118] Most of Dr. Douglas' recommendations would be provided by physicians and the cost would be covered by MSP. The only item that would not be covered is physiotherapy, although Dr. Douglas did not estimate what number of treatments that might be necessary.
- [119] I award Mr. Shehzeda \$1,000 for these physiotherapy sessions, which by my estimate should cover approximately ten sessions.

Special Damages

- [120] The parties have agreed that Mr. Shehzeda's special damages are \$1,196.85, being the cost of certain physiotherapy and associated travel expenses.

CONCLUSION

[121] In conclusion, and based on these reasons, I find the following awards of damages to be appropriate for the injuries sustained by Mr. Shehzeda in the Accident:

Non-pecuniary Damages

\$40,000.00

Cost of Future Care

\$1,000.00

Special Damages

\$1,196.85

TOTAL

\$42,196.85

[122] Mr. Shehzeda is also entitled to pre-judgment interest at the prevailing rate with respect to the special damages.

[123] Finally, counsel are at liberty to speak to the matter of costs if they are unable to agree.

"Fitzpatrick J."

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Prepared on 29 October 2026 · Esheria