

CANADA / JUDGMENT

Shrieves v. Smith

2020 BCSC 710

COURT

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2020 BCSC 710 Shrieves v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shrieves v. Smith,

2020 BCSC 710

Date: 20200507

Docket: M177461

Registry: Vancouver

Between:

Robert Lawrence Shrieves

Plaintiff

And

Andrew Smith

Defendant

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

February 10 -13, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 7, 2020

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Introduction

- [1] The plaintiff, Mr. Shrieves, claims damages arising from a motor vehicle accident which occurred on September 17, 2015 (the "Accident"). Mr. Shrieves was driving his Honda CRV on East Hastings Street in Vancouver when a vehicle drove out of a side street and impacted the driver's door of the Honda CRV.
- [2] As of the date of trial, Mr. Shrieves was 71 years of age; he was 67 years of age as of the date of the Accident. He had incorporated and operated a business from 1996 to late 2015, called Window Classics, which supplied and installed residential and commercial window blinds. Through his personal company, he paid himself an annual salary. His role was to make quotations, obtain contracts, mainly with major developers on new projects and arranged for a company owned by Mr. Victor Chang, called Spectrum Window Coverings ("Spectrum"), to manufacture blinds and then hired installers to complete the work. Mr. Shrieves' involvement involved very little physically demanding work, save for occasional repairs to installations.
- [3] Also through his arrangement with Mr. Chang and Spectrum, Mr. Shrieves received shares in Spectrum. The shares were purchased back by Mr. Chang after Mr. Shrieves' retirement in monthly installments of \$1,740 for three years. Those payments are not income to Mr. Shrieves, but the purchase of an asset by Mr. Chang.
- [4] Liability for the Accident has been admitted by the defence. These reasons deal with Mr. Shrieves' claims for:
- i. Non-pecuniary damages as compensation for the injuries suffered in the Accident;
 - ii. Loss of income which arose from Mr. Shrieves' early retirement in December 2015, due to the injuries suffered in the Accident. The plaintiff says that prior to the Accident he planned to retire at 70 years of age. This claim is at issue. The defendant submits this decision to retire was both premature and unrelated to the Accident;
 - iii. Special damages; and
 - iv. Costs.

Lay Evidence

I. The Plaintiff

The Plaintiff before the Accident

- [5] In his early years of employment, Mr. Shrieves was injured in a serious motor vehicle accident which resulted in back surgery. Mr. Shrieves testified that he would, on occasion, seek chiropractic treatment and massage in the years following. He also had back surgery when he was approximately 40 years old. He continued to work in the construction industry for several years.
- [6] Prior to 2015, Mr. Shrieves was diagnosed with rheumatoid arthritis, causing pain in joints throughout his body. His family doctor referred Mr. Shrieves to Dr. Hiltz, a rheumatologist, for treatment. Dr. Hiltz prescribed medication which, according to Mr. Shrieves, relieved his pain. As of the Accident, he was no longer taking medication.
- [7] Mr. Shrieves had also attended upon a chiropractor, occasionally, before the Accident for back pain resulting from an accident when he was approximately 20 years old.
- [8] Mr. Shrieves was injured in another motor vehicle accident which occurred on June 26, 2015, approximately three months prior to the Accident. In the previous accident, in which Mr. Shrieves was at fault, his Ford Explorer was "T-boned" by the other vehicle on the passenger side causing his Explorer to roll over. Mr. Shrieves confirmed the June 2015 accident was very forceful. He took a "couple days" off work following the accident and saw his family doctor on two other occasions. He believed he had recovered from his injuries by the time of the Accident in September 2015. He testified he had soreness in his shoulder and neck which resolved and had no cognitive problems resulting from that accident.
- [9] The testimony of both Mr. Shrieves and Ms. Shrieves regarding their future was that Mr. Shrieves intended to retire at age 70. On or about September 2015, and before the Accident, they had just finished paying for the education of their son for four years and they "had a clear resolve for Bob to keep working to save and retire." Their son had graduated in August of 2015, and, as of September 2015, Ms. Shrieves testified that Mr. Shrieves had no plan to retire earlier than age 70. As Ms. Shrieves had also retired and had a pension from her many years as a teacher, they would have been aware of their finances for the future and had considered their ability to be able to afford retirement.
- [10] In the past, Mr. Shrieves had been an active boater and fisherman.

The Accident

- [11] Mr. Shrieves testified that at the time of the Accident, he had no remaining symptoms of the minor injuries suffered in the June 2015 accident.

- [12] In the September 2015 Accident, Mr. Shrieves was driving his Honda CRV eastbound on Hastings Street in Vancouver when his vehicle was struck at his driver's side door by a vehicle coming from a side street. Following the Accident, Mr. Shrieves was unable to open the driver's door forcing him to exit from the front passenger door. There was considerable damage to the Honda as a result of the Accident, the cost of which amounted to over \$9,000.
- [13] He attended at the emergency department of Richmond General Hospital regarding pain experienced in his left neck and shoulder following the Accident.

The Plaintiff after the Accident

- [14] Mr. Shrieves' family doctor, Dr. Ki-Sun Kim, testified he first saw Mr. Shrieves following the Accident on September 28, 2015. Dr. Kim reviewed his records and testified that Mr. Shrieves advised him he could not recall if he had hit his head during the Accident. At that time, Dr. Kim recorded that Mr. Shrieves "complained of pain in the left neck and left shoulder, along with persistent occasional dizziness" and occasional forgetfulness: (Ex. A, Tab 4C, p. 6). Dr. Kim prescribed rest, physiotherapy, chiropractic and massage therapy.
- [15] Regarding his work, Mr. Shrieves testified as to a lack of confidence in making decisions based upon drawings. He said he became agitated and, on occasion, unlike his former self, would express frustration with potential clients. He was concerned because he was having trouble "thinking clearly". He described how he was "nervous" and "out of sorts" and that those experiences were "all new", and he was making "mistakes at work", and was "agitated".
- [16] Mr. Shrieves testified that prior to the Accident, with his wife helping, he would paint their Richmond home, but that in the first year after the Accident, he felt dizzy on a ladder, which had not previously been a problem, so he did not paint above the ground floor and hired someone to paint above the first floor. He suspected his dizziness and balance problem was related to the medication that had been prescribed for his pain.
- [17] Between late September 2015 and May 2019, Mr. Shrieves attended for physiotherapy treatments on 38 occasions, chiropractic sessions on 17 occasions and massage on 11 occasions. Mr. Shrieves testified that as of trial, his neck and shoulder were much improved, but he still suffers from agitation. He also practiced exercises, including stretching, as directed by his physiotherapist.
- [18] Returning to his problems at work, Mr. Shrieves met with his wife and between them they decided he would retire, they would sell their home in Richmond, B.C. and then move to Vancouver Island. He repeated that, prior to the Accident, his plan was to work until 70 years of age, however, retirement at that age was not definite. Their house was listed for sale in December 2016, and sold quickly.
- [19] Concluding his testimony regarding why he retired earlier than he had planned, he stated he was out of sorts, was having problems at work, he loved the Victoria area, still had occasional problems with his back, but his neck and shoulder issues had resolved. He added

that he had a good working relationship with Mr. Chang, in their business dealings, they had a mutual reliance, and that Mr. Chang did not want him to retire, but when he left, Mr. Chang sponsored and arranged a retirement party for Mr. Shrieves. He did retire in December 2015.

- [20] As to when he made a decision to sell the Richmond home, he testified that he and his wife had listed the house for sale on November 9, 2015. They had previously considered moving to the Victoria area, but had not made a decision in that respect. Their son had moved to Sooke in 2015 after graduating from university, having secured employment with the local School Board as a substitute teacher. There had been problems for their son in his teaching career in Sooke, specifically, little demand, and their son had moved into the home Mr. and Mrs. Shrieves had purchased in Langford, near Victoria.
- [21] On cross-examination, Mr. Shrieves, who appeared to be an agreeable person, admitted to not being certain when he attended for physio and other treatments, agreed he had a job as long as he wanted it and could not recall having gone for a cat scan as recommended by Dr. Kim. Regarding his job being available as long as he wanted it, he said he was physically able to work, but it was the pressure, stress, fatigue and anxiety of the job that influenced his decision, not physical pain, as he testified that the pain from the Accident had largely resolved.
- [22] Otherwise, Mr. Shrieves agreed that he worked up to 40-50 hours per week up to December 2015.
- [23] Regarding recreation, Mr. Shrieves testified as to being an active fisherman who had his own boat, that he had stopped fishing before the Accident and had sold his boat. He also stated that since moving to the Victoria area, he has not been fishing.
- [24] In submissions, the defence agreed that Mr. Shrieves testimony was credible but not reliable, that he could not recall treatments or necessarily what he may have stated to Dr. Kim and others as to his condition. It should be recalled that Mr. Shrieves and his wife testified that during the fall of 2015, he became more anxious and forgetful, so it should not be surprising that Mr. Shrieves may not have been able to recall statements, treatment and details of his condition on certain dates.
- [25] The court agrees that Mr. Shrieves' testimony was credible and at times he appeared to be uncertain and forgetful. His forgetfulness was not selective, he did not attempt to avoid answering difficult questions and was quite willing to agree that his physical injuries were not debilitating.

II. Deirdre Shrieves

- [26] Ms. Shrieves is a retired English teacher and department head at a secondary school in Richmond, B.C., having retired in 2010. Her testimony regarding her husband was very positive, as is expected in cases of this nature.

- [27] She testified regarding Mr. Shrieves that prior to the Accident, he was very active around their home in gardening, painting and otherwise maintaining their home.
- [28] Regarding his disposition, Ms. Shrieves described her husband as "really good natured", "calm", "kind" and "never angry". Regarding his work, Ms. Shrieves stated how Mr. Shrieves was successful in bringing in many clients for the business, including Polygon and other large developers.
- [29] Ms. Shrieves testified that Mr. Shrieves had planned to work to age 70 and, after they had spent four years paying for their son's education, Mr. Shrieves had a "clear resolve" to keep working and save so as to be able to retire at age 70. She stated he had no plans to retire as of September 2015, other than at the age of 70.
- [30] On the date of the Accident, she described Mr. Shrieves as "very quiet for the next few days", "maybe missed one day of work", and that about one month after the Accident, she became worried as he was quiet, suffered headaches, "muddled his thoughts", "was short at times", "fatigued" and wandered the halls at night. Continuing, she stated, he was "anxious", "worried about work", had memory issues, and was not capable of some decisions, "he got emotional, worried about the future", and in October they had a family meeting and she said, "you have to retire".
- [31] They were also concerned that it was likely not a good time to retire and move elsewhere as the value of their home was increasing very quickly, there were multiple offers on homes, but they needed to do something, planning to move to the Victoria area where they could buy a home at a lower cost than the value of their Richmond home. Since they have moved to the Victoria area, Ms. Shrieves stated that her husband had largely recovered, but remaining are some memory issues, and that Mr. Shrieves rarely wants to engage with others and he no longer has an interest in fishing and boating as he had prior to the Accident.
- [32] In his submissions, the defendant has cautioned the court over the credibility of Ms. Shrieves, citing inconsistencies between her testimony and that of Mr. Shrieves. The defence submits, for example, that Ms. Shrieves' descriptions of her husband's symptoms after the Accident are inconsistent with the clinical records in evidence which reflected Mr. Shrieves' statements to his physician. Upon review of that evidence, there are differences in their testimony, however, those differences are not significant. The testimony of a spouse, having been living with Mr. Shrieves during the months following the accident, are bound to be more detailed than a very brief note of Dr. Kim. The defence referred to the testimony of Ms. Shrieves that following the Accident, her husband had headaches, appeared "muddled", short with her, had fatigue, and her concern over Mr. Shrieves walking around at night. She also testified as to her husband being "hazy". If Mr. Shrieves was "muddled", confused, worrying and was short with his wife, these would not likely be conditions which Mr. Shrieves would report to his physician. His wife would know her husband's tendencies much more than would his physician. As well, it is the court's observation that Mr. Shrieves was

often understating in describing his symptoms and was agreeable, but often unable to recall or to describe his symptoms.

- [33] The defence also referred to Ms. Shrieves' testimony that Mr. Shrieves would not go up ladders to paint the upper story of their new home as he had in the past and compared that testimony to the note in his physiotherapist's records that Mr. Shrieves "was able to complete tasks around the house without limits". The physiotherapist did not testify at trial. In any event, there were considerable references in the clinical notes of Dr. Kim to Mr. Shrieves' "dizziness", which was consistent with the testimony of Ms. Shrieves. A review of the examples of alleged inconsistencies lead to the conclusion that the defence was "hunting and pecking" for minor inconsistencies, none of which proved to be significant.
- [34] Ms. Shrieves testimony was clear, descriptive and consistent. She is the person who was in the best position to describe her husband's behaviour over time and her descriptions were consistent with the medical records and the testimony of Dr. Kim in particular. I accept Ms. Shrieves as a credible and honest witness, keeping in mind that she does have an interest in the outcome of this matter, but that her honesty was not overcome by her relationship with her husband.

III. Victor Chang

- [35] Previously in these reasons I referred to Mr. Chang's relationship to Mr. Shrieves through their business enterprises.
- [36] Mr. Chang's testimony was brief, referring to Mr. Shrieves being his "right hand man" and that when Mr. Shrieves announced his decision to retire, Mr. Chang was shocked.

Medical Evidence

I. Dr. Ke-Sun Kim

- [37] Dr. Kim was Mr. Shrieves' family doctor from 1994 until Mr. Shrieves moved to Victoria in December 2015. He was qualified as an expert medical doctor practicing in family medicine, capable of providing opinion evidence on the diagnosis, prognosis, and management of physical and psychological injuries arising from traumatic events such as motor vehicle accidents.
- [38] Dr. Kim also prepared a report dated December 14, 2016, which was Exhibit 9 at trial. I summarize portions of that report:
- Mr. Shrieves' rheumatoid arthritis was, prior to the Accident, "currently stable, in the low disease state".

- Dr. Kim referred to the June 2015 accident and stated Mr. Shrieves had been diagnosed with a soft tissue injury to the neck and shoulder and a subsequent examination on July 8, 2015 by his locum "confirmed the diagnosis and advised continued conservative management" which was stretches, heat and Ibuprofen.
 - Referring to the Accident, Dr. Kim saw Mr. Shrieves on September 28, 2015, Mr. Shrieves could not recall if he had hit his head in the collision, complained of pain in the left neck and left shoulder along with persistent occasional dizziness. A physical exam found tenderness along the left paracervical muscles and trapezius and a diagnosis of left paraspinal soft tissue neck strain along with queried mild concussion.
 - On October 29, 2015 Mr. Shrieves reported "ongoing dizziness and forgetfulness" but the dizziness had improved and his neck symptoms were better after physiotherapy and chiropractic treatment. The doctor suspected likely "post-concussive symptoms".
 - On December 14, 2015 Mr. Shrieves reported ongoing forgetfulness and his dizziness had improved, ongoing therapy was recommended and that he was thinking of retirement, "given his recent injuries".
 - After moving to Victoria, Mr. Shrieves returned for his final visit to Dr. Kim, reported stiffness in the left neck as well as forgetfulness and some insomnia. He continued to experience post-concussive symptoms which Dr. Kim stated would resolve with time, but the length of time "is indeterminate".
 - Dr. Kim also confirmed he prepared the note dated December 15, 2015 that Mr. Shrieves would benefit from retirement.
- [39] On cross-examination, Dr. Kim was asked if the injuries suffered in the Accident were preventing Mr. Shrieves from performing his full-time duties, to which Dr. Kim stated "no", confirming an earlier report to him by Mr. Shrieves that Mr. Shrieves had been able to work full-time after the Accident. Otherwise, Dr. Kim's diagnosis and prognosis were not challenged. It should also be noted that at the time of the examination for discovery, and the letter provided by Dr. Kim on January 15, 2016, Mr. Shrieves had already retired and, by that time had moved to the Victoria area, and stated he had no longer continued with his interests in boating and fishing, especially since he had sold his boat.

II. Dr. Alister Prout

- [40] Dr. Prout was qualified as a medical expert in the field of neurology, able to provide expert opinion on the diagnosis, prognosis and management of injuries arising from trauma such as motor vehicle accidents. Dr. Prout entered his expert report of August 30, 2019, as Exhibit 8 at trial. That report was extensive and very comprehensive regarding his diagnosis and prognosis of Mr. Shrieves' injuries.

[41] At p. 15 of his report, Dr. Prout provided his diagnosis and signs of injury relating to Mr. Shrieves, which I quote:

It is my opinion that Mr. Shrieves suffered injuries in the subject accident that consisted primarily of musculoskeletal injuries to the upper back and neck, these injuries being a sprain/strain type injury. Mr. Shrieves likely suffered a mild soft tissue type injury to the lower back in the subject accident. Based on the history provided by Mr. Shrieves and the clinical records reviewed it appears that low back pain did not continue to be a significant problem but upper back and neck and in particular left trapezius area pain continued to be a significant problem and limited Mr. Shrieves with respect to his normal activities both of a recreational and work nature.

In conjunction with the soft tissue injuries sustained, particularly those to the neck, Mr. Shrieves developed symptoms of dizziness that appeared at least in part due to post-traumatic positional vertigo that was documented by physiotherapy and likely due to the injury to the neck and associated forces transmitted to the head, this resulting in dizziness originating from the inner ear.

In conjunction with the persistent pain symptoms and functional limitations post-accident Mr. Shrieves developed sleep disturbance that in conjunction with the pain symptoms and reduced activities resulted in subjective concerns relating to forgetfulness that in my opinion were secondary to the above-mentioned injuries and symptoms.

It has been suggested by the treating family physician that Mr. Shrieves may have suffered a concussion in the subject accident although the circumstances of the accident, particularly with respect to Mr. Shrieves' recollection of the accident and his state post-accident is not in my opinion likely.

Mr. Shrieves, because of persistent musculoskeletal symptoms, dizziness, sleep disturbance and cognitive inefficiencies, became less productive in his work during the three months post-accident and this prompted an early retirement.

During the months post-accident Mr. Shrieves was experiencing a change in his behaviour with a feeling of nervousness, being less carefree and he had more difficulty handling his job, these impairments likely due to a combination of the effects of persistent pain, poor sleep, dizziness and a decreased ability to remain physically active.

.....

4. The progress of patient's recovery

Mr. Shrieves appeared to recover from the effects of the injuries sustained in the accident over a period of three to six months and at this time does not appear to have significant residual symptoms other than upper trapezius and neck symptoms which are variable and for the most part non-limiting.

....

6. Your prognosis

My prognosis would be for clinical stability with the possibility of flare ups of neck pain and potentially dizziness should further injuries to the neck or head region be sustained.

7. Causation

It is my opinion that the symptoms which followed the subject accident were due to effects of the subject accident. Mr. Shrieves did have musculoskeletal problems relating to a diagnosis of inflammatory arthritis pre-accident although those symptoms appear to go into remission prior to the accident and had no bearing on the post-accident symptoms and injuries secondary to the accident.

. . . .

It is my opinion that Mr. Shrieves' injuries did likely diminish to a mild degree his ability to perform his usual employment tasks during the months post-accident. Mr. Shrieves has since retired and is not currently limited with respect to his ability to perform in his previous employment were he to wish to return to that work.

[42] Dr. Prout did not recommend any further treatment.

[43] Dr. Prout stated on re-direct examination, he had no knowledge of the work demands experienced by Mr. Shrieves.

[44] Once again, this expert's opinions were not seriously challenged on cross-examination and his report in particular was very thorough.

[45] The defence called no evidence.

Issues

[46] A preliminary issue arose with respect to the use of clinical records. I will deal with that issue first.

[47] I will then make findings of fact regarding the nature and extent of the injuries caused by the Accident.

[48] Finally, I will discuss the claimed heads of damages: non-pecuniary damages, past loss of income and special damages.

Analysis

I. Clinical Records

[49] The parties have not been able to agree to the terms of a document agreement in spite of efforts prior to and during trial. More specifically, the parties have not been able to agree on the use to be made of clinical records of treating physicians and other treatment providers such as physiotherapists and chiropractors. The documents include the clinical records of

Dr. Kim (Ex. A, Tab 4C), Dr. Hiltz, (Ex. A, Tab 13), Dr. Leung (chiropractic) (Ex. A, Tab 6), Bradley Wong, RMT, (Ex. A, Tab 7), Nadine Nadeau, (chiropractic), (Ex. A, Tab 9), Parkway Physiotherapy, (Ex. A, Tab 12) and Dr. Oosthuizen (Family Medicine - Victoria) (Ex. A, Tab 11).

- [50] The defendant has provided the court with drafts of Document Agreements which have been exchanged between the parties, suggesting the last draft prepared by the defendant was consistent with relevant case law and should have been agreed to by the plaintiff.
- [51] With respect, it is not the function of the court to determine the reasonableness of draft agreements which have been exchanged, choose one and then presumably make a determination on costs. The court's function is to apply the law to the circumstances before it including the clinical records and testimony respecting the same and then determine what records may be admitted as exhibits at trial.
- [52] I have been provided with several authorities on the topic of the admissibility of clinical records, an issue which arises in many motor vehicle accident actions. Those authorities include *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431, *Cunningham v. Slubowski et al*, 2003 BCSC 1854, *Sandhu v. Gill*, 26 B.C.T.C. 354, 1999 CarswellBC 2820 (SC) and *Firman v. Asadi*, 2018 BCSC 2437, among others.
- [53] The decision of Verhoeven J. in *Firman* is recent and to the point. Justice Verhoeven starts with the defendant's attempt to adduce records as business records:
- [7] In the first instance the defendants seek to adduce the records as business records under s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124. The plaintiff, appropriately, does not challenge the fact that they are business records, as demonstrated by the documents themselves. That is, the basic preconditions for admissibility under s. 42 are not in issue. They are records kept in the ordinary course of business by a person who is obliged to keep the records, and so on. The plaintiff has not required that the keeper of the records or perhaps the doctor who made the note testify as to the fundamental pre-requisites, which are generally apparent, on the face of the documents. That is as usual in most cases of this type, that is, the parties do not require proof of the authenticity and other basic requirements of s. 42.
- [8] The purposes for which the documents can be used is the issue.
- [Emphasis added.]
- [54] After reviewing the authorities and the several categories of documents in issue in *Firman*, Verhoeven J. found:
- [29] Given those, I apply the following:
1. With respect to clinical records, if I am satisfied that the plaintiff made a statement, and if I am satisfied that it proves an admission against her interest, or the plaintiff adopts as true the statement at this trial, then the statement can be admitted for proof of its contents;

2. Observations of the treating professional on examination of the plaintiff, that is, observations directly made by that person as recorded with the requisite degree of clarity and reliability, can be taken as proof of the facts of those observations. Also, the fact of an opinion, but not the opinion, can be admitted if it is otherwise relevant to an issue in the case. So for example, if there is a diagnosis made or a treatment recommendation made, and the fact that treatment was sought on a certain occasion, to the extent that those facts are relevant, those facts, but not those opinions, may be admissible.
- [55] The defendant has carefully prepared Appendix "A" to its written submissions at trial which basically is a chart indicating a date, the name of the treatment provider, an extract from the clinical record and finally the plaintiff's testimony when presented with the statement in each clinical record.
- [56] After a considered review of Appendix "A", which accurately reflects the plaintiff's testimony and the extracts from the clinical records, those clinical records are admitted as exhibits, however, are to be considered along with the oral testimony of Mr. Shrieves, and those clinical recorders who had prepared the records, particularly Dr. Kim who knew Mr. Shrieves well, having been his family physician for approximately twenty years. Any opinions reflected in the clinical notes are not admissible where the recorder of the clinical notes was not called as a witness and qualified as an expert in his or her particular specialty.
- [57] I quote from the decision of *Brock v. King*, 2009 BCSC 1179, regarding the reliability of Mr. Shrieves' testimony, which was questioned by the defence and the extent of his attendance for medical care and assessment, which is reflective of the circumstances of Mr. Shrieves:
- [60] The plaintiff relies on *Travis v. Kwon*, 2009 BCSC 63, and *Myers v. Leng*, 2006 BCSC 1582. In both cases there were gaps in the plaintiffs' attendance on their physicians. In *Travis v. Kwon*, Mr. Justice Johnston states at paras. 74 and 77:
- [74] Where a plaintiff gives credible evidence at trial, and is not significantly contradicted by entries in medical records or otherwise, the absence of a full documentary history of medical attendances is not that important.
- [77] In this case the plaintiff is generally credible, and I do not fault her for a commendable desire to avoid making a nuisance of herself by going to a doctor primarily in order to build a documentary records and thus avoid the risk of an adverse inference from failing to do so, or out of a misguided belief that by papering her medical files, she can prove her claim. A sensible plaintiff, having some knowledge of the medical system and its capabilities from her training, would be better advised to go to the doctor only when necessary, and thus avoid accusations that she is exaggerating, or suffering from what some authorities have referred to as "chronic benign pain syndrome": *Moon v. Zachary*, [1984] B.C.J. No. 241, 1984 CarswellBC 2000, at para. 100.

- [58] As was the case in Brock, Mr. Shrieves is credible and by no means was he attempting to build a documentary record and for the most part, his testimony was not in conflict with the documentary record.
- [59] I close this issue by stating that the statements made by Mr. Shrieves and admitted by him are admissible. I also emphasize that clinical records are not intended to be a transcription of what was said between patient and treating professional. They represent only a portion of the interchange between patient and treating professional that was recorded and as a result are of limited assistance.

II. Findings of Fact: Nature and Extent of the Injuries

- [60] The physical injuries suffered by Mr. Shrieves as a result of the Accident were mild to moderate injuries to his left neck and shoulder and headaches, and the court accepts the findings of Dr. Prout that Mr. Shrieves suffered from post-traumatic positional vertigo due to the Accident and the several cognitive symptoms described by Dr. Prout. I also accept it was not likely that Mr. Shrieves suffered a concussion in the Accident as Dr. Kim had thought possible.
- [61] I also find that any mild injuries Mr. Shrieves suffered in the June 2015 accident had generally resolved. His rheumatoid arthritis had likewise resolved.
- [62] Also, prior to the Accident, Mr. Shrieves continued to have occasional treatment to his lower back or the lumbar region of his back which related to a very serious accident in which Mr. Shrieves was injured, approximately forty years previous.
- [63] In that respect, I refer to the decision of Barnes v. Richardson et al., 2008 BCSC 1349, and in particular, the following paragraph from that decision:
- [17] Determining the cause of loss and damage must be kept separate from the assessment of damages to compensate for that loss and damage, since different principles govern the two questions: A. (T. W. N.) v. Clarke, 2003 BCCA 670, 22 B.C.L.R. (4th) 1 at para. 16. Causation concerns whether the accident caused the pre-existing condition to be activated or aggravated. The assessment of damages considers whether there was a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence: Hosak v. Hirst, 2003 BCCA 42, 9 B.C.L.R. (4th) 203 at para. 10.
- [64] It is not clear on the evidence whether the lingering effects of those injuries were aggravated by the Accident. There is evidence before the court that treatments received by Mr. Shrieves included treatment to his left shoulder and the left side of his neck and to his back. If Mr. Shrieves was requiring the treatment for injuries suffered in the Accident, any additional treatment to his back would be incidental to the treatment caused by the Accident. I will assess his claims for damages, in particular the non-pecuniary and special damages claims, on this basis.

III. Damages Claimed by the Plaintiff

i. Non-Pecuniary Damages

- [65] Mr. Shrieves seeks non-pecuniary damages for pain and suffering in a sum of \$75,000. The defence submits adequate compensation for non-pecuniary damages is in the range of \$35,000 to \$40,000.
- [66] The non-exhaustive list of factors for consideration in assessing non-pecuniary damages contained in the reasons for judgment in *Stapley v. Hejslet*, 2006 BCCA 34, have been quoted in hundreds of cases in this court. In the case of Mr. Shrieves, the nature of his injuries (soft tissue injuries plus cognitive impairment), the duration of the same (now largely resolved with some cognitive issues remaining), emotional suffering (frustration regarding his memory issues) and loss of lifestyle (loss of interest in fishing, boating and assisting in work around the home) are most prominent. Mr. Shrieves was able to continue in his occupation after the Accident, however, his cognitive issues described previously in these reasons were at the source of his decision to retire.
- [67] Counsel for Mr. Shrieves has referred to the decisions of *Petrovic v. Stetsko*, 2017 BCSC 741, *Cheung v. MacDonald et al.*, 2004 BCSC 222, and *Zhang v. Ghebrenenya*, 2015 BCSC 938, as containing awards of non-pecuniary damages comparable to the case at hand. In those decisions, the range of awards in 2020 dollars ranged from \$78,000 to \$70,000.
- [68] In *Cheung*, (\$77,000 in 2020 dollars), the plaintiff's injuries included a concussion, moderate whiplash with neck and shoulder pain, jaw pain and low back strain. He suffered dizziness, which impacted his enjoyment of his work (dentistry) and had trouble sleeping. I would consider the injuries and the effect of the same on Mr. Cheung as more significant than in the case of Mr. Shrieves.
- [69] In *Petrovic*, the court awarded \$75,000 (\$78,000 in 2020 dollars) where the plaintiff experienced pain and tightness in his left shoulder, pain in the back of his head, neck, jaw and lower back. The court described the plaintiff as a "quiet stoic individual" (para. 56), his injuries were not considered permanent with a guarded prognosis for the future pain in his shoulder. He had been physically active and could not continue with his dragon boat racing "to the same level he did prior to the accident", but presumably did continue (para. 57).
- [70] Considering the above cases and the particulars of the plaintiff in *Zhang*, the injuries and the effect of the injuries on the plaintiffs in those cases were more severe than those experienced by Mr. Shrieves.
- [71] The defence compares the situation of Mr. Shrieves to those described in *Glendenning v. Matwychuck*, 2019 BCSC 1661, *Janda v. MacKenzie*, 2018 BCSC 168, *Bay v. Woollard*, 2019 BCSC 1073, *Kumant v. Pommier*, 2011 BCSC 1732, and *Hoque v. Howard Carter Lease Ltd.*, 2020 BCSC 160.

- [72] In Glendenning, the plaintiff suffered from several prior injuries which were aggravated in two accidents and all injuries resolved within six months to a year. The trial judge commented, at para. 122, "There was also a vagueness to some aspects of Ms. Glendenning's testimony concerning her symptoms that undermined its reliability". Non-pecuniary damages were assessed at \$35,000.
- [73] In Janda, the plaintiff was off work for a considerable time, his injuries were more extensive than in the case of Mr. Shrieves, but there were no cognitive issues. The court awarded \$40,000 where the plaintiff was found to have given inaccurate reporting of his pain.
- [74] Similarly, in Bay, the injuries were soft tissue, there was concern over the reliability of the plaintiff's testimony and, but for his age, i.e. 76 years old at the time of the accident, his injuries would have resolved within three to six months and the court awarded \$30,000.
- [75] I also refer briefly to the Hoque decision, one with which I am very familiar, where the court awarded \$35,000 in non-pecuniary damages. Being familiar with the precedent, the injuries, the duration of the same and the effect on the plaintiff's lifestyle were less than in Mr. Shrieves' case.
- [76] I conclude that the facts in the case at hand resulted in injuries and the effect of those injuries being less than submitted by the plaintiff and more than those submitted by the defence, and award \$50,000 for non-pecuniary damages.

ii. Past Loss of Income

- [77] The most contentious head of damages in this case is the claim by Mr. Shrieves for past loss of income or, as counsel submits, loss of past earning capacity. Mr. Shrieves' position is that "but for" the effects of the Accident on his ability to be able to perform his occupation, he would have continued to work another 2.5 years to his 70th birthday, the date by which he had previously intended to retire.
- [78] Based upon his gross income of approximately \$56,000 per annum, Mr. Shrieves claims \$112,000 in past loss of earning capacity with a 20 percent reduction for tax. The principal reason for retiring early, according to Mr. and Mrs. Shrieves, was concern over his ability to continue to be able to perform at his occupation, considering his forgetfulness, indecision and stress he experienced during the fall of 2015 after the Accident. His condition in that period of time was described by Dr. Prout as including "persistent musculoskeletal symptoms, dizziness, sleep disturbance and cognitive inefficiencies", which testimony I accept. There is little doubt that Mr. Shrieves was straining to be able to continue at work, discussed his concerns with his wife, who has also noted his forgetfulness, stress and mood, which led him to decide to retire early. Dr. Prout attributed the cognitive problems of Mr. Shrieves to the consequences of the Accident.
- [79] Mr. and Mrs. Shrieves say that "but for" the Accident, they would have remained in their Richmond home, where they had lived for years, at a time when the value of their home was increasing monthly by a considerable amount, a time when homes were being purchased

for considerably more than asking price. By moving to the Victoria area, they were able to purchase a home for less than they would receive on the sale of their Richmond home, still have funds remaining to assist them in their retirement, and Mr. Shrieves' health would hopefully improve without the stresses of him continuing to work.

[80] The most significant authority in cases involving loss of income where a party has chosen early retirement is *Riley v. Ritsco*, 2018 BCCA 366. In that case, as in the case of Mr. Shrieves, the plaintiff had planned to continue working until age 70 or 71, "he was not anxious to retire and felt his pension needed to grow further before it would provide him the lifestyle he desired in retirement" (para. 73).

[81] The Court of Appeal decision continued:

[74] In fact, he retired at the age of sixty-six. He decided to retire because he did not think he was fit to work: he found work exhausting, he felt that he was not performing well, and he felt that his lack of attentiveness put both himself and others at risk.

...

[76] At all times, Mr. Riley's position was that he was retiring due to his inability to properly do his job as a result of his injuries. That was the reason for retirement that he gave to his employer, his co-workers, and his doctor. No one pointed to any evidence suggesting that there was an undisclosed or ulterior reason for Mr. Riley's decision leaving his employment.

[82] To this point, the facts in *Riley* tend towards similarity with the facts in the case before me. Mr. and Mrs. Shrieves had previously discussed the retirement of Mr. Shrieves at age 70 as his goal. Up to the date of the Accident, there was no indication that Mr. Shrieves was considering retirement at an earlier age. He had previously been in a motor vehicle accident in June of 2015, but his very minor injuries resulting from that accident did not bring him to the point of having to retire. In *Riley*, the Court of Appeal found no one had suggested an undisclosed or ulterior reason to retire early. In the case of Mr. Shrieves, the only suggestion put forward for Mr. Shrieves retiring early was that he and his wife could move to Victoria to be with their son, who in the summer of 2015 had graduated from university with a degree in Education. By that time, however, their son had obtained employment with the Sooke School Board. That factor alone, would have been unlikely to have induced Mr. Shrieves to retire early. The increasing value of their Richmond home would have been a good reason not to sell their home and retire, as prices for real estate were rising dramatically in greater Vancouver which, if their home were sold, could have resulted in a considerable loss, assuming prices would continue to climb.

[83] The Court of Appeal continued in *Riley*:

- [78] The issue for the judge, then, was not what caused Mr. Riley to retire, but rather whether his decision to do so was a reasonable or necessary one. I agree with the contention that it was not open to the trial judge, in the face of ICBC's admission, to find that Mr. Riley's injuries did not cause him to choose early retirement.
- [84] The admission from ICBC referred to was that "Mr. Riley's decision to retire was a result of difficulties with his injuries" (para. 77).
- [85] The admission that Mr. Riley decided to retire due to his injuries put an end to any submission by ICBC that he may have retired for any other reason. However, the test remains, even without an admission, to be whether Mr. Shrieves' decision to retire was a result of difficulties with his injuries. The testimony of Mr. and Mrs. Shrieves, which was not successfully challenged, was that his early retirement was due to the cognitive problems Mr. Shrieves was encountering at work following the Accident which brought about the decision to retire before the age of 70.
- [86] In Riley, the Court of Appeal continued:
- [80] The evidence in this case does not disclose any inconsistency in Mr. Riley's stated reasons for retirement, nor does it hint at any reasons for him leaving his employment other than those that he provided: his fatigue and pain, his inability to perform certain aspects of the job, and problems with his alertness and concentration that led to safety concerns.
- [81] The only real question, then, was whether Mr. Riley's rationale for retiring when he did stands up to scrutiny. . .
- [87] The Court of Appeal noted that the trial judge applied a test requiring the court find "that the injuries and their effects made it necessary for the plaintiff to retire" (para. 81; emphasis added by the Court of Appeal). The Court rejected this test:
- [83] In my view, the test, as articulated, is too stringent. Plaintiffs are not required to show that decisions they make are dictated by necessity. Rather, the question is always whether a plaintiff has acted reasonably in selecting and following a course of treatment and rehabilitation, and in making lifestyle accommodations that are consonant with the injuries suffered. A plaintiff must also take reasonable steps to mitigate damages. Thus, Mr. Riley did not have to prove that he retired out of necessity. He only had to show that his decision to retire was a reasonable one.
- [88] The Court of Appeal added:
- [84] . . . Mr. Riley's retirement may not have been "necessary" in the sense that his employer was willing to have him continue and in the sense that he could have, at great personal sacrifice, managed to keep working. On the other hand, his decision to retire was an eminently reasonable one in the circumstances.

- [89] So, the question is: was the decision to retire made by Mr. Shrieves reasonable in the circumstances? In the fall of 2015 following the Accident he was receiving treatment for his physical injuries but more importantly in considering the reasonableness of his decision, was his testimony regarding the problems he had at work following the Accident. He testified that he "had trouble thinking clearly", was "nervous - out of sorts" and that was all new to him. He testified he told Dr. Kim and his wife of his concerns and that he was no longer confident at work, that he made mistakes and became agitated, which was unlike him prior to the Accident.
- [90] Later, when asked why he retired early, he again testified he was "out of sorts, had problems at work" and that he told Mr. Chang of his decision and Mr. Chang did not want him to leave, that he was Mr. Chang's "right hand man".
- [91] On cross-examination, Mr. Shrieves agreed that he was able to work. When asked if he quit due to anxiety, he answered "yes", he felt stress at work and Spectrum often took on too many jobs which contributed to the stress and that when there had been much work in previous years, he "used to handle it a lot better".
- [92] Mrs. Shrieves also testified regarding the decision to retire, stating how concerned she was for her husband in the fall of 2015, he had "muddled thought", was short at times (i.e. short tempered), showed fatigue, wandered the halls at night, had memory issues and was anxious about work, became emotional, all of which were not like him.
- [93] Mrs. Shrieves also testified that a move to Vancouver Island was not a factor in the decision to retire, that they had been "looking around" the Victoria area on visits to their son during the fall of 2015, and the move was not to be with their son as at the time their son was looking to move back to Richmond where the prospects of a better teaching job were better and where Ms. Shrieves would be able to help him seek employment with the School Board in Richmond due to her past work at the Board.
- [94] In his report, Dr. Prout referred to the dizziness and nervousness at work which had been reported to him by Mr. Shrieves.
- [95] It is also worthy of note that Mr. Shrieves had always liked his job and that he was appreciated by Mr. Chang and, but for his emotions after the Accident, he would not have retired early.
- [96] I conclude the decision of Mr. Shrieves to retire, taken jointly with his wife, was reasonable in the circumstances and the decision was taken due to the injuries, primarily cognitive, that were caused by the Accident.
- [97] I note that in *Riley*, the Court of Appeal went on to consider the chance that, even absent the accident, Mr. Riley might not have worked until his goal retirement age. The Court indicated it could not "ignore the fact that Mr. Riley's aspiration to work to the age of 70 or 71 might not have been realizable, even in the absence of an accident" (para. 91). I do not think it is necessary to make a deduction for such a chance here. In *Riley*, unlike in the case at bar, the

plaintiff's job was physically strenuous and "the physical nature of his work meant that any degenerative physical changes might have forced him to stop working" (para. 91). The evidence in this case, as outlined above, strongly suggests Mr. Shrieves would have worked until his goal retirement age. I make no deduction for the chance he would have retired early even absent the Accident.

[98] Mr. Shrieves' income per year at the time he retired was \$56,000, gross. He retired 2.5 years earlier than he had previously planned which, according to counsel's calculations, results in a gross loss of past capacity to earn of \$140,000, less 20 percent for taxes, for a net loss of \$112,000. Those figures are reasonable and based upon his previous plan to retire at 70 years of age.

iii. Special Damages

[99] Mr. Shrieves claims \$1,853 in special damages for chiropractic, massage and physiotherapy costs. Mr. Shrieves did testify regarding having attended for treatment which was clear from his testimony, although he could not testify with any certainty the days when he attended, and could not say whether some portion of the treatment was for injuries not related to the Accident.

[100] As a result, I award \$1,000 in special damages.

Summary

[101] In summary, I make the following awards:

Non Pecuniary Damages

\$50,000

Past Loss of Income

\$112,000

Special Damages

\$1,000

Total

\$163,000

Costs

[102] As there are likely factors relating to costs of which I am not aware, should the parties not agree on costs, they may set down a hearing for one hour on the subject of costs to be arranged through Supreme Court Scheduling.

"Jenkins J."

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