IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mathieson v. Aiken,*
2023 BCSC 535

Date: 20230405
Docket: S53355
Registry: Vernon

Between:

Andrew Mathieson

Plaintiff

And

Ryan Aiken, Braydon Giesbrecht and Todd Van Gaal

Defendants

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:	R. Ross R. Ean
Counsel for the Defendant, Ryan Aiken:	L. Trach
Counsel for the Defendant, Braydon Giesbrecht:	J.C. Chandler
Counsel for the Defendant, Todd Van Gaal:	A.A.D. Powell
Place and Date of Trial/Hearing:	Kelowna, B.C. March 8, 2023
Place and Date of Judgment:	Kelowna, B.C. April 5, 2023

[1] The plaintiff brings this application to determine the issue of liability in a civil assault claim by way of summary trial.

BACKGROUND

[2] By way of background, the plaintiff was at a 7-Eleven convenience store in Kelowna waiting to pay for some items when he was initially approached by one of the defendants, Ryan Aiken ("Aiken"). What followed was an assault and battery of the plaintiff, including a number of punches thrown by the defendant Braydon Giesbrecht ("Giesbrecht"), resulting in serious injuries, including a fractured skull, fractured orbital bone, damage to his teeth, and concussion. The plaintiff was placed in a medically induced coma for several days.

[3] All of the events were recorded on a security camera inside the store.

[4] The video, which is approximately four minutes in length, was played at the beginning of the summary trial. Rule 9-7(5) of the *Supreme Court Civil Rules* [*Rules*] sets out the evidence that a party may tender on a summary trial application:

> 9-7(5) Unless the court otherwise orders, on a summary trial application, the applicant and each other party of record may tender evidence by any or all of the following:
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> (a) affidavit;
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> (b) an answer, or part of an answer, to interrogatories;
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> (c) any part of the evidence taken on an examination for discovery;
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> (d) an admission under Rule 7-7;
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> (e) a report setting out the opinion of an expert, if
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> (i) the report conforms with Rule 11-6 (1), or
>
> (ii) the court orders that the report is admissible even though it does not conform with Rule 11-6 (1).
>
> [Emphasis added.]

[5] While evidence at a summary trial is generally limited to affidavits, the underlined text gives this Court the discretion to allow otherwise.

[6] The plaintiff in his notice of application specifically included the following in the material to be relied on: “Video of the interior of the 7/11 convenience store at the time the Assault occurred, dated July 25, 2015.”

[7] There is no question that all of the defendants are very familiar with the video. All three of the defendants were the subject of criminal charges arising out of the event, and the video was a part of the Crown disclosure. All three defendants also made reference to the video during their examinations for discovery.

[8] I therefore concluded that it was appropriate to permit the video to be used as evidence at the summary trial.

FACTS

[9] The defendants were all from Lethbridge, AB, and were in Kelowna for a music festival known as “Centre of Gravity”. All had consumed alcohol throughout the day: during the drive from Lethbridge; at a friend’s house in Kelowna; at the festival; at one or more pubs or bars in the downtown area following the festival. The three defendants then walked towards their friend’s home and stopped at the 7-Eleven convenience store sometime around 3:00 AM when the incident that gives rise to this claim took place.

[10] The events that give rise to the claim are depicted on the video, which is less than five minutes in length. At the beginning of the video, the plaintiff was is in line to pay for his purchases at the store. Two men, identified as Giesbrecht and Mr. Todd Van Gaal (“Van Gaal”) were ahead of him in the line. Although there is no audio, it appears that the other defendant Aiken was attempting to engage the plaintiff in conversation. The plaintiff appears to be ignoring Aiken and was looking at his phone. Giesbrecht then put his arm around Aiken’s shoulder to maneuver him away.

[11] Aiken then struck at the plaintiff, knocking his phone from his hand. The phone fell to the ground. The plaintiff picked up his phone while Aiken appears to continue to speak to him. Giesbrecht then stepped between Aiken and the plaintiff, and then engaged in a conversation with the plaintiff. Aiken, who at this point was

behind Giesbrecht, reached around Giesbrecht and punched or jabbed the plaintiff on the right side of his face with his left fist, and then stepped back behind Giesbrecht. Giesbrecht continued to speak with the plaintiff. Although there is no audio, the evidence of both Giesbrecht and Van Gaal during their discoveries was that at some point Giesbrecht suggested to the plaintiff that he step outside for a fight.

[12] Shortly thereafter, Aiken once again approached the plaintiff and Giesbrecht. Aiken reaches around Giesbrecht and punched the plaintiff in the face for a second time, again with his left fist. Both punches were sufficient to move the plaintiff's head, but neither appears to have resulted in any obvious injury.

[13] Shortly afterwards, Van Gaal put his purchases on the counter and stood by to watch the exchanges. Aiken and Van Gaal started to approach the plaintiff but then both backed away. Van Gaal then picked up something from the floor and appeared to throw it in the direction of the plaintiff. As the plaintiff went to pick up something from the ground, Aiken, who was holding his purchases in his left hand at this point, threw a punch with his right hand in the direction of the plaintiff's head that appears to have missed the plaintiff because the plaintiff was able to evade it.

[14] The plaintiff took a couple of steps back to resume his place in line to pay for his items. Aiken then started walking towards the plaintiff again, with Van Gaal only a step behind him. The plaintiff took two or three steps back as Aiken approached him. Aiken did not stop, and as he continued to approach the plaintiff, the plaintiff, having already backed up a couple of steps, punched Aiken in the face.

[15] When the plaintiff punched Aiken, Aiken was knocked to the ground. Van Gaal then immediately threw a punch at the plaintiff. Van Gaal was close enough to Aiken when Aiken was punched by the plaintiff that Van Gaal threw his punch before Aiken had hit the ground. At this point, Giesbrecht, who had been the furthest from the plaintiff when Aiken was originally struck, came forward, shoved Van Gaal aside and then punched the plaintiff on three occasions.

[16] After the plaintiff was knocked to the ground, the defendants then hurriedly left the store.

[17] The entire video, and therefore the entire series of events, took less than four minutes from the start until the plaintiff was knocked to the ground by Giesbrecht's punches. The total time between Aiken's right-handed punch that the plaintiff evaded as he was bent over to pick up something from the floor until Giesbrecht's punch is less than 12 seconds.

[18] The three defendants were all charged criminally. Giesbrecht pleaded guilty to assault causing bodily harm. Aiken pleaded guilty to simple assault, and Van Gaal was found guilty of simple assault after a trial, but acquitted of assault causing bodily harm.

ISSUES

[19] The issues to be decided on this application are as follows:

a) Is the liability issue suitable for disposition by way of summary trial?

b) Is Giesbrecht permitted to raise an argument of self defence in the face of his criminal conviction for assault causing bodily harm?

c) Are the defendants jointly liable?

[20] For the reasons that follow, I conclude the question of liability can be dealt with summarily and find the defendants jointly liable for the plaintiff’s injuries.

SUITABILITY FOR SUMMARY TRIAL

[21] The first question is whether this matter is suitable for summary trial.

[22] The defendants Aiken and Giesbrecht say the matter is not suitable for summary disposition, whereas the defendant Van Gaal takes no position on the question.

[23] Counsel for Aiken says the matter is not suitable for summary trial because she says the credibility of the parties needs to be tested at a full trial through *viva voce* evidence and cross examination. Counsel says she has deliberately not conducted a discovery nor any sort of cross examination of the plaintiff because she does not want the plaintiff to be prepared for any cross-examination at trial.

[24] Of the defendants, only Giesbrecht swore an affidavit in response to the summary trial application. Giesbrecht pleaded guilty to assault causing bodily harm arising from his interaction with the plaintiff. It is not disputed that he threw the punch or punches that caused the plaintiff to fall unconscious.

[25] In his affidavit, Giesbrecht deposes that he intervened to defend Aiken from the plaintiff, and that he is entitled to advance the defence of defence of a third party and provocation in defence to the civil proceeding. He also deposes that he would not have pleaded guilty had he known that his conviction could be used as evidence of civil culpability. I will return to the impact of Giesbrecht's guilty plea later.

[26] The plaintiff says the matter is suitable for summary disposition. As part of that decision, I must consider whether in the circumstances of the case it would be appropriate to sever the issues of quantum and liability.

[27] I am satisfied that severance is appropriate in the circumstances of this case.

[28] In order to succeed with a summary trial, the plaintiff must also satisfy the court that severance of the issues of liability and quantum is appropriate in the circumstances. Severance is permitted by R. 12-5(67), which provides as follows:

> 12-5 (67) The court may order that one or more questions of fact or law arising in an action be tried and determined before the others.

[29] The British Columbia Court of Appeal undertook a thorough analysis of the suitability of determining matters by summary trial in *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83. The Court of Appeal reviewed the Supreme Court of Canada's decision in *Hryniak v. Mauldin*, 2014 SCC 7, which encouraged a shift in culture to better align with the proportionality principle that the best forum for resolving a

dispute is not necessarily that with the most painstaking procedure. The Court of Appeal then cited with approval a list of factors articulated in this Court's decision in *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485. The Court of Appeal in *Ferrer* said the following:

> [27] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, the court considered a large number of authorities (most of which emanated from the British Columbia Supreme Court) on when it is appropriate to hive off an issue in litigation for summary trial. It distilled from the cases a list of factors to be considered:
>
> > [110] In summary, the authorities in BC, including *Hryniak*, make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:
> >
> > a) whether the court can find the facts necessary to decide the issues of fact or law;
> >
> > b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
> >
> > i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
> >
> > (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
> >
> > (2) the potential for multiple appeals; and
> >
> > (3) the novelty of the issues to be determined;
> >
> > ii. the amount involved;
> >
> > iii. the complexity of the matter;
> >
> > iv. its urgency;
> >
> > v. any prejudice likely to arise by reason of delay; and
> >
> > vi. the cost of a conventional trial in relation to the amount involved.
>
> [28] This list is a good indication of the factors that are typically of concern when a court is asked to deal with a single issue on a summary trial. I would not, however, suggest that all of these factors will be relevant in every case, and I would discourage a checklist approach to the question.

[30] In this case, I see no difficulty or inherent unfairness in severing the issues of liability and quantum. While severance of a single issue is often inappropriate, it is routinely done in personal injury actions in this province. There is no potential for

duplication or inconsistent findings, the trial will be simplified and the prospect of settlement perhaps increased if liability is no longer at issue.

[31] On the question of suitability for summary disposition, I am told that the plaintiff, perhaps unsurprisingly, has absolutely no recollection of the events at all. He remembers having dinner at his girlfriend's and leaving her home the previous evening, and the next thing he remembers is approximately seven days later after waking from an induced coma in the hospital.

[32] As for the defendants, I was taken through portions of their examinations for discovery. Each confirmed that they were intoxicated on the night in question and each referred to the video during their discovery.

[33] Excerpts of the examinations for discovery of each defendant were placed before the Court by the plaintiff.

[34] It is no answer to an application for summary determination to put no evidence before the court while insisting on a conventional trial. In *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275, the Court of Appeal stated the following:

> [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in ***Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8*** (1988) 27 B.C.L.R. (2d) 378 at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up': see ***Hamilton v. Sutherland*** (1992) 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R.18A motion. In this instance, it was not realistic for Everest to hope that the Court at the summary trial would of its own volition decline to proceed because it was being asked to determine issues of dishonesty, or because the possibility of certain *viva voce* evidence had been discussed in a different context.

[35] The encouragement for a "culture shift" in *Hryniak* and the inclusion of the principle of proportionality in R. 1-3 of the *Supreme Court Civil Rules* suggest that

the Court ought not to be timid in making use of the summary trial process. All of that said, the general principles and leading authority on summary trials, *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.) continue to apply.

[36] In *Royal Bank of Canada v. Tyran Transport Ltd.*, 2019 BCSC 2294, Justice Skolrood held the following:

> [30] The central consideration is whether the court is able to find the facts necessary to determine the issues on the record before the court. Even where the court can find the necessary facts, it must still consider whether it would be just to decide the matter summarily by reference to factors such as the amount involved, the complexity of the matter, its urgency, any prejudice that might arise by reason of delay, and the cost of taking the matter forward to a conventional trial: see *Inspiration Management Ltd. v. McDermid St. Lawrence* (1989), 36 B.C.L.R. (2d) 202 (C.A.).
>
> [31] One other point of note with respect to summary trials. It is important to keep in mind that a summary trial, while typically conducted on the basis of a written evidentiary record, is nonetheless a trial, and parties are obliged to take every reasonable step to adduce the evidence necessary for judgment.

[37] With the exception of Giesbrecht's affidavit, which I will address later when considering the impact of his guilty plea, the defendants have chosen to tender no evidence. I find the video speaks for itself.

[38] I am satisfied that I have sufficient evidence to decide the liability question summarily.

LEGAL BASIS FOR CIVIL ASSAULT AND BATTERY

[39] The plaintiff's claim against the defendants is in battery and assault. Battery, often referred to as "trespass to the person", generally involves direct physical contact with the plaintiff's body.

[40] The tort of civil assault is described by Linden et al. in *Canadian Tort Law*, 12th ed. (Toronto: LexisNexis, 2022) [*Linden on Torts*] at 2.04 as follows:

> The tort of assault occurs when a defendant intentionally causes a plaintiff to apprehend imminent contact with her or his person. The tort protects a plaintiff's right not to be subjected to that apprehension which, if present, will

> comprise an interference with the plaintiff's right to psychological integrity and security of the person.

[41] Self defence and provocation can each apply to claims of battery, but they are distinct. In *Fridman's The Law of Torts in Canada*, 4th ed. (Toronto: Carswell, 2020) at 103, self defence is described as follows:

> Self-defence depends on the idea that the defendant is either under attack at the hands of the plaintiff, or reasonably believes that he or she will be subject to such an attack, even if the plaintiff has neither the intention nor the power to make such an attack. . . .
>
> Even if the circumstances entitle the defendant to claim that he or she was acting in self-defence, he or she cannot escape liability unless it is established that the amount of force used was reasonable in the circumstances. This will depend on the court's assessment of the situation, taking into account the form and nature of the plaintiff's attack on the defendant and the reasonableness of the defendant's response.

[42] Self defence serves as a complete defence to a civil battery claim, just as it also serves as a defence to a criminal charge of assault.

[43] Provocation is not a complete defence but may be considered in the mitigation of damages. Provocation is described in *Linden on Torts* at 2.06:

> In order to amount to provocation, the conduct of the plaintiff must have been "such as to cause the defendant to lose his power of self-control and must have occurred at the time of or shortly before the assault". Prior incidents would have relevance only "if it were asserted that the effect of the immediate provocative acts upon the defendant's mind was enhanced by those previous incidents being recalled to him and thereby inflaming his passion". One cannot coolly and deliberately plan to take revenge on another and expect to rely on provocation as a mitigating factor.

[44] Finally, defence of third persons might also serve as a defence to a battery claim. In *Linden on Torts*, defence of third persons is described at 2.06:

> One is privileged to defend not only one's self, but others who are endangered by assailants. Just as tort law recognizes the social value of protecting one's self, it also realizes that citizens will often take steps to save others from danger, and that this should be permitted. The law allows people to defend themselves, their relatives, employees, friends or even total strangers equally, as long as they are reasonable in doing so.
>
> As in the defence of self-defence, if one person defends another in the reasonable belief that there is need of protection, the defender will be

> excused from liability even if mistaken. In *Gambriell v. Caparelli*, a mother, believing her son was being choked by the plaintiff, shouted at him to stop, picked up a three-pronged garden cultivator, struck him three times on the shoulder with it, and finally hit him on the head with considerable force. The mother was relieved of liability on the ground that she had few options open to her, given her lack of knowledge of English, and her size in relation to the plaintiff's. His Honour Judge Carter, relying on the *Compensation for Victims of Crime Act*, which he felt implied that the legislature "considered it meritorious to aid one's neighbour", explained: "[W]here a person in intervening to rescue another holds an honest (though mistaken) belief that the other person is in imminent danger of injury, he is justified in using force, provided that such force is reasonable … ."
>
> As in self-defence, the person who comes to the assistance of another must not use excessive force, and bears the onus to prove that it has not been so used.

[45] As with self defence, defence of a third person will also constitute a full defence to a criminal charge. Section 34 of the *Criminal Code*, R.S.C. 1985, c. C-46, codifies that there can be no criminal liability when protecting oneself or another, in certain circumstances:

> **34 (1)** A person is not guilty of an offence if
>
> **(a)** they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
>
> **(b)** the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
>
> **(c)** the act committed is reasonable in the circumstances.

POSITIONS OF THE PARTIES

[46] There is no question that it was Giesbrecht's punches that caused the plaintiff's injuries: he pleaded guilty to assault causing bodily harm.

[47] However, Giesbrecht denies that he is legally liable for the plaintiff's injuries. He argues that he was acting in self defence, in that he came to the aid of Aiken after Aiken was punched by the plaintiff. He also argues provocation arising out of the same event.

[48] Giesbrecht also argues that the plaintiff was setting up Aiken with the intention of punching him just before Giesbrecht struck the plaintiff. Giesbrecht says that he was the peacekeeper and was on his way out of the store when the plaintiff punched Aiken.

[49] Aiken says that the parties were not acting in concert. He argues that initially Giesbrecht is trying to dissuade Aiken from escalating the confrontation, as evidenced by his attempts to move him away. Counsel for Aiken concedes that while Aiken may have been trying to precipitate an altercation with the plaintiff, he was no longer in a position to participate after he had been punched by the plaintiff.

[50] Aiken argues that the state of mind of each of the three defendants would be relevant, and that Giesbrecht should have the opportunity to argue self defence (defence of a third party).

[51] Van Gaal argues that the parties are not jointly liable because there was no common intention. He refers to both the discovery evidence and the video evidence, which confirm that:

a) When Van Gaal went to punch the plaintiff, he had no idea where Giesbrecht was; and

b) When Giesbrecht went to punch the plaintiff, he did not notice Van Gaal. Van Gaal says this is confirmation that there was no common intention between the parties.

[52] He also refers to the reasons for judgment of Judge Klinger from his criminal trial at para. 25 which he argues is essentially a finding on a civil standard that Van Gaal had no expectation that Giesbrecht was going to join in the skirmish.

[53] Counsel for Van Gaal says there is no commonality, no common plan or purpose and no joint effort in this case, and argues that the damage is severable. In other words, the only punch that caused damage was from Giesbrecht and that liability should rest with him alone. He argues that there should not be a finding of

joint liability on the facts, and that the fair outcome is that liability and damages are divisible, a position with which Aiken agrees.

[54] I will start with the legal significance of the defendants' criminal convictions arising out of the events in the store.

CRIMINAL CONVICTIONS

A. Giesbrecht's Conviction

[55] The defendant Braydon Giesbrecht pleaded guilty to assault causing bodily harm pursuant to s. 267 of the *Criminal Code*. That section reads as follows:

> **267** Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,
>
> **(a)** carries, uses or threatens to use a weapon or an imitation thereof,
>
> **(b)** causes bodily harm to the complainant, or
>
> **(c)** chokes, suffocates or strangles the complainant.

[56] Following Giesbrecht's guilty plea, the matter proceeded to sentencing based on an agreed statement of facts. Paragraph 1 of Judge Wyatt's sentencing decision reads as follows:

> [1] THE COURT: Braydon Giesbrecht has pled guilty to one count of assault causing bodily harm of Andrew Mathieson on July 25, 2015 in Kelowna, B.C. There is no dispute as to the facts. They are set out in an agreed statement of facts that has been filed as an exhibit today. I will not repeat those facts other than to say that this offence occurred in the early-morning hours at a local 7-Eleven store after Mr. Giesbrecht and his two friends had been drinking at the Centre of Gravity festival in downtown Kelowna. There was some sort of verbal and physical altercation between the complainant and one of Mr. Giesbrecht's friends, and during that altercation Mr. Giesbrecht stepped in and hit the complainant, who then fell to the floor. Mr. Giesbrecht then hit the complainant two more times in the face and left the store.
>
> [Emphasis added.]

[57] The agreed statement of facts, while reduced to writing in the criminal proceeding, was not placed in evidence before the Court in this matter.

[58] Giesbrecht argues that his criminal conviction is only *prima facie* evidence that the events to which he pleaded guilty occurred. He relies on this Court's decision in *W.K. v. Pornbacher* (1997), 32 B.C.L.R. (2d) 360, 1997 CanLII 12565 (S.C.) [*Pornbacher*] at para. 34.

[59] The plaintiff argues that it is an abuse of process for the defendants to try to relitigate their earlier convictions in the civil proceeding. He refers to *Toronto (City) v. C.U.P.E., Local* 79, 2003 SCC 63 [*C.U.P.E.*]. In that decision, the Supreme Court of Canada discussed when it may be appropriate for the court to circumscribe the ability of a party to relitigate a previously adjudicated matter. Justice Arbour expressed particular concern with regard to the re-litigation of criminal convictions:

> [54] These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

[60] I conclude that *Pornbacher* is not current law in British Columbia. In *R.T. v. Lowe*, 2021 BCSC 590, Justice Marchand reviewed authorities that touched on the same question of whether a defendant to a civil battery claim should be entitled to relitigate the facts in the face of a criminal conviction. He determined that previous decisions that reached conclusions similar to that in *Pornbacher* were decided without the benefit of *C.U.P.E.*, then concluded on the facts before him that the defendants' guilty pleas in the criminal proceedings included all of the essential elements of the civil tort upon which the plaintiff's claim was based.

[61] Giesbrecht says that he would not have pleaded guilty had he known that civil liability could flow, although there is no evidence to support this claim beyond his bare assertion.

[62] Similarly, although Giesbrecht in his affidavit suggests that he punched the plaintiff because he was coming to Aiken's defence, such a position, if accepted, would have constituted a complete defence to the charges. By pleading guilty, Giesbrecht was acknowledging that the defence was not available.

[63] Giesbrecht's arguments with regard to the possibility of civil culpability and a self defence argument would both suggest that he believes that he was not represented effectively by counsel at the time of his guilty plea. However, he has taken no steps to set aside the plea nor tendered any evidence from his counsel at the time.

[64] Finally, I note from Judge Wyatt's summary of the agreed statement of facts that were not put before me that Giesbrecht punched the plaintiff in the face twice more after the initial punch that knocked him down.

[65] Not only would it be an abuse of process to allow Giesbrecht to relitigate his conviction in the criminal proceeding, there is no air of reality to a self defence argument in any event. Van Gaal had already engaged with the plaintiff after the plaintiff punched Aiken, and Giesbrecht took several steps forward and had to shove Van Gaal aside in order to get to the plaintiff. The plaintiff was clearly backing away as Giesbrecht approached him. The plaintiff was no threat, whether to Aiken or anyone else at that point.

[66] I conclude that Giesbrecht is not entitled to relitigate the criminal proceeding by now arguing that he only punched the plaintiff because he was coming to Aiken's defence. His conviction is sufficient to establish his liability for the plaintiff's injuries.

B. Aiken's Conviction

[67] The defendant Ryan Aiken pleaded guilty to assault pursuant to s. 266 of the *Criminal Code*. That section reads as follows:

> **266** Every one who commits an assault is guilty of
>
> > **(a)** an indictable offence and is liable to imprisonment for a term not exceeding five years; or

> **(b)** an offence punishable on summary conviction.

[68] At Aiken's sentencing hearing, Aiken was clear that although he was pleading guilty to common assault, he was not accepting responsibility for the plaintiff's injuries by so doing. The video was played to Judge Hewson, and it was apparent that Aiken had punched the plaintiff. However, the initial blow was a weak blow and the second one was deflected.

[69] It is evident that Judge Hewson considered that Aiken played a significant role in the overall circumstances. Judge Hewson stated the following:

> [10] . . . A second aggravating factor is the role played by Mr. Aiken. Mr. Aiken, it is evident in the video, played a role that permitted this incident to become prolonged long past when others would have allowed it to have finished. A third aggravating factor is that the violence in this case was entirely gratuitous. A fourth is that there was apparent to me on the video in any event a complete absence of provocation by Mr. Mathieson. A fifth aggravating factor was that Mr. Aiken's conduct took place in the context of his support by and support for a group of other like-minded people; in other words, it was of group of three men who were assaulting a single man.

[70] Earlier in the reasons, Judge Hewson noted that Aiken's sentencing did not account for the injuries to the plaintiff:

> As a result of the assault committed on him by Giesbrecht and Van Gaal, Mr. Mathieson suffered serious injuries. <u>It is important to point out that Mr. Aiken, by his guilty plea, has in no way accepted responsibility for those injuries and he is not being sentenced as if he had</u>.
>
> [Emphasis added.]

[71] I accept that Aiken's guilty plea, which was to assault but not to assault causing bodily harm, is not something that can necessarily be used against him in terms of liability. That is, Aiken's punches, which were lighter and earlier in the sequence of events, appeared to have no obvious consequence in terms of the harm done to the plaintiff. As such, while he committed a civil battery by way of his earlier punches, it is not evident that damages flow from those earlier punches.

[72] What follows from these findings is that Aiken's guilty plea is not evidence that he is liable for the injuries suffered by the plaintiff following the punches from Giesbrecht.

C. Van Gaal’s Conviction

[73] The defendant Van Gaal pleaded not guilty and his matter proceeded to trial.

[74] He was convicted of common assault under s. 266 of the *Criminal Code* for his punch that struck the plaintiff's clothing, but acquitted as a party to assault causing bodily harm pursuant to s. 267. In paragraph two of his decision, Judge Klinger summarized what he had to decide:

> The issue raised in this case is whether the accused was a party to the offence committed by Giesbrecht and, if not, whether he is guilty of a common assault on Mr. Mathieson.

[75] Van Gaal argues that a review of Judge Klinger's reasons for judgment leads to the conclusion that Van Gaal is not liable for the plaintiff's injuries. The effect of Judge Klinger's reasons as it relates to the liability of Van Gaal will be discussed later when I address the question of whether or not the defendants are jointly liable.

[76] I conclude that Van Gaal’s conviction for assault is insufficient to establish that he is liable for the plaintiff’s injuries.

DISCUSSION OF JOINT LIABILITY

[77] In all of the circumstances, Giesbrecht's guilty plea to assault causing bodily harm is sufficient to establish his liability for the plaintiff's injuries.

[78] However, the finding of guilt as against Van Gaal and Aiken's plea, while serving as proof that they assaulted the plaintiff, are not, standing alone, sufficient to constitute proof of civil liability for the injuries that resulted from Giesbrecht's punches.

[79] The question is therefore whether the defendants are jointly liable for the plaintiff’s injuries.

A. Law of Joint Liability

[80] The Supreme Court of Canada discussed the concept of joint tortfeasors in *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3:

> **74** In *The Law of Torts* (8th ed. 1992), Fleming discusses the concept of joint concurrent tortfeasors. He states this at p. 255:
>
> > A tort is imputed to several persons as joint tortfeasors in three instances: agency, vicarious liability, and concerted action. The first two will be considered later. The critical element of the third is that those participating in the commission of the tort must have acted in furtherance of a common design. . . . Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realise they are committing a tort. [Emphasis in original.]
>
> **75** The appellants' actions bring them within the third category of joint tortfeasors so well described by Fleming. In the context in which the text writer has utilized the word conspiracy, it refers to the design or agreement of persons to participate in acts which are tortious, even though they did not realize they were committing a tort.

[81] In this case, it is only the third instance, concerted action, that might be applicable.

[82] In *Siegerist v. Tilton*, 2020 BCSC 549, a 14-year-old plaintiff was attacked shortly after he left his high school to walk home. Two adult males, at least one of which was wielding a telescopic baton, jumped out of a vehicle driven by the defendant Tilton and physically assaulted the plaintiff. The two paused at Tilton's direction, and the plaintiff was then assaulted again, this time by Tilton's eldest son. Tilton was found guilty of assault causing bodily harm for his role as the directing mind of the assault, which conviction was upheld on appeal.

[83] Tilton denied liability in the civil action for battery, claiming that he had not physically touched or caused injury to the plaintiff. Justice Walker dismissed a no evidence motion in the midst of trial, finding that Tilton's conviction after trial was sufficient for him to be found liable as a joint tortfeasor with those who physically struck the plaintiff.

[84] Justice Walker referred to the decision of the New Brunswick Court of Appeal, *Martin v. Martin* (1996), 176 N.B.R. (2d) 178, 1996 CanLII 18609 (C.A.). In *Martin*, the Court of Appeal affirmed the liability of two of the defendant brothers for battery, even though it was another brother who actually struck the plaintiff. The Court made the following comments:

> **19** I start with dispelling any doubt that torts such as battery cannot be committed jointly because of the argument that the battery of one defendant cannot be the battery of another. A battery can be committed jointly, *Hickman v. Poyns* cited in *Broome v. Wooton*, Yelv. 67, 80 E.R. 47. In fact, Glanville Williams in *Joint Torts and Contributory Negligence* (Stevens & Sons Ltd.: London, 1951) at page 14, is of the opinion that there is no tort incapable of being committed jointly.
>
> **20** In his approach to the question of whether the brothers were joint tort feasors, the trial judge cited a passage from G.H.L. Fridman, Q.C., *The Law of Torts in Canada* (Toronto: Carswell, 1990) vol. 2, which emphasizes that the defendants, in order to be joint tortfeasors, must be engaged in a common action for a wrongful purpose. He cited from pages 347-48:
>
> > "For two or more persons to be considered to be joint tortfeasors, the tort in question must be committed by one of them on behalf of or in concert with another. The acts must be performed in furtherance of a common design. Mere similarity of design is not enough, there needs to be concerted action to a common end. Thus, whenever one party is vicariously liable for the acts of another, they will be joint tortfeasors. They will be considered to have acted in concert. In other instances, the necessary combination of concerted action must be established. Only in one situation, the case of non-feasance in breach of a joint duty, will actual or imputed combination be unnecessary. What is to be considered combined or concerted action has been the subject of numerous judicial decisions. It would seem that the various defendants must be engaged in a common action for a wrongful, not a lawful purpose. They will not be acting in concert where they are acting together for a lawful purpose that is potentially dangerous."
>
> **21** I point out that there is nothing mysterious in the words "acting in concert". They mean simply "acting together". The trial judge then referred to the *Johnston v. Burton* decision where a judge of the Court of Queen's Bench in Manitoba held that the defendants were joint tortfeasors. One of the defendants was fighting with the plaintiff when the other defendants got involved in the fight, severely injuring the plaintiff.

[85] I have found the decision of *I.C.B.C. v. Stanley Cup Rioters*, 2016 BCSC 1108 [*Stanley Cup Rioters*] to be most helpful on the question of when defendants may be jointly liable. *Stanley Cup Rioters* was a case brought by ICBC for damages arising out of riots that followed a Stanley Cup playoff game. As a result of the riot,

substantial damage was done to vehicles and other property. There were originally 82 defendants. ICBC's claim was that all of the defendants were jointly and severally liable for the damage done to all of the insured vehicles.

B. Differentiating Joint, Joint and Several, and Several Liability

[86] Justice Myers began his discussion on the question of liability by distinguishing between joint tortfeasorship and joint and several liability:

> [14] It is important in the present case to distinguish the concepts of joint tortfeasorship and joint and several liability. It is also important to set out the criteria for the concepts and to delineate their boundaries.
>
> [15] There have been numerous descriptions of the concepts. The classic case is the English Court of Appeal's judgment in *"Koursk" (The), Re* [1924] P. 140, which dealt with collisions between three vessels. Perhaps the most commonly cited academic work is Glanville Williams, *Joint Torts and Contributory Negligence* (London: Stevens & Sons, 1951). He set out the following typology at pages 1-16.
>
> **A. Joint Tortfeasors – Joint Liability**
>
> [16] Two or more tortfeasors are joint tortfeasors in one of the following three situations:
>
> 1. Where one is the principal of or vicariously liable for another (p. 6);
> 2. Where a duty imposed jointly upon them is not performed (p. 9);
> 3. Where there is concerted action between them to a common end (p. 9).
>
> **B. Several Concurrent Tortfeasors – Joint and Several Liability**
>
> [17] Several concurrent tortfeasors are independent tortfeasors whose acts concur to produce a single result (p. 16). This can occur in two circumstances: where two causes are necessary in order to effect the consequence or where either cause would be sufficient in itself to produce the consequence. The common characteristic is that it is impossible to apportion the damage among the different tortfeasors.
>
> [18] Williams refers to all the above as concurrent tortfeasors. Concurrent tortfeasors are generally liable for all of the (same) damages. Other cases and works refer to this as joint and several liability. The use of the phrase "joint tortfeasorship" in this circumstance is inaccurate and misleading: per Bankes L.J. in *The Koursk* at p. 150. The High Court of Australia drew a helpful delineation in *Thompson v. ACTV* (1996), 186 CLR 574 at 580-1:
>
> > The difference between joint tortfeasors and several tortfeasors is that the former are responsible for the same tort whereas the latter are responsible only for the same damage.

> **C. Several Tortfeasors causing different damages – Several Liability**
>
> [19] The third related category that arises in cases where there are multiple people involved in an event or a case is that of several tortfeasors causing different damage. In this instance each tortfeasor is liable only for the damage which he has caused by himself.

[87] Justice Myers then discussed the requirement for concerted action or common design as a foundation for joint liability. He reviewed the English authorities and concluded that what was required was a concerted action to a common end:

> [22] The terms "concerted action", "acting pursuant to a common design" and similar variants have been used by the courts interchangeably. I will elaborate on the concept, primarily through reference to the *Sea Shepherd* decision because it is a recent high-level decision that considered the matter in some depth. I recognise that the *Sea Shepherd* case on its facts is not directly applicable to a riot situation where all the participants to the tort are actually "on the ground". Nevertheless, it fully enunciates the legal principles in issue.
>
> [23] In *Sea Shepherd*, the Sea Shepherd Conservation Society caused damage to a fishing vessel as part of an environmental protest. The defendant, Sea Shepherd UK, was a United Kingdom charity whose objective was to raise and provide funds to support the Sea Shepherd Conservation Society. The issue was whether the UK charity was a joint tortfeasor with the Conservation Society because it had done things such as a mail-out informing members of the scheduled protest. The mailing did not refer to any prospective tortious activity.
>
> [24] All five members of the panel gave decisions, two of them dissenting. However, they were clear that there was no disagreement as to the legal principles at stake; rather, the disagreement was as to the application of those principles to the facts.
>
> [25] Lord Neuberger referred to the Conservation Society as the primary tortfeasor and noted that the claimant contended that the UK charity was jointly liable because it assisted the primary tortfeasor to commit the tort. Lord Neuberger set out three conditions for joint liability to be established in the circumstances:
>
> > 55. It seems to me that, in order for the defendant to be liable to the claimant in such circumstances, three conditions must be satisfied. First, the defendant must have assisted the commission of an act by the primary tortfeasor; secondly, the assistance must have been pursuant to a common design on the part of the defendant and the primary tortfeasor that the act be committed; and, thirdly, the act must constitute a tort as against the claimant. As Lord Toulson says, this analysis is accurately reflected in the statement of the law in *Clerk and Lindsell on Torts*, 7th ed, p 59, cited by all members of the Court of Appeal in *The Koursk* [1924] P 140, 151, 156, 159.

> [26] With respect to the first condition, assistance, Lord Neuberger and the other judges held that the assistance must be substantial and not trivial.
>
> [27] Lord Sumption at para. 37 and Lord Neuberger at para. 55, adopted the following statement from *Clerk and Lindsell on Torts*, 7th ed, p 59, which had been quoted by Scrutton L.J. in *The Koursk*:
>
> > Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design … but mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action to a common end. [Emphasis added.]

[88] However, the principle is not unfettered or unlimited. At para. 30, Justice Myers referred to the following, also from the *Sea Shepherd* decision:

> [30] Lord Neuberger, at para. 56, noted that this basis of tortious liability had to be kept within reasonable bounds. Similarly, Lord Sumption said, at para. 39:
>
> > The principal concern of the law in this area is to recognise a liability for assisting the commission by the primary actor of a tort, while ensuring that the mere facilitation of the tort will not give rise to such a liability, even when combined with knowledge of the primary actor's intention. …

[89] Justice Myers concluded that ICBC's claim that all of the identified rioters were jointly and severally liable for all of the damage was too broad:

> [32] It is to be borne in mind that this was not a planned or deliberate riot. There was no ringleader; it was not instigated by a person or group of people. It was spontaneous. Under these circumstances, it appears to me ICBC's proposition is too broad.
>
> [33] First, it is too broad on a geographical level: every one participating in the riot on Seymour Street would be jointly liable for damage done by participants on Howe Street.
>
> [34] Second, it is too broad from a conduct point of view. For example, someone who has refused to leave the riot in order to take photographs would be equally liable for the destruction of a vehicle by someone else even if they never encouraged that destruction, much less laid hands on the vehicle.
>
> [35] Third, it is too broad because it does not recognise that the assistance rendered to the principal tortfeasor must be substantial.
>
> [36] Fourth, it begs the difficult factual distinction between whether there was one riot or several. (Although the riot has been referred to in the singular, and I will continue to use the term, it is imprecise for the purposes of determining joint liability for a tort.)

[90] In the result, Justice Myers concluded that mere participation in the riot was insufficient for joint and several liability, but participation as it related to a vehicle that was damaged if they acted with the common design with others could be sufficient. Ultimately, liability for damage to vehicles had to be considered on a vehicle by vehicle basis:

> [44] As I stated, this was not a directed or coordinated riot. Nor did it involve gangs spontaneously coalescing and then moving from location to location in unison. As I set out above, I do not accept that participation in the riot, in itself, establishes joint and several liability for torts committed during the riot. As noted by Lords Neuberger and Sumption in *Sea Shepherd*, joint tortious liability must be kept within reasonable bounds. The analysis must be more fine-tuned than looking at the riot as a whole. For most of the defendants, the question that must be asked is whether they acted in concert with the common end of destroying a vehicle and whether the destruction occurred as a result (above, para. 27).
>
> [45] Another way of expressing the question is to ask whether a defendant was part of the group that destroyed the vehicle and was his participation more than trivial. That has to be examined vehicle by vehicle, defendant by defendant. A defendant may be liable for damage to more than one vehicle if he took part in damaging those vehicles; that does not make him liable for all of the vehicles.
>
> [46] Several people spontaneously arriving at a vehicle and some of them cheering when another damages the vehicle does not amount to a common design. There is no case where the law has gone that far. Cheering or observing is not sufficient participation upon which to found joint liability.
>
> [47] People "piling on" a vehicle in order to damage or destroy it may be joint tortfeasors if it is apparent they acted together pursuant to a common design to do the damage. In a riot context, I do not think it necessary that the plan be explicitly laid in advance between them. They may also be concurrent tortfeasors if the damage they caused is impossible to apportion. In that case, each is liable for the full amount of the loss. They may also both be liable as principal tortfeasors (per Lord Toulson at para. 19 of *Sea Shepherd*).
>
> [48] There are several instances where a defendant did something to a vehicle that did *not* harm it (for example, attempting to remove a gas tank cover) and the vehicle was destroyed at a later point, there being no evidence as to the link between the defendant's initial action and the ultimate destruction. In that case, I do not think there can be any liability. That can be viewed as an instance where, to use Lord Neuberger's framework (above, para. 25), no assistance was provided to the tortfeasors who are primarily liable; *i.e.*, those who caused the damage. It can also be viewed as the defendant having only a similarity in design but being an independent actor not causing damage per Scrutton L.J. in *The Koursk* (above para. 27).

[91] Ultimately the question of whether the defendants are jointly liable involves a review of the facts.

C. Analysis: Are the Defendants Jointly Liable?

[92] It is not disputed that the punch or punches that knocked the plaintiff to the ground and caused his injuries were thrown by the defendant Giesbrecht. The question is whether or not Aiken and Van Gaal are jointly liable, along with Giesbrecht, for the plaintiff's damages.

[93] As set out in *Stanley Cup Rioters*, the question of joint liability turns on whether the three defendants were engaged in a concerted effort towards a common end. If so, they are jointly liable. If not, each would only be liable for the consequences of their individual actions.

[94] It is clearly evident that Aiken was agitating for a fight from when the three arrived at the store. For a time neither Van Gaal nor Giesbrecht were interested in provoking the plaintiff and appeared to take steps to try to dissuade Aiken, recognizing that there is no audio to accompany the video. For his part, the plaintiff was trying to avoid a confrontation and was looking at his phone.

[95] It appeared for a time that the situation had sufficiently de-escalated as Giesbrecht put his arm around Aiken's shoulder and manoeuvred him away from the plaintiff. After Van Gaal threw something in the plaintiff's direction and the plaintiff bent over to pick something up from the floor, Aiken threw another punch, this time with his right hand, that the plaintiff was able to evade. The plaintiff backed away.

[96] This could have been the end of the matter. However, Aiken, who had already paid for his purchases, and who had by this time already assaulted the plaintiff on two or three occasions, went back towards the plaintiff, for no obvious reason other than presumably to re-instigate the confrontation. Indeed Van Gaal, who still did not have his purchases in hand took a step or two in the same direction, and was right behind Aiken as Aiken sought to resume a confrontation with the plaintiff.

[97] On this occasion, the plaintiff, not unreasonably, is anticipating that his involvement with the defendants, and in particular with Aiken, is not over. On this occasion he is ready as Aiken approaches him without stopping, which is when the plaintiff punched Aiken.

[98] I have reviewed the video again in response to Giesbrecht's suggestion that the plaintiff was cleverly setting up Aiken in order to punch him. I do not interpret the video in this manner. Rather, it appears that Aiken has returned to confront the plaintiff yet again, having just missed with his right-handed punch at the plaintiff's head as he was picking something up from the floor, and that the plaintiff is backing away from Aiken as Aiken approached.

[99] Van Gaal and Giesbrecht both immediately set upon the plaintiff. Van Gaal was the closer and threw the first punch, although the plaintiff was able to avoid it to the extent Van Gaal's fist only came into contact with the plaintiff's clothing.

[100] Immediately thereafter, Giesbrecht shoved Van Gaal aside and threw the first of his punches, making contact with the plaintiff and knocking him to the ground. It is not clear whether he was rendered unconscious by the punch or when his head hit the ground.

[101] Both Van Gaal and Giesbrecht were doing the same thing at the same time, that is punching the plaintiff, something that Aiken had already done on two or three occasions and had likely returned for the same purpose, there being no other purpose for him to confront the plaintiff once again.

[102] Aiken argues that the events are separate because Aiken wanted to fight but Giesbrecht was trying to prevent an altercation at the beginning, whereas after Giesbrecht had struck the plaintiff, Aiken pulled Giesbrecht away. As such, Aiken says that he was the aggressor and Giesbrecht the peacemaker at one point, and that Giesbrecht was the aggressor and Aiken the peacemaker at a later time. I do not agree.

[103] I do not accept that Aiken was a peacemaker at any time. When he pulled Giesbrecht away, it was not out of any wish to maintain the peace or concern for the fact that the plaintiff was now lying unconscious at their feet. Aiken's sole concern was flight. None of the defendants did anything to try to assist the plaintiff, either directly or indirectly by way of calling for assistance. Instead, all three left the store only to be located subsequently by police.

[104] Van Gaal relies on Judge Klinger's decision in his criminal case to support the argument that he is not jointly liable for the injuries. In the decision, Judge Klinger stated the following:

> [25] It has not been proven that there was a common intention to assault Mr. Mathieson, nor in my view was the accused wilfully blind as to the likelihood that Giesbrecht would commit the offence. In my opinion, it has not been proven that he shut his eyes to that likelihood because he knew or strongly suspected that looking would fix him with knowledge. It is more likely that when he saw Aiken strike, he had no thought of Giesbrecht at all.
>
> [26] In conclusion, I find that the Crown has not proven beyond all reasonable doubt that the accused was a party to the offence committed by Giesbrecht.

[105] However, Judge Klinger's decision must be read in context. It is a criminal law proceeding, where the Crown bears the burden of proof beyond a reasonable doubt. Just prior to the above quotation, Judge Klinger stated the following:

> [22] . . . The Crown argues that the act committed by this accused consisted of him directing a punch toward Mathieson suggesting that, by doing so, he assisted or encouraged or instigated Giesbrecht to commit the offence. Even if the accused's conduct had the effect of encouraging or instigating Giesbrecht to commit the offence, which on these facts may or may not be the case, I must next consider the *mens rea* requirement.
>
> Did the accused deliver his blow for the purposes of aiding Giesbrecht to commit the crime?
>
> [23] In order for me to come to that conclusion, I would have to be satisfied beyond all reasonable doubt that the accused intended to assist Giesbrecht in committing the offence and that he knew Giesbrecht intended to commit the crime. I am unable to come to that conclusion on these facts.
>
> [24] The accused knew that Giesbrecht had earlier invited Mathieson to step outside to fight and that a fight had not occurred. Just prior to Aiken's advancing toward Mathieson following the third punch, Giesbrecht had moved toward the door area. When the accused threw a punch at Mathieson,

> he had his back to the front door area. I cannot find on these facts that the accused knew that Giesbrecht intended to rush at Mathieson and commit the offence.

[106] The question that Judge Klinger had to answer was whether Van Gaal was intending to assist Giesbrecht. However, that is not the same question that must be answered in the civil case, which is whether there was a concerted action to a common end.

[107] Van Gaal says that because his punch did not land, and therefore did not cause harm to the plaintiff, his position is no different than the person who removed the gas tank cover on a vehicle that was subsequently destroyed by others in *Stanley Cup Rioters*, where there was no liability.

[108] For his part, the plaintiff does not disagree with the analysis of joint tortfeasorship and joint and several liability in *Stanley Cup Rioters*, but says the circumstances in our case are more analogous from a factual perspective to Justice Myers's findings with regard to 'vehicle 1', where he stated the following:

> [58] Also outside the Canada Post building was **vehicle 1**, a 1996 GMC pickup truck. With several others, Mr. Alexander rocked the truck in an unsuccessful attempt to overturn it. Others took over and he was present when they succeeded in flipping it. It was later destroyed by fire. It was, of course, treated as a total loss. Flipping the vehicle in and of itself would have made it a total loss given that the amount paid out by ICBC was only $3,172.
>
> [59] Mr. Alexander was engaged in a common enterprise or design to destroy this vehicle. When he did not succeed in flipping it, others took over and he remained present. He was an active participant in the group that destroyed the vehicle and is therefore jointly liable for that.
>
> [Emphasis added.]

[109] I am satisfied that all three of the defendants, who knew each other and of Aiken's propensity to start fights, expected and anticipated that a physical altercation would result. While I accept that the defendants did not enter the store with the intention of assaulting the plaintiff specifically, Van Gaal and Giesbrecht were both aware of Aiken's propensity to try to start fights and each was willing to back up the others, as evidenced by the events that followed. The entire event took less than five

minutes. I do not accept that it is either necessary or appropriate to break down each incident or transaction and view them as discrete or separate events.

[110] The defendants' interactions were interconnected and similar as to purpose and effect. All three engaged in activity intended to provoke or humiliate the plaintiff, all prior to the final act by Giesbrecht that rendered the plaintiff unconscious: Aiken, both verbally and by punching at him on three occasions and returning to taunt him; Van Gaal by throwing coins at the plaintiff and moving towards him a step behind Aiken; Giesbrecht by suggesting that the plaintiff go outside to fight. All three defendants also intended to, and did commit battery, of the plaintiff: Aiken threw three punches at him, two of which connected; Van Gaal who punched at the plaintiff but connected only with his clothing; and Giesbrecht, who connected three times and caused the plaintiff's injuries.

[111] I conclude that each of the three defendants played an instrumental role in the battery of the plaintiff.

[112] It is obvious and not disputed that had Giesbrecht not punched the plaintiff, he would not have been injured.

[113] Had Van Gaal not thrown a punch at the plaintiff, Giesbrecht may not have been able to throw such a devastating punch at the plaintiff. Giesbrecht was able to do so because the plaintiff had been occupied with evading Van Gaal's punch and was therefore less capable of defending himself from Giesbrecht. To this end, I observe that the time between Van Gaal's punch that struck the plaintiff's clothing and Giesbrecht's first punch was no more than three seconds.

[114] Had Aiken, the initial agitator, not returned to confront the plaintiff, Giesbrecht and Van Gaal would likely have not thrown punches at the plaintiff as they only did so in response to the plaintiff striking Aiken after Aiken went back to the plaintiff to resume taunting or otherwise trying to engage him in a confrontation that the plaintiff, at least until that point, had refused to engage in.

[115] I find that all three defendants were engaged in a common enterprise to taunt, bully and ultimately assault and batter the plaintiff. While the roles of each of the three were not identical, and despite the fact that one or more of them did not actually succeed in throwing a punch that hurt or injured the plaintiff, all three threw punches at him in a very short period of time, and for a common purpose.

[116] I agree with the plaintiff's submission that the circumstances here are analogous to 'vehicle 1' in *Stanley Cup Rioters*. All three defendants engaged the plaintiff physically in a very short period of time and all three threw punches in relatively short order. Van Gaal and Aiken cannot avoid liability simply because Giesbrecht's punches were the strongest and caused the actual injury. All three defendants had the common intention and were active participants in the physical assault and battery of the plaintiff.

D. Was the Plaintiff Contributorily Negligent?

[117] It is trite law in British Columbia that a finding of contributory negligence would preclude a finding of joint liability. The *Negligence Act*, R.S.B.C. 1996, c. 333 applies not only to negligence claims but also to intentional torts: *Brown v. Cole* (1995), 14 B.C.L.R. (3d) 53, 1995 CanLII 1782 (C.A.).

[118] The response to civil claim filed by Van Gaal refers to the actions of Aiken and Giesbrecht. The response filed by Giesbrecht refers to Aiken and Van Gaal. However, it also at paragraph four pleads *ex turpi causa non oritur actio*—that the plaintiff was the cause of his own misfortune by becoming involved and physically fighting with the other defendants.

[119] The defendant Aiken says the plaintiff instigated the altercation by punching Aiken first, with Van Gaal and Giesbrecht coming to his defence.

[120] I do not accept that the plaintiff should be viewed as the instigator. By the time the plaintiff punched Aiken, Aiken had already struck him with a closed fist twice and the plaintiff had been able to avoid one other subsequent punch. When Aiken walked towards the plaintiff after the plaintiff had returned to join the line to pay for

his purchases, he had no purpose other than to try to antagonize the plaintiff. The exit was in the opposite direction, and the defendants had already paid for their purchases. It was wholly reasonable for the plaintiff to defend himself from Aiken, whose aggressive and confrontational demeanour was obvious.

[121] It was argued on behalf of the defendants that at least one of Van Gaal or Giesbrecht had suggested to the plaintiff that he “get out of here”. This could only have happened before Aiken went back the final time. Both Van Gaal and Giesbrecht also argue that the plaintiff should have taken steps to remove himself from the situation.

[122] I do not accept that any such statement changes the analysis on liability or benefits the defendants in any way for the following reasons:

a) It is difficult to see how the plaintiff should feel safer if he were to go outside into a dark parking lot at 3:00 AM, knowing that one or more of the defendants was agitating for a physical altercation; and

b) The plaintiff was waiting to pay for his items and otherwise minding his own business, while the defendants tried to engage him in a physical confrontation he clearly did not want.

[123] I reject the argument that the plaintiff contributed to his injuries.

DISPOSITION

[124] The defendants are jointly liable for the plaintiff’s injuries.

COSTS

[125] Unless any party wishes to address the issue, the plaintiff is entitled to his costs.

“Wilson J.”