COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pyper v. Schuetze,*
2023 BCCA 334

Date: 20230815
Docket: CA47941

Between:

John [Redacted] Pyper

Appellant
(Defendant)

And

Katy Schuetze

Respondent
(Plaintiff)

Corrected Judgment: The text of the judgment was corrected at paragraph 16 on August 31, 2023 and the cover page was corrected on October 10, 2023.

Before: The Honourable Mr. Justice Harris
The Honourable Justice Dickson
The Honourable Madam Justice Fisher

On appeal from: Orders of the Supreme Court of British Columbia, dated November 12, 2021 (*Schuetze v. Pyper*, 2021 BCSC 2209, Vancouver Docket S1810941) and February 14, 2022 (*Schuetze v. Pyper*, 2022 BCSC 455, Vancouver Docket S1810941).

Counsel for the Appellant:	J. Whyte
Counsel for the Respondent:	B.T. Lepin
Place and Date of Hearing:	Vancouver, British Columbia November 3, 2022
Place and Date of Judgment:	Vancouver, British Columbia August 15, 2023

Written Reasons by:
The Honourable Justice Dickson

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Madam Justice Fisher

Summary:

This appeal centres on an allegation of uneven scrutiny of the evidence of former spouses in a personal injury action for battery. The appellant claims the trial judge subjected his evidence to more rigorous scrutiny than that of the respondent; impermissibly relied on hearsay and similar fact evidence; erred in assessing the cause of the respondent's psychological issues; and erred in awarding the respondent partial special costs. In consequence, he claims he was deprived of a fair trial. Held: Appeal allowed to the limited extent of varying the award of partial special costs to exclude all costs associated with three interlocutory applications in which costs awards were made. The judge did not otherwise err in principle in her credibility analysis or treatment of the evidence. Her credibility and related findings were grounded in the evidence, contextually reasonable and witness specific. The judge's conclusion on causation was likewise supported by evidence, including that of the experts.

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[1] This appeal centres on an allegation of uneven scrutiny of the evidence of former spouses in a personal injury action for battery. The battery involved an incident of serious domestic violence. The main issue at trial was the credibility of the parties' evidence.

[2] The appellant, John Pyper, contends the trial judge subjected his evidence to more rigorous scrutiny than that of the respondent, Katy Schuetze, in assessing their respective credibility, and impermissibly relied on hearsay and similar fact evidence. As a result, he says, he was deprived of a fair trial. In addition, he says the judge erred in her causation analysis, and erred further in awarding Ms. Schuetze partial special costs.

[3] In my view, the judge made none of the errors Mr. Pyper alleges, except by failing to exclude the costs of three interlocutory applications concerning which costs awards were previously made. For the reasons that follow, I would allow the appeal to the extent only of varying the special costs award to exclude all costs associated with those applications.

Background

[4] The respondent and Mr. Pyper. are former spouses. Married in May 2008, they have two children, M. and W.

[5] Both parties alleged the other was violent toward them throughout the marriage. Both also denied the other's allegations of prior domestic violence.

[6] On September 16, 2018, a violent incident occurred between the parties (the "Violent Incident"). It took place in the family home when the children were present. It arose out of a dispute over the whereabouts of a cell phone.

The Violent Incident

[7] According to Ms. Schuetze, the Violent Incident began when Mr. Pyper attacked her in the kitchen of their home, held her in a bear hug and punched and kicked her. After a brief respite, he began punching and kicking her again, this time near the front door. Finally, in the upstairs hallway, he knocked her face first onto the ground, sat on her back and struck her repeatedly on both sides of her head.

[8] According to Mr. Pyper, the Violent Incident began when Ms. Schuetze attacked him in the kitchen, squeezing his testicle, and punching and kicking him as he restrained her. After a brief respite, she resumed her attack, punching and kicking him in the groin and elsewhere when they were near a ground-floor office. Finally, in the hallway while they struggled over the missing cellphone, they lost their balance and fell to the floor.

[9] M., then age six, called 911 during the Violent Incident and brought the phone to her mother, who spoke to the dispatcher. Within 20 minutes the police arrived, detained Mr. Pyper, and removed him from the family home. An ambulance took Ms. Schuetze to the hospital where she was examined and released. Following his release from custody, Mr. Pyper also attended at the hospital, was examined, and released.

[10] The police placed the children in the temporary care of Ms. G., a neighbour. Among other things, M. told Ms. G. that “daddy” couldn’t find his phone and wallet, started blaming “mummy” for taking it, then started shouting, calling “mummy” names, and hitting her in the head. When she made these statements to Ms. G. M. clenched her fists and put them to her temples. She also said that she was worried “mummy” got hurt more by “daddy” as it took her a number of times to call the police because she could not remember how.

After the Violent Incident

[11] For the four and one-half month period immediately following the Violent Incident, the parties had no contact with one another. Mr. Pyper was charged with assaulting Ms. Schuetze and prohibited by the terms of his bail from contacting her. During that period, Ms. Schuetze commenced the underlying action for battery. In response, Mr. Pyper counterclaimed for battery. In both the claim and counterclaim, the parties pleaded their respective versions of the Violent Incident. Both also pleaded that the other had assaulted them on numerous occasions in the past.

[12] In February 2019, contrary to the terms of his bail, Mr. Pyper contacted Ms. Schuetze by calling her from a number that she did not recognize. In the course of the call, Mr. Pyper told her that he had a new girlfriend and wanted to know where she stood. They met the next day and resumed contact for a period of reconciliation, which ended in November 2019. During this reconciliation period, they engaged in various activities, together and with the children, and Mr. Pyper asked Ms. Schuetze to get rid of her lawyer, unwind the criminal charge and drop the civil claim.

[13] In September 2020, Mr. Pyper pleaded guilty to assault. His plea was based on an Agreed Statement of Facts filed in the criminal proceeding. He received an absolute discharge. Ms. Schuetze was not consulted regarding the content of the Agreed Statement of Facts.

[14] After the Violent Incident, Ms. Schuetze consulted several medical professionals in connection with her injuries and ongoing symptoms. These included her family physician, Dr. Penner; a specialist in physical and medical rehabilitation,

Dr. Foley; and a neuropsychologist, Dr. Mead-Westcott. The professionals diagnosed Ms. Schuetze with a concussion, a mild traumatic brain injury ("MTBI"), post-traumatic stress disorder ("PTSD"), a major depressive disorder ("MDD") and somatoform symptom disorder ("SSD") associated with the injuries and symptoms caused by the Violent Incident.

[15] Ms. Schuetze did not work for several months after the Violent Incident. She returned to her previous employment as a development director in May 2019. Although she was employed full-time prior to the Violent Incident, following her return she worked part-time for approximately 12 hours per week.

The Proceedings

[16] Before the trial commenced, the parties brought various pretrial applications, one of which was an application brought by Mr. Pyper to disqualify Ms. Schuetze's counsel, Ms. Lepin, based on an alleged conflict of interest. In June 2019, Justice Gaul dismissed the disqualification application and awarded costs to Ms. Schuetze at Scale B in any event of the cause. In addition, in January 2021, Master Elwood ordered the parties to bear their own costs of an interlocutory application, and, in March 2021, dismissed another without costs.

[17] At trial, the parties testified at length regarding the Violent Incident and its sequelae. They also both described prior incidents of alleged domestic violence, as well as their related distress and marital dysfunction. When Ms. Schuetze was testifying about a 2013 incident of self-harm, her counsel questioned her regarding text messages in a document Mr. Pyper produced in the litigation. Mr. Pyper's counsel cross-examined her about the same document, which was admitted into evidence without objection.

[18] Ms. Schuetze also adduced a considerable body of other evidence, including: photographs of her bruises taken shortly after the Violent incident; Ms. G.'s testimony regarding M.'s statements that day; testimony from her work colleagues regarding her functioning before and after the Violent Incident; and expert evidence

regarding the nature, cause and effects of her related injuries and ongoing symptoms.

Trial Reasons: 2021 BCSC 2209

[19] The judge began her reasons by summarizing the claim, the counterclaim, and the positions of the parties. She identified the critical issue as the credibility of the parties' testimony. Then she embarked on what she accurately described as a long and detailed discussion of the evidence.

Evidence Review

[20] The judge outlined the parties' backgrounds, and their evidence on the history and nature of their relationship. As to the latter, she described their allegations regarding prior violent incidents, their separations, and their reconciliations over the course of the marriage.

[21] One of the prior incidents was the 2013 incident referred to in the text messages presented to Ms. Schuetze on her direct examination. The incident in question involved Ms. Schuetze repeatedly hitting her stomach during her second pregnancy. In her evidence review, the judge noted Ms. Schuetze's testimony that the incident occurred in April of 2013, but the text messages were dated in February 2013. She also noted Mr. Pyper's testimony denying that he manipulated the text messages and claiming there were two stomach-hitting incidents.

[22] Turning to the Violent Incident, the judge described the parties' competing accounts in considerable detail. In doing so, she reviewed Ms. Schuetze's cross-examination on her police statement, and described the photographs depicting her bruises, the transcript of her 911 call, and the content of the Agreed Statement of Facts. Her description of Mr. Pyper's evidence was also very detailed. Among other things, the judge observed that Mr. Pyper acknowledged certain injuries depicted in the photographs, attributing them to the struggle and Ms. Schuetze kicking him, but failed to address Ms. Schuetze's injuries depicted in other photographs.

[23] The judge went on to describe much of the other evidence, including evidence regarding M.'s statement to Ms. G., the 2019 reconciliation, and Ms. Schuetze's alleged injuries and symptoms caused by the Violent Incident. As to the latter, she noted Ms. Schuetze's testimony that she suffered from ongoing pain, headaches, ear-ringing, sleep disruption, poor concentration, and constant fear of Mr. Pyper. She also noted the testimony of Ms. Schuetze's work colleagues regarding her presentation before and after the Violent Incident, and the expert evidence regarding the diagnoses, symptoms and treatment of Ms. Schuetze's injuries and ongoing symptoms.

[24] Specifically, the judge stated that the experts diagnosed Ms. Schuetze with a concussion, MTBI, PTSD, MDD, and SSD. The experts' evidence was that Ms. Schuetze suffered from, among other things, persistent emotional distress, difficulty sleeping, headaches, dizziness, ear-ringing, isolation, and problems with mood and concentration, all of which was caused by the Violent Incident. Regarding the PTSD diagnosis, the judge described Dr. Mead-Wescott's evidence that Ms. Schuetze experiences various ongoing symptoms, including symptoms of intrusion, avoidance, and hypervigilance regarding Mr. Pyper, as well as Dr. Mead-Wescott's evidence that the 2019 reconciliation was not inconsistent with Ms. Schuetze's PTSD diagnosis and related avoidance symptoms.

[25] After providing this detailed description of the evidence, the judge turned to her analysis.

Analysis of the Evidence

[26] First, the judge analysed the admissibility of M.'s hearsay statements to Ms. G. and to Mr. Pyper She reviewed the governing principles and leading authorities, and found that Ms. G.'s evidence was accurate and truthful. She also found that some, but not all, of what M. told Ms. G. was sufficiently reliable to be admissible, including M.'s statement that "daddy" started calling "mummy" names and shouting, then started hitting her in the head. Accordingly, she admitted those aspects of M.'s hearsay statements. In addition, she admitted Mr. Pyper's evidence

regarding one of M.'s hearsay statements and Ms. Schuetze's hearsay expressions of pain in the 911 call and her police interview.

Credibility of the Parties

[27] Next, the judged assessed the credibility of the parties. Again, she began by reviewing the governing principles and leading authorities. Then she summarized her conclusions at the outset of her analysis. In doing so, she said this:

> [345] For reasons that I will explain, I find that Ms. Schuetze was a credible witness who testified as accurately as she could, over many days of cross-examination. While some of her evidence about the Violent Incident was impacted by gaps in her memory, her recollection struck me as much more plausible than Mr. Pyper's. Further her account of the Violent Incident harmonizes with other credible and objective evidence, which I have accepted. As discussed below, I do have a limited concern about either the unintentional influence of her interest or the impact of some of the ongoing psychological symptoms on certain aspects of her evidence. However, that limited concern does not affect my overall assessment of her evidence.
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> [346] In sharp contrast I have very serious concerns about Mr. Pyper's evidence based on multiple factors discussed below, which lead me to find his testimony not credible. They include for example, manipulating a document, inconsistencies between some of the admissions contained in the [Agreed Statement of Facts] and his evidence about the Violent Incident, other discrepancies between his alleged injuries and his medical records, and the improbability that he would recall with precision the exact circumstances and mechanics of the Violent Incident.

[28] After stating her conclusions on credibility, the judge provided a detailed explanation of the basis upon which they were reached.

Ms. Schuetze

[29] At paras. 347 to 360 of her reasons, the judge discussed her assessment of Ms. Schuetze's evidence. She described Ms. Schuetze's demeanour as "articulate, pleasant, polite, responsive, and appropriately distressed at times", although she found her "quite reactive and less coherent toward the end of the cross-examination". She also noted that Ms. Schuetze's account of her recollection of the Violent Incident was fragmented, which, given its intense and chaotic nature, she viewed as "much more realistic and plausible than Mr. Pyper's very precise and highly detailed account". Then she addressed what Mr. Pyper submitted were "many

internal and external inconsistencies" in Ms. Schuetze's evidence regarding the Incident, almost of all of which she found involved "minor details" that she did not consider material "on their own or collectively".

[30] The judge recognized there were differences between Ms. Schuetze's testimony and her police statement. In explaining her credibility assessment of Ms. Schuetze's evidence, she specifically identified some those differences. For example, she noted, Ms. Schuetze initially denied certain suggestions on cross-examination and, when confronted with her statement, testified she could not remember. She went on to observe that "some of what Ms. Schuetze said she could not remember would align with an interest in minimizing some of her own negative conduct". However, she stated, "that concern is overcome by Ms. Schuetze's unqualified acceptance that what she said at the time was true". Moreover, she stated, Ms. Schuetze's "core allegations remained materially consistent".

[31] The judge also stated that Ms. Schuetze's evidence about the Violent Incident "harmonizes with other evidence". For example, she found that Ms. G.'s observations of Ms. Schuetze and the photographs of bruising "are much more consistent with Ms. Schuetze's version of events than Mr. Pyper's". In addition, she found M.'s hearsay statement, though of limited weight, indicated "it was her father who was aggressive and violent", which the judge saw as "consistent with Ms. Schuetze's account of the Violent Incident and, just as importantly, inconsistent with Mr. Pyper's". She stated the same was true of Ms. Schuetze's expressions of pain immediately following the Violent Incident.

[32] Next, the judge commented on two specific inconsistencies in Ms. Schuetze's testimony that she said seemingly reflected "the influence of her interest or a strong focus on her experience of her ongoing symptoms": at para. 359. The first was an apparent inconsistency between Ms. Schuetze's relatively impressive physical capabilities in 2019 and what she claimed she had been able to do since then. The second was some inconsistency between her evidence of her serious and

debilitating ongoing symptoms as compared to what she reported to Dr. Yao in February 2019.

[33] As to the latter, the judge accepted that Ms. Schuetze's fear of Mr. Pyper abated in 2019 when she believed he wanted to reconcile and that she felt much better when she was less fearful. The judge also noted that Ms. Schuetze had not yet returned to work when she met with Dr. Yao and therefore was able at that time to avoid triggers. Nevertheless, she commented, she would not have expected Ms. Schuetze to be able to engage in some of the activities that she did throughout the reconciliation period in 2019 based on her evidence regarding her ongoing symptoms.

[34] Turning to Mr. Pyper's allegation that Ms. Schuetze struck her pregnant stomach on two separate occasions — an allegation Mr. Pyper made in support of his position that Ms. Schuetze was the emotionally unstable and violent one in the relationship — the judge did not find it surprising "that an otherwise well functioning pregnant woman in Ms. Schuetze's circumstances may harm herself": at para. 360. Moreover, she commented, she viewed acts of self-harm as quite distinct from acts of violence toward other people:

> [360] … To conclude otherwise would involve relying on unsupported assumptions or stereotypes about how people behave in particular circumstances (see: *R. v. Delmas*, 2020 ABCA 152 at para. 31, aff'd 2020 SCC 39). For the same reasons, I reject any suggestion by Mr. Pyper that his allegations about Ms. Schuetze becoming "dysregulated", meaning emotionally and psychologically distressed or overwhelmed, are a factor that affects her credibility.

[35] Following her explanation of why she found Ms. Schuetze's evidence credible, the judge turned to her "significant concerns" regarding the credibility of Mr. Pyper's evidence in addition to those already identified.

Mr. Pyper

[36] The judge outlined her additional concerns regarding Mr. Pyper's credibility at paras. 362 to 379 of her reasons. She dealt first with his demeanour. In doing so, she stated "I might have said that he represented quite well in some ways" had the

case not involved allegations of serious family violence. She described Mr. Pyper as an articulate, attentive, detailed witness, and commented that he appeared "remarkably relaxed and very comfortable on the witness stand": at para. 362. Then she said this:

> [362] … Recognizing the need for care in making assumptions about human behaviour, in my experience, Mr. Pyper's presentation was highly unusual and I found it difficult to reconcile with his alleged experience and many of the circumstances discussed during his testimony. Further, and very much unlike Ms. Schuetze, Mr. Pyper never displayed any feelings of empathy for his children in relation to their exposure to the Violent Incident.

[37] The judge went on to characterize Mr. Pyper's evidence as internally consistent. However, she considered his highly detailed account to be "unrealistic, improbable and also calculated, given the chaotic, highly charged, violent and complex nature of the circumstances he described, as well as his apparently good but not exceptional memory": at para. 363.

[38] Further, the judge noted inconsistencies between Mr. Pyper's evidence and certain admissions in the Agreed Statement of Facts, which she found significant. For example, she stated Mr. Pyper admitted in the Agreed Statement of Facts that he yanked the cellphone out of Ms. Schuetze's hand and, when he did, they both fell against the wall. However, at trial he testified that it was Ms. Schuetze pulling back that caused them to fall.

[39] The judge also noted discrepancies between Mr. Pyper's evidence and his medical records. For example, though Mr. Pyper emphasized the alleged testicle squeezing in his testimony, describing it as very hard and very painful, his medical records did not refer to any squeezing of the testicle. The judge was satisfied that "had Ms. Schuetze in fact squeezed his testicle he would have reported it": at para. 370. Similarly, she noted Mr. Pyper testified at trial that he threw up following the Violent Incident and reported doing so at the hospital. However, the hospital records were inconsistent with that allegation. Moreover, noting that Mr. Pyper is taller than Ms. Schuetze, the judge stated that she had difficulty accepting

Mr. Pyper's allegation that Ms. Schuetze hit him forcefully on the top of his head with her arm straight while standing.

[40] The judge identified another significant credibility concern as relating to Mr. Pyper's allegation that Ms. Schuetze struck her pregnant stomach twice in 2013, not once as he previously alleged in an affidavit. In discussing this concern, the judge stated she was "quite certain" that Mr. Pyper had manipulated the text messages dated February 6 and 7, 2013 and did not accept the document's authenticity. She also expressed concern regarding Mr. Pyper's honesty and integrity arising out of his "flagrant, prolonged and numerous breaches of bail conditions regarding contact and communication with Ms. Schuetze and the children", which included his "organizing of separate cell phones to be used for phone calls only during which he used a fake name": at para. 374. In her view, they pointed to "a high degree of planning and commitment to evading detection".

[41] Relatedly, the judge found that Mr. Pyper's 2019 attempt at reconciliation "was motivated by his goals of persuading Ms. Schuetze to recant her allegations of physical violence" and bring an end to the civil action. She noted that he did not dispute telling Ms. Schuetze to fire her lawyer and that he had the name of a lawyer who would help her unwind her allegations of violence. Moreover, the judge found Mr. Pyper's evidence regarding Ms. Schuetze's alleged psychological instability "contrived and improbable", and his evidence suggesting that she was emotionally vulnerable to be "part of the larger self-serving and gratuitous narrative about his psychological superiority": at para. 378.

[42] The judge concluded her credibility assessment with the following:

> [379] Ultimately, based on my assessment of Mr. Pyper's testimony in the context of the evidence as a whole, I am firmly of the view that he was dishonest, calculating and cleverly manipulative. Given my assessment, I cannot safely rely on Mr. Pyper's evidence unless it is undisputed or consistent with credible evidence that I do accept.

Liability Findings

[43] Based on her assessment of the evidence as a whole and her conclusions on credibility, the judge made several factual findings. Given the nature of those factual findings, she concluded that Mr. Pyper committed a serious battery of Ms. Schuetze on September 16, 2018, and dismissed Mr. Pyper's claim in battery against Ms. Schuetze

[44] In summary, the judge rejected Mr. Pyper's account of the Violent Incident except to the extent that it was undisputed. Contrary to his account, she found that Mr. Pyper physically attacked Ms. Schuetze at least three times as the incident unfolded in their family home. Specifically, she found that during the Violent Incident Mr. Pyper kicked and kneed Ms. Schuetze, punched or grabbed her in the chest, and, while she was lying face down in the hallway, sat on Ms. Schuetze's back, grabbed her head, and repeatedly and forcefully struck or punched her on each side of the head.

[45] The judge also made certain findings regarding the parties' past relationship and prior incidents of violence. These included a finding that the violent conflict between them began when M. was a baby. The judge accepted Ms. Schuetze's specific allegations regarding Mr. Pyper's acts of past physical violence toward her. However, she held, the parties' allegations of past violence were not admissible as similar fact evidence. Rather, that evidence was admissible "to provide context for the Violent Incident and some of Ms. Schuetze's alleged injuries and symptoms, most significantly fear for her safety, and for the purpose of assessing credibility" at para. 390.

Causation Findings

[46] Based on her acceptance of Ms. Schuetze's testimony and the uncontradicted expert evidence, the judge found that Mr. Pyper's battery caused or resulted in a concussion, an MTBI, and multiple symptoms accurately diagnosed as PTSD, MDD and SSD. In addition, she found that since her return to work in May 2019, Ms. Schuetze suffered from various ongoing symptoms, including headaches,

dizziness and difficulty concentrating. She found further that Ms. Schuetze's psychological, cognitive, and physical symptoms are intertwined.

[47] In addressing the causation issue, the judge stated that Ms. Schuetze initially felt profoundly traumatized by the Violent Incident. However, she found, her intense fear abated somewhat during the 2019 reconciliation and she felt less afraid throughout that period. Then she said this:

> [393] … I firmly reject the suggestion that Ms. Schuetze's willingness to attempt to reconcile and her engagement with Mr. Pyper is inconsistent with the diagnosis of PTSD and significant ongoing fear. I expect I can take judicial notice of the reality that victims of intimate partner violence often leave and return to the relationship many times. In any event, based on the facts of this case, I infer many factors likely contributed to Ms. Schuetze's willingness to keep trying, among them the psychological and emotional impact of an abusive and controlling relationship, isolation, her view that an intact family was best for the children and the absence of immediate family support.

Damages

[48] The judge awarded Ms. Schuetze a total of $795,029.68 in damages. The award was comprised of $100,000 for non-pecuniary loss; $22,271.45 for the cost of future care; $239,485 for past loss of income/earning capacity; $425,000 for loss of future earning capacity; and $8,273.23 for special damages.

Costs Reasons: 2022 BCSC 455

[49] After the judge released the trial reasons, Ms. Schuetze applied for special costs of the whole proceeding, or, alternatively, costs at Scale C and double costs for trial preparation and attendance. The judge awarded partial special costs for the pre-trial period, excluding costs for trial preparation and attendance, together with Scale B costs for the latter and the costs application. The special costs aspect of the costs award was based on Mr. Pyper's repeated attacks on Ms. Schuetze's counsel, Ms. Lepin, between December 2018 and late 2020. In the judge's view, those attacks amounted to reprehensible litigation misconduct.

[50] As she did in her trial reasons, the judge began her costs analysis with a review of the governing principles and leading authorities. She also reviewed the

decision of *C.S. v. C.B.*, 2021 BCSC 879, upon which Ms. Schuetze relied. In *C.S.*, Justice Funt emphasized the importance of a client maintaining trust and confidence in their counsel, and found the respondent's disparaging statements concerning the claimant's counsel in two emails sent near the outset of the litigation amounted to reprehensible conduct that "would sow doubt in the mind of any reasonable person, permeating the relationship between that person and counsel": at para. 7. In consequence, he awarded partial special costs against the respondent.

[51] Next, the judge reviewed the salient facts, starting with a December 2018 exchange of correspondence in which Mr. Pyper's former counsel alleged that Ms. Lepin was in a conflict of interest because she had previously provided Mr. Pyper with legal advice concerning certain motor vehicle accident claims. Ms. Lepin responded by disputing the allegation on the basis that she had never obtained any relevant confidential information and the matters were unrelated. However, the judge noted, in January 2019, Mr. Pyper made a complaint to the Law Society that was rejected based in part on this Court's analysis of a similar allegation at issue in *Sandhu v. Mangat*, 2018 BCCA 454. She also noted that Mr. Pyper applied for an order disqualifying Ms. Lepin from acting for Ms. Schuetze based on the same alleged conflict of interest, but Justice Gaul dismissed his application.

[52] The judge acknowledged Mr. Pyper's claim that his only purpose in making the complaint and bringing the disqualification application was to address his concern regarding Ms. Lepin's apparent conflict of interest based on legal advice from his former counsel. She rejected his claim. In doing so, she noted the early February 2019 "apparent reconciliation" during which Mr. Pyper instructed Ms. Schuetze to get rid of Ms. Lepin and unwind both the criminal proceeding and her allegations of physical violence. She also noted her previous conclusion that, in reconciling, Mr. Pyper "was motivated by his goals of persuading Ms. Schuetze to recant her allegations of physical violence and to bring an end to this action": at paras. 27–30.

[53] Furthermore, the judge stated, in January 2020 Mr. Pyper sent a message to Ms. Schuetze in which he stated he hoped Ms. Schuetze would get "better advice than from Bonnie Lepin the firecracker with no ethics". In addition, he sent another message in which he asserted that "Bonnie Lepin is pure evil and will say and do anything". The judge rejected Mr. Pyper's expression of regret, and noted that in October 2020, after learning Ms. Lepin had loaned Ms. Schuetze funds, he "again raised the spectre of the Law Society" by writing directly to Ms. Lepin: at para. 32. In that letter, Mr. Pyper suggested that Ms. Lepin consider the need to "self-report".

[54] After repeating her view that Mr. Pyper was "dishonest, calculating, and cleverly manipulative", the judge said this:

> [37] I have no difficulty concluding that [Mr. Pyper] was likely motivated by the goal of undermining [Ms. Schuetze] ability to pursue her claim. He would have perceived Ms. Lepin as a threat to his ability to effectively deceive or manipulate [Ms. Schuetze] for a time, but also the Court. Once his efforts to persuade [Ms. Schuetze] to end the action and get rid of Ms. Lepin and the reconciliation failed, he attacked, much as the respondent in *C.S*. did, Ms. Lepin herself in an attempt to undermine [Ms. Schuetze's] confidence in her. He did so, well aware of the terrible violence he had inflicted during the violent incident and other acts of family violence prior to that.
>
> [38] While the text messages to [Ms. Schuetze] on their own were akin to the respondent's reprehensible emails in *C.S.*, the whole of [Mr. Pyper's] efforts to prevent Ms. Lepin from continuing to act as [Ms. Schuetze's] counsel were, in my view, much worse. His reprehensible misconduct was far more sustained, multifaceted, and potentially more harmful given [Ms. Schuetze's] vulnerability and the nature of the action.

[55] Notwithstanding these findings, the judge recognized the need to exercise restraint when granting a special costs award. After noting that Mr. Pyper's attacks on Ms. Lepin ended in late 2020, she went on to award partial special costs for the pre-trial period, to be assessed by the Registrar.

On Appeal

[56] Mr. Pyper relies on three grounds of appeal, the first of which includes several elements. In his submission, the judge erred:

1. in assessing the parties' credibility, by subjecting his evidence and the evidence of Ms. Schuetze to uneven scrutiny and, in doing so, relying on impermissible reasoning or improperly admitted evidence;

2. in analysing causation, by failing to consider whether Ms. Schuetze had proven that the Violent Incident caused the alleged psychological injury and symptoms from the 2019 reconciliation period forward; and

3. in awarding partial special costs, by purporting to vary prior costs awards on interlocutory applications without jurisdiction and by sanctioning him for extra-legal conduct which did not justify a special costs award.

[57] If this Court finds merit in his uneven scrutiny argument, Mr. Pyper seeks the admission of fresh evidence on appeal, namely, an expert opinion that the February 2013 text message document is authentic.

Discussion

Standard of Review

[58] The issues raised on appeal involve questions of law, questions of fact, and questions relating to the exercise of discretion in awarding costs.

[59] Questions of law, including questions of jurisdiction, are reviewed for correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8. In *R. v. Roth*, 2020 BCCA 240, this Court stated that it is an error of law for a judge to subject the evidence of the defence to more rigorous scrutiny than the evidence of the Crown, although this bare proposition has been called into question in subsequent authorities: *Roth* at para. 47; *R. v. Campbell*, 2023 BCCA 19 at paras. 48–49.

[60] Questions of fact and factual inferences drawn from evidence can only be reversed where there is a palpable (obvious) and overriding (material) error. This standard applies to credibility findings, which are owed particular appellate deference given the overwhelming advantage trial judges enjoy in the assessment of credibility: *Housen* at para. 20; *Khela v. Clarke*, 2022 BCCA 71 at para. 6.

[61] Questions relating to the discretionary award of costs are also reviewed on a deferential standard. Appellate courts interfere with special costs awards only where judges misdirect themselves on the applicable law, err in principle, make a palpable error in assessment the facts, or otherwise make an award that is so clearly wrong as to amount to an injustice: *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at para. 33.

Credibility Assessment: Uneven Scrutiny and Other Alleged Errors

[62] Mr. Pyper contends the judge erred in law in conducting her credibility assessments. He relies primarily on the concept of uneven scrutiny on this ground of appeal. In his submission, the judge scrutinized his evidence much more rigorously than Ms. Schuetze's evidence in assessing their respective credibility. He says the judge also treated similar factors differently, relied on speculative and stereotypical reasoning, and failed to carry out the necessary analysis before considering M.'s hearsay statements and similar fact evidence concerning past acts of violence. In cumulative consequence, he was deprived of a fair trial.

[63] In advancing his submission on uneven scrutiny, Mr. Pyper acknowledges Canadian courts have examined and developed the concept of uneven scrutiny almost exclusively in the context of criminal proceedings. However, he submits, there is no principled reason why it is not equally erroneous for a judge to scrutinize a civil defendant's evidence significantly more rigorously than a plaintiff's evidence in assessing their credibility. In both contexts, he argues, the parties are entitled to a fair trial.

[64] In support of his submission, Mr. Pyper emphasizes the judge described his demeanour and Ms. Schuetze's demeanour in similar terms, then found that similar factors enhanced Ms. Schuetze's credibility but detracted from his own. For example, he notes, the judge described Ms. Schuetze as articulate, pleasant and remarkably patient under cross-examination, and described him as articulate, attentive, and calmer than cross-examining counsel. However, she went on to find these otherwise positive characteristics detracted from his credibility because the

case involved serious family violence. According to Mr. Pyper, in addition to reflecting uneven scrutiny, this finding was based on speculative and stereotypical reasoning about how those involved in family violence should act, and how much emotion they should show when testifying in court.

[65] In addition, Mr. Pyper submits, the judge treated the parties' respective abilities to recall details of the Violent Incident differently. For example, she found that Ms. Schuetze's fragmented recall of the incident enhanced her credibility, but that his more detailed recall detracted from his credibility. The judge also adopted a distinctly forgiving approach to frailties in Ms. Schuetze's evidence, such as inconsistencies between her testimony and medical records or her demonstrated physical abilities, which Mr. Pyper claims the judge either excused or failed to address in assessing Ms. Schuetze's credibility. Mr. Pyper says, in comparison, the judge focused heavily on comparable frailties in his evidence, such as the absence of any reference to testicle squeezing in hospital records, and drew negative inferences based on those frailties.

[66] Further, Mr. Pyper submits the judge's finding that he manipulated the 2013 text messages was speculative, unsupported by any evidence and is contradicted by fresh expert evidence he seeks to proffer regarding the authenticity of the messages. He argues the issue of the 2013 text messages related to a collateral matter and was improperly raised on Ms. Schuetze's direct examination.

[67] Moreover, Mr. Pyper submits, the judge's credibility assessment was improperly influenced by her treatment of past violence and hearsay statements. He maintains although the judge admitted evidence of past violence as "context", she erroneously treated it as similar fact evidence in conducting her credibility assessment. In his submission, this was an error because she did not first consider whether the probative value of that evidence outweighed its prejudicial effect. Nor, he says, did she consider whether M.'s hearsay statement to Ms. G. was necessary before she admitted and considered that hearsay.

[68] Mr. Pyper acknowledges that, considered individually, any of these matters might be insufficient to displace the high deference ordinarily due to a judge's credibility findings. However, he submits, considered in combination, they reflect legally erroneous uneven scrutiny and justify a new trial.

[69] I am not persuaded by these submissions.

[70] As noted, this Court stated in *Roth* that it is an error of law for a judge to subject defence evidence to more rigorous scrutiny than Crown evidence in assessing credibility: at para. 47. However, as Mr. Pyper concedes, to the extent that uneven scrutiny exists as a ground of appeal, it is a notoriously difficult ground to make out. The state of the law in this regard was recently summarized in *Campbell* as follows:

> [48] In *R. v. Roth*, 2020 BCCA 240, this Court stated that it is an error of law for a judge to subject the evidence of the defence to more rigorous scrutiny than the evidence of the Crown: at para. 47. Notably, however, in *G.F.* Justice Karakatsanis questioned whether "uneven scrutiny" is a helpful ground of appeal. Several Courts have recently observed that "uneven scrutiny" is a notoriously difficult ground to make out, its value as an analytical tool to demonstrate error in a judge's reasoning process on credibility findings is doubtful, and, if it exists, it may not amount to an independent ground of appeal: *G.F.* at paras. 99–101; *R. v. Mehari*, 2020 SKCA 37 at para. 31; *R. v. S.S.*, 2022 BCCA 392 at paras. 72–75. As Justice MacKenzie explained in *S.S.*, *Roth* does not stand for the simple proposition that "uneven scrutiny" is a free-standing ground of appeal, nor did the Court treat it as such in *Roth*. Rather, the conclusion in *Roth* was that the judge's credibility assessment of the accused was tainted by three distinct and readily identifiable errors in principle: *Roth* at para. 54; *S.S.* at paras. 73–74.
>
> [49] In *G.F.*, Justice Karakatsanis emphasised that "the focus must always be on whether there is reversible error in the trial judge's credibility findings": at para. 100. It is a reversible error of law for a judge to find facts or assess credibility based on speculative reasoning. Factual findings and credibility assessments must be context-specific and grounded in the evidence, not based on conjecture or stereotypical behavioural generalisations. When judges find facts and draw inferences, they must not rely on stereotypes or assumptions about what a person might normally do in a situation. Rather, they must engage with the case-specific evidence: *R. v. R.K.K.*, 2022 BCCA 17 at para. 39; *R. v. Conway*, 2021 BCCA 460 at para. 44–45.

[71] To the extent that uneven scrutiny does exist as an independent ground of appeal, I accept that complaints of this kind may be raised on appeal in civil as well

as criminal proceedings in connection with credibility assessments. As Mr. Pyper submits, in both contexts the parties are entitled to a fair trial. I am fortified in this view by the approach adopted by the Ontario Court of Appeal in *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283, leave to appeal to SCC ref'd, 38232 (28 March 2019). In *Moyse*, the Court entertained, but ultimately rejected, an uneven scrutiny argument on an appeal involving a civil claim for the misuse of confidential information claim: at paras. 18–33.

[72] However, I do not accept that the judge scrutinized the evidence unevenly in assessing Ms. Schuetze's credibility, on the one hand, and Mr. Pyper's credibility, on the other. Nor do I detect any error in principle in her credibility analysis. Her credibility and related findings are grounded in the evidence, contextually reasonable and witness specific. While she reached different conclusions on the parties' credibility, when her reasons are read fairly and as a whole, it is clear that she subjected the evidence of both parties to rigorous, balanced and transparent scrutiny.

[73] Contrary to Mr. Pyper's submission, the judge did not treat the parties' abilities to recall details of the Violent Incident differently. Rather, she rejected Mr. Pyper's claim to having a highly detailed recall as implausible given the nature of the event. This was a view she was entitled to take. Nor did the judge draw different conclusions from the parties' similar presentations or rely on stereotypical assumptions in assessing Mr. Pyper's credibility. Rather, she found they presented very differently in significant respects, and drew reasonable inferences based on common sense, human experience and factors specific to the case.

[74] The judge also specifically considered and analysed various frailties in both parties' evidence, including inconsistencies in the parties' testimonies and other reliable evidence. She went on to explain the inferences that she drew from the inconsistencies and frailties in question. For example, as noted above, the judge observed that Mr. Pyper's hospital records did not include any reference to a complaint of testicle squeezing. After acknowledging the need for caution in relying

on the report of a party's statements in a clinical record, bearing in mind the centrality of the allegation to Mr. Pyper's account of the Violent Incident and his pain, the judge found Mr. Pyper made no such complaint and would have reported testicle squeezing had it occurred. In my view, none of the inferences she drew from this or other frailties in the evidence were unreasonable or otherwise unavailable.

[75] As the Court explained in *Moyse*, the evaluation of the impact of specific inconsistencies and flaws in a witness' testimony lies at the core of a trial judge's function: at para. 31. The same is true of evaluating witness demeanour and drawing common-sense inferences untethered to stereotypical behavioural generalisations.

[76] Finally, in my view, the judge did not fail to analyse the admissibility of M.'s hearsay statements or evidence of past violent acts appropriately. She responded to the arguments presented and reached available conclusions on the admissibility of such evidence and the uses to which it could be put. The contested issue regarding then-nine-year-old M.'s hearsay statements was reliability, not whether M. should be subjected to examination in the courtroom by her warring parents' lawyers to determine their admissibility. Regarding the evidence of past violent acts, both parties pleaded, adduced and relied on it for permissible purposes given the issues for determination, as correctly identified by the judge.

[77] As to the judge's conclusion that the 2013 text messages were manipulated, in my view, it was grounded in the evidence, not mere speculation. For example, in explaining her concern regarding the messages, the judge noted that they appeared as "a monologue" from Ms. Schuetze and included questionable content. In addition, in describing the messages, she noted that those from Mr. Pyper appeared in two different shades of green and that he did not discuss the alleged incident when he and Ms. Schuetze met with a counsellor shortly thereafter.

[78] Although the judge's conclusion that the text messages were manipulated was not the only possible reasonable conclusion, it was available on the evidence. In addition, and importantly, the judge's finding on the point was only one factor of many that contributed to her credibility assessment. In my view, even if erroneous, it

was not a decisive factor. Given the lack of merit in Mr. Pyper's position on uneven scrutiny, as he concedes it follows that we need not consider the proffered fresh evidence.

[79] I would not give effect to this ground of appeal.

Causation

[80] The judge found that the Violent Incident caused Ms. Schuetze's psychological injuries. She also found that the injuries had continued from then until the date of trial and that they were likely to continue for some time after the trial.

[81] Mr. Pyper contends the judge erred in finding that Ms. Schuetze's psychological injuries continued to the date of trial in light of the undisputed evidence of the parties' 2019 reconciliation period. In his submission, it is inconceivable that Ms. Schuetze could have engaged in the reconciliation if she was still suffering from PTSD avoidance symptoms, as described by Dr. Mead-Wescott. Mr. Pyper argues the undisputed evidence was that Ms. Schuetze voluntarily participated in the reconciliation and thus demonstrated her ability to overcome her PTSD symptoms. He says that was so regardless of Ms. Schuetze's motivation for reconciling, which was the only focus of Ms. Schuetze's evidence on the point and the judge's corresponding causation analysis.

[82] According to Mr. Pyper, bearing in mind the causation principles relating to psychological injuries outlined in *Yoshikawa v. Yu*, (1996), 21 B.C.L.R. (3d) 318 (C.A.), the judge erred in her causation analysis. Specifically, he notes, in *Yoshikawa*, this Court affirmed that a plaintiff's "psychological problems do not have their cause in the defendant's wrongful act if the plaintiff could be expected to overcome them by his or her own inherent resources, or 'will-power'" and that psychological suffering caused by a defendant will only attract damages where a plaintiff's condition is not "something within her control to prevent": at para. 12.

[83] Mr. Pyper submits the judge did not address these critical causation issues. Instead, she focused on *why* Ms. Schuetze reconciled with an allegedly abusive

husband, not on *how* she managed to do so if she suffered from PTSD. In other words, he says, the judge failed to grapple with the obvious contradiction between the dynamics of PTSD and the fact that Ms. Schuetze successfully overcame them to reconcile with Mr. Pyper in 2019.

[84] I reject this submission.

[85] I see no such error in the judge's causation analysis. Contrary to Mr. Pyper's submission, the evidence demonstrated there is no "obvious contradiction" between the dynamics of PTSD and a suffering spouse reconciling with an abusive spouse. Moreover, the judge grappled directly with his argument that the 2019 reconciliation was inconsistent with Ms. Schuetze's PTSD diagnosis and her allegedly significant ongoing fear. She firmly rejected it, as she was entitled to do.

[86] In my view, the judge's conclusion on causation was grounded in the evidence, including that of the experts. It is entitled to deference on appeal.

Special Costs

[87] Finally, Mr. Pyper contends the judge erred in sanctioning him with special costs for applying for Ms. Lepin's disqualification when Justice Gaul had already ordered costs against him at Scale B in any event of the cause. She also erred, he says, in sanctioning him for extra-legal contact with Ms. Schuetze which she viewed as improperly motivated, and erred further in failing to consider that not all allegations made against lawyers should attract special costs awards, as this Court stated in *Patriquin v. Laurentian Trust of Canada Inc.*, 2002 BCCA 6 at para. 29.

[88] In support of his submission, Mr. Pyper argues that members of the public should be encouraged to make claims of conflict of interest against lawyers where there is a reasonable basis for doing so. Citing *Patriquin*, he says lawyers must not be made into a protected class by a costs policy that discourages legitimate claims, and the mere fact of an unsuccessful disqualification application based on an alleged conflict of interest does not justify an order for special costs. In addition, he says, a trial judge lacks jurisdiction to vary costs orders previously and specifically

made on interlocutory applications, as this Court explained in *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 at paras. 101 and 108. In this case, he notes, Justice Gaul made such an award on the disqualification application, as did Master Elwood on two other interlocutory applications.

[89] Further, Mr. Pyper argues, improper motivation for *extra-legal* conduct, including interactions with an opposing party, does not justify a special costs order. In his submission, the judge essentially sanctioned him with special costs because she found he was insincere in his attempt to reconcile with Ms. Schuetze, not because of anything he did or failed to do in the litigation. Moreover, he says, the judge also overstated the derogatory nature of the messages and failed to distinguish them from public attacks on a lawyer's reputation in pleadings, such as those in *Gichuru v. Smith*, 2014 BCCA 414.

[90] According to Mr. Pyper, properly characterized, the text messages in question in this case amounted to no more than "schoolyard taunts". Unlike the messages in *C.S.*, he says, they would be unlikely to "sow doubt in the mind of any reasonable person" and they do not warrant the award of special costs.

[91] I am not persuaded by these submissions, except as they relate to the absence of jurisdiction to vary the three previous costs awards made on interlocutory applications. In my view, the judge should have excluded the costs of those applications from her partial special costs award based on the principles explained in *567 Hornby Apartment Ltd.* However, given her factual findings concerning the nature and intended effect of the impugned conduct, she did not err otherwise in the exercise of her discretion. Those findings were firmly grounded in the evidence, and her discretionary determination is entitled to appellate deference.

[92] In reaching this conclusion, I reject Mr. Pyper's submission that the judge's findings related to "*extra-legal* conduct", not to litigation misconduct. On the contrary, she found that Mr. Pyper's sustained, manipulative efforts to persuade Ms. Schuetze to "get rid" of Ms. Lepin by repeatedly and unfoundedly attacking Mr. Lepin's professionalism were part of an improper effort to persuade Ms. Schuetze to

abandon her claim. In other words, the judge found that his impugned conduct related directly to the litigation.

[93] As Justice Funt recognized in *C.S.*, misconduct of this kind is reprehensible. Depending on the circumstances, where it occurs, it may well warrant a special costs award. In my view, in this case the judge was justified in concluding that it did.

Conclusion

[94] For these reasons, I would allow the appeal to the limited extent only of varying the award of partial special costs to exclude all costs associated with the three interlocutory applications in which costs awards were made.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Fisher"