

CANADA / JUDGMENT

McGlue v. Girvan

2024 BCCA 208

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 208 McGlue v. Girvan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

McGlue v. Girvan,

2024 BCCA 208

Date: 20240531

Docket: CA49142

Between:

Eleanor Joanna McGlue and Stephen Anthony Ferreira

Appellants

(Defendants)

And

Alasdair John Girvan

Respondent

(Plaintiff)

Before:

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Voith

The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated

May 30, 2023 (Girvan v. McGlue, 2023 BCSC 902, Vancouver Docket M196910).

Counsel for the Appellants:

M. Wright

M.D. Mirosolin

Counsel for the Respondent:

E.M. Patel

J.R. Kendall

Place and Date of Hearing:

Vancouver, British Columbia

May 8, 2024

Place and Date of Judgment:

Vancouver, British Columbia

May 31, 2024

Written Reasons by:

The Honourable Madam Justice Stromberg-Stein

Concurred in by:

The Honourable Mr. Justice Voith

The Honourable Justice Skolrood

Summary:

The respondent was awarded damages arising out of a motor vehicle accident. The appellants seek to set aside the award on the basis the judge made a palpable and overriding error by awarding damages in the absence of proof of causation. Held: Appeal allowed and claim dismissed. The respondent advanced a scheme to defraud ICBC, seeking complicity of the respondent driver and his ex-partner. The judge concluded the respondent's lack of credibility and reliability undermined the evidence to establish causation and she needed to find "corroborative objective evidence" yet she failed to explain how she reached her conclusion on causation. Reviewing the record, the judge made a palpable and overriding error by awarding damages for physical and psychological injuries in the absence of evidence of causation.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Introduction

- [1] This is an appeal from the order of Justice Hughes awarding the respondent, Alasdair John Girvan, damages in the amount of \$631,341 for injuries the judge found were caused, or exacerbated, by a motor vehicle accident. The reasons are indexed at 2023 BCSC 902.
- [2] Liability was admitted. The central issue concerned Mr. Girvan's reliability and credibility and whether he was able to prove compensable injuries arising from the accident.
- [3] The judge concluded she could not accept Mr. Girvan's evidence at "face value" because his testimony was inconsistent and contradictory, and he had demonstrated a willingness to feign, exaggerate, or embellish his injuries to obtain financial benefit, which was "fatal to his credibility and taint[ed] the whole of his evidence at trial." The judge also found that "Mr. Girvan's failure to provide complete and accurate medical histories to the experts who assessed him, and his demonstrated willingness to feign or amplify injuries to obtain financial benefit, undermine[d] the weight that can be given to the experts' opinions on both causation and the nature, extent, and duration of the plaintiff's injuries and chronic pain." In addition, the judge found Mr. Girvan's physical, mental and addiction problems were deteriorating before the accident.
- [4] Despite these findings, the judge concluded, relying on the "evidence as a whole", that as a result of the accident Mr. Girvan suffered an exacerbation of pre-existing physical injuries and a new soft-tissue injury to his left shoulder. The judge also found that Mr. Girvan suffered an exacerbation of pre-existing anxiety and depression and a recurrence of major depression with new psychotic features.
- [5] In light of the judge's adverse credibility and reliability findings, the issue on this appeal is whether the "evidence as a whole" was sufficient to ground the judge's ultimate finding of causation. The appellants contend the judge made a palpable and overriding error by awarding damages in the absence of evidence and by relying on expert evidence without proof of the necessary underlying facts and assumptions. In the alternative, the appellants submit the award was inordinately high because Mr. Girvan's alleged injuries were pre-existing and he was in a state of deterioration prior to the accident.
- [6] The judge's discussion of the evidence and her restatement of the law were comprehensive. However, I am of the view that the judge did not adequately explain how, after identifying numerous credibility and reliability issues, she reached the conclusion that Mr. Girvan had met his burden of proving causation. The judge's review of the evidence and her findings with respect to causation stand in stark juxtaposition.
- [7] It is my view that the appeal should be allowed and the claim dismissed rather than be remitted to the trial court. I see the adverse credibility findings as being fatal to Mr. Girvan's claim of injuries caused by the accident given that there was no objective evidence to support his claim.

The Trial Judgment

- [8] I will review the judge's discussion of the evidence to the extent necessary to consider the issues on this appeal.
- [9] The accident occurred on July 18, 2017. The appellant, Ms. McGlue, was approaching an intersection travelling between 40-60 km/hour when she noticed traffic slowing ahead of her. She attempted to brake, but was unable to stop and rear-ended Mr. Girvan's vehicle.
- [10] The judge accepted Ms. McGlue's testimony that immediately following the accident Mr. Girvan hopped out of his vehicle and walked towards Ms. McGlue's vehicle looking friendly and concerned. Ms. McGlue apologized to Mr. Girvan who told her not to worry and that he had not felt the impact of the accident. Ms. McGlue exchanged numbers with Mr. Girvan who then climbed back into his SUV and drove away.
- [11] The judge accepted that after Mr. Girvan left the scene of the accident he phoned Ms. McGlue and told her he had spoken with a friend who said if they called the paramedics to the scene of the accident they could each get \$20,000 from the Insurance Corporation of British Columbia ("ICBC") for an injury claim. Ms. McGlue responded that she was not injured and wanted no part in that.
- [12] After the phone call, a firetruck arrived at the accident scene. The first responders asked Ms. McGlue whether she had called for them. She told them she had not. Ms. McGlue then looked across the street and saw Mr. Girvan's vehicle parked on the shoulder. The first responders drove to Mr. Girvan's side of the street.
- [13] Mr. Girvan's testimony about the events immediately following the accident differed substantially from Ms. McGlue's evidence. Mr. Girvan first testified that he did not recall calling Ms. McGlue and speculated that perhaps she had called him. Ms. McGlue's phone records corroborated that Mr. Girvan called Ms. McGlue. Mr. Girvan then changed his evidence from not recalling the conversation to denying that it occurred at all.
- [14] As to the presence of the first responders, Mr. Girvan testified that as he was driving away from the scene of the accident he attempted a left turn but found his body seizing up to the point where he was driving into oncoming traffic. He pulled over onto the gravel shoulder and called his then-partner, Ms. Cowie, who told him to stop driving and to call an ambulance. Mr. Girvan called an ambulance as he was feeling shaky and stiff and felt like he was going into shock. He was transported to a hospital.
- [15] After Mr. Girvan was discharged from the hospital, Ms. Cowie drove him back to the accident scene. His car battery was dead and Mr. Girvan pushed the vehicle forward so Ms. Cowie, in the driver's seat, could pop the clutch and start the engine.
- [16] The judge found Mr. Girvan's denial of his phone call to Ms. McGlue was "not credible", and his evidence about how he felt shortly after the accident was "not consistent". Mr. Girvan gave varying accounts of his pain and injuries to his treating physicians, the first responders,

and Ms. McGlue. The judge rejected Mr. Girvan's evidence that his body seized up after the accident, and found Mr. Girvan's account of serious pain was "difficult to reconcile" with his admitted ability to push-start his vehicle (a Nissan X-Terra sport utility vehicle) and drive home. The judge also rejected Mr. Girvan's evidence that Ms. Cowie told him to call an ambulance, preferring Ms. Cowie's evidence that Mr. Girvan had not told her he was injured, and she did not tell him to phone an ambulance.

- [17] The judge recognized Mr. Girvan's credibility was a central and determinative issue and observed that in chronic pain cases, "[t]he court must always be concerned with the reality of the plaintiff's complaints of ongoing pain in order to determine the existence and extent of the injuries and properly assess damages based on such complaints": at para. 22, citing *Gee v. Bock*, 2019 BCSC 1348 at para. 36. The judge noted that "the absence of objective findings in chronic pain cases increases the opportunity for exaggeration, distortion, or even fabrication": at para. 22, citing *Wells v. Kolbe*, 2020 BCSC 1530 at para. 83.
- [18] The judge accepted Mr. Girvan was at times attempting to be truthful and accurate, but concluded he was "neither a credible nor reliable witness", and his testimony was "replete with internal and external inconsistencies": at paras. 27-28. He gave conflicting accounts of whether he was injured in the accident and how he felt shortly thereafter: he told Ms. McGlue he felt fine after the accident but told Dr. Koch he was fearful for his life and had suffered a concussion; he told Dr. Field and Dr. Anton he hit his head on the roof of his SUV but there was no mention of this in the ambulance or hospital records; and his account of pain following the accident was difficult to reconcile with his push-starting his SUV several hours after the accident.
- [19] The internal and external inconsistencies included not only those in Mr. Girvan's account of the accident and events immediately following, but also in Mr. Girvan's evidence about his medical history, drug use, and previous employment.
- [20] Mr. Girvan's recollection of his prior medical history was neither consistent nor precise and his answers were often tangential: at para. 31. His evidence about the circumstances leading to his dismissal from his previous employer was "not credible or capable of belief": at para. 31. Mr. Girvan testified he used cocaine occasionally, but the judge accepted Ms. Cowie's evidence about his excessive use of cocaine and oxycodone and binge-drinking. He told Dr. Anton he was taking OxyContin "at one time" for a shoulder injury, which the judge found was "a significant and material understatement in light of his actual admitted use of OxyContin both prior to and following the Accident": at para. 30.
- [21] The judge found Mr. Girvan was generally defensive, argumentative, and at times sarcastic when confronted with inconsistencies in his evidence and when questioned about his pain, psychological condition and use of medication in the months before the accident: at para. 31.

[22] Even more troubling was the fact that Mr. Girvan was found to have engaged in dishonest conduct, which the judge considered fatal to the credibility of his evidence. In addition to attempting to solicit Ms. McGlue's involvement in a scheme to apparently defraud ICBC, Mr. Girvan later suggested to Ms. Cowie that it would be financially beneficial to her to provide evidence supportive of his position at trial.

[23] As a consequence of her credibility findings, the judge stated at para. 32:

I find that I must treat Mr. Girvan's evidence generally, and in particular his self-reported history of complaints to the physicians who assessed him, with caution, especially where his evidence lacks corroborative objective evidence or findings. This is particularly the case where it is necessary to make factual findings as to the nature and extent of Mr. Girvan's injuries and ongoing sequelae thereof, based solely on his self-reported pain and impairment and where the evidence of the physicians who testified and provided opinion evidence is predicated on his self-reported subjective symptoms, in the absence of objective medical findings. In light of this, I conclude that I cannot accept Mr. Girvan's evidence at face value and must treat it cautiously. This includes Mr. Girvan's reports to his physicians regarding his medical history and past and present use of oxycodone and cocaine.

[Emphasis added.]

[24] Notwithstanding finding that she must treat Mr. Girvan's evidence cautiously, especially in the absence of "corroborative objective evidence or findings", the judge noted that credibility and reliability are not all or nothing propositions, and that Mr. Girvan's position was not made untenable simply because his evidence lacked credibility and reliability. The judge also declined to draw an adverse inference in respect of Mr. Girvan's evidence arising from the fact that he testified after his expert witnesses.

[25] The judge found Ms. Cowie to be a forthright and honest witness, despite her admitted animosity towards Mr. Girvan. The judge preferred Ms. Cowie's evidence to that of Mr. Girvan, and framed her findings (at para. 36):

- a) That the plaintiff's use of cocaine and alcohol increased in the period from 2015-2017 and that this was one of the principal factors that led to the breakdown in their relationship, which culminated in September 2017 when Ms. Cowie called the RCMP to have an intoxicated Mr. Girvan removed from the home;
- b) That the plaintiff's physical capabilities appeared to decline in the 2015 to 2017 time frame following his second workplace injury, though not to the point of interfering with his ability to complete retraining and obtain employment with King Hoe. I note in this regard that Ms. Cowie's evidence in that regard is consistent with Mr. Girvan's contemporaneous pursuit of WorkSafeBC benefits for both physical and psychological injuries;
- c) As to the events immediately following the Accident and the plaintiff's condition and capacity thereafter; and

- d) As to the plaintiff's demonstrated capacity following the Accident, which I find she had the opportunity to observe given their ongoing co-parenting of their daughter and her resulting near-daily interaction with the plaintiff via FaceTime.
- [26] Ms. Cowie observed Mr. Girvan's physical capacity following the accident, at one point watching him run across the street and up the stairs two at a time, only to grab his back and hobble down the stairs when he observed she was watching him, claiming he was unable to pick up a box and load it into his truck. He jumped on trampolines, gave their daughter piggyback rides, and sustained an injury on a push scooter.
- [27] The judge discussed Mr. Girvan's employment history because Mr. Girvan had suffered workplace injuries to his right shoulder, neck, and back in 2014 and 2015, which were the injuries he alleged had been exacerbated by the accident. Mr. Girvan brought WorkSafeBC claims for the 2014 and 2015 injuries as well as for anxiety and depression. WorkSafeBC denied Mr. Girvan's claim for chronic neck and back pain, but accepted his claim for right-shoulder injury and associated chronic pain. He unsuccessfully pursued multiple reviews of that decision. In June 2016 he was unsuccessful in bringing a WorkSafeBC claim for anxiety and depression related to his injury, with WorkSafeBC concluding that the available evidence suggested Mr. Girvan's psychological condition was pre-existing and was not exacerbated by the workplace injury. WorkSafeBC determined that Mr. Girvan was eligible for vocational retraining as a result of his shoulder injury.
- [28] After he completed his retraining, he began work as a surveyor/gradesman in July 2017. That job lasted a few shifts. He brought a WorkSafeBC claim for dust inhalation. Then, one day prior to the accident, Mr. Girvan rolled a water truck while at work. He was required to take a drug test later that day and was told the test was "non-negative" for cocaine. Consequently, Mr. Girvan was found to have either known, or had reason to suspect, that he had failed the drug test and this may have had negative consequences for his continued employment. In fact, his employment was terminated.
- [29] Turning to the expert evidence, the judge noted that the weight to be given to an expert opinion depends on the degree to which the underlying assumptions have been proven by other admissible evidence. The judge referred to several authorities to that effect, and cited (at para. 53) the following excerpt of Chief Justice Wilson's judgment in *Leonard v. British Columbia Hydro and Power Authority*, 49 D.L.R. (2d) 422 at 424-425, 1964 CanLII 485 (B.C.S.C.) (as cited in *Wettlaufer v. Air Transat A.T. Inc.*, 2013 BCSC 1245 at para. 50):

The doctor says he accepted some statements made by his patient as facts and formed an opinion thereon. Such an opinion, I think, is subject to criticism if the patient does not appear as a witness and corroborate the existence at the time of the symptoms alleged to have been described to the doctor. Such an opinion, in so far as it relies on the credibility of the patient, is subject to rejection by a judge or jury who, having heard the patient, do not find him credible. I do not think they are bound by the doctor's opinion as to credibility but they must pay a considerable regard to it, particularly if it is related to associated objective evidence, such, for

instance, as evidence of spasm. But I do not see any reason why a judge or jury, having heard the expert and the patient, should not, in a proper case, reject the evidence of the expert on the ground that the patient is not a credible witness and that, therefore, the hypothesis on which the expert gave his opinion is not established having, of course, the fullest regard to the expertise of the doctor and to any objective evidence he has propounded. If this were not so then judges and juries would be completely bound by the opinions of experts as to credibility, and this cannot be.

[Emphasis in Trial Judge's Reasons.]

[30] In the judge's view, the case before her fell within the circumstances described in Leonard:

[54] In my view, this case falls within the circumstances described by Wilson C.J.S.C. in Leonard. The plaintiff's lack of credibility and reliability in providing his medical history, past and present drug use (oxycodone and cocaine), the injuries he allegedly suffered, the ongoing sequelae of pain resulting therefrom, and his functional capacity post-Accident has significantly and negatively impacted his ability to prove the facts and assumptions underlying the expert evidence on which he relies. In particular, Mr. Girvan's failure to provide complete and accurate medical histories to the experts who assessed him, and his demonstrated willingness to feign or amplify injuries to obtain financial benefit, undermines the weight that can be given to the experts' opinions on both causation and the nature, extent, and duration of the plaintiff's injuries and chronic pain.

[Emphasis added.]

[31] Mr. Girvan tendered reports from three medical experts and a functional capacity evaluator. The appellants tendered expert evidence from a psychologist, Dr. Koch. The experts testified at trial and were cross-examined, with the exception of Dr. Koch, who was not required to attend for cross-examination.

[32] Dr. Jennifer Griffiths was Mr. Girvan's family doctor since January 2018. She provided two reports: an initial report dated February 5, 2019, and an updated report dated May 30, 2022. Dr. Griffiths opined that, as a result of the accident, Mr. Girvan suffered chronic pain in his neck, back, and shoulders; frequent severe head pain as a consequence of chronic muscle spasms in his neck; and depression, anxiety, and insomnia. As to prognosis, Dr. Griffiths described Mr. Girvan as totally and permanently disabled.

[33] The judge raised a number of significant concerns regarding Dr. Griffiths' evidence. These included inconsistencies between Dr. Griffiths' clinical observations and Mr. Girvan's admitted and demonstrated capacity at the relevant points in time. They also included a tendency by Dr. Griffiths to overstate Mr. Girvan's injuries, attribute his injuries solely to the accident, and to offer diagnoses without conducting the necessary diagnostic testing. The judge noted Dr. Griffiths certified in a Canada Pension Plan application that Mr. Girvan's disability arose from the accident and she did not disclose, or was not aware, of the ongoing effect of Mr. Girvan's prior workplace injuries and never discussed a return-to-work program with him. Dr. Griffiths provided Mr. Girvan with serial off-work notes yet did not know, or

did not recall, what his work duties entailed.

- [34] The judge found the issues with Dr. Griffiths' evidence were demonstrative of "a concerning pattern of conduct whereby Dr. Griffiths provided her medical opinion attributing the plaintiff's injuries and inability to work to the Accident without acknowledging his pre-existing conditions, and without any critical analysis of the impact of those conditions on his current condition or prognosis": at para. 68. The judge concluded the weight that could be given to Dr. Griffiths' evidence was nearly entirely negated, and she rejected Dr. Griffiths' evidence where it conflicted with that of Dr. Anton and Ms. Craig: at paras. 70, 109
- [35] Dr. Hubert Anton was a physiatrist who assessed Mr. Girvan on December 13, 2021, and provided a report dated January 26, 2022. Dr. Anton opined that, as a result of the accident, Mr. Girvan had sustained soft tissue injuries to his neck, left and right shoulder girdle and upper and lower back; an opioid dependence; and opioid induced hyperalgesia ("OIH"). The judge found Dr. Anton to be a forthright and careful witness who understood his role as an expert. Critically, however, on cross-examination Dr. Anton agreed that his opinion would be undermined if several hypothetical facts were proven to be true. These hypothetical facts were those underlying the trial judge's adverse credibility and reliability findings. Because the hypothetical facts were later established to be true, the judge accepted Dr. Anton's evidence subject to the caveat that Dr. Anton "would in all likelihood have resiled at least somewhat from his opinion": at para. 78. In the judge's view, the facts as she found them suggested that "[Mr. Girvan's] pain was less severe than Dr. Anton opined": at para. 79.
- [36] Dr. Shaohua Lu was a psychiatrist who examined Mr. Girvan on January 17, 2022, and provided a report dated February 6, 2022. He also provided a rebuttal report to the appellants' expert's psychological report. Based on Mr. Girvan's self-reporting, Dr. Lu concluded that, prior to the accident, Mr. Girvan was mentally stable and resilient and showed no clinical indication of depressive symptoms. Dr. Lu also opined that following the accident, Mr. Girvan had chronic pain, depression, and OIH with a poor prognosis. The judge found Dr. Lu's opinion as to Mr. Girvan's pre-accident condition was inconsistent with the preponderance of the evidence, including Dr. Field's clinical records, the WorkSafeBC claim for psychiatric injury, and Ms. Cowie's testimony, which established that Mr. Girvan had reported anxiety, panic attacks, and depression in the months prior to the accident. When pressed on the inconsistencies in his evidence, Dr. Lu became defensive and argumentative: at paras. 82-84. The judge rejected Dr. Lu's opinion that Mr. Girvan was psychologically stable prior to the accident and found the evidence established that Mr. Girvan's pre-existing psychological issues were significantly more active and extensive than Dr. Lu acknowledged. This was the case even without factoring in Mr. Girvan's ongoing cocaine use and prior treatment for addiction, neither of which had been disclosed to Dr. Lu or put to him at trial, due to the order of Mr. Girvan's testimony and Dr. Lu's apparent intransigence: at paras. 84, 109.

[37] Dr. William Koch was the appellants' sole expert witness. He attempted to conduct an examination of Mr. Girvan on September 16, 2021, and provided a report dated September 21, 2021. Mr. Girvan became defensive and angry during the assessment, and ultimately ceased participation and departed, refusing to return Dr. Koch's test materials. As a result, Dr. Koch was unable to provide a definitive diagnosis, or any opinion, about Mr. Girvan's prognosis or treatment recommendations. He opined Mr. Girvan engaged in more defensive self-disclosure than 98% of the normative sample and noted a number of inconsistencies in the medical history provided by Mr. Girvan and the clinical records he reviewed. Dr. Koch provided the following opinions, which the judge accepted (at para. 91):

- a) Mr. Girvan's assertion that "life was grand and everything was coming together" before the Accident appeared to underreport previous life and health difficulties reflected in the clinical records, which included reports of panic attacks, anxiety, and sleep disturbance, along with instances of interpersonal and employment conflicts;
- b) Mr. Girvan engaged in "defensive self-disclosure", which precluded a definitive diagnosis of his pre-Accident conditions, but the clinical records reviewed provided evidence that Mr. Girvan suffered some form of panic disorder or other anxiety disorder for which he was regularly using Ativan or Clonazepam into the month prior to the Accident and had a pre-Accident history of depression;
- c) Some elements of Mr. Girvan's history, namely escalation of OxyContin use before the Accident and simultaneous use of OxyContin, marijuana, and benzodiazepines, suggested a possible polysubstance use disorder and opiate addiction; and
- d) It was unclear whether Mr. Girvan's low mood arose because of his physical injuries, marital difficulties, or secondary to his substance use (OxyContin and marijuana), and Dr. Koch had no validity data to assist in understanding the extent to which Mr. Girvan may have been exaggerating his mental health issues.

[38] Ms. Louise Craig was a functional capacity evaluator who assessed Mr. Girvan on June 20, 2019. Ms. Craig's examination was truncated due to Mr. Girvan presenting with elevated pain levels that caused her to conclude that no further testing could be safely completed. Despite this, Ms. Craig testified that Mr. Girvan's pain behaviours were indicative of a high level of pain and disability, and he was not competitively employable. On cross-examination, Ms. Craig conceded that the levels of pain and disability she observed during the assessment were inconsistent with Mr. Girvan's admitted capabilities. These included Mr. Girvan's ability to run up flights of stairs, ride on a scooter, jump on a trampoline, and give piggyback rides to his daughter. The judge found that Ms. Craig's report did not appear to reconcile her observations that there was nothing wrong with Mr. Girvan's lower extremity function with her overarching conclusion that he was not competitively employable. Ms. Craig became defensive and argumentative when pressed on these inconsistencies. The judge concluded she must treat Ms. Craig's opinion cautiously. The judge's findings with regard to Mr. Girvan's credibility, taken together with Ms. Craig's acceptance of Mr. Girvan's self-reported history

as true, "significantly undermine[d] the factual foundation for [Ms. Craig's] opinion": at para. 102. The judge concluded Mr. Girvan had greater overall physical function than Ms. Craig opined: at para. 103.

[39] Considering the expert evidence as a whole, the judge accepted that the weight of the expert evidence had been negatively impacted and undermined in several instances by Mr. Girvan's failure to prove the facts and assumptions underlying the expert reports: at para. 109. The judge also noted that, due to the order of testimony at trial, with Mr. Girvan testifying last, she had been "deprived of the opportunity to consider the evidence of the experts who testified before the plaintiff within the proper context": at para. 107. The judge summarized her findings with respect to the expert evidence at para. 109:

- a) Dr. Anton's opinion was undermined as to the severity of the plaintiff's injuries;
- b) Ms. Craig's opinion was undermined by the significant inconsistencies between the functional capacity she observed the plaintiff to have on assessment and his admitted capacity for activities in other contexts;
- c) Dr. Lu's opinion was fundamentally undermined by his lack of awareness of the plaintiff's ongoing cocaine use and prior attendance at a drug rehabilitation program, and the defendants' inability to put that evidence to the plaintiff on cross-examination in the face of intransigence from Dr. Lu; and
- d) The weight that can be given to Dr. Griffiths' opinion is nearly entirely negated by her tendency to overstate the impact of the Accident on the plaintiff, failure to account for the plaintiff's pre-existing conditions in her opinion, apparent willingness to provide a diagnosis without having completed the required diagnostic testing, and her failure to appreciate the proper role of medical expert witnesses.

[40] Then, in the following paragraph, the judge stated:

[110] Considering the evidence as a whole, I find that the plaintiff suffered the following physical injuries from the Accident:

- a) Exacerbation of pre-existing soft tissue injuries to the neck, back, and right shoulder;
- b) Left shoulder soft tissue injury;
- c) Exacerbation of pre-existing chronic pain;
- d) Exacerbation of opioid dependency; and
- e) Progression of OIH.

[41] With regard to Mr. Girvan's allegation of psychological injuries caused by the accident, the judge stated:

- [114] The plaintiff relies on Dr. Griffiths' opinion diagnosing him with "depression and anxiety since his accident" (emphasis added). I do not accept Dr. Griffiths' opinion as: it is inconsistent with the preponderance of the clinical records, including, in particular, those of Dr. Field; she was not qualified as a psychiatrist or psychologist; and she demonstrated a willingness to make diagnoses in the absence of applying recognized diagnostic criteria.
- [115] Rather, relying on Drs. Lu and Koch's evidence, I find that as a result of the Accident, the plaintiff suffered an exacerbation of his pre-existing anxiety and depression and a recurrence of major depression with new psychotic features.

[Emphasis in original.]

- [42] The judge turned to the assessment of damages. The appellants made no submissions on the assessment of damages given their position that Mr. Girvan had failed to establish causation. The judge's assessment of the various heads of damages is found at paras. 130-179 of her reasons and the conclusion and summation of damages at paras. 180-181. I will not discuss the judge's reasoning with respect to the assessment of damages as this appeal turns on the precondition to that assessment--whether Mr. Girvan has met his burden of establishing causation.

Standard of Review

- [43] A trial judge's findings on causation are a question of fact: *Benhaim v. St-Germain*, 2016 SCC 48 at para. 36. Absent palpable and overriding error, they are owed deference: *Warlow v. Sadeghi*, 2021 BCCA 46 at para. 32, citing *Ediger v. Johnston*, 2013 SCC 18 at para. 29.
- [44] The assessment of damages is generally a fact-finding exercise: *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 105 at para. 78. Accordingly, appellate intervention will be justified only where the judge applied an incorrect principle of law, where there was no evidence upon which the trial judge could have reached their conclusion, or where the amount awarded was so inordinately low or so inordinately high that it can be said to be "wholly erroneous": *Ostrikoff v. Olivera*, 2015 BCCA 351 at para. 2, citing *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435; see also *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2015 BCCA 232 at para. 14.
- [45] In *Zhao v. Fang*, 2022 BCCA 227, this Court discussed the sufficiency of reasons:
- [22] There is no free-standing right of appeal on the basis of the sufficiency of a trial judge's reasons. Appellate intervention is only justified where the reasons, when considered along with the record, do not permit meaningful appellate review. This occurs where the reasons are both inadequate and inscrutable: see *R. v. Gagnon*, 2006 SCC 17; *Shannon v. Shannon*, 2011 BCCA 397; *Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2017 BCCA 29.

[23] Reasons must be read generously and as a whole, bearing in mind the presumption that trial judges know the law: Barendregt at para. 104, citing R. v. G.F., 2021 SCC 20 at para. 79. In G.F., the Supreme Court described the task of appellate courts in assessing the sufficiency of reasons, which can be summarized as follows:

- The task of appellate courts is not to finely parse a trial judge's reasons but rather to assess whether the reasons, read in context and as a whole and in light of the live issues at trial, explain what the trial judge decided and why in a manner that permits effective appellate review: at para. 69.

- If the reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error: at para. 70.

- Reasons must be both factually sufficient and legally sufficient. Factual sufficiency, which is ordinarily a very low bar, is concerned with what the trial judge decided and why. Legal sufficiency requires that the aggrieved party be able to discern the viability of an appeal and appellate courts be able to determine whether an error has occurred; this is highly context specific and must be assessed in light of the live issues at trial: at paras. 71, 74.

[46] A judge is not required to discuss all of the evidence on a given point, or to detail every aspect of their factual deliberations. Rather, the question is whether the reasons demonstrate that the judge grappled with the substance of the live issues: Kakavelakis v. Boutsakis, 2017 BCCA 396 at para. 46.

Analysis

[47] At trial, it was demonstrated that Mr. Girvan's testimony could not be relied on, not only because he gave varying and inconsistent accounts of his pain, capabilities, and personal/medical history, but also because he demonstrated a willingness to lie and feign or exaggerate injury for financial benefit. The judge acknowledged credibility and reliability are not all or nothing propositions, but it is clear that she considered she required "corroborative objective evidence or findings", to support Mr. Girvan's evidence of injury caused by the accident.

[48] The approach taken by the judge, in my view, was appropriate. In Mariano v. Campbell, 2010 BCCA 410 at para. 40, Justice Groberman cited Maslen v. Rubenstein (1993), 83 B.C.L.R. (2d) 131, 1993 CanLII 2465 (B.C.C.A.) for the "correct approach" to cases such as the present:

With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in Price v. Kostyba (1982), 70 B.C.L.R. 397 (S.C.), repeating his observations in Butler v. Blaylock, [1981] B.C.J. No. 31 (B.C.S.C.), put it thus [p. 399]:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrong-doer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

So there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

[49] In *Koltai v. Wang*, 2017 BCCA 152, Bauman C.J.B.C. (as he then was) questioned whether the requirement that there be evidence of a "convincing nature" as discussed in *Marslen* was indicative of a higher, and thus erroneous, standard of proof. I do not see it that way. In *Koltai*, the Chief Justice also referred to *F.H. v. McDougall*, 2008 SCC 53, where the Supreme Court of Canada established "once and for all" that there is only one civil standard of proof, which is proof on a balance of probabilities, but also held that "in all cases, evidence must be scrutinized with care by the trial judge" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test": *F.H.* at paras. 40, 45-46. *Maslen* recognizes that in cases such as the present, evidence of a sufficiently convincing, clear and cogent nature takes on a different form than it would, for instance, in a case concerning broken limbs.

[50] This all goes to the most important characteristic of the present case--the nature of the injuries alleged by Mr. Girvan, being an exacerbation of deteriorating pre-existing soft-tissue and psychological injuries, and an alleged new soft-tissue injury to his left shoulder, placed Mr. Girvan's claim in a category for which his credibility was not only critical, but determinative. The expert opinions with respect to causation for the injuries relied on Mr. Girvan's self-reporting.

[51] Despite acknowledging the relevant principles, the judge inexplicably concluded, with no additional analysis, that Mr. Girvan had proven causation for the bulk of his alleged injuries despite his lack of credibility and the resulting lack of weight that could be given to the experts' opinions. This, in my view, demonstrates a failure to grapple with the critical issue--whether the evidence presented at trial was sufficiently clear, convincing and cogent such that it could support a finding, on a balance of probabilities, that Mr. Girvan had sustained injuries as a result of the motor vehicle accident. Rather than squarely addressing this issue, the judge leapt directly into a finding on causation based on "the evidence as a whole", and on the evidence of Drs. Lu and Koch, which the judge had only just characterized as "fundamentally undermined" and "unable to provide any diagnosis with a high degree of

confidence", respectively.

- [52] In my view, and as the judge acknowledged, given Mr. Girvan's lack of credibility and reliability, a finding on causation required the judge to identify the "corroborative objective evidence or findings" she concluded was necessary to ground such a finding. Any reliance on the experts' opinions on causation also required justification. This was especially so given the order of testimony at trial, with Mr. Girvan testifying last, which prevented the experts from being able to comment fully, or not at all, on the inconsistencies later revealed in Mr. Girvan's evidence.
- [53] The less straightforward issue on this appeal is whether there is any kernel of evidence which could weigh in favour of a finding on causation. Here, I would note that even if there is, the judge's failure to identify it and explain her reliance on it has rendered the judgment inscrutable, and thus unsupportable. It cannot be said that the basis for the causation finding lies clearly in the record. However, if there is some element of corroborative evidence, it would militate in favour of remitting the matter for a new trial, rather than dismissing the claim outright: see *R. v. Wilkins*, 2007 BCCA 335 at para. 21. My conclusion that the claim should be dismissed results from my view that there is no such evidence to be found, and the trial judge erred by making a finding of causation without an evidentiary basis.
- [54] I will proceed by discussing the alleged physical and psychological injuries, with a focus on the evidence that the judge relied on, or for which the judge's reliance can be inferred from the reasons. Mr. Girvan also points to evidence he submits can support a finding of causation, but was not discussed by the judge in her reasons.

The Physical Injuries

- [55] The judge explained her finding of causation for Mr. Girvan's alleged physical injuries resulted from her consideration of "the evidence as a whole". It is clear, however, her finding relied largely, if not entirely, on Dr. Anton's evidence. This is evident because the judge's conclusions on causation mirror Dr. Anton's evidence.
- [56] Dr. Anton's opinion that Mr. Girvan had suffered an exacerbation of his pre-existing injuries and a new left-shoulder injury as a result of the accident was premised on the compromised credibility and reliability of Mr. Girvan's self-reporting. The ordering of testimony at trial required appellants' counsel to put the credibility and reliability issues to Dr. Anton in this way:

Q: I'm going to suggest to you, and I'm also going to ask you how this affects your opinion, of course, that when Mr. Girvan was rear-ended that he got out of his vehicle and walked over to where the defendant, Ms. McGlue's vehicle was, and engaged in some friendly banter with her and told her that he didn't really feel a thing on impact. I'm going to ask you to accept the assumption that he called a tow truck for her because her car was undrivable and that he then left the accident scene.

I'm going to ask you to assume that about 10 or 15 minutes after he left the scene he had a telephone conversation, cellular telephone conversation with the defendant where he told her that he'd spoken to a friend and said that if they called paramedic -- that they should call paramedics because they could each get \$20,000 for this -- for their -- for the -- for an injury claim. I'm going to ask you to assume that rather than being in shock and in pain and stopping, that Mr. Girvan did call an ambulance but to the accident site, and when the ambulance arrived, they came to where the collision had occurred but by then Mr. Girvan had returned to the proximity of the accident site and parked across the road. I'm going to ask you to assume that Ms. McGlue was first approached by the ambulance people and she wanted no part of him or the ambulance and said I'm not hurt and she pointed across the street to where Mr. Girvan was. And it was from that location that he was then taken to Surrey Memorial Hospital.

Putting on your expert's hat as an examiner, a forensic medical examiner, do you consider those to be significantly different facts from what you were told by Mr. Girvan?

A: That's a lot of assumptions. What you're describing is different than what he reported to me.

[57] Counsel asked Dr. Anton whether, if the hypothetical facts were proven, it would influence "the accuracy and validity and veracity of the opinion that [he] took from Mr. Girvan":

Q: And with -- if -- if those facts are made out and proven, does that influence the accuracy and validity and veracity of the opinion that you took from Mr. Girvan?

A: It definitely influences the accuracy of the history. And it definitely affects the veracity. The... I would say my job -- you used the term forensic examiner. My job is not so much to determine whether a given individual may have exaggerated or even lied about the facts or whether they have exaggerated what happened at the scene of the accident. I think ultimately, with respect, that is someone else's job.

What is important from my point of view is his description of his initial symptoms. And essentially the key difference in terms of his initial symptoms is that he described after he left the scene that he had severe pain that was so severe he had to pull over to the side of the road for reasons of safety.

If he did not have that, then the implication is that his injuries were potentially less severe.

Now, I have to say that there was other information from other sources here. There's records from the emergency department. You eluded to the initial examination by Dr. Field. Those are relevant, too.

But clearly getting back to what we said initially, if I assume that the patient told me something and it's true, and it's not true, that is something I would have to consider in terms of my diagnostic conclusions, my opinion about the veracity of the patient's complaints of symptoms.

[Emphasis added.]

[58] Dr. Anton's response demonstrates that he viewed the hypothetical facts as capable of influencing the accuracy of the history provided by Mr. Girvan, the severity of Mr. Girvan's injuries, and the veracity of Mr. Girvan's complaints of symptoms as a whole. This was because, as Dr. Anton acknowledged, a medical diagnosis of the physical injuries alleged by Mr. Girvan was reliant on his self-reporting:

Q: And that's particularly true -- I use the example of a fractured tibia. Nobody has to question a person about that, they just look at it and they can tell what it is. But with respect to --

A: Right.

Q: -- to this, when you talk about Surrey memorial, there is a self-report of what he was feeling?

A: Yes.

Q: And to add to the potential problem with veracity and affecting your opinion, that's 10 days later when he tells Dr. Field that he thinks he hit his head on the roof of the car?

A: Yes.

Q: And in view of the fact that that's not found in the Surrey Memorial records, and if you accept the assumptions that I just gave you, that has negative implications for the veracity of what Mr. Girvan has told everybody, doesn't it?

A: I -- I would be less concerned about whether or not he hit his head on the roof of the car because there's normally a certain amount of white noise around the time of an accident and that what the patient thinks happened may change over the course of time, so I'm frankly less concerned about that.

If the question here was did this man sustain a brain injury, the question of direct trauma to the head is very significant. But within the context of the other complaints he had after the accident, it's - it's less significant than some of the other things that he reported.

Q: Just the -- the absence of extreme pain, not having to stop, the conversation that I'm alleging, that we're alleging took place and returning to the accident scene, those are what affect the underpinnings of your opinion?

A: Right. They affect the assumptions that I made based on the history of the initial events around the time of the accident. So the accident -- those are more important in terms of my opinion. But the blow to the head or the lack of blow to head, the head is not that important.

Q: And what's even more important is when you contextualize that into a discussion about being able to make money out of this claim and then plugging it in to calling the ambulance and coming back to the accident scene, that becomes more troubling in terms of assessing the veracity of Mr. Girvan's self-report, doesn't it?

A: It's - it's -- I would say it's troubling. But I would just put in the caveat that you've asked me to make a lot of assumptions here.

[]

A: Was there a... I think I finished, but I'll repeat. I think that those -- those things that you identified raised questions about Mr. Girvan's credibility. And that's important in the context of my assessment, but at the end of the day, it's not my place, it's not my role to determine whether or not he's a credible individual.

To put this in the bigger content, people who have had soft tissue injuries, and indeed, have chronic pain, there is no reliable objective medical tool, X-rays, blood tests, brain scans, there's nothing that can tell us, one, whether the history that the patient gives regarding the severity of their pain and how it affects their life is true, and two, whether indeed they are actually feeling pain.

So this is in the bigger picture a huge problem in cases like this where we have no objective measure, no gold standard, no truth-telling test that will tell us what the patient is true [sic]. And it ultimately boils down to, for me, as a physician, but for everyone, to just -- to make a determination as to whether they think the patient is -- is a credible and reliable historian and witness.

Q: And I don't want to flog a dead horse, but I did ask you to assume that those facts were true. So I -- I don't want --

A: Yes.

Q: -- you to say I'm putting - I'm not sure. My -- my request was that you assume that those facts are going to be proven and accepted by the court. So that -- you needn't concern yourself with that.

If those facts are established as true, particularly in the context of self-report, that undermines an opinion that you, using your best skill and professional judgment, can arrive at, true?

A: Yes.

[Emphasis added.]

[59] In my view, the judge misapprehended Dr. Anton's evidence when she found that it was undermined only as to the severity of Mr. Girvan's injuries, and in apparently relying on Dr. Anton's evidence to ground a finding of causation for the physical injuries. Dr. Anton's testimony paints an entirely different picture--one in which his opinion regarding the severity of Mr. Girvan's symptoms and the existence of those symptoms was undermined by

Mr. Girvan's lack of credibility. Dr. Anton acknowledged he did not have information available to him that he "would have to consider in terms of [his] diagnostic conclusions, [his] opinion about the veracity of the patient's complaints of symptoms". In my view, it cannot be said that Dr. Anton's evidence was sufficient to support a finding of causation, given that Dr. Anton acknowledged his opinion had been undermined and his diagnostic conclusions were at best incomplete.

- [60] Moreover, even if Dr. Anton's opinion was only undermined as to the severity of Mr. Girvan's injuries, as the trial judge found, severity was precisely what was at issue. Mr. Girvan was alleging, in effect, that the accident had caused an increase in the severity of his pre-existing but deteriorating injuries. In my view, even if the judge did not misapprehend which aspects of Dr. Anton's opinion had been undermined, it would have nonetheless been an error to rely on Dr. Anton's evidence to ground a finding of causation for the exacerbation of Mr. Girvan's pre-existing injuries. Such a finding necessarily required Mr. Girvan to provide evidence of an increase in the severity of his pre-existing injuries, which the trial judge found could not be provided by Dr. Anton.
- [61] Mr. Girvan submits that it was not an error for the judge to rely on Dr. Anton's opinion because Dr. Anton did not rely solely on self-reporting. He submits that Dr. Anton conducted his own clinical testing and observed that Mr. Girvan had a limited range of motion and poor muscle development. Additionally, Dr. Anton reviewed other clinical records, including those of Dr. Sidney Field, who was Mr. Girvan's physician at the time of the accident, and Dr. Ansel Chu, a physiatrist who treated Mr. Girvan before and after the accident. In Mr. Girvan's submission, those observations and reports constitute objective evidence upon which a finding of causation could be made.
- [62] I would not accede to this submission for several reasons.
- [63] First, Dr. Anton's testimony confirms that he viewed his opinion as undermined despite the clinical testing he conducted and despite his review of collateral medical records. This was because, as Dr. Anton explained, for the soft-tissue injuries and chronic pain that Mr. Girvan alleged, there is "no objective measure, no gold standard, no truth-telling test". Reliance is inevitably placed on the truth of what the patient tells the doctor, supported by other corroborative evidence as may be found (and typically must be found) in the surrounding circumstances. For the same reason that Dr. Anton's medical opinion was undermined, most of the findings and observations set out in the collateral medical records reviewed by Dr. Anton were also intrinsically tied to Mr. Girvan's reliability and credibility and are of no assistance.
- [64] Second, Dr. Field was called as lay witnesses. His evidence was not discussed at length by the judge, which is not determinative, but speaks to the insignificance of the evidence in relation to the issue of causation. As Justice Frankel explained in *Ford v. Lin*, 2022 BCCA 179:

- [90] When a party calls a doctor as a fact witness, the doctor's testimony is subject to the rules that apply to any other fact witness. What this means is that a party is not entitled, as a matter of course on direct examination, to tender their own out-of-court statements. Absent an exception to this general exclusionary rule, a plaintiff can no more call a doctor to testify they said their back was sore on a particular day than they can their next-door neighbour.
- [65] Third, the pre-existing nature of all but allegedly one of Mr. Girvan's injuries meant that post-accident clinical observations of the same type of symptoms and pain behaviours as existed before the accident, even of the most robust or objective nature (i.e., palpating, observing muscle spasms and range of motion), were not sufficient to establish that the accident exacerbated the pre-existing injuries. As the appellants point out, Mr. Girvan's reported pain and capabilities varied significantly in the years prior to the accident, and at times he complained of greater incapacity and pain prior to the accident than he did following it. In fact, one of the elements of Dr. Griffiths' testimony that the trial judge accepted was her concession that Dr. Chu's observations in a March 2017 report were "remarkably similar" to Mr. Girvan's post-accident complaints: at para. 66. The judge also accepted, on the basis of Drs. Field's and Chu's clinical notes, that Mr. Girvan was experiencing significant pain in his neck and back leading up to the accident: at para. 120. In my view, where the only objective indicia of an injury pre-dates the alleged cause, and the subjective indicia are found to lack credibility, there is nothing upon which to make a finding of causation.
- [66] Finally, with regard to the alleged new left-shoulder injury, Mr. Girvan relies on Dr. Field's diagnosis based on Mr. Girvan's post-accident complaints of increased pain, movement restrictions, and left-side shoulder spasms. This was not a new injury, or at very least the symptoms upon which the diagnosis was made were not new. Mr. Girvan had previously presented with left-side shoulder spasms as early as 2015, which continued into 2017, which renders these observations insufficient to ground a finding of causation for that injury, especially because the other symptoms underlying the diagnosis were of a self-reported nature.
- [67] Mr. Girvan also relies on the evidence of his sister, Wendy Petersen, and his friend and work colleague, Shaun Madden, as providing pre- and post-accident observations of his physical capabilities, which he says the trial judge could have relied on to make a finding of causation.
- [68] Similar to the evidence of Dr. Field, the judge made limited reference to the evidence of Ms. Petersen and Mr. Madden. Ms. Petersen was found to have "likely understated and minimized [Mr. Girvan's] past struggles with substance use and addiction, undoubtedly out of an understandable desire to protect and assist [Mr. Girvan]": at para. 124. She also only saw Mr. Girvan on a handful of occasions in the years leading up to the accident and was unaware of his drug use and the specifics of his physical complaints. Likewise, Mr. Madden had limited knowledge of Mr. Girvan's pre-accident condition. He was never told about Mr. Girvan's neck and back spasms and had no recollection that Mr. Girvan had gone into drug rehabilitation.

- [69] The post-accident observations made by Ms. Petersen and Mr. Madden not only lacked an accurate comparison to Mr. Girvan's pre-accident condition, they were also tainted by Mr. Girvan's willingness to feign injury. Mr. Girvan had, on at least one occasion, adopted an injured posture when he noticed he was being observed.
- [70] In my view, none of the evidence discussed by the judge, or called at trial, was capable of supporting a finding of causation for Mr. Girvan's alleged physical injuries.

The Psychological Injuries

- [71] The judge relied on the evidence of Drs. Koch and Lu to support her finding of causation for Mr. Girvan's alleged psychological injuries. In my view, this evidence was incapable of supporting such a finding.
- [72] The gaps in Mr. Girvan's self-reporting is why the judge found that Dr. Lu lacked awareness of Mr. Girvan's ongoing substance abuse, which "fundamentally undermined" his opinion. It is also why the trial judge rejected Dr. Lu's opinion that Mr. Girvan was psychologically stable prior to the accident as being inconsistent with the preponderance of the evidence. These issues went to the heart of Dr. Lu's opinion as to causation for Mr. Girvan's alleged psychological injuries, which necessarily involved comparing Mr. Girvan's pre- and post-accident psychological condition.
- [73] Similarly, Dr. Koch was unable to provide any diagnosis due to Mr. Girvan's lack of cooperation during the assessment. The judge framed this as an inability to provide a diagnosis "with a high degree of confidence", but Dr. Koch declined to provide any definitive diagnosis, simply because a diagnosis to the requisite standard was impossible. Mr. Girvan provided a vague psychosocial and vocational history during Dr. Koch's assessment, and ultimately left before it could be completed. As a result, Dr. Koch was unable to test for the possibility that Mr. Girvan was exaggerating his mental health problems, and he found that Mr. Girvan likely engaged in strategic and defensive self-disclosure by under-reporting his previous life and health difficulties. Dr. Koch opined that Mr. Girvan had a history of depression and was suffering from "some form" of panic or anxiety disorder prior to the accident, but that qualified aspect of Dr. Koch's report provides no assistance to Mr. Girvan in establishing causation for a post-accident exacerbation of those same conditions.
- [74] Mr. Girvan submits that it was possible for the judge to make a finding of causation by considering the evidence provided by Drs. Lu, Koch, and Griffiths, and the lay witnesses in conjunction. Mr. Girvan also points to the evidence of his counsellor, Jeri-Lyn Munro, as indicative of his worsened post-accident psychological condition.
- [75] I am unable to agree with this submission. A finding of causation in these circumstances would require Mr. Girvan to demonstrate on a balance of probabilities that "but for" the accident, he would not have suffered a deterioration in his psychological condition. However, Mr. Girvan's pre-accident psychological condition was obscured as a result of his failure to provide medical experts with an accurate picture of his pre-existing drug use and

medical history, which was fatal to his ability to prove he had suffered an exacerbation of psychological injuries as a result of the accident. Further, and additionally, Mr. Girvan's lack of credibility calls into question his reporting of symptoms following the accident.

- [76] The simple fact is there was no reliable evidence about the extent of, and likely trajectory for, Mr. Girvan's pre-accident psychological issues. The preponderance of the evidence demonstrated that Mr. Girvan had pre-existing anxiety, depression and substance abuse issues, but those issues were not fully disclosed to the medical experts. Without an accurate baseline and etiology for Mr. Girvan's pre-accident psychological condition, it was not possible to conclude that his condition had in fact changed, or that any changes were related to the accident, which removed any weight that could be given to the experts' opinions on causation. This problem was entrenched by the order in which Mr. Girvan presented his case at trial, which prevented the experts from clarifying their opinions in the proper context.
- [77] Ms. Munro was unable to provide evidence as to Mr. Girvan's pre-existing psychological condition because she had no interactions with Mr. Girvan prior to the accident. The other lay witnesses were unaware of the extent of Mr. Girvan's substance abuse, which was a critical aspect of his pre-accident psychological condition. Dr. Koch provided no definitive diagnostic opinion, much less an opinion about causation for the alleged post-accident psychological injuries. The causation opinions of Dr. Lu and Dr. Griffiths were undermined for a variety of reasons, including Mr. Girvan's failure to provide relevant information about his drug use and medical history.
- [78] Finally, I note that Mr. Girvan points specifically to his diagnosis of major depression with new psychotic features and submits that it is a new objective diagnosis which is demonstrative of post-accident deterioration. In essence, the precursors to developing psychosis are said to be difficult to feign.
- [79] Regardless of how robust the diagnosis itself may be, I do not view it as sufficient to ground a finding of causation, for two reasons. First, Dr. Lu testified that the diagnosis of a recurrence of major depression with new psychotic features was related to Mr. Girvan's chronic pain. Without proof of causation for his physical injuries and pain, much of the basis for finding a link between the accident and the deterioration in Mr. Girvan's psychological condition also falls away. Second, as I have already discussed, a finding of causation would require Mr. Girvan to demonstrate that "but for" the accident he would not have experienced a recurrence of major depression with new psychotic features, despite his significant drug use and depression leading up to the accident. Mr. Girvan underreported both of these things to the medical experts, which meant there was no expert evidence distinguishing the psychological impact of the accident from the confluence of other factors which affected and indeed caused his "active and extensive" pre-accident psychological issues. While causation may be inferred from a temporal sequence of events in some cases (see *Midgley v. Nguyen*, 2013 BCSC 693 at para. 171), in these circumstances such an inference cannot be made.

Conclusion

[80] I agree with the appellants' statement at para. 107 of their factum:

Having apparently arrived at the inescapable conclusion that the respondent's lack of credibility had undermined the critical evidence required to establish causation, the trial judge inexplicably concluded later in her reasons for judgment that he had established that he was injured both physically and psychologically in the Accident. This conclusion is utterly at odds with her own findings and the evidence before the court and invites appellate intervention on the basis of palpable and overriding error.

[81] I conclude that having rejected Mr. Girvan's evidence, and hence the foundation for the experts' evidence, and having discounted the evidence of the expert and lay witnesses, there was no "corroborative objective evidence" for the judge to make a finding that the accident caused or exacerbated physical or psychological injury. In my view, the judge made a palpable and overriding error in making a finding with respect to causation.

Disposition

[82] I would allow the appeal and dismiss Mr. Girvan's claim.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Mr. Justice Voith"

I agree:

"The Honourable Justice Skolrood"

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