
CANADA / JUDGMENT

Mundell v. Cherry

2021 BCSC 1483

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1483 Mundell v. Cherry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mundell v. Cherry,

2021 BCSC 1483

Date: 20210730

Docket: M115767

Registry: Vancouver

Between:

James Michael Mundell

Plaintiff

And:

Benjamin Arthur Cherry

Defendant

And:

Insurance Corporation of British Columbia

Third Party

- and -

Docket: M154509

Registry: Vancouver

Between:

James Michael Mundell

Plaintiff

And:

Michael Bracaglia and Purolator Inc.

Defendants

Corrected Judgment: The front page of the judgment was corrected on December 15, 2021

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

February 10-12, 16-19, 22-26, 2021

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April 7-9, 12-16, 2021

Place and Date of Judgment:

Vancouver, B.C.

July 30, 2021

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Introduction

- [1] These reasons address two actions brought by the plaintiff James Mundell for damages he alleges he has suffered as a result of two motor vehicle accidents that occurred on March 18, 2010 ("MVA 1"), and October 4, 2013 ("MVA 2"), respectively.
- [2] The action arising out of MVA 1 was defended by the third party Insurance Corporation of British Columbia (ICBC) pursuant to the provisions of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.
- [3] The defendants in the action arising out of MVA 2 are Michael Bracaglia and his employer, Purolator Inc.
- [4] For convenience, I will refer to the parties being sued as ICBC and the MVA 2 Defendants, respectively, when it is necessary to distinguish between them. I will refer to them collectively as "the defendants" when it is not. Each of the defendants has admitted liability for the accidents which have led to these actions.

- [5] Mr. Mundell alleges that he suffered serious and life-altering injuries as a result of the accidents that have rendered him unemployable and have caused him extreme pain and mental distress. The defendants submit that Mr. Mundell suffered only minor injuries in the accidents which resolved in less than 18 months in both cases. They further submit that Mr. Mundell's complaints are exaggerated and, in any event, largely do not result from the accidents.
- [6] For the reasons that follow I agree with the position of the defendants and find that Mr. Mundell is only entitled to moderate damages, which I will set out in these reasons.

The Accidents

MVA 1

- [7] On March 18, 2010, Mr. Mundell was driving his three children home after attending a dance recital in his Cadillac Escalade SUV. At approximately 8:00 PM, a pickup truck being driven by the defendant Benjamin Arthur Cherry swerved out of the oncoming lane of traffic and sideswiped the driver's side of Mr. Mundell's vehicle.
- [8] Mr. Mundell does not remember the actual moment of the collision. It is however apparent that significant damage was done to his vehicle. The side airbags deployed in the collision. Mr. Mundell's first concern was for his children. He arranged for a taxi to take them home. Later that evening he attended the emergency ward at Eagle Ridge Hospital for assessment.
- [9] Mr. Mundell was evaluated at the hospital but no X-rays were ordered. He was given a prescription for Tylenol 3 and sent home.
- [10] The next day Mr. Mundell saw his family doctor, Herbert Chang. At that time he complained of a number of musculoskeletal and neurological symptoms, summarized in Dr. Chang's consultation notes of March 19, including back pain and headache. Dr. Chang diagnosed a grade 2 soft tissue injury to Mr. Mundell's neck and back. He advised him to apply cold packs for 72 hours post-accident, and to try to keep mobile. He prescribed cyclobenzaprine and lorazepam, but did not consider it necessary to order any radiology.
- [11] I will return to Mr. Mundell's medical history later in these reasons.

MVA 2

- [12] On October 4, 2013, Mr. Mundell was on his way to have a late lunch with a friend when his vehicle was rear-ended by a Purolator delivery van. The collision occurred while Mr. Mundell was in the right lane of traffic, turning off the highway. Mr. Mundell testified that he suddenly felt a large jolt and knew he had been rear-ended. He exchanged information with the driver of the van and was able to drive his car from the scene of the accident to keep the lunch appointment.

- [13] Mr. Mundell testified that immediately after the collision he felt a little stiff and felt he had a headache coming on. He cut short his lunch because his headache worsened and became, in his words, a "massive headache". He said he also experienced pain in his back and upper leg.
- [14] Mr. Mundell made an appointment with Dr. Chang but was not able to see him until the following Thursday. He testified that during that time he was experiencing excruciating headaches that lasted up to three hours at a time. His evidence was that the headaches worsened, and that he has experienced them two to three times per day, continuing to the time of trial. He states that initially he did get some temporary relief from Botox injections. However, he says that these injections became less effective over time.
- [15] On October 10, 2013, Mr. Mundell was able to see Dr. Chang. Dr. Chang's notes indicate that Mr. Mundell reported increasing hip pain that radiated down his outer right leg. He also reported having some difficulty with sexual relations with his partner. Notably, the notes record that Mr. Mundell reported increased bi-frontal headaches "today" and increased neck pain over the last two days that would accompany movement.
- [16] In his closing submissions, Mr. Mundell's counsel submitted that these excruciating, constant headaches are his main complaint and the cause of most of his subsequent difficulties. Mr. Mundell's position is that these headaches have destroyed his ability to run his business or to pursue any meaningful employment as well as having a devastating impact on his personal life.

Background and History

- [17] Mr. Mundell was born in 1970 and for most of his childhood lived in an affluent household.
- [18] Mr. Mundell completed high school. After some post-secondary schooling he went to Paris to enroll in the Le Cordon Bleu Paris culinary school. Despite a limited mastery of the French language, he successfully completed that course, but did not pursue a career as a chef. He did however obtain training in hotel management and worked overseas for a number of years in the international hospitality industry.
- [19] In 1995, while on vacation in Canada, he was injured in a motor vehicle accident and did not return to his employment in Azerbaijan. In or about 2000, he joined his stepfather and his brother in a wholesale flooring business. While I do not recall any specific date being given in evidence, at or around this time Mr. Mundell married and subsequently had three children. He separated from his wife in or about 2009.
- [20] Unfortunately, after the flooring business was formed, Mr. Mundell's brother was injured in a skiing accident and required multiple surgeries, all of which caused extreme pain for which he was prescribed narcotic medications. Eventually his brother developed an addiction to those medications and ended up taking his own life. These events had a profound effect on Mr. Mundell.

- [21] After a few years of being in business with his stepfather, Mr. Mundell incorporated his own flooring supply company, a numbered company which carried on business under the name JM Imports ("JMI").
- [22] In 2007, Mr. Mundell incorporated Trilogy International Ltd. ("Trilogy"). From the expert report prepared by Daniel Sturgess, a certified business valuator, it appears that Mr. Mundell originally intended to supply certified wood products (that is, wood products certified by the Forest Stewardship Council as products produced from responsibly managed forests) through JMI and non-certified wood products, primarily flooring, through Trilogy. However, his efforts to supply certified wood products were not successful, and after 2008 he carried on his business exclusively through Trilogy.
- [23] Trilogy's business model was for Mr. Mundell to locate overseas sawmills that could supply wood flooring products to his North American customers. An essential element in his business plan was to have his customers pay for these products before Trilogy had to pay the mills that supplied them. This permitted Trilogy to operate without any significant working capital.
- [24] Trilogy had only two customers that are relevant to this litigation: Metropolitan Hardwood Floor Inc. ("Metropolitan") and Buckwold Western Ltd. ("Buckwold"). Metropolitan is a United States company based in Washington State and Buckwold is a Canadian company headquartered in Saskatchewan.
- [25] For a time Trilogy operated profitably and increased its sales to its two customers. In 2007, according to its financial records, it had sales, rounded to the nearest \$1000, of USD \$5,831,000. However, in 2008 sales declined to USD \$3,103,000, and further declined in 2009 to USD \$1,722,000. From 2009 onward almost all of Trilogy's sales were to Buckwold.
- [26] I accept that a portion of the decline in sales was attributable to the global economic conditions arising out of the 2008 credit crisis. However, Metropolitan ceased to purchase any products from Trilogy in 2008 and, except for a small order in 2014, did not purchase any further products after that year.
- [27] Trilogy's sales to Buckwold increased to USD \$2,758,000 in 2010, then declined to USD \$1,877,000 in 2011, USD \$1,373,000 in 2012, and USD \$1,164,000 in 2013. Trilogy ceased preparing financial statements after 2013, though it did have some sales in 2014, including one sale to Metropolitan.
- [28] Mr. Mundell's position is that the drop in revenue was attributable to his inability to operate his business as a result of the injuries he suffered in the two accidents. The defendants' position is that the loss of revenue was not attributable to the accidents.

- [29] There is considerable dispute about the state of Mr. Mundell's health prior to MVA 1. However, there is no dispute that he suffered from a number of musculoskeletal conditions. The consensus of the medical evidence is that he also had bipolar II disorder. The parties dispute the degree to which these conditions were symptomatic and the impact they had on his pre-accident functioning.
- [30] Mr. Mundell testified that he was not incapacitated or handicapped in any way by his pre-accident condition. The defendants take the position that Mr. Mundell's pre-accident conditions were symptomatic and that Mr. Mundell was taking significant amounts of analgesic medication, including prescribed morphine sulphate, to treat his symptoms.
- [31] I accept that Mr. Mundell was capable of performing all of the essential tasks of his business before MVA 1. The real question with respect to MVA 1 is the extent, if any, to which that accident caused injuries that had a permanent disabling effect on him.
- [32] Mr. Mundell testified that after MVA 1 he experienced severe and debilitating lower back pain that required him to take medications, affected his ability to sit for long periods of time, made it very difficult for him to concentrate, and made it impossible to engage in his former recreational activities such as dirt biking. He says he tried golf on a couple of occasions after MVA 1 but was not able to complete a round and suffered back pain thereafter.
- [33] He also testified that following MVA 1 he took his children to a townhouse owned by his father in Palm Springs and took a nanny along to help with the children.
- [34] Mr. Mundell returned in October to his home in Port Coquitlam after spending about three months in Palm Springs. He described his pain as being so excruciating that he felt like he was being kicked in the back by steel-toed boots. Later that year he decided to take his family, a nanny, and his mother and stepfather to Hawaii to celebrate his 40th birthday. He said that before he had spinal fusion surgery to his lumbar spine in December 2010, he could not walk five feet. He commented that his parents could not believe the state he was in while in Hawaii. He tried acupuncture without success.
- [35] Eventually Mr. Mundell's father arranged for him to fly to California for a medical assessment. He had surgery there to fuse his lumbar spine in December 2010. After the surgery he convalesced in Palm Springs and hired a nurse to assist him. He received passive therapies such as massage and physiotherapy. After the surgery his symptoms improved considerably. Although he continued to experience pain, he was able to walk.
- [36] After Mr. Mundell returned to British Columbia he described his circumstances as horrible and wonderful at the same time. He testified that he was under doctor's orders not to lift his small daughter. He said that he remained in pain and became short-tempered with his family. He particularly noticed elevated pain when he drove his car. At that time, he employed two domestic employees as well as a gardener. His mother and stepfather helped with childcare and domestic chores.

- [37] In April 2011, Mr. Mundell returned to California to have surgery to address the symptoms of thoracic outlet syndrome ("TOS") that he had experienced for several years prior to MVA 1. This surgery improved his TOS complaints. There is no allegation that the accidents made a material contribution to his TOS condition.
- [38] Mr. Mundell testified that after he returned to British Columbia following his thoracic outlet surgery his lower back pain improved somewhat. However, he also said that his ability to pursue his business continued to be very limited by his ongoing back pain. In his words "pain was ruling my life". Although Mr. Mundell was emphatic that he faced severe limitations as a result of his pain, his evidence about the specifics of that pain and how it affected his functioning was general and non-specific. For example, when asked what tasks he was performing at work he used words to the effect that he "mostly put out fires".
- [39] Between April and November 2011, Mr. Mundell's mood deteriorated. He said that during those months he had periods of depression for the first time. On November 4, 2011, he saw Dr. Chang about his mood. At that time, he told Dr. Chang that he was experiencing increased irritability and angry outbursts. He said that he was having particular difficulties with his insurance companies that had refused to accept or settle his claims for medical costs, and was also involved with a dispute with his insurers with respect to damage to his house. He said his work output had decreased. He also reported being under financial distress.
- [40] However, in the same visit he said he was physically much improved after his surgeries and subsequent convalescence. He also indicated that he had only recently returned to exercise and regular job duties. Dr. Chang conducted some psychological inventories and concluded that Mr. Mundell was suffering from severe depression and anxiety. He counselled Mr. Mundell for 30 minutes, gave him a referral to a psychiatrist, and prescribed escitalopram and zopiclone as anti-depressants.
- [41] In a follow-up examination two weeks later, Dr. Chang reported Mr. Mundell was feeling better after taking the anti-depressants. However, he also reported some suicidal ideation.
- [42] On the evening of November 26, 2011, Mr. Mundell consumed a large amount of Tylenol 3, muscle relaxants and vodka and passed out, waking up the next morning. On November 28, he again saw Dr. Chang, who spent some time reviewing his psychological condition. In this appointment he made no mention of disabling on-going pain. However, the focus of the appointment was to discuss the incident of November 26, which Dr. O'Shaughnessy, a psychiatrist who prepared a report for the plaintiff, described as a suicidal gesture. Mr. Mundell did not mention pain to Dr. Chang as one of the reasons for this gesture.
- [43] At a follow up visit on December 2, 2011, Dr. Chang again reviewed Mr. Mundell's complaints and symptoms and made some changes to his prescriptions. After a number of subsequent visits, on February 16, 2012 Dr. Chang noted that Mr. Mundell's mood had stabilized and that he had reported that he was able to carry out his usual business activities.

- [44] On May 22, 2012, Mr. Mundell told Dr. Chang that after his surgeries he was starting to show significant improvements with increasing range of motion and marked improvement in his pain. At that time, he was not taking any medication for pain. He said he was working with a trainer, was gradually improving his strength, and was able to lift significant amounts of weight with his arms and legs without pain. He stated that he was not having any headaches. He said that he was working again and business was improving.
- [45] On May 16, 2012, Mr. Mundell was a passenger in a car that went over a speed bump or pothole. He was thrown sideways and hit the right side of his body and head against the door and window of the car. He reported pain in the neck and the back of his legs. Overall, however, Dr. Chang concluded that Mr. Mundell's symptoms were improving and recommended conservative treatment. He prescribed morphine sulphate and arranged to see him in two weeks. Any symptoms from this event resolved shortly after this visit.
- [46] On July 23, 2012, Mr. Mundell told Dr. Chang that he had discontinued the use of antidepressants as suggested by his psychiatrist. In that visit Mr. Mundell reported that two days previously he had awoken with a moderate steady headache and increased neck spasm. Dr. Chang diagnosed the headache as a tension headache from neck spasm.
- [47] Dr. Chang did not see Mr. Mundell again until December 17, 2012, when Mr. Mundell reported that he felt his mood disorder was starting to return. During that visit Mr. Mundell told Dr. Chang that over the previous several months he had been trying to deal with problems associated with his business that were created over the last year due the lack of interest that resulted from his mental illness. At that time, he did not attribute those problems to any pain symptoms. This was followed up with a visit on January 4, 2013, in which Mr. Mundell repeated that he was having some difficulties with concentration and initiative, although it had improved somewhat. Again, Mr. Mundell did not attribute these difficulties to pain.
- [48] On January 28, 2013, Mr. Mundell reported to Dr. Chang that he had developed increased lower back pain after noticing a pop during sexual activities. At that visit Dr. Chang recorded that Mr. Mundell had previously had self-limited episodes of lower back pain which would improve after several days, but had not had such an episode since his lumbar fusion in 2010. In March 2013, Mr. Mundell reported back spasms after bowling with his children. Dr. Chang described these symptoms as identical to his previous low back episodes, saying that Mr. Mundell "knows what needs to be done and had come in for help with medications". Dr. Chang gave him prescriptions for cyclobenzaprine and morphine sulphate.
- [49] On June 11, 2013, Mr. Mundell saw Dr. Chang to renew his bipolar II medications and other matters not related to this litigation. At that time, he requested that his medication be switched to Abilify because he was experiencing some hallucination-like symptoms on Seroquel. He reported that his bipolar II condition remained stable.

- [50] The next report of pain in Dr. Chang's records is dated September 12, 2013, when Mr. Mundell reported bilateral hip pain, worse in the right leg. In that appointment he described his back pain as somewhat settled after his back surgery in California in 2010.
- [51] On September 26, 2013, Mr. Mundell again saw Dr. Chang with respect to his depression and repeated his complaints of bilateral hip and pelvic pain. That summer, Dr. Chang had ordered a bone scan and was awaiting its results. There is no mention in this consultation of any complaints related to MVA 1.
- [52] As indicated above, Mr. Mundell saw Dr. Chang on October 10, 2013, the Thursday following MVA 2. His evidence was that this was the first appointment that he could obtain. He did not attend at any walk-in clinic or seek treatment at a hospital emergency ward in the six days between MVA 2 and this appointment.
- [53] In this visit Mr. Mundell told Dr. Chang that he had awoken the morning after MVA 2 with stiffness and soreness of the lower back. The notes of the visit indicate that he had been sexually active since MVA 2. Dr. Chang also noted that Mr. Mundell reported increased bi-frontal headaches, but it is not clear from his clinical notes whether those were being experienced from the time of MVA 2 or just on the day of the appointment. In any event it is clear that headaches were not his principal complaint at that time.
- [54] Mr. Mundell next saw Dr. Chang with respect to the injuries he suffered in MVA 2 on January 7, 2014, some three months after his first appointment. At that time his principal complaint was localized sharp stabbing neck pains which radiated up to the temporal scalp with headaches. Dr. Chang had previously ordered X-rays of Mr. Mundell's neck, but those had not taken place by the date of this appointment.
- [55] On January 17, Mr. Mundell had a follow-up appointment to discuss the results of the X-rays to his neck, which showed no significant changes from 2008. His principal complaint continued to be severe neck pains. There was no mention of headaches, but there was a reference to neck pain radiating into the nuchal ridge at the back of his neck.
- [56] Mr. Mundell's next appointment with Dr. Chang with respect to MVA 2 was on September 18, 2014, to complete an ICBC Form CL-19. In that visit he made no reference to headaches, but again reported that his neck pain did have some radiation into his left ear and temple.
- [57] I have reviewed all of Dr. Chang's notes of further appointments with Mr. Mundell after September 2014. I can find little reference to debilitating headaches in those notes. Apart from his ongoing psychiatric problems, Mr. Mundell's principal complaints in that period related to neck pain. For example, on March 16, 2015, Mr. Mundell reported increased neck pain with radiation into the shoulder region. At that time, he also reported that he was beginning to self-isolate again.

Overview of Issues

- [58] There is a divergence between the objective evidence of injury in these cases and the symptoms to which Mr. Mundell has testified. This in itself is not unusual. However, it means that Mr. Mundell's case is largely dependent on his own evidence of his condition before and after the accidents. This in turn makes his credibility of central importance to the disposition of these actions. This is particularly so because almost all of the expert medical evidence tendered by the plaintiff proceeds on the assumption that Mr. Mundell accurately reported his symptoms to the persons who prepared the reports.
- [59] This also makes it necessary to address credibility at the outset of these reasons.
- [60] Some of the considerations relevant to an assessment of credibility were set out in *Bradshaw v. Stenner*, 2010 BCSC 1398:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).
- [61] The above quotation, and other authorities, emphasize that an assessment of credibility requires a careful review of all of the factors touching on the reliability of a witness's evidence.
- [62] I have reluctantly concluded that Mr. Mundell was not a reliable witness in this trial. There are a number of specific reasons why I reached that conclusion, which I will outline in the following paragraphs of these reasons. Before doing so however I make the general observation that Mr. Mundell was prone to exaggeration in giving his evidence, was frequently non-responsive to questions put to him in cross-examination, and on numerous occasions gave answers that were implausible in the circumstances.
- [63] Counsel for ICBC listed a large number of criticisms of Mr. Mundell's credibility in an appendix to their written closing submissions. While I find that many of these criticisms were unwarranted, I do find that others are illustrative of the inherent unreliability of Mr. Mundell's evidence.

- [64] In his evidence Mr. Mundell made a point of emphasizing the vast difference between his pre and post-accident condition with respect to both his personal and business circumstances. Many of these comparisons were inaccurate, but Mr. Mundell persisted in asserting his incorrect recollections even when presented with objective evidence that contradicted them.
- [65] One example of this involved Mr. Mundell's evidence as to Trilogy's gross sales and margins before MVA 1. In his evidence-in-chief he stated that Trilogy had sales revenue of \$8,000,000 in 2007. In fact, its revenue that year was approximately \$6,200,000. He testified that Trilogy's sales doubled in one year between 2006 and 2007, when in fact they increased by only 30%. Similarly, he testified that Trilogy's gross margin on sales was 23-25%. However, Trilogy's own records showed that the gross margin before MVA 1 was less than 14%.
- [66] In addition, Mr. Mundell insisted that Trilogy continued to sell product to Metropolitan after 2008, but the records show no new sales after the end of that year until a small order in 2014. When it was put to him in cross-examination that Trilogy had no sales to Metropolitan after 2008, he testified that there were sales in 2011 even though Trilogy's records do not support that evidence.
- [67] An equally troublesome example of Mr. Mundell's reliability concerned his evidence about how actively involved he had been in his business prior to MVA 1. According to the report of the plaintiff's occupational therapist, Megan Stacey, Mr. Mundell told her that he had traveled 400,000 miles on business in one year. In his direct examination, he stated that he traveled 200 days a year. However, when his passport for March 2006 to March 2011 was put to him in cross-examination, showing that he had not traveled remotely close to that amount of time, he testified that this was a replacement passport for one showing more travel that his children had damaged. He testified that he had had to surrender the previous passport to the government to obtain a new one. However, the passport in evidence shows that it was issued in Vancouver on March 20, 2006, and contained visas from as early as December 2006 through 2010.
- [68] In my view Mr. Mundell's evidence that there was another passport covering the same period showing greater travel was simply unbelievable. He produced no corroborating evidence supporting the existence of such a passport. I also note that Mr. Mundell did not tender any other documents supporting his evidence that he had traveled to the extent he claimed.
- [69] A further example of the implausibility of Mr. Mundell's evidence is his testimony that he played no role in the determination of the amounts charged as business expenses to Trilogy. In direct examination Mr. Mundell testified that he had observed his father and his wealthy friends "writing off" expenses and that his objective was to get the taxes of his company "down to zero". He said that he left it up to his accountants and his bookkeeper, Alvina Wu, to decide how to book his expenses. While Trilogy was operating, Mr. Mundell charged virtually all of his personal expenses as corporate expenses. Mr. Mundell said that when he

met with his accountants to discuss the year end statements for Trilogy, he spent his time playing video games and writing emails, playing no role in the discussions regarding the year end.

- [70] Mr. Mundell did not call any independent evidence to support this testimony. Alvina Wu was called as a witness. Her evidence directly contradicted Mr. Mundell's evidence that she decided how to record expenses. Her evidence, which I accept, was that Mr. Mundell told her where to book the expenses. Mr. Mundell's credibility is further eroded by his admission that some of the expenses claimed were entirely fictitious, including large amounts claimed for a non-existent office for Trilogy in China.
- [71] I do not accept the submission of Mr. Mundell's counsel that he accepted responsibility for the wrongful charging of expenses to his company. On the contrary I find that in his evidence Mr. Mundell sought to minimize his role in the claiming of these false business expenses and tried to lay the blame for them on Ms. Wu and his accountants.
- [72] I also have concerns about demonstrably false evidence given by Mr. Mundell in a previous proceeding. On May 18, 2010, Mr. Mundell swore an affidavit verifying his income in matrimonial proceedings with his estranged spouse. Despite the evidence he gave in this trial that his company was very profitable in 2009 and 2010, he deposed in his financial statement that his income for spousal and parental support purposes was zero. This is particularly troubling because it demonstrates that in 2010 Mr. Mundell was prepared to make false statements under oath to advance his position in litigation. I find the explanation given by Mr. Mundell that he put that information in his financial statement because his tax return showed no income to be inherently implausible. I am satisfied that Mr. Mundell knew that he was receiving a substantial income and living an affluent lifestyle in 2010.
- [73] I am also unable to reconcile Mr. Mundell's evidence with respect to his symptoms after both MVAs with the symptoms he described to Dr. Chang, and to a lesser extent, to the numerous professionals who examined him clinically and for the purpose of preparing their opinions in this litigation.
- [74] In particular, Mr. Mundell testified that he has suffered from severe debilitating headaches from the day after MVA 2 to the present. He described those headaches as so severe that he spent most of his time lying in bed at home with the lights out. He said that the headaches were a daily occurrence and that usually he would experience them two to three times per day with a duration of up to three hours.
- [75] However, the evidence does not support these assertions. I reviewed the clinical records of Dr. Chang in some detail above. Mr. Mundell did not report headaches of the type to which he testified to Dr. Chang until 2015 at the earliest. Mr. Mundell did not see Dr. Chang about the injuries he suffered in MVA 2 between January 17, 2014, and September 18, 2014, when he came in to complete the ICBC Form CL-19.

[76] On November 25, 2014, Dr. Chang recorded that Mr. Mundell had been sent for a CT scan of his neck after reporting increased neck symptoms. The scan showed severe degenerative changes at C6-C7 and C4-C5, with possible critical narrowing of the exiting C7 nerve root and possible impingement of the left C5 nerve root. These findings were not related to the accidents and were generally consistent with the 2008 scans. Dr. Chang reported that these findings were consistent with his symptoms. There was no report of headaches in this consultation.

[77] In addition to the lack of evidence of seeking treatment for headaches, the evidence of Mr. Mundell's activities in the month following MVA 2 does not support his evidence about his condition. Counsel for the MVA 2 Defendants cross-examined Mr. Mundell on his MasterCard purchases in November 2013. These show that Mr. Mundell made purchases at Petro-Canada as follows:

1.

November 2

\$98.82

2.

November 7

\$96.59

3.

November 13

\$93.17

4.

November 18

\$108.04

5.

November 21

\$50.00

[78] When he was cross-examined about these purchases and it was suggested to him that they indicated that he was driving his car regularly in November, Mr. Mundell refused to agree that these were purchases of fuel and instead said they may have been purchases of Red Bull energy drink. I find that answer to be inherently implausible.

[79] Mr. Mundell did not produce MasterCard statements for any period after the November 2013 statements.

[80] For all of the above reasons and due to the numerous other inconsistencies in his evidence I have concluded that I cannot rely on Mr. Mundell's evidence as to his physical condition or the circumstances under which his business collapsed.

Mr. Mundell's Original Position before MVA 1

[81] Mr. Mundell is entitled to damages which will fairly compensate him for any impairment of his position prior to MVA 1 which were caused or contributed to by the defendants' negligence. Because there are two accidents in this case, I must also determine whether the damages he has suffered are divisible or indivisible as between MVA 1 and MVA 2. I must also be satisfied that the damages he alleges he suffered would not have been suffered but for the defendants' negligence.

[82] In this case Mr. Mundell's original position before both MVAs is very much in dispute.

[83] However, there is agreement between Dr. Cameron, an expert who filed a report on behalf of the plaintiff, and Dr. Negraeff, an expert who filed a report on behalf of ICBC, that the following is a fair description of Mr. Mundell's condition prior to MVA 1:

Dr. Armstrong's analysis of Mr. Mundell's condition prior to the first MVA concluded that he had pre-existing chronic axial myofascial disorders, degenerative disc disease in the cervical and lumbar spine, thoracic outlet syndrome, headaches with some features of migraine, recurring shoulder dislocations, developmental disorders of his thoracic and lumbar spine (possibly Scheuermann's disease), bipolar disorder and ADD. He also opined that Mr. Mundell had risk factors for worsening chronic pain including pre-existing chronic pain, previous personal exposure in his upbringing to familial abuse, mental illness, and substance use disorders. He further stated Mr. Mundell told him that he did not have any functional limitations from these problems in personal care, work, social or recreational roles.

As for experience of pain specifically, Dr. Armstrong states Mr. Mundell had chronic neck, shoulder and back pain pre first MVA. He also said he had intermittent numbness and tingling in the distal upper extremities.

From the documents available, I agree that Dr. Armstrong's assessment of the Plaintiff's condition prior to the first MVA is an accurate representation. I note also the family doctor records note Mr. Mundell also suffered from frequent insomnia prior to the first MVA. (Exhibit 80, p. 10 - 11)

[84] Despite my general agreement with the above description, I am not satisfied that Mr. Mundell had or has Attention Deficit Disorder (ADD). I find that both before and after the accidents Mr. Mundell suffered from bipolar II disorder. I am satisfied that some of his behaviours before the accident, such as his profligate spending habits and his complete disregard for the income tax responsibilities of himself and his company, were attributable to the manic phase of this disorder. Therefore, I find that that the symptoms of that disorder were part of Mr. Mundell's original position before MVA 1.

- [85] There was considerable discussion in the trial about whether the back pain experienced by Mr. Mundell prior to MVA 1 should be characterized as chronic. However, in my view the label used to describe his condition is less important than understanding the actual state of his health prior to the accidents.
- [86] There is no doubt that Mr. Mundell suffered from a number of medical conditions prior to MVA 1. As noted above, the undisputed evidence is that he suffered from degenerative disc disease both in his cervical and lumbar spine, as documented in an MRI he underwent in 2008. These conditions tended to flare up if Mr. Mundell strained his back through over-exercise or as a consequence of minor accidents, such as one that occurred with a golf cart.
- [87] The consensus of medical opinion is that Mr. Mundell also had a bipolar II disorder prior to MVA 1. Bipolar II disorder differs from bipolar I in that its manic phase does not result in disabling behaviour. This was referred to by the physicians as hypomania. Prior to MVA 1 Mr. Mundell did display some self-damaging activities, such as extravagant spending that resulted in him living beyond his considerable income and reduced sleep. It is also possible that the manner in which he recorded his personal expenses as business expenses may have also been attributable in part to his bipolar disorder.
- [88] I find that flare ups of back pain from relatively minor traumas were part of Mr. Mundell's original position. Each MVA aggravated his symptoms, but I could see no objective evidence that they were significantly more serious than other non-tortious incidents that caused flare-ups.
- [89] The question of when the symptoms from MVA 1 resolved is complicated by the lumbar surgery that Mr. Mundell underwent in December 2010. It appears there was a long period of convalescence after that surgery and subsequent TOS surgery in 2011. However, by 2012 Mr. Mundell reported substantial improvement in his back pain.
- [90] Despite the fact that Mr. Mundell suffered from the above afflictions, before MVA 1 he did manage to achieve success in business, purchase a home, and take an active part in the raising of his three children. However, I found it difficult to form a comprehensive view about his pre-accident activities in the years leading up to MVA 1.
- [91] I found Mr. Mundell's evidence about his pre-accident condition to be vague, without a clear chronological framework, and anecdotal in nature. For example, he testified that he had enjoyed dirt biking and that he had skydived. However, he did not say when or how often he engaged in those activities. Similarly, his evidence about his pre-accident business activities was extremely general, and at times inconsistent with the documentary evidence. He did not describe what he did in connection with his employment on a regular basis. I was left with no idea how much time he spent on business when he was not travelling. Furthermore, the evidence he did give with respect to his work-related traveling was clearly exaggerated, as demonstrated by the discrepancies between his oral evidence and his passport.

- [92] In addition, the evidence of the collateral witnesses called by Mr. Mundell about his pre-accident condition was vague. Alvina Wu described him as the smartest person she knew but provided no details as to how she reached that conclusion.
- [93] Scott Cooper, an employee of Buckwold who frequently attended trade shows with Mr. Mundell prior to MVA 1, described him as energetic and engaged during these shows. However, he provided few specifics about Mr. Mundell's day-to-day functioning. Similarly, Mr. Mundell's stepfather gave a few anecdotes about Mr. Mundell but provided little detailed information.
- [94] I also find that Mr. Mundell was less than candid about the health difficulties he was facing prior to MVA 1. The evidence discloses that he frequently consulted Dr. Chang in that period for complaints relating to his neck and back.
- [95] On May 12, 2009, Dr. Chang reported that Mr. Mundell was taking gabapentin, a neuropathic pain medication for his chronic neck pain. On June 20, 2009, Dr. Chang again reported that Mr. Mundell was suffering gradually increasing neck, shoulder, and back pain as a result of running out of gabapentin. On July 13, 2009, Mr. Mundell reported suffering from a severe headache for the previous five days, which resulted in him going to the hospital.
- [96] On November 19, 2009, Dr. Chang reported that Mr. Mundell was having increased lower back pain and that an MRI from November 2008 showed diffuse degenerative changes in the lumbar spine. At that time, he also recorded that Mr. Mundell had an appointment with a neurosurgeon concerning his neck pain and thoracic outlet syndrome. At that appointment Dr. Chang prescribed cyclobenzaprine and morphine tablets.
- [97] On December 21, 2009, Mr. Mundell reported to Dr. Chang that he was suffering from insomnia. On January 14, 2010, Dr. Chang prescribed zopiclone to help Mr. Mundell sleep on a business trip to Europe. That prescription was refilled on February 15, 2010.
- [98] In my view these appointments do confirm that Mr. Mundell was suffering episodes of back and neck pain and was dealing with insomnia prior to MVA 1.
- [99] On balance I conclude that before MVA 1 Mr. Mundell was able to function adequately in his business, but that he was struggling to do so. An example of this was the evidence about his dealings with Metropolitan prior to MVA 1.
- [100] Metropolitan was one of Trilogy's two key customers up to 2008. The product that Trilogy sourced for Metropolitan came from a mill in Malaysia, referred to in the evidence as the "BKB Mill". In 2007, Trilogy sold just over \$3,000,000 of product to Metropolitan. However, in 2008, apparently as a result of a change in management at the BKB Mill, Metropolitan began to experience a marked decline in the quality of its product. Mr. Mundell gave extensive evidence about his efforts to address the quality problems with the BKB Mill. As I understand it, Mr. Mundell paid funds out of his own pocket to address some of the claims Metropolitan had when BKB refused to honour claims for certain products that Metropolitan considered to be defective. However, despite his efforts, Metropolitan ceased

to buy product from the BKB Mill in 2008, Mr. Mundell was unable to source another mill for Metropolitan, and Trilogy did no further business with it until 2014, when it placed a small order.

- [101] I accept that the 2008 financial crisis was part of the reason for Metropolitan ceasing to buy product from Trilogy. However, Metropolitan remained in business and Buckwold continued to import product in that period. There was no specific evidence of what efforts Mr. Mundell made to regain sales to Metropolitan in the period between the time that they ceased purchasing BKB Mill products and MVA 1.
- [102] In that period Mr. Mundell was involved in matrimonial proceedings with his wife and his spending continued unabated.
- [103] Mr. Mundell admitted that he became reckless in the handling of Trilogy's finances during that time. The conclusion I reach is that Trilogy lost Metropolitan as a customer because of the problems with the BKB Mill and because Mr. Mundell was unable to find another mill to supply Metropolitan. There is no evidence on which I can conclude that Trilogy would not have lost Metropolitan as a customer but for MVA 1 or that there was a substantial possibility that that would not have occurred.
- [104] In summary, I conclude that Mr. Mundell's pre-MVA 1 condition was that: (i) he suffered from degenerative disc disease in his lumbar and cervical spine that tended to become symptomatic through overuse or minor trauma; and (ii) he suffered from bipolar II disorder that chiefly manifested itself in reckless personal spending and unsound business practices, together with chronic insomnia. In addition, he was going through divorce proceedings with his spouse and was experiencing financial difficulties, which were undoubtedly causing him some distress.

Medical Opinion Evidence

- [105] The parties filed a great deal of medical evidence in this case.
- [106] The plaintiff filed expert reports from the following professionals:
1. A report dated June 18, 2018, and addendum reports dated March 4, 2019, April 5, 2019, and November 19, 2020, from Dr. Harpreet Sangha, a specialist in physical medicine and rehabilitation;
 2. Medical legal reports dated June 25, 2012, and October 24, 2016; addendum reports dated February 6, 2017, and February 7, 2019; a rebuttal report dated March 19, 2019; and an updated medical legal report dated November 7, 2020, from Dr. Roy O'Shaughnessy, a psychiatrist;
 3. Medical legal reports dated July 11, 2011, October 26, 2011, and December 23, 2020, from Dr. Ramesh Sahjpaul, a neurosurgeon;

4. A medical legal report dated December 2, 2016, and rebuttals dated April 4, 2019, December 7, 2020, and January 11, 2021, from Dr. John Armstrong, a specialist in the assessment and management of patients with chronic non-cancer pain;
5. A medical legal report dated April 13, 2019, from Dr. Donald Cameron, a neurologist;
6. A report on past and future loss dated November 16, 2020, from Daniel Sturgess, a certified professional accountant, certified business evaluator, and forensic accountant;
7. A medical legal report dated November 12, 2020, from Dr. Spencer Wade, a registered psychologist;
8. A cost of future care analysis dated November 13, 2020, from Megan Stacey, an occupational therapist;
9. A medical legal report from Dr. Herbert Chang, Mr. Mundell's family and treating physician, dated January 3, 2017.

[107] ICBC relied on the following expert reports:

1. A medical legal report dated November 22, 2015, from Dr. John Paul Thompson, an orthopaedic surgeon;
2. A rebuttal report dated December 28, 2020, prepared by Tania Percy, an occupational therapist;
3. A rebuttal report of February 11, 2017, to the report of Dr. Armstrong, prepared by Dr. Michael Negraeff, an anaesthesiologist and pain specialist;
4. Medical legal reports dated May 27, 2016, May 7, 2017, and November 30, 2020, prepared by Dr. Todd Tomita, a forensic psychiatrist.

[108] The MVA 2 Defendants relied on the following reports:

1. A medical legal report dated October 26, 2017, prepared by Dr. Richard Kendall, an orthopaedic surgeon;
2. A medical legal report dated February 26, 2019, prepared by Dr. Catherine Paramonoff, a specialist in physical medicine and rehabilitation;
3. Medical legal reports dated December 22, 2017, and December 18, 2020, of Dr. Kevin Solomons, a psychiatrist.
4. Medical legal reports dated January 23, 2018, March 12, 2018, and December 22, 2018, of Dr. Peter Wong, a neurologist.

[109] I have read all of the reports from all parties' experts. However, I do not find it necessary to review this evidence in detail because all of the experts called by Mr. Mundell based their opinions on the assumption that Mr. Mundell was a reliable source of information about his pre- and post-accident condition. However, the facts on which the plaintiff's expert

evidence is based have not been established because I have found that he is not a reliable source of such information. The plaintiff's experts of course relied upon some information from sources other than Mr. Mundell, such as reports on radiology and Dr. Chang's clinical records. The fact remains however that the facts in this case may be markedly different than those assumed by the plaintiff's experts.

Mr. Mundell's Objectively Verifiable Injuries

- [110] The considerations addressed in the previous paragraph are particularly important in this case because there is very little disagreement over the extent of Mr. Mundell's objectively measurable physical injuries.
- [111] The evidence is that MVA 1 did cause some myofascial injuries. These were described by Dr. Chang as grade 2 soft tissue injuries to the neck and back. A grade 2 injury involves a partial tear of the soft tissue fibres, although the tissue still remains intact. The swelling, tenderness, and pain are more pronounced and the healing time can be considerably longer than a grade 1 injury. It typically takes anywhere from about six weeks to a couple of months for a grade 2 injury to heal, although in up to 15% of the cases the symptoms may become chronic.
- [112] It is difficult to determine when Mr. Mundell's symptoms from MVA 1 resolved because of his decision to have lumbar fusion surgery in December 2010. For reasons I will set out later, I am unable to conclude that this surgery was performed to address any injuries Mr. Mundell suffered in MVA 1. Based on the evidence I do have I conclude that the surgery was performed to address the pre-existing degenerative disc disease shown on radiography as existing in 2008. There is no question that the surgery required a period of convalescence after December 2010.
- [113] Previously in these reasons I referred to a consultation Mr. Mundell had with Dr. Chang on May 22, 2012. Based on this consultation, I conclude that Mr. Mundell had returned to his pre-accident condition by that time.
- [114] With respect to MVA 2, I find that Mr. Mundell's physical injuries consisted of a mild whiplash-type injury.
- [115] Dr. Chang diagnosed soft tissue injuries to the neck and lumbar paraspinal muscles as a result of MVA 2. While he did not specify what grade he diagnosed, from the treatment he ordered I infer that he regarded them as grade 1.
- [116] Mr. Mundell did not seek treatment for MVA 2-related symptoms from Dr. Chang between January 2014 and early 2015. As I have already indicated, Mr. Mundell has not established that he was suffering from debilitating headaches in this period. I therefore conclude that he was not suffering any significant symptoms attributable to MVA 2 after January 2014 and had returned to his pre-accident condition by mid 2014.

- [117] If Mr. Mundell's reported symptoms are genuine, they must have a psychological foundation. However, of the many experts who prepared reports, only Dr. Cameron diagnosed what may in lay terms be described as symptoms generated by psychological causes. The preponderance of medical evidence is that Mr. Mundell suffers from bipolar II disorder, which predates the MVAs. All of the doctors who have diagnosed a connection between this condition and the accidents acknowledge the relationship between the two is complex. For example, in his February 6, 2017 report, Dr. O'Shaughnessy states that mood disorders are highly sensitive to psychosocial stressors and can often be triggered by events such as significant loss, financial pressures, physical injuries, and blows to self-image.
- [118] In the same paragraph Dr. O'Shaughnessy concludes that the two accidents were material factors triggering Mr. Mundell's subsequent depressive episodes. However, in reaching that conclusion he clearly relies on Mr. Mundell's self-reported pain symptoms, which I have concluded are exaggerated and unreliable.

Causation

- [119] The principles of causation are well-settled but sometimes difficult to apply, especially with regard to the assessment of damages in tort.
- [120] To establish liability the plaintiff must show that he would not have suffered the loss claimed but for the negligence of the defendant. A plaintiff need not show that the defendant's negligence was the sole cause of his injuries as long as it is part of the cause beyond the de minimis range. Causation need not be determined with scientific precision.
- [121] The rules of causation must not be confused with the rules of damage assessment in tort. The distinction was explained by Chief Justice McLachlan in *Blackwater v. Plint*, 2005 SCC 58:
- [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.
- [122] With respect to the assessment of damages, the plaintiff is entitled only to be placed in the same position that they were in before the tortious conduct of the defendant (their original position).
- [123] I have concluded that Mr. Mundell has not established that the two motor vehicle accidents have made a material contribution to his present difficulties.

- [124] I base this conclusion on the following factors.
- [125] Firstly, I cannot accept Mr. Mundell's evidence as to the severity of the symptoms he alleges he is suffering. I have already stated the reasons why I did not find him to be a credible or reliable witness and need not repeat them.
- [126] It follows from my rejection of much of Mr. Mundell's evidence that there is insufficient evidence for me to conclude that the accidents caused anything more than mild to moderate soft tissue injuries, which have resolved.
- [127] On the whole of the evidence, I have concluded that the principal causes of Mr. Mundell's present difficulties, to the extent that they are genuine, are his pre-existing degenerative disc disease in his neck, and to a lesser degree in his lumbar spine. In addition, his bipolar II disorder has been aggravated by the failure of his business and the breakdown on his relationship with his children. I have also concluded that the long duration of this litigation and the critical importance of its outcome have been further stressors on Mr. Mundell. I have no doubt that Mr. Mundell's difficulties have dealt a blow to his self-image and have further exacerbated his mood disorder and his ability to cope with his degenerative disc condition, but I am unable to find that they were caused or materially contributed to by the accidents that have led to this litigation.
- [128] It may also be that some of the evidence given by Mr. Mundell of which I have been critical, such as the exaggeration of the scope and success of his pre-accident business activities, is an expression of his despair over events unrelated to the accidents. Nevertheless, they seriously affect the reliability of such evidence.
- [129] I have therefore concluded that Mr. Mundell is only entitled to moderate damages arising out of the two accidents to compensate him for the temporary deterioration from his original position before each accident.
- [130] I find that neither accident caused any permanent damage to Mr. Mundell's neck and spine. I am satisfied that any physical trauma from either accident was not materially worse than the trauma suffered by Mr. Mundell from non-tortious causes, such as the incident when he was a passenger in his car when it went over a pothole, or an earlier accident involving a golf cart in June 2008.

Apportionment of Liability

- [131] ICBC and the MVA 2 Defendants have admitted liability to Mr. Mundell. There is however an issue as to whether the injuries he suffered are divisible or indivisible.
- [132] In this case I have concluded that non-pecuniary damages are divisible between the two accidents. I have concluded that Mr. Mundell suffered moderate soft tissue injuries in MVA 1 and mild soft tissue injuries in MVA 2.

- [133] I find that the injuries suffered in MVA 1 had resolved to the extent that Mr. Mundell had returned to his pre-MVA 1 condition before MVA 2 occurred. Both injuries exacerbated pre-existing conditions I have outlined above. I am satisfied that the exacerbation from MVA 1 was resolved well before MVA 2. I find that the suicidal gesture made by Mr. Mundell in 2011 was not caused or contributed to by MVA 1 and that, in any event, that event had been managed and successfully treated by January of 2012.
- [134] I also find that MVA 2 caused another temporary exacerbation of Mr. Mundell's pre-existing injuries, but that the exacerbation was resolved in the following year.
- [135] Later in these reasons I will address the question of whether an award of damages should be made for loss of income earning capacity based on the principles set out in *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353 (S.C.). To the extent that I find any such loss, it is my view that it is an indivisible injury based on the cumulative effect of the two accidents to Mr. Mundell's capacity to earn income.
- [136] I find that the tortfeasors in MVA 1 and MVA 2 are equally at fault and that any award for an indivisible injury should be apportioned equally to the parties responsible for them. Accordingly, ICBC and the MVA 2 Defendants are jointly and severally liable for the award for the loss of income earning capacity I will assess later in these reasons.

Damages

Non-Pecuniary Damages

- [137] As might be expected, there is a wide divergence between the plaintiff's and the defendants' position on the proper award for non-pecuniary damages.
- [138] I have already summarized Mr. Mundell's condition prior to MVA 1. The object of an award of non-pecuniary damages is to put Mr. Mundell in the same position he was in before the accident to the extent that it is possible for a monetary award to do so. This analysis of the principle was explained in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.):
- [170] The fundamental governing precept is *restitutio in integrum*. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. This is the philosophical justification for damages for loss of earning capacity, cost of future care and special damages.
- [171] For those losses which cannot be made good by money, damages are to be awarded on a functional basis to the end of providing substitute pleasures for those which have been lost. This is the philosophical justification for awarding damages for non-pecuniary loss.
- [139] The principles applicable to assessing non-pecuniary damages are well settled. After the quotation of para. 78 from *Blackwater* set out at para. 121, Justice McLachlin continued her reasons as follows;

- [79] At the same time, the defendant takes his victim as he finds him -- the thin skull rule. Here the victim suffered trauma before coming to AIRS. The question then becomes: What was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.
- [80] Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.
- [81] All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.
- [140] Some considerations relevant to these reasons to be taken into account in quantifying non-pecuniary damages were summarized in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering;
 - (f) loss or impairment of life;
 - (g) impairment of family, marital, and social relationships;
 - (h) impairment of physical and mental abilities; and
 - (i) loss of lifestyle.
- [141] In assessing an award for non-pecuniary damages, I am also required to have regard to awards made in other cases, though each case must of course be decided on its own facts.

- [142] The plaintiff's counsel referred me to a number of cases in which awards close to the maximum amount to be awarded for non-pecuniary damages of \$100,000, since adjusted for inflation to approximately \$375,000, provided for in the "trilogy" of torts cases from the Supreme Court of Canada in 1978. However, given my findings on the extent of Mr. Mundell's injuries and his original position, those cases are clearly distinguishable and of no assistance in determining an appropriate award.
- [143] The defendants cited a number of cases which have fact patterns closer to the facts I have found in this trial.
- [144] In *Bagri v. Heran*, 2020 BCSC 2002, the plaintiff suffered soft tissue injuries after three separate accidents. Her pain symptoms continued to linger at the time of trial. Her sleep was disturbed but she was not prevented from working as a hairstylist. She was awarded \$50,000 for non-pecuniary damages.
- [145] In *Harle v. Williams*, 2020 BCSC 1684, the plaintiff sustained injuries to his neck, right shoulder, and back that persisted for almost three years and were aggravated by his work as a concrete layer. Prior to the accident he was in good health both physically and emotionally. He was also awarded \$50,000 in non-pecuniary damages.
- [146] In this case it is difficult to assess Mr. Mundell's injuries because of the issues I have identified with his credibility and my conclusion that he has exaggerated the extent of his symptoms. However, I am mindful of the principle that the seriousness of the plaintiff's physical injuries is not necessarily a good indicator of the effect of those injuries on the individual plaintiff. In addition, in this case Mr. Mundell's injuries did exacerbate his pre-existing bipolar II disorder and aggravate his neck and spinal condition for some period of time.
- [147] Taking these considerations into account I assess Mr. Mundell's non-pecuniary damages from MVA 1 at \$50,000.
- [148] I am satisfied that Mr. Mundell suffered less severe injuries in MVA 2 than in MVA 1. I face the same difficulties in assessing his post-MVA 2 condition as I did with his post-MVA 1 condition. I cannot attribute the reported decline in his condition after MVA 2 to the injuries he suffered in that accident. However, I do find that there was some further aggravation of his spinal complaints which persisted for some time. In all the circumstances, and essentially for the same reasons I gave with respect to MVA 1, I assess Mr. Mundell's non-pecuniary damages for that accident at \$40,000.

Loss of Income Earning Capacity

- [149] Damages for both past and future income loss are based on a loss of capacity. An award for past loss of earning capacity compensates the plaintiff for loss of capacity prior to trial that was sustained as a result of the injuries suffered in the accident: *Ibbitson v. Cooper*, 2012 BCCA 249 at paras. 18-19; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 28.
- [150] While it is the loss of capacity that is being compensated for, in appropriate circumstances that loss can be assessed by reference to loss of earnings. The assessment of loss of earning capacity requires a consideration of hypothetical events. A party need not prove such events on a balance of probabilities but must establish that there is a real and substantial possibility that they would have occurred but for the actions of the tortfeasor.
- [151] In *Grewal v. Naumann*, 2017 BCCA 158, Justice Goepel described a real and substantial possibility:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The Plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the Plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [152] Mr. Mundell submits that the defendants are liable for the loss of Buckwold as a customer because their wrongful actions rendered him incapable of properly servicing it when difficulties arose with the mill supplying it in 2013 and 2014. He also submits that there was a real and substantial possibility that he could have re-established a connection with Metropolitan had he not been injured. He therefore seeks damages for loss of capacity based on the loss of hypothetical future sales to those two customers.
- [153] However, I am satisfied that there is no real possibility that Mr. Mundell would have continued to operate Trilogy in the manner he did before MVA 1 on a prolonged basis if he had not been injured. An assessment of damages on that ground is therefore not appropriate.
- [154] As I outlined earlier in these reasons, Metropolitan ceased purchasing product from Trilogy in 2008. The loss of Metropolitan's business cannot be attributed to any wrongful act of the defendants. While Mr. Mundell did have some discussions with Metropolitan in 2014 about supplying it with further products, I am not satisfied that any accident-related disabilities prevented or materially hampered those discussions from coming to fruition. I find that the problem that prevented the reestablishment of business with Metropolitan was the decision of the mill that Mr. Mundell hoped to use as a source of products to terminate supplying

Metropolitan because it felt that Metropolitan was being too demanding with respect to the quality of product it was producing.

- [155] I appreciate that Mr. Mundell testified that had he not been injured he might well have been able to find another mill to supply Metropolitan. However, in my view that is mere speculation on his part. Mr. Mundell had not been able to find a new mill for Metropolitan in 2008, before MVA 1. I can see no difference between the circumstances that led to Metropolitan ceasing to purchase through Trilogy in 2008 and those that existed in 2014.
- [156] I have also concluded that the defendants are not liable for the loss of Buckwold as a customer in 2014.
- [157] Trilogy did continue to supply product to Buckwold through 2013, although its sales steadily declined in the preceding years. While the evidence about why Buckwold ceased to purchase product through Trilogy is somewhat confused, it is clear that in 2014 Buckwold became dissatisfied with the quality of product being produced by the mill from which they received supply and with the timeliness of its delivery.
- [158] Until approximately the end of 2013, Buckwold paid Trilogy for orders before delivery of product from the supplying mill and Trilogy in turn paid the mill once the product was shipped. However, in 2014 Bruce Buckwold informed Mr. Mundell that because of concerns over delays in filling orders and resolving product claims, Buckwold would no longer pay Trilogy in advance for product but would only pay when it arrived in Canada and the necessary documentation to import it was in order.
- [159] There is a dispute between the parties as to whether this change in terms was caused by concerns over the quality of the product being shipped by the mill or whether it was out of frustration with Trilogy's handling of the orders. The plaintiff submits that these problems arose because Mr. Mundell was not capable of managing his business due to the state of his health arising out of the injuries he suffered in the MVAs. The defendants say it was because Buckwold was dissatisfied with the quality and timeliness of shipments.
- [160] What is not in dispute is that Buckwold's change in payment terms made it impossible for Trilogy to continue to supply Buckwold because Trilogy did not have the necessary working capital to pay the mill for product before it was paid by Buckwold.
- [161] The plaintiff has not satisfied me that it was Mr. Mundell's injuries that caused Trilogy to lose the Buckwold account. As with many of the claims advanced in these actions, I am left only with Mr. Mundell's evidence that he was rendered incapable of managing his business because of the severity of his injuries. Because I cannot accept his evidence as reliable, there is no evidentiary basis for concluding that any accident-related condition was the cause of the loss of the Buckwold account.

- [162] It may be that Mr. Mundell's bipolar II condition or his chronic back pain caused him to procrastinate in following up on the problems with the mill supplying Buckwold. However, the medical evidence is clear that Mr. Mundell's degenerative spine condition and bipolar II illness predated the accidents. Even if MVA 1 triggered or contributed to a depressive episode in 2011, the evidence is that Mr. Mundell had recovered from that episode long before 2014.
- [163] I have also concluded that in addition to the loss of Buckwold's business there was no real and substantial possibility that Mr. Mundell could have preserved Trilogy's business even if he had not been injured. The evidence satisfies me that Mr. Mundell had not established a viable permanent business prior to MVA 1.
- [164] I base this conclusion on a number of factors. The first is the lack of any evidence that Mr. Mundell took any effective steps to find a replacement mill for the BKB Mill after Metropolitan ceased to source product from it. I also rely on Mr. Mundell's business practices, which in my view would have caused insurmountable problems for Trilogy before very long. In particular, Mr. Mundell had no proper accounting system and paid no attention either to Trilogy's legal obligations to file accurate tax returns or to his own obligation to do the same. In addition, Trilogy had no working capital to meet its obligations and there is no evidence that Mr. Mundell was in a position to provide it with any.
- [165] I find it is no coincidence that one of the events that precipitated the loss of the Buckwold account was a garnishing order from the Canada Revenue Agency to collect unremitted withholding tax owed by Trilogy. Trilogy was unable to pay demurrage charges as a result of that garnishment and had to ask for an advance from Buckwold to pay them. Mr. Mundell's failure to repay the funds advanced was, in Mr. Buckwold's words, the "last straw" in his business dealings with Trilogy.
- [166] I am therefore unable to base any award for loss of income earning capacity on the failure of Trilogy.
- [167] However, I am satisfied that the plaintiff's ability to pursue any occupation that was reasonably open to him prior to the accidents has diminished since the accidents. In my view the injuries that the plaintiff suffered in the accidents and his reaction to them did accelerate the process of his becoming unemployable.
- [168] A major cause of Mr. Mundell's unemployability, in my view, is Mr. Mundell's bipolar II disorder, with more and more frequent depressive episodes. I accept Dr. O'Shaughnessy's opinion, stated in his February 6, 2017 report, that the accidents, together with other stressors that were unrelated to the accidents, triggered a depressive phase of his bipolar II disorder. However, I find that the other factors, including his financial condition, the deterioration of his relationships with his children, and a decline in his perceived social standing, would have triggered a progression of the depressive phases of that disorder in any event. Despite this, I have concluded that the accidents and their relatively short term

physical sequelae did accelerate the onset of disabling depressive episodes.

[169] I find that there was a real and substantial possibility that, absent the accidents, the onset of Mr. Mundell's physical and psychological deterioration and the point at which Mr. Mundell was no longer capable of earning an income would have been delayed beyond the time he experienced that onset.

[170] Taking all of these considerations in account I conclude that the analysis set out in Brown is applicable in this case. In that decision Justice Finch, as he then was, outlined an approach to measuring the extent of the impairment;

[7] In *Andrews et al. v. Grand & Toy Alberta Ltd. et al.* (1978), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50 Dickson J., as he then was, characterized the problem of assessing a claim for lost ability to earn income in this way (p. 469 D.L.R.):

"We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity of which compensation must be made: *The Queen v. Jennings*, *supra*. A capital asset has been lost: what was its value?"

[8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[171] In this case there was evidence that prior to MVA 1, Mr. Mundell was capable of earning income from a variety of self-employed businesses, centered on marketing and sales. I also conclude that he was capable of earning a higher than average income from those businesses. He is now incapable of obtaining any gainful employment.

[172] Applying the above principles to the difficult facts of this case justifies an award equivalent to the loss of one year's income to Mr. Mundell.

[173] In assessing this amount, I take into account the income that Mr. Mundell earned from Trilogy to the end of 2013. Taking all of these circumstances into account I assess damages for loss of earning capacity at \$100,000.

[174] Because this assessment is based on an acceleration of the deterioration of his capacity which occurred before trial, I regard this as a claim for loss of past capacity.

Special Damages

[175] Mr. Mundell claims the following amounts for special damages:

No.

Item

USD

Amount

CAD

Amount

1.

Massage Therapy

\$5,706

\$216

2.

Chiropractic Services

\$5,130

3.

Tarleton Medical (prescription)

\$70

4.

Pain Management (Dr. Torian)

\$4,000

5.

Lumbar Spine Surgery

\$297,809

6.

Surgery Related Equipment Rentals

\$6,307

7.

Post-Operative Doctor Visits

\$450

8.

Post-Operative Physiotherapy

\$1,075

9.

2015 trip to China

\$4,697

10.

Transportation

\$64

\$6,272

11.

Private Medical Imaging

\$5,060

12.

Childcare Expenses 2010

\$39,536

13.

Prescriptions

\$5,002

\$1,443

14.

Counselling

\$3,600

\$120

15.

Occupational Therapy

\$549

TOTAL:

\$329,213

\$57,893

[176] I have the same difficulty in dealing with the claim for special damages that I faced in assessing Mr. Mundell's other claims. Apart from the expenses related to his spinal fusion surgery in December 2010, they relate largely to his subjective complaints.

[177] I do note that Dr. Chang did prescribe medication for Mr. Mundell following MVA 1 and I am satisfied that some of those prescriptions were for pain associated with the accidents. However, they represent only a very small part of the claim for special damages.

[178] I find that Mr. Mundell has not established entitlement to most of these claims. To succeed in a claim for special damages for post-accident medical care, a plaintiff must establish that there was medical justification for the care or treatment and that the claim is reasonable. In addition, the defendants are only liable for care or treatments necessary to return the plaintiff to their original condition.

[179] Mr. Mundell has failed to establish that there was medical justification for the massage therapy that he received in the United States or that it was attributable to the injuries he suffered in MVA 1. This is so because I cannot accept his evidence of the extent to which he was suffering symptoms as a result of that accident. In addition, there is no admissible or reliable evidence that he was advised to receive these treatments from any qualified person. I also note that Mr. Mundell on several occasions had two to three massages a day. While these massages may have made him feel better, there is no evidence that they were medically justified.

[180] However, I do allow recovery for the massages Mr. Mundell received in British Columbia. These were administered in proximity to the accidents. I therefore allow this claim in the amount of \$216.

[181] For the same reasons, I do not allow the claims for chiropractic treatments. With regard to the reasonableness of these charges, I find that they were excessive. By way of example, I note that Mr. Mundell has claimed for two massages and five chiropractic treatments on June 17, 2010. Again, there is no reliable evidence that these treatments were medically justified or were caused by MVA 1.

- [182] With respect to the injections from Dr. Torian, I note that there was no evidence from Dr. Torian as to the necessity for such treatments, and that Dr. Chang told Mr. Mundell that he did not recommend such treatments for non-localized back pain.
- [183] Mr. Mundell claims the costs of his December 2010 spinal fusion surgery he underwent in California as special damages.
- [184] I find he has not established this claim. The surgery was performed by Dr. Etebar. There are medical records from Dr. Etebar in evidence but no opinion evidence was tendered from him. At trial, ICBC submitted that the surgery had not been shown to be necessary and that in any event it would be unreasonable to burden ICBC with the costs of treatment that would have been available to Mr. Mundell in British Columbia at no cost to him if it had been necessary. However, I base my decision on this issue on the lack of any evidence from the California physicians that the surgery was necessary to treat the injuries Mr. Mundell suffered in MVA 1. The surgery was performed to treat Mr. Mundell's degenerative disc disease. The evidence is that there was no change in that condition between an MRI conducted in 2008 and the MRI performed in California prior to the surgery.
- [185] In his report, Dr. Chang indicated that Dr. Etebar diagnosed multi-level spondylosis and degenerative disc disease in the lumbar region with a disc bulge at the L4-5 vertebrae and bi-lateral radiculopathy at L-5. My understanding of the evidence is that these conditions were all present prior to MVA 1. In addition, I do not consider it reasonable for Mr. Mundell to have paid for this expensive treatment in California without first exploring whether he could have had the procedure done in British Columbia. Mr. Mundell had the right to have the surgery performed but I do not find that it would be reasonable to require ICBC to pay for that procedure.
- [186] It follows from my decision with respect to the lumbar surgery that the costs of the surgery-related rental equipment, post-operative doctor visits, and post-operative physiotherapy are not recoverable.
- [187] Mr. Mundell also claims the cost of his flight to China in 2015 to try to qualify the Mudanjiang mill. He submits that this is properly a special damage claim because it was an unsuccessful effort to re-establish a business relationship with Metropolitan. However, I have already found that Trilogy ceased to sell product to Metropolitan some time prior to MVA 1 for reasons unrelated to the defendants' wrongdoing. I therefore see no connection between this expense and the accidents.
- [188] Mr. Mundell is entitled to the cost of the taxi to transport his children home on the night of MVA 1 and the Air Canada cancellation penalty, totalling \$229.00.
- [189] Because I have found that Dr. Torian's charges are not recoverable, I also find that the cost of traveling to California for the epidurals administered by him are not recoverable. Finally, it would appear that the Flight Centre bill for \$4,696.51 is a duplicate of the claim for the flight to China, which I have found is not recoverable.

- [190] With respect to the private MRI in March 2010, Dr. Chang was of the opinion that the MRI was not warranted at the time, and Mr. Mundell appears to have decided to have the imaging done by himself. The imaging showed no significant change from an MRI done in 2008, thereby validating Dr. Chang's view of its necessity in 2010.
- [191] Mr. Mundell has also claimed for childcare after MVA 1. The great majority of these claims are for Adrianna Toothill, Christie MacDougall, and Cassandra Cammock. All of these employees were paid for by Trilogy and claimed as a business expense.
- [192] I am again handicapped by the non-specific nature of Mr. Mundell's evidence on this point. Apart from his own testimony, there is little evidence as to what these caregivers did and for how long they did it. For some time prior to MVA 1 Mr. Mundell had paid for nanny and childcare services by charging their services to Trilogy. Mr. Mundell acknowledged that Christie MacDougall had been utilized as an executive assistant at Trilogy prior to MVA 1.
- [193] Mr. Mundell testified that he needed childcare assistance after he went to California to live in his father's house in the spring of 2010. He says he went to California because his home in British Columbia had been damaged from a water leak and because the California house had just one storey. While I have some scepticism about the necessity for childcare, I have concluded that some modest amount is appropriate for this claim. I assess these damages at \$10,000.
- [194] Mr. Mundell claims USD \$5,001.72 and CAD \$1,442.66 for prescriptions from March 19, 2010 to November 12, 2020. However, again I have only the most general evidence as to what these medications were prescribed for. For example, in his closing submissions at para. 703, counsel submits that prescriptions filled by Mr. Mundell in California were the same or similar to medications prescribed in British Columbia and were therefore medically justified and reasonable. However, there is no direct evidence from the prescribing physician stating what the prescriptions were for.
- [195] Doing the best I can with the limited evidence in the light of the surrounding circumstances, including the fact that Dr. Chang did issue prescriptions for pain relief in the period following MVA 1, I allow special damages of \$3,000 against ICBC for prescriptions relating to MVA 1. I do not award any damages for prescriptions against the MVA 2 Defendants because MVA 2 occurred on October 10, 2013, and no prescriptions were submitted between October 7, 2011 and February 2015. I am satisfied that by February 2015 Mr. Mundell had returned to his pre-accident position with respect to MVA 2.
- [196] The plaintiff also claims USD \$3,600 and CAD \$120 for counselling. Mr. Mundell testified that while he was in California during the first few months following MVA 1, he saw Dr. Gaedt, a counsellor, for 12 sessions three times per week, paying USD \$200-300 per session in cash. He claims USD \$3,600 for these sessions. Dr. Gaedt provided a letter confirming that Mr. Mundell was a patient from May to September 2010 but was unable to provide any more information because his file no longer existed.

- [197] I have concluded that Mr. Mundell has not established a sufficient basis for this claim. As with many of his other claims, this claim is entirely dependent on his own testimony that the purpose of these sessions was to address the after affects of MVA 1. However, Mr. Mundell was dealing with a number of issues in 2010, including the breakdown of his marriage. More fundamentally however I do not find his unsupported testimony sufficient to establish that this claim relates to MVA 1.
- [198] In addition, I accept the submission of the MVA 2 Defendants that the sessions with Dr. Wade in 2020 are too remote from the dates of the accidents to be compensable, given my finding that Mr. Mundell returned to his pre-accident condition with respect to MVA 2 within a few months.
- [199] Finally, Mr. Mundell testified that he was assessed by an occupational therapist in the fall of 2019. He did not identify the person he saw and the reference in his submissions is simply to Karp Rehab. To the best of my recollection the results of the assessment were not put into evidence. There is simply no evidence connecting this occupational assessment to the injuries he suffered in this case. Again I am forced to conclude that Mr. Mundell has not established a sufficient connection between these services and any injury he received in the accidents in issue in this case for this claim to be compensable.

Cost of Future Care

- [200] Mr. Mundell seeks damages in the range of \$410,738-\$552,191 for cost of future care, as outlined in the report of Megan Stacey, an occupational therapist who assessed Mr. Mundell.
- [201] All of the items recommended and costed by Ms. Stacey relate to Mr. Mundell's condition as it was in 2020. I have already found that long before that date Mr. Mundell had recovered to his original position from the injuries he suffered in the accidents and that his ongoing difficulties were attributable to the progression of conditions from which he suffered prior to MVA 1. In particular, many of the recommended medications relate to Mr. Mundell's psychiatric bipolar II condition and his chronic degenerative disc disease condition.
- [202] In summary, Mr. Mundell has not established that he would not have required the future care items listed by Ms. Stacey but for the accidents. Therefore he is not entitled to recover these amounts as damages against the defendants.

Summary of Awards

- [203] In summary I award the following damages;

Item

MVA 1

Amount

MVA 2

Amount

Joint and

Several

Non-pecuniary damages - MVA 1:

\$50,000

Non-pecuniary damages - MVA 2:

\$40,000

Loss of past income earning capacity: (Joint and several between ICBC and MVA 2 defendants)

\$100,000

Special damages

Massage - MVA 2:

\$216

Childcare - MVA 1:

\$10,000

Taxi and Air Canada cancellation fee - MVA 1

\$229

Prescriptions - MVA 1:

\$3,000

SUBTOTAL:

\$63,229

\$40,216

\$100,000

[204] If the parties cannot agree on the proper adjustments for income tax and court order interest they may seek further directions from the court.

Costs

[205] While Mr. Mundell has not established many of the claims he has advanced in these proceedings, he nevertheless has established damages against both defendants and is accordingly entitled to his costs on Scale B, subject to any matters of which I am not aware.

"Sewell J."

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