IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Degen v. British Columbia (Public Safety)*, 2023 BCSC 508

Date: 20230331
Docket: S198647
Registry: New Westminster

Between:

Bradley Marvin Degen

Plaintiff

And:

The Minister of Public Safety and Solicitor General of British Columbia

Defendant

Before: The Honourable Mr. Justice Crossin

Reasons for Judgment

Counsel for the Plaintiff:	T. Harding
Counsel for the Defendant:	A. Scarth K. Hucal A. Shamstabrizi
Place and Dates of Trial:	New Westminster, B.C. August 16-20, 23-26, 30-31, September 1-3, 2021 January 24-26, 28, and May 19-20, 2022
Place and Date of Judgment:	New Westminster, B.C. March 31, 2023

Introduction

[1] On the evening of July 25, 2016, two RCMP officers, Cst. Perkins and Cst. Spoljar, were dispatched to the area of a lumberyard in Surrey, British Columbia. The officers were responding to a citizen complaint that a semi-trailer truck was parked on the street outside the lumberyard with its motor running. It was also reported that the driver of the truck had been observed and was possibly under the influence of alcohol and was now in the truck and unresponsive to efforts of the complainant to engage him.

[2] The driver of the truck was the plaintiff.

[3] The cab of the truck had a sleeping area behind the seats of the vehicle and it was there the plaintiff was asleep upon the arrival of the officers. The officers arrived at the scene separately but more or less at the same time. Some preliminary banging on the door of the cab failed to get any response. The officers hoisted themselves up the side of the cab, one on each side, and peered in through the windows with flashlights, to then discover the plaintiff apparently asleep. The doors were locked, the windows shut, the engine was running.

[4] There is controversy in the evidence concerning the unfolding of events at this point, but what is clear is the plaintiff remained in his locked vehicle and the officers were frustrated in their attempts to engage with the plaintiff regarding the complaint.

[5] Matters shortly evolved to the point where the police believed there existed lawful grounds to arrest the plaintiff for obstruction of justice and, in fact, so proceeded to effect the arrest. It is common ground that in the course of the arrest the windows of the truck were broken by the officers and both officers deployed their respective conductive energy weapons (CEWs). The plaintiff was tasered twice while inside the cab of his truck.

[6] The plaintiff was transported to the RCMP detachment in Surrey and ultimately charged with obstruction of justice and assaulting a police officer. These charges were stayed some months later.

[7] The plaintiff brings a claim in tort. He alleges that not only was he twice tasered, but as well, during the arrest, punched multiple times in the head and torso by both officers inside the cab. The plaintiff says the conduct of the officers was unlawful and the defendant is liable for the wrongdoing. The claim of the plaintiff sounds in battery, negligent investigation, and malicious prosecution. The plaintiff says he suffered a multitude of injuries, including mild traumatic brain injury. He seeks damages; including punitive damages.

The Evidence of the Plaintiff

The Evening and Early Morning Hours of the Incident

[8] The plaintiff testified that on July 25, 2016 he was employed as a truck driver with Banner Transport. On that date, he arrived at the scene of the incident driving his semi-truck with a load of lumber for delivery to a warehouse referred to in the trial as Vancouver Cedar. The warehouse is located in Surrey, British Columbia.

[9] He testified that he arrived at the warehouse at approximately 5:30 p.m. The warehouse was closed for the day but was scheduled to re-open the following morning. He parked his semi-truck on the street near the front gate of the warehouse. His truck was equipped with a place to sleep in the cab of the truck, located behind the driver and passenger seats. The vehicle was equipped with a driver's side window and a passenger's side window.

[10] The plaintiff decided to sleep in his semi-truck that evening. After eating he went to sleep in the sleeping area of the cab. He left the keys in the ignition and the motor running at what he termed a high idle in order to run the air conditioning unit in the cab. He testified this was about 9:30 p.m.

[11] He testified that he consumed no intoxicating substances that evening. He fell asleep wearing his underwear. He had removed his glasses. He testified that at

some point (prior to the police arrival) he alighted from his truck to stretch and to urinate outside on the street.

[12] Subsequently he was awakened by pounding on both doors; that is, the front driver's door and the front passenger door. A flashlight, shining through the passenger side window, was upon him as he was awakened. He noted the police lights from the police vehicle and knew it was the police. He confirmed the keys were in the ignition, the motor was running, and it was running at a high idle. The windows were closed, the doors were locked.

[13] The plaintiff testified that he made his way to the driver's seat and turned the high idle down to low idle in order to reduce the sound. He agreed that with the high idle and the windows closed, someone would have to yell in order to be heard inside the truck. He testified as well that the low idle only slightly reduced the sound.

[14] The plaintiff initially testified that he does not recall telling the officer or officers to "fuck off" upon being initially awakened.

[15] In any event, he did not alight from the truck but instead lowered the driver's side window two to three inches. He testified that when he lowered the window, an officer then climbed up onto the step of the truck (approximately three feet off the ground) and put his hand in the opening of the window to hang onto the window. The plaintiff testified the officer was yelling at the plaintiff to open the door.

[16] The plaintiff testified that it was Cst. Perkins on the driver's side hanging onto the top of the glass of the window. The plaintiff denies Cst. Perkins, or anyone, at anytime, identified themselves as police officers. He denies either of the police officers said, at any time, that they were investigating a care and control, or impaired driving, complaint. He denied Cst. Perkins asked to see his driver's license and naturally denied that he refused to produce his driver's licence or identification when requested to do so.

[17] The plaintiff testified that he asked, through the window, what was going on. He testified that the officer kept yelling "open the fucking door". When asked at the

trial about his unwillingness to open the door, the plaintiff testified that there was no value to your rights if you have to give them up at a certain point.

[18] The plaintiff testified that he told the officer at the driver's window that he was there delivering a load, and said that "you guys got the wrong guy" and "I'm going back to bed". He also conceded that he possibly then told the officer or officers to "fuck off".

[19] The plaintiff then brought the truck back up to high idle and rolled up the window. The plaintiff testified the closing of the window caused the officer at the driver's side to let go of his grip. He testified that as a result, Cst. Perkins fell or jumped to the ground. The plaintiff testified he did not push the hand of the officer that was gripping the window. He does not recall Cst. Perkins then announcing that the plaintiff was under arrest for obstruction of justice.

[20] He testified that the side windows of both the driver's and passenger's doors were broken by the officers. Later in his testimony he was adamant that it was the passenger side window that was broken in the first instance.

[21] The plaintiff testified that upon the windows being broken, he was immediately tasered by both officers through the now broken windows. He testified it was painful. It is common ground between the parties that this caused immediate convulsion and it is also common ground it caused the plaintiff to void his bladder.

[22] The plaintiff testified he was tasered twice. The plaintiff had taken the position leading up to trial that the tasering had occurred more or less simultaneously as he sat in the cab of his truck. This accords with what would also be the evidence of the officers.

[23] The plaintiff agreed that at his examination for discovery he stated under oath that he does not recall losing consciousness after being tasered and that the tasering occurred more or less simultaneously. He also testified that he made notes shortly after the event and his notes reflect the fact that the two taserings happened simultaneously.

[24] He testified at trial he is now of the view that he was not tasered simultaneously.

[25] The plaintiff's evidence at trial is that he was tasered once in the cab of his truck and that the second tasering took place some minutes later outside the cab after being arrested and removed from the cab of the truck by the police.

[26] In any event, the evidence of the plaintiff is that after he was tasered in the cab, Cst. Perkins entered the driver's side of the cab. At this point, the plaintiff stated that he was partially seated with his knees near the gear shift and the left side of his head against the cooler that was between the seats. The right side of his head was facing the officer as the officer came in the window. He testified the officer was yelling that he had care and control.

[27] The plaintiff then testified that Cst. Perkins punched him multiple times on the right temple. At the same time, the plaintiff stated the second officer entered the vehicle from the passenger side, having unlocked the door. He testified they both "pinned me down", bent his left wrist, and handcuffed him. He stated it was Cst. Spoljar that had come in the passenger side of the vehicle and when he had done so, laughed and pointed out that the plaintiff had "pissed himself". He says both officers were in the cab and both removed him from the cab. Of this he is certain. He is uncertain if the second officer, Cst. Spoljar, punched him in the head and torso during the course of both officers pinning him down.

The Arrest and Following

[28] The plaintiff testified that the officers both removed him from the cab and placed him on the curb near the vehicle. Photos of the plaintiff were taken as he sat on the curb. These photos have been marked as Exhibit 6. The photos were taken by Cst. Perkins.

[29] The plaintiff testified that the paramedics arrived on scene about 11 p.m. but did not assess him. He testified the paramedics simply extracted the prongs of the CEWs. He reported to the paramedics that he suffered from anxiety and he was

taking Pristiq. He told the paramedics he was not suffering any dizziness. He complained during his evidence at trial that the paramedics' report did not reflect the fact that he had taken blows to the head and was suffering from a possible concussion. However, he did not testify that he in fact told the paramedics he had received blows to the head or was experiencing any concussion-like symptoms.

[30] He testified that while on the curb he was not immediately informed that he was under arrest for obstruction of justice or assaulting a police officer. He testified he was not formally told of the charges and read his *Charter* rights until after the police had "ripped his truck apart". He does agree however that Cst. Spoljar asked if he wanted to contact counsel and that he indicated he would like to speak to a lawyer.

[31] The plaintiff testified that he was given shorts and a shirt to wear at the scene. The plaintiff was shortly driven by the police to the RCMP detachment.

[32] The plaintiff stated that when he arrived at the police detachment with the police officer (a different officer than those involved in the arrest, one Cst. Nozifort) he asked someone if he could have some sweatpants or coveralls. He testified that this request was refused. The plaintiff testified that he complained at the station that he had a sore chest and neck pain.

[33] He stated he was a put in a room and an officer brought him a phone book and asked what lawyer he wanted to speak to. The plaintiff testified he wanted to speak to legal aid and so the officer left the room indicating he would attempt to make arrangements to do that. Approximately ten minutes later, according to the plaintiff, another officer entered the room and told the plaintiff that they had contacted legal aid, left a message, and that legal aid would call back.

[34] He was assessed by the nurse on duty that evening at the Surrey RCMP detachment.

[35] The plaintiff stated in evidence that he had no medical complaints upon being assessed by the nurse at the detachment except for an injury to his wrist. It was

decided, as a result of his visit to the nurse, that he should be taken to the hospital. The plaintiff testified he was taken to the hospital for the purposes of x-rays to his wrist and chest.

[36] The plaintiff testified on numerous occasions during his evidence that he was forced to wear his urine-soaked underwear from the time he was arrested, throughout his initial attendance at the detachment, and while at Surrey Memorial Hospital. In addition, he was still wearing his underwear during his first appearance in court later that day.

[37] He was asked whether he had ever asked anyone at the detachment if he could take off his urine-soaked underwear and the evidence of the plaintiff was that he asked upon his arrival for different clothes but was refused.

[38] The plaintiff ultimately spoke with duty counsel that morning and appeared in court in the afternoon. He appeared in court with shorts and a T-shirt but testified he did not have shoes on. He was released on his own recognizance at approximately 6:30 p.m.

[39] The plaintiff testified that the next day, July 27, 2016 he attended a different hospital, namely Abbotsford Hospital, in order to deal with his wrist. He testified that was the only medical reason he attended. The evidence of the plaintiff is that his wrist was in a brace for eight to ten weeks. This was due to a sprain.

The Plaintiff's Life Circumstances

[40] The plaintiff was born and raised in Alberta, having been adopted as a child. He was, at the time of trial, 51 years of age.

[41] The plaintiff did well in school for the time that he was in school. He played sports. He enjoyed reading. He quit high school in grade 11, however, to work in the oil fields of Alberta. His goal was to become what is referred to in the industry as a truck push. A truck push is a supervisor in charge of coordinating the machinery and the workers when setting up and operating oil rigs. It is a position of some

responsibility. His father was a truck push and he worked for his father at some point.

[42] He gained experience in pursuit of his goal and was soon driving trucks. He performed this work for many years. He would work from time to time out of the country. He worked in Siberia for two months in 1993, but generally was in Spruce Grove and Taber, Alberta until 1996. In 1997, he went to the Sudan for some weeks for work.

[43] In 2002, he was in Yemen where he worked six weeks off and six weeks on, as a truck push, returning to Canada as a truck push in the early 2000s. He performed these duties with various companies until 2014.

[44] The plaintiff was married in 1996 and that union produced two children; a daughter born in 1996 and a son born in 1999. This marriage ended in 2007.

[45] Subsequently, the plaintiff married Ms. Laura Bowers. This marriage ended in December 2018.

[46] In his spare time prior to the incident, the plaintiff liked to read, fish, and attend music concerts.

[47] The oil industry, according to the plaintiff, collapsed in 2014. This ended his time in this industry. His employment following the collapse was varied. For reasons that were somewhat unclear, the plaintiff did not produce his income tax returns for the years 2010 to 2013. In any event, he testified he was virtually unemployed in 2014.

[48] Although he testified he attempted to secure employment; he remained unemployed in 2015.

[49] He secured employment as a truck driver in February 2016 with Banner Transport. This was full-time employment earning him approximately $55,000 that year. He was so employed with Banner Transport on July 25, 2016.

[50] The plaintiff was asked about medications that he was taking prior to the incident.

[51] The plaintiff confirmed that in 2010 he was taking Paxil for anxiety. He remained on Paxil “for a long time”. He testified that from 2015 onward he took Pristiq in place of Paxil. Pristiq is an antidepressant that can also address anxiety. He denies he was taking it for depression. He testified that he's never suffered from depression.

[52] The plaintiff was also questioned concerning certain medical information generated before the incident. In this regard, the plaintiff was referred to the notes of a Dr. Bystrom as a result of the plaintiff’s attendance at the Towne Centre Medical Clinic in Kelowna, BC, in May 2015.

[53] The note that was put to the plaintiff is as follows: “Weren't coping. Increased depression, anxiety and anger management. Worse in the last two years. Tried Paxil but overall no improvement." The plaintiff does not agree that this is what he reported to Dr. Bystrom and submits that it is an inaccurate note. He denies he had any anger issues in the past.

[54] He attended again at the same clinic ten days later, on May 25, 2015 to see a Dr. Bower relating to a driver's exam. He doesn't recall this visit with any particular detail. He was taken to Dr. Bower’s note: “has problems with anxiety and anger management”.

[55] In this regard, the plaintiff testified that he would sometimes “lash out” at his wife, Ms. Bowers, prior to the incident in question. This evidence appears to have been elicited as a precursor to his evidence that since the incident he has had anger issues that he says are a result of the alleged assault.

[56] In any event, he testified that he returned to his employment immediately after the incident, not missing a day of work, only to suffer a work-related injury some months later in May 2017. It was a shoulder injury suffered after he fell off the steps of his truck while inspecting it. He was off work for approximately three months.

[57] He testified he returned to work thereafter without incident but quit Banner Transport in November 2017. His income for 2017 was approximately $45,000.

[58] He then secured employment driving a snow plow with Emcon Services. This was seasonal and ended after a couple of months in early 2018.

[59] In April 2018, he secured employment with SW Events Technology. The plaintiff testified that he was hired to drive a truck. When his employer asked him to do manual labour he refused and quit. He testified he could certainly perform the manual labour; but took the position that he was hired as a driver and was not prepared to do anything else. Consequently, his stay with SW Events Technology ended after two weeks.

[60] He remained unemployed until the end of 2018 when he returned to driving a snow plow for a short while. In 2018, he earned approximately $7,000.

[61] Some months later, in July 2019, he secured a position as a truck driver with Jade Line Trucking. Income from Emcon Services and Jade Line Trucking in 2019 was approximately $50,000.

[62] This employment ended in September 2020 when the plaintiff approached his employer and advised that his “symptoms” had gotten “a little bit worse” and he was going to pursue disability payments. The plaintiff testified he didn't secure disability benefits but collected employment insurance. The plaintiff says his decision to end his employment was motivated by two or three instances in 2020 relating to the plaintiff's confidence in driving the truck safely. He referred to this as his “decreased situational awareness”.

[63] He earned approximately $61,000 in 2020. He thereafter took on tasks of splitting wood and managed to undertake this physical activity until he stopped in June 2021 for reasons which are unclear.

[64] As referenced, the plaintiff gave evidence concerning what he termed “decreased situational awareness”. The examples he provided of this issue occurred

in 2020 and perhaps before, although the evidence was somewhat vague whether his evidence addressed instances of decreased situational awareness prior to 2020.

[65] He described backing his truck into a concrete barrier in 2020 attempting to manoeuvre in an area in Tsawwassen. In addition, there was another event while in Sicamous in 2020. If I understood his evidence properly, this event involved the plaintiff pulling his truck into a gas station, which was a difficult area congested with other trucks. The lights “buggered" him and he backed into a cement barrier. Finally, sometime between 2016 and 2020, he “caught a gate” with his truck while parking at a Kal Tire store in Kelowna.

[66] The plaintiff also testified that in the summer of 2020, he picked up a load in Salmon Arm that had been dropped off by another driver. The plaintiff testified that the driver had loaded it in a way that was unsafe and that when the plaintiff stopped suddenly just outside of Calgary, the loads slid and he had to call a tow truck to readjust the load. He stated that he should have recognized that the load had been secured in an unsafe manner.

[67] As previously referenced, as a result of these experiences he testified he decided to end his employment in September 2020.

[68] The plaintiff has described various symptoms arising since the incident.

[69] The plaintiff testified that he sleeps a lot less than he did prior to the incident; that is, he sleeps five to six hours per night. He testified that he wakes up fatigued and with headaches.

[70] He does, however, adopt his evidence from the examination for discovery as truthful that he has had no sleep problems since the incident and has no difficulty falling asleep.

[71] The plaintiff discussed his reading habits since the incident. He continues to read but reads more online. He says reading gives him a headache and what he has

referred to as brain fog. When he reads, testified the plaintiff, the words don't get jumbled, it's just that the words don't flow.

[72] The plaintiff addressed the issue of noise since the incident. The plaintiff testified that his tolerance for a noisy room varies. Sometimes it creates a headache and sometimes it does not.

[73] He has testified that he suffers from seizures, presumably since the incident, and has described certain occasions that he characterizes as seizures.

[74] The plaintiff provided two or three examples of such occasions. He testified that in November 2020 he came down with a severe headache and the next thing he knew he was two or three blocks from his home.

[75] The plaintiff has also described another incident, also in November 2020, where he again had a headache and his right arm and right leg were jerking. He testified the next thing he knew he was being yelled at by a police officer. He testified he couldn't understand the words of the police officer, but was arrested and taken into custody. According to the plaintiff, he was criminally charged with mischief for allegedly throwing rocks at his neighbour’s house. In addition, he was charged with assaulting a police officer. The plaintiff testified that the officer was attending to the complaint of rock throwing and knocked on his door. The plaintiff stated that the officer reached in and the plaintiff pushed him back and shut the door.

[76] Finally, the plaintiff testified that in May of 2021 he had two episodes of his limbs jerking while in and about his home.

[77] The plaintiff confirmed that he did not report what he has referred to as seizures to any medical person and also testified that no one has witnessed the events that he has described as seizures. In the context of these seizures he has not called 911 nor has he attended the hospital following these events for assessment or treatment.

[78] The plaintiff testified that since the incident his memory has been impacted. While he says he has lost only a little long-term memory, he submits that he has very little short-term memory. The notion of short-term memory was not defined from his perspective but examples of what he calls his short-term memory difficulties were offered in evidence. For instance, following the incident, he used sticky notes in the home to remind him to shut off the stove. He would forget to call people. He testified he will forget something “in five minutes". He needs a list to go shopping.

[79] The plaintiff testified he has a lot of anger about the incident. He now lashes out because he's lost his quality of life. He testified that he lashed out at his wife, Laura Bowers, even though “she was a person I cared about and who was doing her best”. He testified he lashes out at his mother and his friends, although not his friend, Tammy Miller, nor his friend, Craig, although he recalled lashing out at Craig “about a week ago”. He does not lash out at his friend, Rocky.

[80] He testified that he is able to drive and still drives a vehicle in and about the streets of the province. He says he does so notwithstanding being susceptible to what he has referred to as the seizures as previously described. This is because he has no other way to travel about. Indeed he testified that he spends, at least in 2021, $200–$300 per month in gas. He testified concerning long drives for instance, from BC to Alberta, a trip that would normally be a ten-hour drive now takes 14 hours because he stops to rest.

[81] The plaintiff testified that since the incident he finds bright lights and/or fluorescent lights cause him difficulty. In particular, the light causes him to squint, and gives him headaches, and what he refers to as “brain fog”. The evidence appears to be however, that he has not sought treatment from an optometrist or an ophthalmologist. The plaintiff also states that his eyesight is perfect.

[82] This issue of light sensitivity, according to the plaintiff, also relates to his concert going, or more precisely, the curtailment of his concert going, as a result of the incident. He testified that the light issue, coupled with noise, causes difficulties. He testified that he would go to rock concerts prior to the incident, particularly heavy

metal concerts. He did testify however, that he has kept attending concerts since the incident, but he finds the concerts difficult and has had to leave due to this discomfort.

[83] Finally, he testified that he went fishing before the incident and after the incident also went fishing but hadn't fished for a while at the time of trial. He testified that he still performs his household chores and house maintenance although sometimes it takes him somewhat longer.

[84] He was asked about his attitude towards the police. He testified he had “no problem" with the police prior to 2016. He testified that he was convicted of impaired driving in his teenage years. He also testified that in his 20s he was convicted of dangerous driving. He stated that in 2008, in the course of the police engaging with him at his home concerning an allegation he had hit his child, he punched one of the police officers and knocked the officer unconscious. He pled guilty to assaulting a police officer and was sentenced to time served in pre-trial custody, apparently 99 days.

[85] The plaintiff provided evidence concerning his relationship with his wife, Ms. Bowers.

[86] It is apparent from the evidence that the plaintiff and Ms. Bowers are currently embroiled in a fairly acrimonious divorce proceeding. The plaintiff testified concerning aspects of the relationship. This evidence appeared to be pre-emptive in anticipation of Ms. Bowers providing evidence.

[87] The plaintiff testified that during their marriage Ms. Bowers would bring home certain medications from the hospital to provide for her father who was a veteran. The plaintiff testified that he didn't approve of this and they got into arguments concerning it.

[88] He further testified that Ms. Bowers would bring home medication in blister packs and he didn't approve of this either, so he would take the blister packs and hide them.

[89] Ms. Bowers moved from the matrimonial home in April 2018 and the plaintiff testified that when he returned from work one day he changed the locks. However, the plaintiff stated, upon subsequently coming home from work he discovered Ms. Bowers at the home. Ms. Bowers had locked herself in the house. Ms. Bowers had a neighbour with her. Somehow the police were summoned and an officer went inside the home but not before telling the plaintiff he would be charged with obstruction if he didn't get away from the door.

[90] In due course, the police officer emerged from the house and indicated that Ms. Bowers was simply packing up some of her things and would be leaving shortly. The plaintiff testified that he wanted to see what she was taking. The police didn't allow him near her and in addition, assisted her in leaving the house by taking her out the back way.

[91] The plaintiff then testified that he secured what he has referred to as a protection order because of the threats that he alleges Ms. Bowers made against him.

[92] He testified that he complained to the police, in due course, that Ms. Bowers breached the order. He stated that the police were not prepared to do anything and in fact, according to the plaintiff, were not even interested in looking at what he suggested was evidence of the breach. The plaintiff testified that he’s attempted to have his wife charged on four occasions for what he views as breaches; to no avail.

[93] The plaintiff testified that in 2019, after the parties had separated, Ms. Bowers asked him to smuggle cocaine in his truck from Vancouver to Kelowna. The plaintiff testified that after discussing the matter with his family, he refused. This resulted, according to the plaintiff, in Ms. Bowers threatening to have him “disappear” if he went to the police concerning her request.

[94] Nevertheless, the plaintiff testified, he did in fact go to the police and presumably reported all these matters. He testified that the police wouldn't do anything about it.

[95] The plaintiff provided evidence that, in July 2020, he and his adult son were in their driveway and the police came to his home “without any explanation" and attempted to goad his son into fighting with the police on the front street. He testified that he filmed this event. This was the extent of his evidence concerning this particular incident.

[96] The plaintiff addressed what he has tried to do over the years to attempt to treat some of the injuries that he complains about.

[97] He testified that counselling concerning these issues has not occurred; although the evidence is less than clear. As I understand the plaintiff's evidence, he was referred to an entity called Brain Trust in December 2018. He attended and personnel at Brain Trust said they would phone back for an appointment but they never did. He testified that he tried again to contact them after his examination for discovery in February 2020. He stated that he went to Brain Trust on three or four occasions although it is not clear on the evidence to what end. The plaintiff did say however that the sessions were not for counselling for anxiety or depression.

[98] He confirmed that he provided certain information to Dr. Mehdiratta, a neurologist, in May 2020, where he indicated that, at that time, he was sleeping seven hours per night. However, he also testified that he had misunderstood the question and that he lies in bed for half an hour after he wakes up. He testified that, consequently, it could be six-and-a-half hours of sleep.

[99] The plaintiff addressed the notes made by Dr. Claire Young, a doctor at the Towne Centre Medical Clinic in Kelowna, where he attended in August 2016 following the incident. The notes of Dr. Young are as follows: “surrounded by 10 police, tasered twice and injured left wrist, had x-rays but didn't show anything”. The plaintiff testified that he could not recall his attendance.

[100] The plaintiff was also asked about another attendance at Towne Centre Medical Clinic following the incident. He was asked about the notes of Dr. Young from September 24, 2016. The note indicates that “he never wakes up with

headaches". The plaintiff testified that this statement was untrue. However, he did confirm that he does not have bad dreams, nightmares, or dizziness.

The Evidence of Tammy Miller

[101] Ms. Miller is a long-time friend of the plaintiff. She currently resides in Stony Plain, Alberta but works at a Shoppers Drug Mart in Spruce Grove. She went to school with the plaintiff.

[102] The plaintiff would assist her with her math and tutor her in her homework in that regard. This was mostly in grades eight, nine, and ten.

[103] The plaintiff was never violent in school and would try and calm situations if it appeared to be getting violent. This was when they were about 14. She testified that they are like brother and sister.

[104] She testified that he finished high school and received his diploma. When she was advised of the plaintiff's evidence that in fact he dropped out in grade 11, she testified that she didn't recall that.

[105] She testified that she was not aware that he had been convicted in 2008 of assaulting a police officer.

[106] However, when the plaintiff moved to BC she didn't see him as often but he would come to Alberta to visit. She testified that they would speak on the phone on a weekly basis.

[107] That said, she understood that his first marriage was happy and he did not confide in her as to why that marriage ended. Ms. Miller was not aware of the problems that were unfolding in the marriage until after the marriage broke up.

[108] Ms. Miller was asked concerning what she could say and about the plaintiff's behaviour and personality prior to July 2016.

[109] Ms. Miller testified that prior to July 2016 they would talk about reading and work and how their parents were.

[110] She was asked whether he was “organized". She testified that yes, he had talked about what he was going to do at work the next day if they were speaking on the phone. She didn't understand anything but listened. He had a good vocabulary and Ms. Miller testified that as far as she knew he’d never had trouble finding the right word for something.

[111] He was witty when he would interact with people and he never behaved inappropriately.

[112] Ms. Miller testified that prior to the incident she was not aware that the plaintiff suffered from anxiety; she believed that he suffered from depression.

[113] She testified that he had a good memory when they would discuss matters on the phone prior to the summer of 2016. She testified that, prior to 2016, he didn't complain about headache, fatigue, or not sleeping properly, although Ms. Miller testified that the plaintiff did not share his personal issues or problems with her.

[114] In any event Ms. Miller was asked how, if at all, that has changed since July 2016 and she testified that he said that he fatigues easily and has a hard time getting a full night's sleep.

[115] She testified that since the summer of 2016 he seems more introverted and doesn't like to go out as much as he used to. She testified that over the last five years, she has seen him about 20 times; but has seen him a lot more in the “past three weeks” because he has come back to Alberta.

[116] She then testified that over the last three weeks his concentration is not like what it used to be. She testified that he has trouble finding the right words to say.

[117] She testified that she was out with the plaintiff and his mother at Boston Pizza for lunch and he had a hard time deciding what he wanted to eat and the lights bothered him. She believes that this outing occurred in 2018.

[118] Ms. Miller recalled a discussion one day on the phone while he was making chili. She asked him about ingredients and he stated that he felt like he was

forgetting to put something in the chili. Ms. Miller testified that she didn't think that would have happened before 2016.

[119] Ms. Miller testified that since 2016 “he's not good at math anymore". She testified that she knows this because he had to use a calculator one day in a grocery store to make change. It is unclear whether she observed this or was told this.

[120] She stated that the plaintiff recently, that is, about three weeks prior to the trial, came to her drugstore and he was squinting because he said the fluorescent lights bothered him and she said as far as she knew he did not have difficulty with lights prior to 2016.

[121] Ms. Miller offered evidence concerning his reading. She testified that he told her that he would try reading a page at a time one day and the next day told her that he didn't remember anything he read. He said he was frustrated.

[122] Finally, there is the concession that most of her evidence is as a result of what the plaintiff has told her. She stated that in her view he would not be lying to her about these matters.

[123] She confirmed that, prior to the trial, she and the plaintiff had gone to the library to set up a video to record a “trial run" of her evidence to be given at trial.

The Evidence of Marilyn Degen

[124] Ms. Degen is the plaintiff's mother. She testified concerning the changes that have occurred in the plaintiff following the incident.

[125] She testified that he appears edgy, confused, and stressed, and that light and noise bother him. According to her observations, he cannot multitask. Ms. Degen gave an example of the plaintiff being unable to multitask using an occasion some years after the incident, in June 2021, when he was moving from Kelowna to Stony Plain, Alberta.

[126] After the move they saw each other often and she noted that he is fatigued and angry, and can no longer read with enjoyment. He cannot be in crowds. He is bitter. She noted a significant decline in her son's attention span.

[127] She testified that while the plaintiff is an excellent golfer and golfs in the morning, he becomes fatigued in the afternoon.

[128] She believes he was diagnosed with depression beginning in 2010.

The Evidence of Scott Longmuir

[129] Mr. Longmuir is a friend of the plaintiff. Mr. Longmuir knew the plaintiff in high school and between 1991 and 2015 they would see each other periodically and speak on the phone every four to six weeks. However, prior to the incident they had drifted apart, and it was only in 2019 that they reconnected on one occasion. They have not visited since. That said, they speak on the phone every week or two.

[130] Mr. Longmuir finds the plaintiff changed from their last visit some years ago. He found him depressed and subdued.

The Evidence of Craig Popham

[131] Mr. Popham is also a friend of the plaintiff. Although Mr. Popham and the plaintiff have not seen each other since 2014, they still speak on the phone. Mr. Popham testified that the plaintiff complains about headaches, fatigue, and the fact that his memory isn't as sharp as it used to be.

The Evidence of Rocky Fehr

[132] Mr. Fehr has known the plaintiff since 2003 and has worked with the plaintiff before and after the incident. He last worked with the plaintiff in 2016 or 2017. Mr. Fehr noted that the plaintiff was anxious in attempting to carry out his tasks and his temperament was terrible. All this was a change from how the plaintiff performed his tasks prior to the incident. He testified that he would not hire the plaintiff.

The Evidence of Inspector Jeffrey Harris

[133] Inspector Jeffrey Harris is a member of the Vancouver Police Department. He was qualified to provide expert opinion evidence concerning: police use of force, use of force techniques, reasonable grounds for the use of force, and risk assessment obligations.

[134] Inspector Harris authored an expert report in this matter entitled “Use of Force Opinion” dated August 25, 2020 and marked Exhibit 23.

[135] Counsel on behalf of the plaintiff, by letter to Inspector Harris dated August 24, 2020, sought an opinion from Inspector Harris as to whether, based upon certain factual assumptions, what occurred was a “proper use of force” by the police officers involved in this matter. The instructing letter set out two assumed factual scenarios upon which the opinion was sought.

[136] The two sets of factual scenarios (entitled Scenario #1 and Scenario #2) were identical except for one factual difference. Scenario #1 assumed the timing of the CEW deployment was more or less simultaneous; while Scenario #2 assumed the timing of the CEW deployment was some minutes apart. In all other respects the two scenarios were the same.

[137] Inspector Harris came to the view that based upon the assumed facts; in both scenarios, neither officer had reasonable grounds to begin using force on the plaintiff.

[138] Some salient features of the assumed facts common to both scenarios were:

1) (Upon awakening) the plaintiff moved towards the driver's seat, opened the window about two inches, and asked Cst. Perkins what was going on;

2) The plaintiff showed no signs of insobriety;

3) Cst. Perkins said they had a report that he was intoxicated;

4) The plaintiff said “You've got the wrong guy. I’m parked. I was sleeping. Fuck off”;

5) Cst. Perkins stepped down from the truck step. This was expanded upon by Inspector Harris in the report as follows:

> (Upon this remark by Mr. Degen) “Does this mean that the officer should now just abandon his or her investigation? No. But it does mean the officer should attempt more follow-up investigative steps such as; looking for signs of liquor or drug use like liquor bottles inside or outside the truck, attempting more dialogue with Mr. Degen, attempting to convince him to exit the truck to provide further field sobriety tests, etc. Instead Cst. Perkins ends his conversation with Mr. Degen, steps off the truck…”;

6) (Upon stepping down) Cst. Spoljar extended his baton and smashed the driver's window;

7) Once the window was broken out, Cst. Spoljar mounted the driver's top step, punched the plaintiff in the face, grabbed him, and tried to drag him out of the cab through the window opening;

8) Cst. Spoljar was unable to get the plaintiff out the window;

9) (Following the tasering) The officers then opened the semi’s door and entered the cab. The officers both punched the incapacitated plaintiff in the torso and head; and

10) The beating or tasering rendered the plaintiff unconscious.

[139] It was during cross-examination that Inspector Harris was asked for his opinion relating to certain evidence that had emerged in the trial. Inspector Harris was asked if one assumed the plaintiff had closed the window during the initial encounter with Cst. Perkins, and that caused Cst. Perkins to fall off the truck, whether that act by the plaintiff could be viewed as active resistance or assaultive behaviour on the part of the plaintiff.

[140] The notion of active resistance or assaultive behaviour is relevant to use of force and the continuum of use of force in both the reports of Inspector Harris and

Sgt. Fawcett. Sgt. Fawcett was the expert witness called by the defendant in this area.

[141] In any event, Inspector Harris opined that if the window was closed purposely it would be viewed as either active resistance or assaultive behaviour.

[142] In re-examination, Inspector Harris was then asked to change one fact in his scenarios; the assumption being “Mr. Degen closed the window”. He was asked, given this new fact: what is the appropriate response from the officer?

[143] Inspector Harris testified that in that event – and assuming the officer came down from the truck, and assuming he was not injured, and assuming there was no risk of imminent flight – ‘it may be time for a little more dialogue’ to try and calm the person down.

[144] The suggested dialogue at that point, in the opinion of Inspector Harris, was to tell the person that they must produce their driver’s license and insurance papers and they must do it now; otherwise, if they do not cooperate in this regard, it will amount to obstruction of justice and the person will or may be arrested.

The Evidence of Dr. Manu Mehdiratta

[145] Dr. Mehdiratta was called by the plaintiff. Dr. Mehdiratta was qualified, without objection, as an expert in the area of neurology with a specific interest and expertise in the cause, diagnosis, treatment, and prognosis relating to mild traumatic brain injury or concussion.

[146] The report of Dr. Mehdiratta is dated July 9, 2020 and marked Exhibit 21.

[147] Dr. Mehdiratta consulted with the plaintiff for one hour via Zoom in May 2020. He testified that his conclusions in the report are largely, if not exclusively, founded upon the information provided by the plaintiff. In this regard, the plaintiff reported that he was tasered twice and was punched repeatedly in the head. Dr. Mehdiratta diagnosed the plaintiff with:

1) mild traumatic brain injury (moderate to severe);

2) post-concussion syndrome;

3) chronic migraines; and

4) cognitive and sleep issues.

[148] Dr. Mehdiratta opines that the symptoms have been caused by a head trauma.

[149] Dr. Mehdiratta assessed these matters concerning the clinical signs of mild traumatic brain injury and concussion in accordance with certain guidelines utilized in Ontario.

[150] In this regard, the guidelines state that there are four categories of indicia or important indicators concerning mild traumatic brain injury or concussion.

[151] Dr. Mehdiratta testified mild traumatic brain injury or concussion can be diagnosed if the patient is determined to be exhibiting one category of indicia or indicators.

[152] The four categories of indicia referred to by Dr. Mehdiratta were:

1. Any period of loss of or a decreased level of consciousness less than 30 min.
2. Any lack of memory for events immediately before or after the injury (post-traumatic amnesia) less than 24 hours.
3. Any alteration in mental state at the time of the injury (e.g., confusion, disorientation, slowed thinking, alteration of consciousness / mental state).
4. Physical Symptoms (e.g., vestibular, headache, weakness, loss of balance, change in vision, auditory sensitivity, dizziness).

[153] Dr. Mehdiratta concluded, based upon the information he had received, that the plaintiff exhibited categories three and four above.

[154] Dr. Mehdiratta testified that mild traumatic brain injury can be caused by the tasering itself but this was not part of his report and was not expanded upon, except to state that trauma could be the result of a fall following a tasering. He stated that the concussive symptoms can appear even in the absence of a direct contact injury. He confirmed that many symptoms, including headache, are not specific to traumatic brain injury. For instance, headache can be caused by stress. Similarly, issues related to sleep, irritability, anger, or memory are not specific to traumatic brain injury.

The Evidence of Dr. Zohar Waisman

[155] Dr. Waisman is a psychiatrist called as a witness on behalf of the plaintiff. He was qualified as an expert in this field to provide opinion evidence relating to forensic psychiatry with a special interest in psychiatric consequences of trauma, chronic pain, and headache, including long-term sequalae of those. He was further qualified as an expert neuropsychiatrist and qualified to offer opinions on mental disorders attributable to diseases of the nervous system.

[156] Dr. Waisman practices in Ontario. He engaged with the plaintiff for an interview, virtually, for one hour on June 2, 2020. His report is dated August 28, 2020 and is marked Exhibit 18.

[157] Dr. Waisman diagnosed the plaintiff with post-traumatic stress disorder (“PTSD”) and chronic pain, more recently described in the literature as somatic symptom disorder. The chronic pain in the plaintiff’s case is restricted to the reported headaches.

[158] The information received by Dr. Waisman was provided to him by counsel for the plaintiff in his letter of instruction; and as well the information provided by the plaintiff during the interview. In this regard counsel, in his letter, advised “the police used tasers simultaneously and then beat the plaintiff on his head and torso and it is unknown whether they used weapons or if they used fighting gloves”. The plaintiff reported to Dr. Waisman “he was tasered twice prior to being punched repeatedly in the head by an RCMP officer”.

[159] Dr. Waisman concluded, based on the information provided, the symptoms were “caused by the incident”. Dr. Waisman did not parse this in any way.

[160] Dr. Waisman concluded the psychiatric prognosis is guarded but even if treated successfully for PTSD, the plaintiff’s headaches are chronic, and the prognosis for a full resolution is not favourable. Dr. Waisman concluded that the plaintiff will be left with some permanent symptoms even with treatment.

[161] Dr. Waisman opined that based on the information provided, the plaintiff's overall mental deficiency and task performance would remain poorer than pre-accident; resulting in a lower level of work efficiency in a broad range of tasks. He further opined that this reduction in work efficiency reduced prospects of promotion and career advancement, and increased risk of job loss.

[162] When asked how these injuries may impair his economic independence or opportunities, Dr. Waisman recommended a vocational assessment in that regard.

The Evidence of the Defendant

The Evidence of Constable Jonathan Perkins

[163] Cst. Perkins had been a member of the RCMP for approximately one year prior to the incident. He testified he had taken the three-day course concerning the use of the CEW (the taser) in June 2016 but had not actually ever deployed the taser prior to this incident.

[164] Cst. Perkins testified that he became involved in this matter responding to a dispatch call that there was an unresponsive male in a semi-truck. Cst. Perkins arrived at the scene approximately five minutes later, somewhat after 10 p.m. He parked beside the semi-trailer and activated his emergency lights. He spoke with a complainant (Mr. Fontaine) who advised that his wife had seen the driver of the truck earlier in the evening stumbling about the truck, possibly drunk, and urinating. It was reported that he was possibly drinking from a bottle of alcohol; and was now in the truck and the complainant was unable to wake him.

[165] Cst. Perkins testified to the obvious need to investigate, and testified to the usual steps that are required to investigate such a complaint.

[166] Cst. Spoljar shortly arrived on scene. Cst. Perkins went to the driver's side of the vehicle and stepped up onto the steps in order to look in the driver's side window. He was standing on a step approximately three feet off the ground. It was dark and he used his flashlight to look in the window to see if anyone was actually in the truck. He saw the plaintiff in the back area of the truck, apparently sleeping. The doors were locked and the windows were shut. The engine was running.

[167] Cst. Perkins began banging on the driver's side door in an attempt to rouse the person. Cst. Perkins felt he had to raise his voice in order to be heard over the sound of the engine. As Cst. Perkins was attempting to rouse the person in the truck, Cst. Spoljar went to the passenger side of the vehicle and, as well, raised himself up on that side of the truck to look in the passenger window with the use of his flashlight.

[168] Cst. Perkins testified that the person woke up and said "fuck off". Cst. Perkins told the plaintiff to come to the front seat so he could speak to him. The plaintiff did so. Cst. Perkins asked that he open the window. The plaintiff was reluctant but eventually did so, but only rolling the window down two to three inches.

[169] Cst. Perkins testified that the plaintiff appeared dazed and his eyes were glossy. When the window was lowered, Cst. Perkins grabbed the top of the window to support himself. Cst. Perkins testified that at that point he could not smell any liquor in the cab or on the breath of the plaintiff. The officer testified however that the window was still between the plaintiff's face and mouth and Cst. Perkins could not lean in to better assess.

[170] Cst. Perkins testified that he also announced it was the police and they were investigating the plaintiff for impaired care and control. Cst. Perkins stated that the plaintiff then said words to the effect that he was parked and he didn't have to cooperate.

[171] Cst. Perkins asked for identification. Again, the plaintiff told Cst. Perkins to "fuck off". Cst. Perkins testified that he was calm but was using a loud voice in order to be heard over the truck. He testified that he was not yelling and not swearing.

[172] In or around this point, Cst. Spoljar had now left the area of the passenger window and was standing on the ground on the driver's side somewhat behind Cst. Perkins.

[173] Again, according to Cst. Perkins, the plaintiff told Cst. Perkins to "fuck off", that he was parked, and that he didn't have to produce identification. Cst. Perkins asked him to turn the engine off and step out of the vehicle. The purpose, states Cst. Perkins, was to pursue the investigation concerning the prospect of care and control under the influence of alcohol. Cst. Perkins testified that he was concerned that the plaintiff did not appear to be cooperative and was behind the wheel of a vehicle with the engine running and the keys in the ignition.

[174] Cst. Perkins then testified that the plaintiff again refused but did something that forced Cst. Perkins' hand off the window such that he was forced to let go and jump backwards off the truck onto the ground. The examination for discovery evidence of Cst. Perkins, read in by the plaintiff, was that the plaintiff pushed the fingers of Cst. Perkins off the window but Cst. Perkins testified at trial he can't recall exactly how it happened.

[175] In any event, upon Cst. Perkins going to the ground, the window was also ultimately closed by the plaintiff.

[176] Cst. Perkins concluded that this behaviour amounted to obstructing his ability to pursue an investigation of care and control and yelled out that the plaintiff was under arrest for obstruction of justice.

[177] Cst. Perkins then testified that Cst. Spoljar, while standing on the ground, broke the driver's side window with his baton. Cst. Perkins stated that at that point he went to the passenger side of the vehicle. Cst. Perkins testified that he was concerned that the plaintiff could start driving the vehicle.

[178] Upon arriving at the passenger side, Cst. Perkins broke the passenger side window with his baton, and as he climbed up, observed the plaintiff with a raised fist and believed he was about to punch Cst. Spoljar in the head or face area and immediately deployed his taser. He testified that he believed Cst. Spoljar was at risk of imminent harm. He testified that the prongs of his taser hit the back of what Cst. Perkins described as the plaintiff's lat muscle on the right side.

[179] He stated that the plaintiff then fell down or collapsed between the driver and passenger seat. He noted that Cst. Spoljar had also deployed his taser. He observed Cst. Spoljar unlock the door and enter and arrest the plaintiff. Cst. Perkins stayed outside the vehicle at the window, at the ready, if needed.

[180] He testified there was “a little bit of a struggle” between Cst. Spoljar and the plaintiff as Cst. Spoljar was attempting to cuff the plaintiff. At this point, the plaintiff's head was facing towards the back of the vehicle and his feet to the front.

[181] Cst. Perkins testified that he did not have a completely clear view inside the vehicle due to the passenger seat, and the fact the upper half of the plaintiff's body was out of sight, hidden by the body of Cst. Spoljar during the arrest process.

[182] He testified that he could see Cst. Spoljar reaching up with his left arm towards the head and neck area during what he termed the struggle to handcuff the plaintiff. He testified he did not see Cst. Spoljar punch the plaintiff inside the cab. He testified he saw his arm go towards the head and neck area to grab the plaintiff but he never saw a connection. Cst. Perkins testified that he remained outside the vehicle the entire time.

[183] Cst. Perkins testified because the tasers had been deployed, a supervisor was requested to the scene who arrived within minutes.

[184] Cst. Perkins noted the urine smell following the struggle but denies laughing at the plaintiff.

[185] The plaintiff was removed by Cst. Spoljar and sat at the curb. It was Cst. Spoljar that Chartered the plaintiff and gave him his rights. Cst. Perkins' recollection is that Cst. Spoljar arrested the plaintiff for obstruction of justice. Cst. Perkins was almost immediately relieved by Cst. Nozifort and Cst. Perkins returned to the detachment. Prior to leaving, Cst. Perkins noted one or more officers in the truck but he cannot recall who they were.

[186] Cst. Perkins was pressed in cross-examination concerning the differences in his evidence at trial from the evidence he provided at his examination for discovery.

[187] He testified at his examination for discovery that when he first interacted with the plaintiff while standing up at the driver's side of the window he noted the plaintiff's eyes were bloodshot. In addition, he gave evidence at the examination for discovery that that was the only indicia of insobriety that he noted.

[188] He agreed he gave these answers at his examination for discovery.

[189] In addition, while it appears at some point at his examination for discovery he testified that the plaintiff's eyes appeared glassy and he appeared dazed upon his observations, he subsequently agreed at the examination for discovery that his eyes were not glassy.

[190] Cst. Perkins was asked at the examination for discovery if he agreed that the first punch was thrown by Cst. Spoljar through the broken window at the driver's side. He agreed he so testified at the examination.

[191] It was put to Cst. Perkins that he was asked at the examination for discovery whether Cst. Spoljar punched the plaintiff in the head while Cst. Spoljar was inside the cab of the truck. Cst. Perkins testified at the examination for discovery that he didn't know. He testified at the examination for discovery that he couldn't see the top of the plaintiff's body. Cst. Perkins agreed that he testified at the examination he could see Cst. Spoljar throwing punches toward where the plaintiff's head would be.

[192] Cst. Perkins agreed that he testified at the examination for discovery he could not see whether anything landed and he could not recall hearing any strikes or blows landing.

[193] It was in re-examination at trial that Cst. Perkins was asked to explain the apparent discrepancy concerning his evidence relating to Cst. Spoljar punching at the plaintiff while inside the cab area. He testified that he was trying his best at the examination to recall and he remembered that there were movements. Since the discovery, he testified, he had taken some time to actually go over his notes, the general Occurrence Report, and, as well, he took the opportunity to speak to Cst. Spoljar. All of this refreshed his memory.

The Evidence of Constable Sven Spoljar

[194] Cst. Spoljar, like Cst. Perkins, had little experience on the force at the time of these events. He had been on the force for one-and-a-half years. He too had taken the required course concerning the use of the CEW a few months before the incident but had never deployed his taser before this incident.

[195] Cst. Spoljar testified that he was dispatched to attend to a semi-trailer for what was referred to as a wellness check. This was a result of a complaint that there was an unresponsive male in a semi-trailer. He arrived at the scene, parked his police vehicle behind the semi-trailer, and activated his emergency lights.

[196] Upon his arrival, Cst. Spoljar observed Cst. Perkins knocking on the side of the truck on the driver’s side. Mr. Fontaine was also present. Cst. Spoljar testified that he was advised by one or the other, or both, that the person that was the subject matter of the dispatch was possibly impaired inside the truck. The engine of the truck was running.

[197] Cst. Spoljar testified that from his perspective the task became two-fold; firstly, to continue with a wellness check; and, secondly, the investigation of a possible impaired or care and control circumstance. Cst. Spoljar described the public safety issues concerning an impaired driving investigation.

[198] Cst. Spoljar went to the passenger side of the semi-trailer truck and hoisted himself up to peer in the window. It was dark and he couldn't really make anything out. He used his flashlight. He noted the door was locked. Cst. Spoljar also knocked on the passenger side window. He announced it was the police. He used an elevated voice due to the fact the engine was running. Cst. Spoljar testified that he did not swear.

[199] He noted the plaintiff sit up in a sleeping area. The plaintiff told Cst. Spoljar to turn his flashlight off. Cst. Spoljar responded that he could not do that because of safety reasons and the plaintiff told him to “fuck off”.

[200] Cst. Spoljar observed that the plaintiff's movement was slow and that his eyes were a bit glossy. The plaintiff moved to the driver's seat. Cst. Spoljar then left the passenger side area and moved to the driver’s side area to stand on the ground behind Cst. Perkins in order to be present in the event Cst. Perkins needed assistance and to listen to any conversation that might take place between Cst. Perkins and the plaintiff.

[201] Cst. Spoljar testified that he then observed the driver’s side window lower to a point that Cst. Spoljar characterized as halfway. He overheard Cst. Perkins advise the plaintiff that he was conducting an impaired driving investigation and asked the plaintiff to step out and produce his driver's licence. The plaintiff responded by indicating that he was parked and to “fuck off”.

[202] Cst. Spoljar testified that from his perspective, at that point, you had a person you are attempting to investigate for impaired driving, sitting in the driver's seat of a running vehicle, telling the police to “fuck off”. He testified that his view of the plaintiff was partially obstructed but testified at some point he saw the plaintiff push Cst. Perkins’ hand off the window causing Cst. Perkins to fall to the ground. Cst. Perkins then said the plaintiff was under arrest for obstruction of justice. The window closed and it was at that point that Cst. Spoljar, while standing on the ground, used his baton to break the driver’s side window in order to arrest the plaintiff for obstruction of justice.

[203] Cst. Spoljar testified that at that point the plaintiff had already broken off communication with the police. From Cst. Spoljar's perspective he had witnessed the plaintiff force Cst. Perkins off the side of the semi-truck. Cst. Spoljar testified that the plaintiff had told the officers to "fuck off" numerous times. He testified that he did not believe that climbing back onto the semi-truck to try and knock on the window was the safest thing to do at that point. At that point, it didn't appear that the plaintiff was willing to engage in any type of conversation or cooperation.

[204] Cst. Spoljar, after breaking the window, then hoisted himself up onto the step of the truck to unlock the driver's side door and gain access for the arrest. He immediately observed the plaintiff, while still seated in the driver's seat, reaching somewhat behind him and between the passenger and driver's seat. Cst. Spoljar, concerned about how the plaintiff had interacted with Cst. Perkins, came to the view the plaintiff may be "getting something". It was at that point that Cst. Spoljar punched the plaintiff in the head area.

[205] The punch, testified Cst. Spoljar, was to distract and stop the plaintiff from reaching for what Cst. Spoljar described as "a big unknown".

[206] In response, the plaintiff turned and punched Cst. Spoljar knocking him off the truck. Cst. Spoljar testified he wasn't quite sure where Cst. Perkins was at that point.

[207] Cst. Spoljar then hoisted himself back up onto the step and as he arrived the plaintiff was still in the driver's seat and Cst. Spoljar observed the plaintiff had his fist cocked in a position to throw another punch and it was then that Cst. Spoljar immediately deployed his CEW.

[208] Cst. Spoljar explained that given the confined space and in all the circumstances he did not believe the use of the baton or pepper spray would be practical, effective, or safe.

[209] The plaintiff fell between the driver's seat and the passenger seat. Cst. Spoljar entered the vehicle, advised the plaintiff he was under arrest for assaulting a police officer, and grabbed his right arm to cuff him. Cst. Spoljar testified he was

straddling the plaintiff and while he cuffed his right arm he was having difficulty securing his left arm. The plaintiff was attempting to use his left arm as leverage to stand and also to reach out. The cuffing of both arms was secured by Cst. Spoljar within a minute.

[210] Cst. Spoljar testified he never punched the plaintiff while inside the cab and that Cst. Perkins was never in the vehicle. He testified that it was at some point during the encounter in the cab he noted that Cst. Perkins had also deployed his taser.

[211] Cst. Spoljar secured the plaintiff and removed him from the cab and set him down on the curb beside the truck. He advised the plaintiff he was under arrest for obstruction of justice and assaulting a police officer. The plaintiff was Chartered and warned. The plaintiff said he wanted to speak to a lawyer.

[212] In anticipation of an apparent additional theory of the plaintiff, Cst. Spoljar testified that the plaintiff was not tasered while sitting on the curb.

[213] Cst. Nozifort arrived on scene shortly thereafter. Cst. Spoljar testified that he advised Cst. Nozifort what had occurred, including the fact that Cst. Spoljar had been struck by the plaintiff.

[214] Cst. Spoljar testified that from his perspective the investigation was now out of his hands and in the hands of Cst. Nozifort. He believes he provided his CEW to the officer at the scene in accordance with policy and left to return to the detachment.

[215] In cross-examination, Cst. Spoljar was directed to that portion of his evidence at trial where he had initially gone to the passenger side to look in the passenger side window and had determined that the door was locked. He was asked if he had a warrant. He was asked if he believed that for a wellness check he could make an “unauthorized entry". Cst. Spoljar testified that the answer to that was yes.

[216] In any event, Cst. Spoljar testified that when the plaintiff sat up in the sleeping area initially, he wasn't sure if the plaintiff was well or not.

[217] Cst. Spoljar confirmed in cross-examination that at some point during the event he did in fact observe wrenches behind the driver's seat and the passenger seat. He confirmed that his taser struck the plaintiff in the front left side of his torso.

[218] It was suggested to Cst. Spoljar in cross-examination that Photo #1 in Exhibit 6 depicts what appears to be a bruise above the left eyebrow of the plaintiff. Cst. Spoljar was pressed as to whether it was this area that Cst. Spoljar punched the plaintiff. Cst. Spoljar concedes that he can't recall with particularity where his punch landed. He believes it was either the plaintiff's jaw or the side of the head.

[219] Cst. Spoljar testified that he did not seek medical attention for himself, nor did he observe any mark on his face as a result of the punch he received from the plaintiff.

[220] He testified that aside from reporting the events to Cst. Nozifort, he documented the events, including being punched, in his report that he prepared later that morning.

[221] He testified that he is not aware of any policy or training that required him to report being punched other than reporting to his sergeant. He testified that he in fact did report it to his sergeant at the scene, Sgt. Perhar.

[222] He also confirmed that he informed Sgt. Perhar at the scene that he believed the plaintiff was reaching for something when he punched the plaintiff.

The Evidence of Constable Nozifort

[223] Cst. Nozifort has been an RCMP officer since 2012. On July 25, 2016, he arrived at the scene to assist at 10:48 p.m.

[224] Upon his arrival, the plaintiff was observed sitting on the curb. He was shirtless but wearing "some kind of clothing" on the bottom. Cst. Nozifort was tasked

with delivering the plaintiff to Surrey cells. Cst. Nozifort transported a bag containing various personal belongings of the plaintiff, along with the plaintiff, back to the detachment. Cst. Nozifort testified that the plaintiff was cooperative but was indicating throughout that he was going to sue the RCMP. The plaintiff wanted to call a lawyer and Cst. Nozifort indicated that he would be able to do that at the Surrey cells.

[225] The drive from the scene to the RCMP detachment took about 15 minutes. During the course of the drive Cst. Nozifort testified the plaintiff was talking about suing the RCMP and, as well, Cst. Nozifort.

[226] Upon the arrival at the detachment, a prisoner's check sheet was filled in. Cst. Nozifort confirmed that it was filled in by him in part and by others in part. The form reflects that where there is a check box for "breath (odor of alcohol)" there are the letters "N/A". It was in re-examination Cst. Nozifort was asked what "N/A" meant and from Cst. Nozifort's perspective it meant that the plaintiff was not unfit to be placed in the cells. The form does indicate however that the plaintiff had clear speech, was alert, and calm. Cst. Nozifort saw no signs of alcohol impairment at that point but cannot comment about whether any drug intoxication could have been present.

[227] Upon arrival at the detachment, the plaintiff was uncuffed and offered a phone to call counsel and the opportunity for the plaintiff to contact a legal aid lawyer. The plaintiff indicated that he wanted to speak to his wife but Cst. Nozifort indicated that couldn't happen but he could phone his counsel.

[228] The plaintiff was placed in a room but continued an exchange with Cst. Nozifort about wanting to call his wife. He stated that he had a right to call his wife. Cst. Nozifort testified the plaintiff began to look through the Yellow Pages concerning counsel. Cst. Nozifort testified that the room the plaintiff was in had a phone and told the plaintiff that when it rang he could answer because it could be a lawyer. To the knowledge of Cst. Nozifort he is not aware that the plaintiff ever did call, or speak with, a lawyer that evening.

[229] During this time, Cst. Nozifort was not advised by the plaintiff that he had voided his bladder and was wearing wet underwear. Cst. Nozifort also confirmed in cross-examination that no one had told him at the scene of the incident that the plaintiff had voided his bladder. Cst. Nozifort testified that had he been told that, he would have provided extra underwear for the plaintiff.

[230] The plaintiff was then escorted to the nurse's station as part of the usual protocol and remained uncuffed for this purpose.

[231] The nurse then advised the officers that the plaintiff should go to the hospital because he had been tasered and he was complaining about his wrist.

[232] The plaintiff left the detachment for the hospital wearing a T-shirt and shorts, but Cst. Nozifort did not recall anything on his feet. He did not smell anything unusual emanating from the plaintiff.

[233] Cst. Nozifort checked the plaintiff into Emergency at Surrey Memorial Hospital and sat with him until he was relieved by another officer in the early morning hours.

[234] Cst. Nozifort confirmed that he was relieved at approximately 3:30 a.m., having arrived at the hospital with the plaintiff at approximately 1:00 a.m. While Cst. Nozifort and the plaintiff were waiting for a doctor, the nurses attended to the plaintiff.

[235] Cst. Nozifort confirmed that at no time did the plaintiff ask for his glasses and had he asked for his glasses, Cst. Nozifort would have done everything possible to find them. He said it is quite common for prisoners to ask for their glasses, and that these requests are accommodated.

The Evidence of Wendy Dakin

[236] Ms. Dakin is a registered nurse and has been so employed since 2000. Ms. Dakin was on duty the evening of July 25–26, 2016 at the RCMP detachment in Surrey. She received and medically assessed the plaintiff about midnight. Her form of assessment in this regard is marked as Exhibit 30. It is entitled “Surrey Jail Initial

Health Assessment". It was filled out contemporaneously with the assessment and Ms. Dakin testified that it was accurately filled out.

[237] Her task at the detachment is to assess persons brought in to determine whether the person is fit to be placed in cells or, for one reason or another, ought to be taken to a hospital.

[238] Ms. Dakin testified that she recorded a Glasgow Coma Score of 15. Ms. Dakin testified that 15 means the subject is in complete control of his senses and knows exactly what he is doing.

[239] Ms. Dakin testified that the plaintiff smelled of alcohol. She observed the left wrist of the plaintiff may have been broken and confirmed in cross-examination that if the plaintiff had had any marks on his head she would have noted that.

The Evidence of Dr. Jaspinder Ghuman

[240] Dr. Ghuman was the emergency physician who attended to the plaintiff the morning of July 26, 2016 at Surrey Memorial Hospital.

[241] Dr. Ghuman is a full-time emergency physician at Surrey Memorial Hospital and has been at Surrey Memorial Hospital since 2009. He has dealt with a variety of trauma patients over the years including patients who have been tasered.

[242] In the case of a patient who has been tasered, he is not particularly concerned relating to any damage caused by the taser but his focus is on collateral injury, particularly the potential for head injury as a result of any fall that may have occurred. This includes assessing for skull injury, facial injury, scalp injury, or brain injury.

[243] He also testified that he has had experience with treating concussion and if so advised concerning issues in that regard he would conduct a thorough examination including whether there is headache, any loss of consciousness, nausea, or vomiting.

[244] Dr. Ghuman confirmed the notes of his assessment of the plaintiff at Surrey Memorial Hospital. The notes are marked Exhibit 7. Exhibit 7 was introduced by the plaintiff and marked as an exhibit as a business record pursuant to the *Evidence Act,* R.S.B.C. 1996, c. 124, s. 42. In addition, the document agreement stated that reference to clinical records of medical professionals was proof that the examination findings were as recorded.

[245] Dr. Ghuman confirmed that he assessed the plaintiff beginning at 4:25 a.m. on July 26, 2016. Those notes are as follows:

> The patient was arrested by the police, tasered x 2. Patient was found in truck ETOH. No drugs. No past history. No medications. And on examination patient alert and cooperative. Abrasions on legs and lower back. Heart sounds normal, no murmurs. Range of motion of neck normal. Mid lumbar spine tender. Moving all extremities well. Lungs clear, abdomen soft and non-tender.

[246] The diagnosis was “back and wrist sprain".

[247] The notes indicate the plaintiff was discharged at 5:40 a.m.

[248] Dr. Ghuman testified that the information came from the plaintiff, that he has no independent recollection of this particular matter and concedes it is possible that the information recorded as “ETOH” may have come from a police officer.

[249] Dr. Ghuman testified that he does not write down everything that he is told by the patient but only what he considers relevant. In that regard, Dr. Ghuman testified that his main focus, referred to in evidence as “the big thing", was to assess for any head injury or neck injury. He confirmed that the patient responded appropriately and had the patient reported or provided any information concerning a head injury or concussion that would be in his notes. Similarly, if the patient had reported headache that would be in his notes.

[250] It appears to be common ground that as a result of the assessment, x-rays of the plaintiff were taken of his chest, neck, and wrist. Dr. Ghuman confirmed that they performed an EKG on the plaintiff and recorded the results of that as normal.

[251] Dr. Ghuman was shown Exhibit 6 and in particular Photo 1 of Exhibit 6 that shows some kind of mark above the left eye of the plaintiff. Dr. Ghuman testified that it looked like a bruise but it was hard to tell. Dr. Ghuman did not note any bruise or abrasion was present upon the assessment of the plaintiff some hours later at the hospital.

[252] Dr. Ghuman was asked why it took some time to see the plaintiff; that is between the plaintiff's arrival at the hospital and the assessment at 4:25 a.m. Dr. Ghuman testified that the patients are initially medically assessed upon arrival. They're assessed between one and five. One being very immediate; five being minor and can wait. They are seen in order of that priority. The plaintiff was assigned a four.

[253] There is no evidence that Dr. Ghuman was told that the plaintiff had voided his bladder, and no evidence the doctor discerned the smell of urine.

[254] Counsel for the plaintiff submitted that the purport of Dr. Ghuman's evidence is that he could not recall whether the information he recorded about the plaintiff came from the plaintiff or from Cst. Nozifort.

[255] It will be recalled that the evidence of the plaintiff is that Cst. Nozifort was with the plaintiff when interviewed by the doctor. The plaintiff testified that he doesn't know if Cst. Nozifort spoke to the nurses or the doctors about the matter.

[256] Notwithstanding the evidence of the plaintiff, the evidence of Cst. Nozifort is that he had been relieved at 3:30 a.m. and clearly could not have been present when the plaintiff was providing the information to Dr. Ghuman.

[257] I pause to say, the plaintiff submits that the notes contained in Exhibit 7 referenced by Dr. Ghuman should be determined to be inadmissible evidence, notwithstanding the notes were introduced by the plaintiff in accordance with the *Evidence Act*. In any event, there is no basis for this submission.

The Evidence of Sergeant Matthew Waroway

[258] Sgt. Waroway is a non-commissioned officer in the RCMP currently in charge of the National Tactical Training Centre in Ottawa. He has been a member of the RCMP since 2006. At the time of the incident, he was a Corporal working at the Training Centre at the Surrey detachment. One of his responsibilities in this regard was the downloading of taser logs.

[259] Sgt. Waroway testified that, as a matter of course, taser logs are downloaded subsequent to deployment. A Conducted Weapon Download Report is completed (the “Report”) reflecting the data for the particular taser following deployment. Sgt. Waroway manually transcribes the data from a computer to produce the Report.

[260] The evidence of Sgt. Waroway, that perhaps would otherwise be somewhat routine, took on a different aura as a result of an alleged error Sgt. Waroway committed when transposing certain information from the computer to the Report. This error, on its face and without explanation, appears to indicate that the tasers in this case were not deployed simultaneously but deployed some minutes apart.

[261] In any event, Sgt. Waroway was called to provide evidence in this regard.

[262] He testified that the process of preparing a report entails checking the particular taser to ensure it is in good operating condition and thereafter, with the use of a USB cable, connecting the taser to a standalone computer to receive the log detail. For this purpose it is not connected to the Internet or any other network.

[263] On the issue of timing, Sgt. Waroway testified that the internal clock or timing indicators in the taser sometimes may not line up or coincide with the time displayed on the standalone computer.

[264] For instance, Sgt. Waroway testified that when completing the download of Cst. Perkins’ taser, the time on the taser was 8:48:23, and the time on the standalone computer was 8:50:00. When the download is conducted, time syncing occurs and the time on the taser changes to the time on the computer. Therefore,

testified Sgt. Waroway, Cst. Perkins' taser, which was 1:37 minutes behind the computer clock, was updated to 8:50:00 to coincide with the computer time. Consequently, all times entered on Cst. Perkins' taser log were also 1:37 minutes behind the computer.

[265] Sgt. Waroway testified to the same process concerning the taser of Cst. Spoljar. It was here where Sgt. Waroway had to correct an error he had made in transcribing the data. On the Report there was an indication Cst. Spoljar's taser was determined to be two minutes behind the time on the computer. Sgt. Waroway testified that should have been transcribed as 12 minutes. Consequently, testified Sgt. Waroway, the times entered on Cst. Spoljar's log were also 12 minutes behind the computer.

[266] During the course of Sgt. Waroway's evidence he testified that there were three other entries that he had transcribed on the Report that needed to be corrected, and so corrected this detail during the course of his evidence.

The Evidence of Sergeant Brad Fawcett

[267] Sgt. Fawcett was qualified to provide expert opinion evidence concerning the use of force in the context of policing; including the use of CEWs. His report is dated 20–09–08 and marked Exhibit 37.

[268] A good deal of the evidence of Sgt. Fawcett was, much like the evidence of Inspector Harris, centred on the general principles concerning the use of force, and the model used to instruct and assist officers in relation to the use of force namely, the Incident Management Intervention Model ("IMIM").

[269] The evidence of Sgt. Fawcett and Inspector Harris more or less aligned in this regard. In particular, both witnesses focused on the appropriate use of force given the circumstances and the escalation of conduct. Germane to the case at bar was that Sgt. Fawcett, like Inspector Harris, adopted and supported the guidance of the IMIM model in relation to the prospect of the use of intermediate force in response to active resistance or assaultive conduct.

[270] In this regard it was described by Sgt. Fawcett as follows (in relation to active resistance on the part of a person being engaged by the police):

> as soon as somebody does anything, whether that's grabbing a doorknob, grabbing another person, they are no longer passive; they're active. They're doing something. And of course that range of resistance can span – it stretches the imagination when we talk about the types of active resistance that people can engage in.

[271] And further, in relation to the somewhat more aggravated behaviour characterized as assaultive conduct, it is described by Sgt. Fawcett as:

> now this is somebody – and we use the definition of "assault" from the Criminal Code. A person who by act or gesture applies force to another person or threatens to apply force to another person; you have reason to believe that they have the capacity to do that. It would fall into the category of being assaultive.

[272] Generally speaking, Sgt. Fawcett confirmed that in accordance with the IMIM, active resistance or assaultive behaviour may require the use of what is characterized as "intermediate weapons". Sgt. Fawcett testified:

> intermediate weapons would include all those tools that are designed to be less lethal, if you will… It would include things like oleoresin capsicum spray ("OC spray") and various baton technologies. Typically they are issued with expandable-friction lock batons. It would include, as I mentioned before, canine or dog units. It would include things like conductive energy weapons, extended range projectiles of various types. So that would include an ARWEN, for example, or a SL6. Those are all particular munitions designed to create temporary motor dysfunctions from a distance.

[273] The assumed facts germane to the opinion of Sgt. Fawcett track the instructions received from the defendant.

[274] The assumed facts include:

> …
>
> c. Cst. Perkins and Cst. Spoljar attended the scene and, after speaking to Achille Fontaine, attempted to wake up the plaintiff by knocking on/banging on the truck.
>
> d. Cst. Perkins identified himself as policeand asked the plaintiff to come to the window and turn off the truck. The plaintiff responded with an obscenity.

e. In the altercation that ensued, the plaintiff resisted police enquiries, shouted obscenities, and pushed an officer.

f. After the plaintiff rolled up his driver's side window, Cst. Spoljar broke the driver's side truck window. Cst. Spoljar delivered a closed-fist strike to the plaintiff's jaw in the belief that the plaintiff was about to assault him.

g. The plaintiff then struck Cst. Spoljar.

h. Cst. Spoljar broke the driver's side truck because the plaintiff had pushed Cst. Perkins off of the driver's side step of the semi-truck, the plaintiff was not listening to the RCMP officers, and so the plaintiff could not drive the semi-truck.

i. Cst. Spoljar punched the plaintiff once with a closed-fist strike.

j. The plaintiff then punched Cst. Spoljar in the jaw. Cst. Spoljar came off the step of the semi-truck after being punched.

k. Cst. Perkins and Cst. Spoljar both deployed their conducted energy weapons against the plaintiff.

…

[275] Sgt. Fawcett concluded that the plaintiff's behaviour varied over the course of the encounter. The plaintiff, in the opinion of Sgt. Fawcett, demonstrated active resistance and assaultive behaviour.

[276] Sgt. Fawcett concluded that the range of force options appropriate in the circumstances as set out above included presence, communication, physical control, and intermediate weapons.

[277] Sgt. Fawcett concluded that the use of a closed fist strike by Cst. Spoljar was within the range of force options and, that the use of CEWs by Cst. Perkins and Cst. Spoljar was within the range of force options. He further concluded that the use of other intermediate weapons such as OC spray and the baton could be precluded by virtue of the fact that they would be inappropriate given the tactical environment.

[278] He confirmed in cross-examination that he didn't make any assumptions as to the truthfulness of the information or the assumed facts that he received. He confirmed in cross-examination that some persons that have felt the effects of a CEW, experience what is characterized as critical amnesia, whereby they do not recall what occurred during the cycle of the taser, which is about five seconds. He

also confirmed that some persons may suffer the effect beyond the five second cycle.

[279] He was cross-examined concerning a number of different hypothetical facts arising from his report.

[280] Sgt. Fawcett was asked to assume that Cst. Perkins had concluded that there was “no evidence of insobriety and has concluded the plaintiff is not impaired”.

[281] Sgt. Fawcett testified that if the officer had come to the conclusion that the impaired driving investigation had concluded, then there would be no need for further interaction.

[282] A slight variation on the hypothetical was then put to Sgt. Fawcett in cross-examination.

[283] He was asked to assume that Cst. Perkins concluded that there was not a reasonable basis to believe the plaintiff was not sober. In that event, the question was posed whether in Sgt. Fawcett's opinion the investigation should come to an end. Sgt. Fawcett testified that it should, but the wellness aspect of the matter remained extant.

[284] Further, Sgt. Fawcett was asked to assume the plaintiff “didn't push” Cst. Perkins while Cst. Perkins was clinging to the window. Sgt. Fawcett testified that this would not necessarily change his opinion concerning the appropriateness of the force.

[285] Finally, Sgt. Fawcett was asked to assume that after Cst. Spoljar punched the plaintiff, the plaintiff did nothing and simply sat in his seat. In that event, Sgt. Fawcett was asked whether tasering would be an appropriate response. Sgt. Fawcett indicated that no, it would not be an appropriate response.

[286] Counsel on behalf of the plaintiff spent a good deal of time cross-examining Sgt. Fawcett on an aspect of the Occurrence Report that, in turn, apparently referenced the Report prepared by Sgt. Waroway.

[287] Sgt. Fawcett was able to respond to certain aspects of the Report and certain interpretations of the Report, and his evidence in this regard tended as a whole to support the views of Sgt. Waroway. Sgt. Fawcett however did acknowledge that some of the questioning that was posed by counsel was drifting out of his area of expertise.

The Evidence of Ms. Laura Bowers

[288] Ms. Bowers was the long-time partner of the plaintiff. They were together for a period before they were married in 2011. They separated in 2018. Ms. Bowers is a licensed practical nurse and has been so for the last 25 years. She and the plaintiff are currently involved in divorce proceedings.

[289] It appeared much of the purpose of Ms. Bowers' evidence was to address certain allegations made by the plaintiff that the events in July 2016 impacted the way he lives his life.

[290] Ms. Bowers testified that the kinds of activities and socializing the couple did during their marriage did not change after the incident.

[291] The plaintiff was often away driving trucks but would be home on the weekends. The couple continued to go on vacations until their separation in 2018.

[292] Ms. Bowers testified that beginning in 2010 the plaintiff began taking Paxil for depression and in 2015 began taking Pristiq for anxiety and anger management.

[293] Ms. Bowers stated that during the marriage the plaintiff's behaviour could be confrontational and verbally abusive and that he was easily agitated and quick to anger.

[294] She testified that the plaintiff was disorganized and often misplaced things around the house prior to the summer of 2016.

[295] She testified that he had a good memory and that did not change after the incident. She never observed him using Post-it notes around the house before the

incident nor after. She saw no evidence of any short-term memory issues after the incident, nor did she observe that fluorescent lighting bothered him in any way. She gave an example that when they went shopping he never squinted or reacted to the fluorescent lights, nor did he wear any protective eyewear. He never, before or after the incident, complained that lights of this sort bothered him. He would often cook before and after the incident but never complained that he could not follow recipes.

[296] They would from time to time go to restaurants after the incident and she observed no difficulty in him concentrating or being troubled by noisy or busy environments. Ms. Bowers stated that he certainly never complained about these matters.

[297] Ms. Bowers testified that his time on his cell phone increased after the incident because of the amount of research he was doing concerning civil cases and damages. He would show her the research he was doing on civil cases, the signs and symptoms of tasering, and the circumstances of other lawsuits and damage awards that had been made against the RCMP. She characterized it as an obsession.

[298] In the one or two years after the incident and prior to their separation, she did not observe that he was overly fatigued. He remained more or less the same as he did before the incident.

[299] In fact, testified Ms. Bowers, she and the plaintiff attended two heavy metal rock concerts after the incident where there were laser lights and noise, and there was no sign that any of this bothered the plaintiff.

[300] She did confirm that prior to the incident he would from time to time feel fatigue, and experience back pain, and hip pain in long-haul circumstances. In this regard, both pre- and post-incident he would complain of headaches. He never complained after the incident that he couldn’t focus while he was driving nor focus on more than one task.

[301] Ms. Bowers testified that she found out about this incident because he called her. It was her understanding that he called her from jail. He was angry and the only complaint made to her concerning any physical issues was his wrist.

[302] She testified that the plaintiff has never told her that he had any kind of brain fog as a result of the incident, nor complained about the headache or dizziness. She never observed the plaintiff struggling for words.

[303] Ms. Bowers confirmed in cross-examination that he changed in and around 2013 and became agitated and confrontational due to changes in his work; and he took it out on her. She testified that she doesn't dislike him and the she hopes he can get some help.

[304] It was put to her that in April of 2020 there was issued a protection order excluding her from the matrimonial home. Ms. Bowers testified that she was surprised but not angry that the “Justice Branch”, as she understood it, had issued the protection order. I pause to say, there is no evidence in this case as to the circumstances of this order, nor the nature of the order, nor, in fact, precisely how it came about.

[305] Ms. Bowers answered extensive questions in cross-examination on matters that have arisen during the divorce, presumably since 2018.

[306] It was elicited from Ms. Bowers in cross-examination that the plaintiff saw fit to place posters throughout Kelowna asserting that Ms. Bowers had taken medications from the hospital. Further, the poster had a picture of Ms. Bowers accompanied by the accusation. The plaintiff also placed these posters at Ms. Bowers’ place of employment.

[307] Why the plaintiff saw fit to do this was not offered in evidence. Ms. Bowers is presently suing the plaintiff in defamation.

[308] The plaintiff has also filed an affidavit in the family proceedings alleging that Ms. Bowers asked the plaintiff to transport cocaine in his truck from the Lower

Mainland to Kelowna. This was put to her in cross-examination and she denied this allegation.

[309] The evidence revealed that when she was moving her belongings from the matrimonial home, the plaintiff took photos of her, her son, and her son's friends that were assisting in the move. The suggestion was put to her that there was a person or persons in the photo that were associated with a motorcycle gang. Ms. Bowers testified that she didn't know anyone in the picture except her son, and the others had shown up as friends of her son to assist. It was put to her, as the plaintiff had testified, that she threatened to have the plaintiff killed or “disappeared” if he told anyone about her request to have him truck cocaine from Vancouver to Kelowna. This was denied by Ms. Bowers.

[310] Ms. Bowers confirmed that the plaintiff, herself, and the whole family went to Mexico after the incident and the plaintiff participated in all activities, although the plaintiff drank quite a bit.

[311] She testified that they attended two concerts in Penticton, one in 2016 and one in 2018. She took pictures and they bought T-shirts. They also continued to fish together after the incident and the last time they fished together was in 2019.

[312] She confirmed that the plaintiff’s friend, Craig Popham, came to stay with them for a few days in 2015 and the three of them went fishing together.

[313] Ms. Bowers was asked in cross-examination about the plaintiff's use of Paxil. Ms. Bowers testified that his parents told her that he needed help because he was such an angry man and that's why he was prescribed Paxil. The plaintiff's mother told her that he was weeping and upset because he was not able to see his children.

The Evidence of Dr. Claire Young

[314] Dr. Young is a family physician who worked at Towne Centre Medical Clinic in Kelowna from 2007 to the end of 2017. The plaintiff attended the Towne Centre Medical Clinic following the incident, and from time to time through 2016 and 2017.

[315] Dr. Young confirmed the accuracy of certain of her clinical notes relating to the plaintiff's description of the incident and as well the accuracy of the complaints of the plaintiff to Dr. Young upon his attendances.

[316] Dr. Young testified that the plaintiff complained of being tasered and within some weeks, complained of headaches, fogginess, and poor memory.

[317] Dr. Young testified that her notes accurately reflect her knowledge and recollection of information received, the examinations conducted, and any treatment recommended. The notes were made more or less contemporaneously with each visit.

[318] Dr. Young confirmed that there is no description by the plaintiff about being beaten about the head by the police nor a reference to such an event in the course of describing his complaints to Dr. Young from time to time.

The Evidence of Dr. Dana Wittenberg

[319] Dr. Wittenberg was called by the defendant. Dr. Wittenberg was qualified as an expert clinical psychologist with expertise in neuropsychology including the assessment of adults with a variety of psychological and neurological disorders, including mild traumatic brain injury. Her report is dated March 12, 2021 and marked Exhibit 29.

[320] Dr. Wittenberg met with the plaintiff and conducted a series of tests. There were 18 tests testing cognitive function, verbal learning, and visuospatial memory, including the Beck Depression Inventory, the Beck Anxiety Inventory, and the Delis-Kaplan Executive Functioning test.

[321] The information provided to Dr. Wittenberg by the plaintiff stated that he had been assaulted in the truck by the police, being tasered twice and punched in the head multiple times. He reported full recall of the tasering and the punching.

[322] Dr. Wittenberg, upon her assessment of the material, concluded the various scores across all cognitive domains were within normal limits and no scores were

below expectations. Language skills scored from average to superior; visuospatial abilities scored from average to superior; verbal and nonverbal memory was intact. It was determined the plaintiff exhibits average attention, high-average to superior working memory, mental flexibility, and verbal fluency, as well as average to superior abstract reasoning and problem-solving.

[323] Her opinion was that the plaintiff did not demonstrate any objective impairments. She concluded he did not meet the DSM-5 criteria for a neurocognitive disorder. Consequently, she was of the view there was no disability to his cognitive status. Although Dr. Wittenberg was of the view he is capable of driving a truck, she observed:

> any employment disability related to his physical status will be deferred to the appropriate expert. Mr. Degen expressed a desire to change jobs during the present evaluation; he would benefit from vocational counselling to help him search for roles that would be a good fit. He has many cognitive strengths that would allow him to participate in various occupational opportunities based on interest. A vocational counsellor can help him navigate these opportunities.

[324] Finally, Dr. Wittenberg concluded:

> …As he does not demonstrate any cognitive deficits on the present comprehensive evaluation, it is my opinion that he is presently functioning well, and often above expectation, across cognitive domains.

[325] The cross-examination of Dr. Wittenberg focused on her credibility. As I understood the theme of the cross-examination, it was that she had misled the Court concerning her qualifications. The cross-examination was critical of her methodology. The suggestion was that Dr. Wittenberg lacked the relevant expertise to provide the opinion, or at least her expertise was so bereft that no weight should be afforded her opinion.

The Evidence of Dr. Meera Gupta

[326] Dr. Gupta was tendered as an expert neurologist with special interest in headaches, and expertise in mild traumatic brain injury and concussion, qualified to

offer opinion evidence in: general medicine and neurology including headaches, mild traumatic brain injury, and concussion.

[327] The plaintiff took the position that she was not qualified to offer opinion evidence concerning mild traumatic brain injury. A *voir dire* was held. Upon completion of the *voir dire*, the plaintiff called no evidence and made no submissions. Dr. Gupta was qualified as tendered.

[328] Dr. Gupta conducted an in-person examination of the plaintiff on August 15, 2020. Her report is dated August 27, 2020 and marked Exhibit 32 at trial.

[329] The plaintiff reported being tasered twice while seated in his truck, being beaten in the head, and remaining conscious. He advised that the police tried to break his left wrist. Dr. Gupta had various medical records at her disposal that she referenced in her report.

[330] Dr. Gupta undertook a variety of tests and found normal functioning including normal language function (meaning he was fluent and had no issues concerning basic comprehension) and his sensory examination was normal.

[331] Dr. Gupta came to the opinion that based on the plaintiff's reporting that he had headaches following the incident it was her opinion he has developed chronic post-traumatic headache, whiplash-tension subtype.

[332] It was Dr. Gupta's opinion that he did not meet the criteria for migraine. The plaintiff reported that the headaches did not significantly interfere with his social or occupational functioning. Dr. Gupta concluded the plaintiff was not disabled as a result of headache and she did not suspect headache would worsen over time.

[333] She testified that he was not currently disabled from a cognitive perspective to continue as a truck driver, and reported that indeed this was the intention of the plaintiff as expressed to her by the plaintiff at the time of the assessment.

[334] Dr. Gupta also filed a responsive report to the report of Dr. Mehdiratta. Her responsive report is dated October 13, 2020 and marked Exhibit 33.

[335] Dr. Gupta disagrees with the diagnosis of mild traumatic brain injury as in her view the plaintiff did not lose consciousness or have a Glasgow Coma Scale score less than 13.

[336] The cross-examination of Dr. Gupta, much like the cross-examination of Dr. Wittenberg, consisted of a concerted attack on her credibility, ranging from the suggestion she is misleading the Court concerning qualifications to her qualifications not being sufficient to provide reliable evidence in the area.

[337] The questioning generally took the form of counsel putting a series of medical propositions to Dr. Gupta. She agreed with some but disagreed with most.

[338] Dr. Gupta testified that it was reported to her by the plaintiff that he had certain tremors that Dr. Gupta characterized as mild postural tremor in his outstretched hands. It was reported by the plaintiff that the tremor interferes with his ability to tie flies for fishing. Dr. Gupta confirmed in cross-examination this is inconsistent with brain injury.

[339] The plaintiff reported to Dr. Gupta a change in handwriting. Some days his handwriting is small and messy; other days it's fine, so reported the plaintiff.

[340] Dr. Gupta was asked in cross-examination whether this is consistent with brain injury. Dr. Gupta testified that no, typically it is not seen in brain injured patients and that she has never seen it in her practice.

[341] Dr. Gupta was unclear whether the plaintiff could pursue a supervisory role in the future. This requires, according to Dr. Gupta, a neuropsychological assessment and occupational therapy.

The Evidence of Dr. Derryck Smith

[342] Dr. Smith was qualified, without objection, as an expert in the field of psychiatry, with particular expertise in the assessment of mild traumatic brain injury and post-traumatic stress disorder.

[343] Dr. Smith produced what was referred to as a response report dated October 7, 2020. It is marked Exhibit 35.

[344] He testified that he was not provided the opportunity to interview the plaintiff. Dr. Smith candidly conceded that he could not provide a diagnosis of the plaintiff in the absence of seeing the plaintiff. What Dr. Smith purported to do then was to opine, based on the records only, concerning the diagnoses of Dr. Waisman and Dr. Mehdiratta.

[345] In this regard, Dr. Smith testified concerning mild traumatic brain injury, as follows:

> Q: …It remains my opinion that there is no objective evidence that Mr. Degen sustained a mild traumatic brain injury. It is alleged that the police department punched Mr. Degen in the head. Even if this is true, there is no evidence that this man suffered a head injury or more importantly a brain injury.
>
> And is that your opinion based on the medical reports and documents provided to you?
>
> A: Yes. And the records as well. What I would be looking for to determine a brain injury is the Glascow Coma score, which was normal at 15, whether there was a reported post-traumatic amnesia, which would be difficult to determine since he had been tasered. And there were no other objective measurements that he suffered a brain injury from this.

[346] Dr. Smith also addressed the issue of cognitive impairment. Dr. Smith's view was that in order to come to a firm view concerning cognitive impairment, certain objective testing is required and it is a neuropsychologist that is best suited to make this determination.

[347] Dr. Smith commented on the diagnosis of post-traumatic stress disorder as offered by Dr. Waisman.

[348] It was the observation of Dr. Smith that it did not appear to him that Dr. Waisman had canvassed the plaintiff for the presence of what is referred to as the "A Criteria"; that is criteria, the presence of which is required for a diagnosis of PTSD.

Dr. Smith concedes the reference to A Criteria may be in the notes of Dr. Waisman, and that he did not have the opportunity to review the notes of Dr. Waisman.

[349] Finally, Dr. Smith commented upon the diagnosis of “somatic symptom disorder with predominant pain”.

[350] Dr. Smith took issue somewhat with the diagnosis of Dr. Waisman in this regard. Dr. Smith expressed the view that merely receiving reported symptoms from the plaintiff, including anxiety, that disrupts one’s life, is not sufficient. Dr. Smith expressed the view as follows:

> In order to qualify for the diagnosis of Somatic Symptom Disorder there has to be one or more somatic symptoms that are distressing or that result in significant disruption of daily life. There must be excessive thoughts, feelings or behaviours related to the somatic symptoms as manifested by:
>
> a. disproportionate and persistent thoughts about the seriousness of one’s symptoms;
>
> b. persistently high levels of anxiety about health or symptoms; and
>
> c. extensive time and energy devoted to these symptoms.

[351] In the end, Dr. Smith, rather gently, offered the opinion that Dr. Waisman didn’t offer a particularly strong case that the plaintiff qualifies for these symptoms; assuming the reporting of the plaintiff is accurate.

[352] Finally, Dr. Smith testified that the evidence he reviewed does not support the conclusion the plaintiff sustained any kind of concussion or brain injury; and did not then develop so called post-concussion syndrome.

[353] In addition, like Dr. Waisman, Dr. Smith would have found helpful additional records that he did not have. These records are listed in the report of Dr. Smith.

[354] It was also confirmed in cross-examination what Dr. Smith had initially conceded, namely, that he was at a distinct disadvantage in assessing matters not having the opportunity to examine the plaintiff.

Credibility and Reliability

[355] Issues of credibility and reliability of witnesses played a significant part in this trial.

[356] Credibility and reliability are different notions. Credibility concerns the veracity of a witness; to be blunt, an assessment of whether the witness is lying. Reliability is an analysis of the accuracy of the witnesses evidence. These two concepts may be, but are not necessarily, connected. It is unlikely a witness who is not credible is nevertheless found to be reliable, in the absence of independent corroborative evidence. It is not axiomatic however that a credible witness provides accurate evidence and is therefore a reliable witness. A credible witness may in fact not provide reliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.) at 526, 1995 CanLII 3498.

[357] The determination of veracity and accuracy requires consideration of a number of factors and inquiries.

[358] It may be a witness did not have an optimum opportunity to hear or see matters unfold. Importantly, the condition of the witness at the time may be a relevant consideration. In addition, the memory of a witness may be faulty for one reason or another, including the passage of time. The trauma of an event can impact the ability of a witness to accurately recall. The stress and anxiety sometimes associated with providing evidence in a formal way in an unfamiliar environment, for instance a hearing, an examination for discovery, or a courtroom, can sometimes inhibit the ability to say precisely what one wants to say, and in the way one wants to say it.

[359] There will be circumstances, like the case at bar, where a witness has given previous statements that are inconsistent with the current evidence. Certainly where a witness has provided inconsistent evidence on a previous occasion under oath, the Court will proceed with caution before accepting an invitation to find that person is a witness of truth.

[360] As well, an analysis of whether a witness has remained internally consistent in providing evidence is often a factor that is telling. Inconsistencies in the witnesses own evidence at trial, or with other witnesses, calls for an assessment on the "totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case": *F.H. v. McDougall*, 2008 SCC 53 at para. 58.

[361] When presented with conflicting testimony, the Court should assess the evidence with a view to determining whether a particular version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, 1951 CanLII 252 (B.C.C.A.) at para. 10, [1952] 2 D.L.R. 354. The Court must bring experience to bear in assessing when that evidence of the witness accords with common sense and can live comfortably with the independent evidence that has been accepted by the Court: see also *Bradshaw v. Stenner*, 2010 BCSC 1398.

[362] The tone and manner of the witness in providing his or her evidence remains properly a factor to be considered in assessing credibility and reliability. Frankly, I found this aspect helpful in the overall consideration of matters, but care must be exercised concerning the weight to be afforded what is generally referred to as an assessment of the demeanour of the witness. `

Analysis

The Incident

[363] These are my conclusions relating to the incident.

[364] Cst. Spoljar was dispatched to the scene to assist Cst. Perkins concerning an unresponsive male in a truck. The male was not waking up, according to the complaint.

[365] Cst. Perkins testified concerning his approach to such an investigation. He stated that, somewhat obviously, he wanted to determine whether there was in fact a

person in the vehicle and if that person had care and control of the vehicle, and if that person had the means or ability to put the vehicle into drive. Cst. Perkins testified that in the event there was someone in the vehicle, it would then be his intention to seek the identity of the person in an attempt to discern any signs of impairment, for instance, slurred speech, whether there were any diminished fine motor skills, an odour of alcohol on the breath, whether their eyes may be glossy, and to determine whether there was any open alcohol in the vehicle.

[366] Returning to the sequence of events, Cst. Perkins then stepped up onto the driver's side of the vehicle so that he could look in the window. At this point, the officer was about three feet off the ground.

[367] I find that Cst. Perkins had a reasonable basis to conclude there was a person in the vehicle with the engine running and he had information that the person may have consumed alcohol and had been unresponsive to prior efforts to check on him. I find Cst. Perkins was lawfully entitled to pursue inquiries as he has described relating to an investigation. In and around this time Cst. Spoljar had arrived at the scene and had similarly spoken to either Cst. Perkins and/or Mr. Fontaine concerning the individual in the vehicle.

[368] In order to balance himself, Cst. Perkins grasped the side mirror. The interior of the vehicle was dark. With the use of his flashlight he observed the plaintiff asleep in the back area of the cab. He knocked or banged on the side of the cab in an attempt to rouse the plaintiff. Around the same time, Cst. Spoljar had hoisted himself up on the passenger side window and also brought his flashlight into use in an attempt to see into the cab.

[369] There was no access to the cab. The windows were rolled up and it was determined that both doors were locked.

[370] I find that the police were either yelling or speaking with raised voices in order to try and be heard over the idle of the truck. The plaintiff testified that one would have to yell to be heard by someone inside the vehicle with the engine running at

high idle. The plaintiff also testified that taking it to low idle reduces the noise, but only slightly.

[371] The plaintiff did awaken. Cst. Perkins testified that the plaintiff told Cst. Spoljar to “fuck off and turn off his light”, or words to that effect. Cst. Spoljar supports this evidence. The plaintiff testified that he does not recall telling the officers to “fuck off” but at another point in his evidence concedes it is possible he told the officers to “fuck off”. On the whole, I accept the evidence of the officers concerning the nature of the exchanges.

[372] Cst. Perkins testified that he was saying a number of things to the plaintiff. At this point, Cst. Perkins was on the step holding onto the mirror of the truck. Upon the plaintiff coming to the driver’s seat, Cst. Perkins testified that he asked the plaintiff to open the window. The plaintiff said he was parked and to “fuck off”. Cst. Perkins testified that he asked him again to open the window and the plaintiff did open the window two to three inches.

[373] In this regard, the plaintiff testified that the top of the driver’s side window is 17 inches above the plaintiff’s shoulders as he sits in the driver’s seat. This generally accords with the evidence of Cst. Perkins who testified that the top of the window, as it was rolled down two to three inches, was then about eye level with the plaintiff seated in the driver’s seat.

[374] Cst. Perkins asked the plaintiff again to turn the engine off and to step out of the vehicle. He asked the plaintiff to provide identification.

[375] The plaintiff testified that when he came to the driver’s seat it was then that Cst. Perkins stepped up onto the truck. On the whole of the evidence, this is not correct. Cst. Perkins was already perched on the truck banging on the side of the cab to awaken the plaintiff at this point.

[376] In any event, the plaintiff denies that Cst. Perkins indicated that the police were investigating impaired care and control and also denied being asked for

identification. The plaintiff testified that what he heard was the officer yelling “open the fucking door”.

[377] Cst. Perkins admits raising his voice in order to be heard over the engine noise and through the window, but denies he said at any time “open the fucking door”.

[378] Cst. Perkins testified that the plaintiff, in response to Cst. Perkins asking him to step out and produce identification, told Cst. Perkins “on a couple of occasions”, to “fuck off”.

[379] As this was unfolding, it is the evidence of both Cst. Perkins and Cst. Spoljar that Cst. Spoljar had left the passenger side and come around to stand on the driver’s side, on the ground, slightly to the left of Cst. Perkins as Cst. Perkins was perched on the step attempting to engage the plaintiff.

[380] The plaintiff testified that all he heard was the officer yelling “open the fucking door”. The plaintiff testified he said to the officer “you guys got the wrong guy, I'm going back to bed”. The plaintiff testified he then idled the engine back to a high idle.

[381] I accept the evidence of the police officers in this area of evidence where it conflicts with the plaintiff. The evidence of the plaintiff is generally not in accord with the weight of the evidence that I accept and I do not find his evidence particularly credible or reliable.

[382] Certainly the evidence on the whole suggests the plaintiff's memory of events is, in part, somewhat uncertain. He testified that Cst. Perkins stepped up onto the step of the truck to engage the plaintiff after the plaintiff had moved from his sleeping area of the vehicle to the driver's seat. The weight of the evidence simply does not support this.

[383] In addition, the plaintiff is insistent it was Cst. Perkins that came in the driver's side after tasering him. Again, the weight of the evidence demonstrates it was clearly Cst. Spoljar.

[384] I conclude Cst. Perkins did indicate the nature of the investigation to the plaintiff. He did indicate it was the police. I also find that Cst. Perkins did ask the plaintiff to produce identification, turn off the engine, and either more fully open the window or exit the vehicle. This evidence is entirely consistent with the uncontradicted evidence of the description provided by Cst. Perkins of the usual and ordinary course of conduct when the police are investigating this kind of circumstance. I do not find it plausible that Cst. Perkins would have ignored this protocol and simply stood there yelling “open the fucking door”.

[385] The evidence of Cst. Perkins at this stage leads me to conclude he had not satisfied himself that he had been able to take the appropriate steps to assess the complaint.

[386] He testified that he had information the person was drinking. The person was clearly in care and control of a vehicle with the engine running. From the perspective of Cst. Perkins, he was uncooperative. He appeared angry, testified Cst. Perkins. The person was not identifying himself. He was not opening the window to any degree that allowed Cst. Perkins to engage with the person in order to assist the investigation. Cst. Perkins testified that he smelled no alcohol but said he could not lean in. He testified that he could not conclusively determine the odour of alcohol on the breath in those circumstances with the window still between the officer and the plaintiff's face. He testified, from his perspective, that he observed possible indicia of insobriety. Cst. Perkins testified, and I find, that the plaintiff would not unlock the door. The plaintiff would not exit the vehicle. He would not turn off the engine, and in fact idled the engine back up. The keys remained in the ignition.

[387] Any suggestion at this point that Cst. Perkins was satisfied, based on all the information he was processing, that the investigation could be justifiably brought to an end, is not a viable suggestion.

[388] It is at this point, Cst. Perkins testified he is caused involuntarily to let go of the window and drop to the ground.

[389] Cst. Spoljar testified that he observed the plaintiff push Cst. Perkins' hand away from the window.

[390] The plaintiff denies pushing the hand of Cst. Perkins but concedes that he told Cst. Perkins they had the wrong guy and proceeded to roll up the window causing Cst. Perkins to let go of the window. The plaintiff testified Cst. Perkins did fall backwards to the ground.

[391] Cst. Spoljar believed that the plaintiff had physically touched the hand of Cst. Perkins to get it off the window. I also find that, regardless of the specific action taken by the plaintiff, in deciding to ignore the requests of the officers and then roll up the window, on his own evidence, it was a deliberate act intending only one realistic consequence; namely, it would force Cst. Perkins to immediately release his grasp on the window.

[392] Upon landing on the ground, Cst. Perkins immediately declared that the plaintiff was under arrest for obstruction of justice. I accept this evidence.

[393] It was at this point, that Cst. Spoljar, standing on the ground, seeing the events unfold with Cst. Perkins, broke the window of the driver's side to access the cab to arrest the plaintiff in accordance with the declaration of Cst. Perkins.

[394] Cst. Spoljar testified that, upon rising to the steps on the driver's side to effect the arrest of the plaintiff, he observed the plaintiff turning and reaching towards the back of the cab. Given the behaviour of the plaintiff to that point, Cst. Spoljar was fearful the plaintiff remained in a mood of non-cooperation and may well have been reaching for something "unknown" that presented a risk of harm. In all of the circumstances, he came to the conclusion that this risk required intervention and he struck the plaintiff.

[395] Cst. Spoljar testified that he was then struck by the plaintiff which caused him to fall away from the truck. The officer immediately regained his position on the step and as he did so, he observed the plaintiff with a cocked fist in a position that appeared to be at the ready to strike Cst. Spoljar again. Cst. Spoljar believed he was

to be struck again and immediately deployed his taser. I accept the evidence of Cst. Spoljar.

[396] The plaintiff disagrees completely with this sequence. The plaintiff denies he was struck by Cst. Spoljar and denies he struck Cst. Spoljar. He denies cocking his fist as described, or at all.

[397] The plaintiff says it was the passenger side window that was broken initially and it was Cst. Perkins that entered the cab from the driver's side yelling “you are in care and control”.

[398] It is, however, the evidence of Cst. Perkins that during this sequence he had come back around to the passenger side, broken the passenger side window, hoisted himself up on the step, and observed the cocked fist of the plaintiff as described by Cst. Spoljar. It was then that Cst. Perkins deployed his taser, having come to the conclusion Cst. Spoljar was imminently in harm’s way.

[399] I accept the evidence of Cst. Perkins that he saw the plaintiff with a cocked fist and believed the plaintiff was about to strike Cst. Spoljar. I accept that he felt this was an imminent threat and he had to act immediately. He considered the use of either OC spray or the baton were not viable in the circumstances. Sgt. Fawcett supports this view.

[400] The plaintiff invites the Court to find that most, if not all of the witnesses for the defendant, including the professional witnesses, are not credible. The submissions in relation to Cst. Spoljar are no exception. The plaintiff submits Cst. Spoljar has fabricated his evidence.

[401] I found Cst. Spoljar completely credible on all aspects of this matter. He remained internally consistent notwithstanding a vigorous and prolonged cross-examination.

[402] I am troubled by aspects of the testimony of Cst. Perkins concerning his evidence relating to the alleged multiple blows by Cst. Spoljar inside the cab. I do

not conclude Cst. Perkins is purposely attempting to deceive the Court but I do conclude I cannot place reliance on his evidence in this area. However, I do not conclude it taints all aspects of his evidence. My concerns relating to the evidence of Cst. Perkins on this point do not enhance the evidence of the plaintiff nor undermine the credibility of Cst. Spoljar on this aspect of matters.

[403] I pause here to address the position of the plaintiff that the tasers were deployed some minutes apart and that Sgt. Waroway has lied under oath concerning this issue.

[404] I am satisfied the evidence of Sgt. Waroway is credible and reliable and I accept his evidence concerning the timing of the deployment of the tasers. The overwhelming weight of the evidence in this matter is consistent with the tasers being deployed as testified to by Sgt. Waroway.

[405] Sgt. Waroway gave his evidence in a professional forthright manner and freely conceded his errors. There is no evidence to contradict his conclusions.

[406] On this issue, the defendant submitted as follows:

> When the day/time discrepancy on the CEWD Report was completed for Cst. Perkins' taser, the trigger time on July 26, 2016 changed from 22:30:22 (+1:37) to 22:31:59. When the time update was completed for Cst. Spoljar's taser, the trigger time on July 26, 2016 changed from 22:20:00 (+12:00) to 22:32:00. Sgt. Waroway testified that once the tasers were synced to the standalone computer time and the taser times were updated to reflect the time of the standalone computer, there was a "one second difference" in trigger times.

[407] I come to the same conclusion in my analysis of Sgt. Waroway's evidence.

[408] The evidence of Sgt. Waroway in relation to these corrections did not impact the purport of his evidence concerning the correct and appropriate timing of the deployment of the tasers.

Expert Opinions Regarding Use of Force

[409] There is expert opinion evidence led in this case concerning the use of force.

[410] The plaintiff led the expert opinion evidence of Inspector Harris in order to assist the Court concerning the issue of the use of force. I find certain features of the evidence of some assistance, but, on the whole, I find the evidence of Inspector Harris generally unhelpful.

[411] The focus of the assumed facts in the report of Inspector Harris was in the context of the use of force in pursuing an investigation for being in care and control of a vehicle while under the influence of alcohol. I have found as a fact that the use of force, beginning with the breaking of the driver's side window by Cst. Spoljar, was in the context of facilitating an arrest, for, initially, obstruction of justice and subsequently assaulting a police officer.

[412] Inspector Harris did not address the use of force in this context.

[413] In addition, the assumed facts offer assumptions that are far removed from not only the findings of fact, but the evidence generally.

[414] For instance, it is assumed in Inspector Harris' report:

1) That Cst. Perkins stepped down from the truck.

2) That Cst. Spoljar tried to drag the plaintiff out of his cab through the broken window.

3) Both officers entered the cab and both punched the plaintiff in the torso and the head.

4) The beating or the tasering rendered the plaintiff unconscious.

[415] There is little or no evidence in support of these propositions.

[416] Inspector Harris was asked to provide his opinion concerning a proposition put to him in cross-examination; namely, to change one fact and assume the plaintiff closed the window. The evidence of Inspector Harris on this new assumption does not assist the plaintiff and, in fact, somewhat supports the position of the defendant.

[417] It will be recalled that Inspector Harris testified that, assuming this one changed fact, it may be time, in the opinion of Inspector Harris, “for a little more” dialogue to try and calm the person down. The suggested dialogue was to tell the person that they must produce their driver's license and insurance papers and they must do it immediately, otherwise, if they do not cooperate in this regard, it will amount to obstruction of justice and the person will be arrested.

[418] I have found as a fact that this is what, in essence, Cst. Perkins had already attempted to do but to no avail, prior to his being forced off of the truck.

[419] In addition, I am of the view that aspects of the report and evidence of Inspector Harris were purporting to offer a legal opinion that he was not qualified to provide.

[420] For instance, Inspector Harris offered the opinion that a police officer cannot rely only on a citizen report to arrest for impaired driving. It is my view that this is a legal opinion relating to reasonable and probable grounds to arrest. Inspector Harris offered the opinion that the evidence listed in his assumed facts had “not built any reasonable grounds towards his impaired investigation”. Further, Inspector Harris offered the view, that upon Cst. Spoljar breaking the driver's window, that “given the officers had not formed any reasonable grounds to this point (concerning care and control), the act of breaking the window can be considered the criminal act of mischief…”. Inspector Harris offered the view that “case law clarifies that the measure of force used must be based on reasonableness. Reasonableness is independent of outcome. It is the process that matters with proportionality being key, and preclusion is relevant”.

[421] In my respectful view, Inspector Harris, in the course of formulating his analysis, was not qualified to offer these legal views.

[422] Finally, Inspector Harris quite properly recognized his duty to assist the Court and not be an advocate for any party. That said, Inspector Harris ended his report as follows:

> use of force encounters can be disturbing to some viewers, however appearance does not equate to whether force used is reasonable. When analyzing use of force incidents, the concern is not how serious the subjects injuries are, but how and why they occurred. However in this case, because there does not appear to be reasonable grounds for an arrest and therefore the use of force by the officers may not be justified or considered reasonable, then the seriousness of Mr. Degen's injuries should be of concern for the court.
>
> [Emphasis added.]

[423] Again, with all due respect, these comments are inappropriate and not consistent with his duty. They clearly veer into advocating on behalf of the plaintiff.

[424] That said, I am also of the view that the opinion of Sgt. Fawcett is not without flaws.

[425] While his report is based upon assumptions much closer to the facts as I have found, it suffers from certain qualitative disorder. The report declares that the opinion is based upon the assumed facts and the documents provided.

[426] Sgt. Fawcett was forwarded a significant amount of material including the pleadings, the transcripts of the examinations for discovery of both Cst. Perkins and the plaintiff, certain police officer's notes, a 170-page Occurrence Report prepared by the RCMP, and an audio recording of the statement of Mr. Fontaine.

[427] The apparent foundation for the opinions expressed in the report rests on a conglomeration of assumed facts, examination for discovery evidence, an Occurrence Report, and various statements. Much of that information is not before the Court.

[428] For example, Sgt. Fawcett includes this reference in his opinion:

> DEGEN was described as rolling the driver’s window up and, “… got into the driving position of his running Volvo semi.”, (General Occurrence Hardcopy, p. 25). He recalled hearing Constable SPOLJAR yell “get back” after which Constable SPOLJAR used his baton to break the driver’s side window (General Occurrence Hardcopy, p. 25 & p. 78; Examination for Discovery of Perkins, dated 20-02-05, p. 34). Immediately after breaking the window with his expandable baton, Constable SPOLJAR attempted to grab DEGEN.

[429] As observed, the Occurrence Report is not before me nor, in large part, is the evidence referred to by Sgt. Fawcett from the Occurrence Report.

[430] The *viva voce* testimony of Sgt. Fawcett attempted to disentangle the knot of information relied upon. This did little to provide any comfort. In my view the report remained confusing. The weight of the evidence therefore is significantly impacted.

The Law

[431] The plaintiff's action against the defendant is based in tort.

[432] The primary tort here is battery. A battery occurs whenever unlawful force is intentionally inflicted on another person that is either physically harmful or offensive to their reasonable sense of dignity: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 246, 263, 1992 CanLII 65. If a police officer acts with legal authority, their actions are justified: *Criminal Code*, R.S.C., 1985, c. C-46, s. 25(1) [*Code*]. Justification is a defence to battery.

[433] There had previously been a question in this case of the appropriate person(s) against whom liability was sought in this action. That matter has been addressed, and the sole defendant in this action is now the Minister of Public Safety and Solicitor General of British Columbia.

[434] I pause here to specifically address s. 25 of the *Code*.

[435] There is no question that the officers applied intentional force to the plaintiff. The officers however may have statutory protection.

[436] Section 25 of the *Code* reads as follows:

> 25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,
>
> (b) as a peace officer or public officer,
>
> (c) in aid of a peace officer or public officer, or
>
> (d) by virtue of his office,

> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[437] Notably, s. 25(1) of the *Code* is not universally applicable and is modified by subsequent subsections; in this case, the relevant modifications are found in s. 25(3)–(4) which read:

> (3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.
>
> (4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if
>
> > (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
> >
> > (b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
> >
> > (c) the person to be arrested takes flight to avoid arrest;
> >
> > (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
> >
> > (e) the flight cannot be prevented by reasonable means in a less violent manner.

[438] Section 25(5) of the *Code* has not been reproduced here as it deals with powers in escape from penitentiary, which has no application in this case.

[439] The words "grievous bodily harm" in s. 25(3) of the *Code* have been taken by courts to mean serious hurt or pain: *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.) at para. 18, 1981 CanLII 339.

[440] I return now to the test regarding the applicability of s. 25(1) of the *Code* as a justification for what is otherwise tortious behaviour.

[441] The defendant bears the onus of proving, on a balance of probabilities, that: (1) the officer was required or authorized by law to perform the administration or

enforcement of the law; (2) that the officer acted on reasonable grounds in performing that action; and (3) that the force used was necessary for the purpose: *Bencsetler v. Vancouver (City)*, 2015 BCSC 1422 at para. 147; *Akintoye v. White*, 2017 BCSC 1094 at para. 98; *R. v. Nasogaluak*, 2010 SCC 6 at para. 34.

[442] In *Akintoye*, Justice Fleming provided the following articulation of the three requirements to establish the applicability of s. 25(1) of the *Code* (*Akintoye* was in the context of an investigative detention rather than arrest):

> [98] The defendants accept that under s. 25, they bear the onus of proving on a balance of probabilities, three requirements described in *Chartier v. Graves*, [2001] O.J. No. 634 at para. 54 (S.C.), as follows:
>
> 1. the officer's conduct was required or authorized by law in administering or enforcing the law;
> 2. he or she acted on reasonable grounds in using force; and
> 3. he or she did not use unnecessary force.

[443] I find it useful to state the applicable legal test in a slightly different manner than that put forward by Fleming J. This articulation is in line with the language in *Nasogaluak* at para. 32.

[444] The applicable legal test to establish justification for use of force under s. 25(1) of the *Code* is a three-part test. The onus of proving each element lies with the defendant and is based on a balance of probabilities. In the context of actions taken during the course of an arrest made by an officer, the three elements that must be proven are that:

a) the officer's conduct was required or authorized by law in administering or enforcing the law;

b) the officer was making the arrest based on reasonable grounds; and

c) the officer did not use unnecessary force in effecting the arrest.

[445] Absent the defendant establishing each of the three elements, the use of force is not justified and liability ensues: *Bencsetler* at para. 149. Accordingly, the use of force is unlawful.

[446] Below, I deal with elements (1) and (2) and address element (3) – the necessity of the use of force – separately.

[447] Under the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, s. 33(1) [*MVA*], the plaintiff is obliged to produce his licence for inspection on demand of a peace officer:

> 33 (1)Every person, except
>
> (a)a person driving or operating a motor vehicle exempted under section 2 (5) or section 8 or 10, or
>
> (b)a person driving or operating a motor vehicle of a fire department of a municipality,
>
> must have his or her driver's licence and driver's certificate and a motor vehicle liability insurance card or financial responsibility card, issued for the motor vehicle he or she is driving or operating, in his or her possession at all times while driving or operating that motor vehicle on a highway, and must produce the licence, certificate and card for inspection on demand of a peace officer.

[448] The exemptions to the requirement to produce a licence on demand under s. 33(1)(a) of the *MVA* are for individuals operating farming equipment. Clearly, those exemptions are not applicable here.

[449] The offence of obstruction of justice is found in s. 129 of the *Code* which states:

> 129 Every one who
>
> (a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,
>
> (b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, or
>
> (c) resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure,
>
> is guilty of
>
> (d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
>
> (e) an offence punishable on summary conviction.

[450] In this context, it is necessary to examine briefly the meanings of “resist” and “wilfully obstruct”. Although this is not a criminal case, it is worth noting that charges under s. 129(a) of the *Code* are general intent offences: *R. v. Glowach*, 2011 BCSC 241 at paras. 37, 70.

[451] Resist in this context may mean either active resistance or passive resistance. Active resistance may be exhibited by opposition to a force being applied to a person, whereas passive resistance results from some form of inaction.

[452] Wilful denotes intentional or deliberate behaviour; obstruction denotes blocking or prevention or hindrance. Taken together in this context, “wilfully obstructs” means an intentional or deliberate hindrance of action.

[453] For an offence under s. 129(a) of the *Code*, the elements of the offence that must be proven, in the context of this case, are:

a) the identity of the plaintiff;

b) the date and time of the incident;

c) the location of the incident;

d) the individual allegedly being obstructed was a peace officer or public officer within the meaning of s. 2 of the *Code*;

e) the plaintiff knew that the individual allegedly being obstructed was a peace officer;

f) the plaintiff resisted or wilfully obstructed a peace officer; and

g) the peace officer was engaged in lawful duty at all relevant times.

See *R. v. Quinones*, 2012 BCCA 94 at para. 9.

[454] The arrest in this case was made without a warrant, consequently s. 495 of the *Code* also applies:

> 495 (1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> (b) a person whom he finds committing a criminal offence; or
>
> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.
>
> (2) A peace officer shall not arrest a person without warrant for
>
> (a) an indictable offence mentioned in section 553,
>
> (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
>
> (c) an offence punishable on summary conviction,
>
> in any case where
>
> (d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to
>
> (i) establish the identity of the person,
>
> (ii) secure or preserve evidence of or relating to the offence, or
>
> (iii) prevent the continuation or repetition of the offence or the commission of another offence,
>
> may be satisfied without so arresting the person, and
>
> (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.
>
> (3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of
>
> (a) any proceedings under this or any other Act of Parliament; and
>
> (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).

The Law of Arrest

[455] The test for the lawfulness of an arrest is well embedded in our jurisprudence. The officer must believe he has reasonable and probable grounds to arrest the accused and those grounds must be objectively justifiable: *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250, 1990 CanLII 125. The Court stated in *Storrey*:

> [250] There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See *R. v. Brown* (1987), 1987 CanLII 136 (NS CA), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.
>
> [251] In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest.

[456] The Supreme Court of Canada explained the threshold succinctly in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 1984 CanLII 33, in articulating that the state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion.

[457] Justice Hill addressed this in *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 at 367 (Ont. Ct. J. (Gen. Div.)), 1994 CanLII 5271:

> The appropriate standard of reasonable or credibly-based probability envisions a practical, non-technical and common-sense probability as to the existence of the facts and inferences asserted.

[458] A helpful summary is found in *R. v. Shokar*, 2006 BCSC 770, where Justice Joyce stated as follows:

> [19] There must be both a subjective and an objective basis for the reasonable grounds to arrest the suspect. The arresting officer or the officer who directs the arrest must believe that he has reasonable and probable grounds -- [that is] the subjective element. Further, it must be shown that a reasonable person standing in the shoes of the officer would have believed that reasonable and probable grounds existed to make the arrest -- the objective element.
>
> [20] The standard to be applied in assessing whether or not there were reasonable and probable grounds is not proof beyond a reasonable doubt or

> even a prime facie case. It is one of reasonable probability … Whether or not a reasonable probability exists is also to be determined based on the totality of the circumstances …

[459] These principles were recently reviewed in *R. v. Glendinning*, 2019 BCCA 365, leave to appeal ref'd [2020] S.C.C.A. No. 38878. The Court in *Glendinning* reaffirmed that the phrase "reasonable grounds" is equivalent to "reasonable and probable grounds" which was the phrase previously used in the legislation. The objective grounds do not rise to a level of a *prima facie* case for conviction. The standard is less than that of a civil standard of the balance of probabilities. The standard however is something more than mere suspicion.

[460] The objective aspect of the assessment is to be viewed through the lens of the experienced police officer approaching the matter with prudence and caution, but not through such a jaded lens that all human interaction takes on sinister connotations.

[461] The most pragmatic articulation concerning the objective aspect of the analysis is found in *R. v. Luong*, 2010 BCCA 158, at para. 24 wherein Justice Bennett stated as follows:

> The assessment of whether objective grounds exist undertaken by a trial judge is conducted by first looking at the observations of the officer (which the trial judge has found as facts) through the lens of someone who has the same experience, training, knowledge and skills as the officer who is making the observations, and then deciding if a reasonable person with the same lens would come to the same conclusion as the police officer…

[462] That said, caution must be brought to bear that "accounting for the officer's special knowledge is not the same as deferring the entire objective assessment of the grounds to the officer's intuition. To do so would make the objective assessment meaningless …": *R. v. Oyston*, 2019 BCSC 264 at para. 96.

[463] The offence of obstruction of justice is a hybrid offence. Under s. 495(2) of the *Code*, a suspect can be arrested without a warrant if the officer believes, on reasonable grounds, that the public interest cannot be satisfied without arresting the person or that, if not arrested, the person will fail to attend court. The burden of

proving that an arrest was unlawful because of non-compliance with s. 495(2) in a civil claim for damages for unlawful arrest rests with the plaintiff: *Russell v. British Columbia (Public Safety & Solicitor General)*, 2018 BCSC 1757 at para. 42.

[464] Element (1) of the test, whether the officers were required or authorized by law to perform an action in the administration or enforcement of the law is relatively straightforward.

[465] The officers were in the midst of conducting an impaired driving investigation on the basis of the complaint from Mr. Fontaine. It is not contentious in this case that police officers are authorized to investigate complaints regarding impairment of those operating a motor vehicle. At a certain stage in the investigation, the events transformed this from an impaired driving investigation into an arrest for obstruction of justice.

[466] The circumstances in this case did not allow the police officers to pursue their duties in properly investigating this matter. I find that at the point that the window was rolled up, the officers continued to be in the lawful execution of their duties.

[467] I turn now to element (2) of the test, whether the officers were acting on reasonable grounds in effecting the arrest. I find that this element is met, for reasons which I expand upon below.

[468] I have concluded that Cst. Perkins asked the plaintiff to produce identification. Under s. 33(1) of the *MVA*, the plaintiff was obliged to produce his identification, namely his licence, upon the demand of Cst. Perkins. Recalling that there are exemptions for the requirement to produce a licence, the plaintiff clearly does not fall under any such exemption.

[469] Additionally, at some point the plaintiff caused the truck window to be closed, an act that I have found was deliberate.

[470] Looking to the totality of the circumstances, including the failure to produce identification and the rolling up of the window, the plaintiff engaged in wilful acts that

resisted the efforts of the officers to execute their duties. Accordingly, I find that in the whole of the circumstances, the officers subjectively believed that they had reasonable and probable grounds on which to base an arrest under s. 129(a) of the *Code* for obstruction of justice.

[471] The test further requires an answer to the question as to whether this belief is objectively justifiable.

[472] A reasonable person with a similar lens (experience, training, knowledge and skills) as Cst. Perkins and Cst. Spoljar would have believed that the whole of the circumstances, including the failure to produce identification and closure of the window, amounted to resistance and wilful obstruction of the officers' execution of duties. The officers were there to conduct an investigation and as a direct result of the plaintiff's actions they were unable to do so. Based on my findings, I am persuaded that the beliefs of Cst. Perkins and Cst. Spoljar were objectively reasonable. It is clear that, in these circumstances, both the subjective and objective elements of the test for reasonable and probable grounds are met for an arrest for obstruction of justice.

Use of Force

[473] Now, I turn to analyze whether the use of force employed to effect that arrest were lawful.

[474] The test for assessing an officer's belief that the force used was necessary is a modified objective test: *Akintoye* at para. 101. The officer must "subjectively believe that the force used was necessary and that belief must be objectively reasonable in all the circumstances": *Akintoye* at para. 101.

[475] Additional guidance regarding the legal analysis applicable to the use of force is found in *Nasogaluak*, where the Supreme Court of Canada specified the degree of "allowable" force is constrained by the principles of proportionality, necessity, and reasonableness, including the caution that: "courts must guard against the

illegitimate use of power by the police against members of our society, given its grave consequences": *Nasogaluak* at para. 32.

[476] As I read it, this guidance does not modify the applicable test as set out above.

[477] In applying the test, it is accepted that a range of use of force responses may be reasonable for the purposes of the objective reasonability analysis given the circumstances of the case: *Bencsetler* at para. 153. The reasonableness, proportionality, and necessity of the use of force are assessed in light of the circumstances facing the officers, not based on hindsight: *Akintoye* at para. 102.

[478] In determining this issue, the whole of the evidence and circumstances must be weighed including, of course, the evidence of the expert opinion of Inspector Harris and Sgt. Fawcett.

[479] Both Inspector Harris and Sgt. Fawcett made it clear that police work is demanding, often with the potential of harm to the public or themselves, and there is often a need to act quickly. The purport of their evidence, in accordance with the jurisprudence, is that police are not expected to measure the use of force with nicety or exactitude. They are not required to use the least amount of force to achieve the valid enforcement objective. A police officer is entitled to make the wrong judgment, but the officer is not entitled to act unreasonably. Again, they both emphasized the fact that in assessing matters, it is not an exercise in hindsight.

[480] The language of s. 25 of the *Code* is "necessary" in regard to the appropriate level of force for the police to employ in a given scenario.

[481] The officer must be of the subjective belief that the force was necessary for the purpose and that it was objectively reasonable in all of the circumstances: *Akintoye* at paras. 99, 101. This test must be met on a balance of probabilities, with the onus of proof lying with the defendant: *Bencsetler* at para. 147.

[482] Below, I analyze four uses of force according to this framework: the breaking of the window, Cst. Spoljar's closed fist strike, the use of CEWs, and the alleged use of force of multiple punches in the truck cab.

Breaking of the Window

[483] Although the breaking of the window is not a use of force against the plaintiff, nevertheless it does fall under the category of action included in "anything in the administration or enforcement of the law" as stated in s. 25(1) of the *Code*.

[484] I will address the evidence of Inspector Harris and Sgt. Fawcett on this point. I did not find their evidence concerning the use of force concerning the breaking of the window particularly useful.

[485] Sgt. Fawcett was not asked to opine concerning the use of force on breaking the window. He simply expressed a view in his report that the window was broken to ensure the plaintiff could not drive the semi-truck.

[486] Inspector Harris as well was not asked in his report to address this issue.

[487] Inspector Harris did comment on this issue, although somewhat vaguely, in re-examination. Inspector Harris was asked to consider an assumed fact, in addition to the assumed facts in his report, namely that the plaintiff took deliberate steps to cause Cst. Perkins to fall off the truck. He was asked if "that would justify breaking the window and tasering him".

[488] The response of Inspector Harris was ambiguous but, in fairness, Inspector Harris continued to operate in his assessment from the context of an investigation rather than an arrest.

[489] He did testify that in the event the person was not cooperating and not producing his driver's license in accordance with the *MVA* requirements, matters could conceivably escalate to charging or arresting the person for obstruction of justice.

[490] It is clear on the evidence, and I have found, that Cst. Perkins stated that the plaintiff was under arrest for obstruction of justice. I have found that it was immediately, or almost immediately, after this announcement that Cst. Spoljar broke the window of the truck to facilitate the arrest of the plaintiff.

[491] In all the circumstances, I am satisfied Cst. Spoljar was of the subjective belief that it was necessary to break the window in order to gain entry to the vehicle for the purposes of arresting the plaintiff.

[492] I also conclude the defendant has established, on balance, the breaking of the window was objectively reasonable in all the circumstances.

[493] Cst. Spoljar had observed the efforts of Cst. Perkins to properly undertake an investigation concerning whether the driver of the vehicle may be under the influence of alcohol. It was apparent these attempts had been frustrated. The engine of the truck was running. It had been running since the arrival of the officers and it continued to run throughout the engagement. This made communication with the plaintiff difficult. At one point the plaintiff idled the engine down but this did not alleviate the communication difficulty to any significant degree.

[494] The plaintiff did not turn the engine off. He did not take the keys out of the ignition. He did not open the door. This continued to make inquiries difficult, if not impossible.

[495] The only communication available was as a result of the plaintiff rolling his window down two to three inches. He remained in the driver’s seat. I have found the plaintiff took deliberate steps that caused Cst. Perkins to fall off the truck. At the same time the plaintiff made it clear he was not interested in any communication or cooperation; and certainly not interested in producing his driver's license and engaging with the officers. He was in the driver’s seat, essentially barricaded in his running vehicle.

[496] In my view, some urgency had developed. Communication was fruitless. The use of force in breaking the window was dramatic, but I conclude necessary,

pursuant to s. 25 of the *Code*, in order to properly effect the arrest of the plaintiff in all of the circumstances that faced the officers. I consider the use of force to break the window to have been objectively reasonable in the circumstances.

Closed Fist Strike

[497] The closed fist strike of Cst. Spoljar must also be assessed using the modified-objective test.

[498] Cst. Splojar testified, and I have found, that upon rising to the steps on the driver's side he observed the plaintiff turning and reaching toward the back of the cab. Given the behaviour of the plaintiff to that point, Cst. Spoljar was fearful the plaintiff remained in a mood of non-cooperation and may well have been reaching for something "unknown" that may well present a risk of harm. In all of the circumstances, he came to the conclusion that this risk required intervention and he struck the plaintiff. It is clear that Cst. Spoljar meets the subjective component of the use of force test here.

[499] As outlined above, there had been previous non-cooperation and numerous utterings of profanities from the plaintiff directed at the officers. This history informed Cst. Spoljar's perceptions of the plaintiff being somewhat unpredictable and angry, and he reasonably perceived a risk of harm to himself.

[500] I conclude that it was objectively reasonable in the circumstances for Cst. Spoljar to have delivered a closed fist strike to the plaintiff.

[501] Additionally, based on the evidence before me, I conclude that the harm resulting from this single, closed-fist strike did not amount to serious hurt or pain, i.e. grievous bodily harm within the meaning of s. 25(3) of the *Code*. Accordingly, there is no finding of liability for the harm resulting from the closed-fist strike.

Employing CEWs

[502] I conclude on the evidence that each of the officers had a subjective belief that the use of CEWs was necessary in the circumstances. The basis for this from

each officer's perspective appears to share similarities in that it was driven primarily by the notion that the plaintiff was prepared to strike Cst. Spoljar for a second time. Cst. Spoljar described this as a cocked fist, while Cst. Perkins described the plaintiff as having a raised fist.

[503] In this context, I will address the evidence of Inspector Harris and Sgt. Fawcett.

[504] Again, I do not find the evidence of Inspector Harris is of assistance. His views rested on assumed facts that were far removed from the findings of fact in this case.

[505] Sgt. Fawcett offered the opinion that the use of the taser of both officers was reasonable and necessary in the circumstances.

[506] I have already found that "the circumstances" Sgt. Fawcett relied upon were a mix of assumed facts, and material not before the Court, that rendered it impossible to untangle so as to appreciate the real foundation and parameters of his opinion. In the result, the weight to be afforded this opinion is significantly undermined.

[507] Now, I turn to address whether the use of CEWs was objectively reasonable in the circumstances. At this point in the incident, the officers had access to the plaintiff from both sides of the vehicle. Although, the plaintiff was in a position where he appeared ready to strike Cst. Spoljar, there was no suggestion in the evidence the plaintiff had retrieved, or was about to retrieve, or then possessed, anything on his person, much less a weapon.

[508] At this stage, it is useful to be reminded of the guidance from the Supreme Court of Canada in *Nasogaluak* which tells us that the test of objective reasonability is informed by the principles of proportionality, necessity, and reasonableness.

[509] I am not persuaded that the use of CEWs was proportionate to the threat of a closed fist strike from the plaintiff. In coming to this conclusion, I am aware of the need for police to react quickly to situations. However, the level of force used in this

circumstance was, in my view, disproportionate to the perceived threat. The officers had already gained access to the cab of the truck. The plaintiff was accessible.

[510] There was, on these facts, an opportunity for a brief disengagement before re-engaging the plaintiff concerning the new circumstance of seeking the arrest of the plaintiff. A warning that the force contemplated was about to be utilized is the recommended course and ought to have been taken. Accordingly, I am not persuaded that the use of CEWs was an objectively reasonable use of force in the circumstances at this point.

[511] I find that the defendant has not met their onus to prove the applicability of s. 25(1) of the *Code* as a valid justification defence to the use of force engaged by the deployment of CEWs. Accordingly, I find that the defendant is liable for harms resulting from this battery.

[512] I need not consider the application of s. 25(3) of the *Code* to the use of CEWs. Had I found that s. 25(1) provided a valid defence for the use of force engaged by deploying the CEWs, an analysis under s. 25(3) would have been appropriate to determine whether the use of the CEWs was necessary for the self-preservation of the officers.

Punching in the Truck Cab

[513] The analysis regarding the alleged use of force in the truck cab following deployment of the CEWs is straightforward in this case. I have concluded that no additional punching to the head, or any other part of the plaintiff's body, took place in the cab.

Negligent Investigation

[514] The availability of the tort of negligent investigation in Canadian law was confirmed in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41.

[515] The Supreme Court undertook a traditional duty of care analysis to arrive at their conclusion regarding the availability of the tort of negligent investigation. In that analysis, they established that a duty of care is owed by police officers to a suspect in the course of investigation. The relevant standard of care was described as follows at para. 73:

> I conclude that the appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made — circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results (Klar, at p. 359). Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care. (See Lapointe v. Hôpital Le Gardeur, 1992 CanLII 119 (SCC), [1992] 1 S.C.R. 351; Folland v. Reardon (2005), 2005 CanLII 1403 (ON CA), 74 O.R. (3d) 688 (C.A.); Klar, at p. 359.)
>
> [Emphasis added.].

[516] Turning to the facts of this case, it is clear that the officers were investigating the plaintiff. Accordingly, they owed the plaintiff a duty of care.

[517] However, based on my findings, it is apparent that I find no evidentiary basis that the officers breached their standard of care in investigating the plaintiff. Accordingly, I find that the plaintiff has not established the tort of negligent investigation.

[518] Additionally, although this claim was included in the plaintiff's pleadings, the focus of the plaintiff's claim during trial was on the tort of battery, with some attention

also given to the tort of malicious prosecution. Negligent investigation was not present in the legal analysis found in the written copy of the plaintiff's closing submissions.

[519] This claim is dismissed

Malicious Prosecution

[520] There are four elements of the tort of malicious prosecution. These elements were discussed in *Miazga v. Kvello Estate*, 2009 SCC 51:

> [53] Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were "actively instrumental" in setting the law in motion that may be held accountable for any damage that results: Danby v. Beardsley (1880), 43 L.T. 603 (C.P.), at p. 604. As against a Crown prosecutor, the initiation requirement will be satisfied where the defendant Crown makes the decision to commence or continue the prosecution of charges laid by police, or adopts proceedings started by another prosecutor: Clerk & Lindsell on Torts (19th ed. 2006), at p. 979; J. G. Fleming, The Law of Torts (9th ed. 1998), at p. 677.
>
> [54] The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay. However, where the termination does not result from an adjudication on the merits, for example, in the case of a settlement or plea bargain, a live issue may arise whether the termination of the proceedings was "in favour" of the plaintiff: see, e.g., Ramsay v. Saskatchewan, 2003 SKQB 163, 234 Sask. R. 172; Hainsworth v. Ontario (Attorney General), [2002] O.J. No. 1390 (QL) (S.C.J.); Hunt v. Ontario, [2004] O.J. No. 5284 (QL) (S.C.J.); Ferri v. Root, 2007 ONCA 79, 279 D.L.R. (4th) 643. Whether the second element of malicious prosecution was satisfied in the present case was a live issue at trial; however, the question is not before the Court.
>
> [55] Of course, criminal proceedings may terminate in favour of an accused for a number of reasons and an accused's success in a criminal proceeding does not mean the prosecution was improperly initiated. The third element which must be proven by a plaintiff — absence of reasonable and probable cause to commence or continue the prosecution — further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been

> properly instituted, regardless of the fact that it ultimately terminated in favour of the accused. I will say more about this later in these reasons.
>
> [56] Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fuelled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect. I return to the malice element in the course of the analysis below.

[521] In other words, the plaintiff must establish on a balance of probabilities that:

a) the proceedings were initiated by the defendant;

b) the proceedings were terminated in favour of the plaintiff;

c) there was an absence of reasonable and probable cause for the defendant's conduct; and

d) the defendant was actuated by malice or a primary purpose other than carrying the law into effect.

[522] The third and fourth elements are where the focus of the analysis takes place.

[523] The relevant standard for the third element and its impact on the analysis is discussed in *Miazga* at paras. 74–77:

> [74] The Court's analysis in Nelles lends further support to the conclusion that the third element of the tort turns on the objective assessment of reasonable and probable cause. Unlike the question of subjective belief, which is a question of fact, the objective existence or absence of grounds is a question of law to be decided by the judge: Nelles, at p. 193. As noted in Nelles (at p. 197), the fact that the absence of reasonable and probable cause is a question of law means "that an action for malicious prosecution can be struck before trial as a matter of substantive inadequacy", or on a motion for summary judgment. These mechanisms are important "to ensure that frivolous claims are not brought" (Nelles, at p. 197). In some provinces, the ultimate decision as to whether or not there was reasonable and probable cause for instituting the prosecution is reserved by statute for the trier of fact: see, e.g., Courts of Justice Act, R.S.O. 1990, c. C.43, s. 108(10), and Jury

> Act, R.S.P.E.I. 1988, c. J-5, s. 3(5). Nonetheless, in the absence of any express provision to the contrary, the question whether there is a sufficient case to be put to the jury will remain a matter to be determined by the judge as a matter of law, in accordance with the respective roles of the judge and the jury. Therefore, factual inadequacy in a motion to strike a pleading or on a motion for summary judgment can still form a basis for the pre-trial striking of the pleading or the dismissal of the action, even where the ultimate determination of the issue may be expressly reserved by statute to the jury. See, e.g., Wilson, per Dambrot J.
>
> [75] If the court concludes, on the basis of the circumstances known to the prosecutor at the relevant time, that reasonable and probable cause existed to commence or continue a criminal prosecution from an objective standpoint, the criminal process was properly employed, and the inquiry need go no further. See, e.g., Al's Steak House & Tavern Inc. v. Deloitte & Touche (1999), 45 C.C.L.T. (2d) 98 (Ont. Ct. (Gen. Div.)), at paras. 11-13.
>
> [76] In carrying out the objective assessment, care must be taken in retroactively reviewing the facts actually known to the prosecutor at the relevant time — that is, when the decision to initiate or continue the proceeding was made. The reviewing court must be mindful that many aspects of a case only come to light during the course of a trial: witnesses may not testify in accordance with their earlier statements; weaknesses in the evidence may be revealed during cross-examination; scientific evidence may be proved faulty; or defence evidence may shed an entirely different light on the circumstances as they were known at the time process was initiated.
>
> [77] If a judge determines that no objective grounds for the prosecution existed at the relevant time, the court must next inquire into the fourth element of the test for malicious prosecution: malice.
>
> [Emphasis added.]

[524] As is made clear by *Miazga*, the third element of the malicious prosecution analysis is based on an objective assessment of reasonable and probable cause. Additionally, if there was reasonable and probable cause to commence or continue a criminal prosecution, there is no need to address the fourth element of the tort.

[525] The fourth element of the tort, whether the prosecution was motivated by malice or a purpose other than that of carrying the law into effect, is discussed in *Miazga* at paras. 78–89. The summary at para. 89 is helpful:

> In summary, the malice element of the test for malicious prosecution will be made out when a court is satisfied, on a balance of probabilities, that the defendant Crown prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a "minister of justice". The plaintiff must demonstrate on the totality of the evidence that the prosecutor deliberately intended to subvert or abuse the office of the Attorney General or the process of criminal justice such that he or she exceeded the

> boundaries of the office of the Attorney General. While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry, it does not dispense with the requirement of proof of an improper purpose.

[526] I turn now to the application of the facts of the present case.

[527] Counsel for the defendant conceded the first two elements of the tort of malicious prosecution in their closing submissions. It is clear that the Crown initially approved charges against the plaintiff that were later stayed. The charges, as I understand them, were for two counts of assault of a peace officer and one count of obstruction of justice. However, the charges themselves were not put before me by either party.

[528] Certainly on the evidence before the Court there existed reasonable and probable cause to commence criminal proceedings. It must be recognized however that there is a dearth of evidence placed before the Court by either party in support of an assessment of this issue. There was much reference during the trial to various material, including the Occurrence Report, but that material was not before the Court. Simply put, it is not possible on the evidence to appreciate the basis upon which matters unfolded through the course of the criminal proceedings. There is not a sufficient evidentiary foundation to come to any conclusion that there was an absence of reasonable grounds to commence a criminal prosecution in this matter.

[529] Although it is unnecessary for me to consider whether the Crown had ulterior motives for pursuing charges against the plaintiff, I nevertheless consider that element of the tort. The fourth element, evidence of malice or a primary purpose of prosecution other than carrying the law into effect, is also not met on the evidence in this case.

[530] To establish malice or an ulterior motive, a plaintiff must lead evidence to prove that the Crown stepped outside the prosecutorial role and acted with a motive that involved abuse or perversion of the criminal justice system: *Miazga* at para. 7. That standard is an onerous one.

[531] The plaintiff points to the fact that the charges were stayed as evidence that there was an improper motive for commencing prosecution in the first place. This assertion cannot evidence ulterior motive. There is no evidence before me that supports a finding that the prosecution against the plaintiff was commenced due to improper purposes.

[532] This claim is dismissed.

Injuries

[533] The plaintiff alleges he suffered the following injuries as a result of the battery:

a. Lacerations
b. Left wrist sprain;
c. Head injury;
d. Brain injury;
e. Dizziness
f. Headaches;
g. Sleeplessness;
h. Impaired memory;
i. Impaired cognition
j. Impaired reaction time
k. Blurred vision;
l. Impaired concentration;
m. Psychological injuries;
n. Psychiatric injuries;
o. Depression;
p. Anxiety;
q. Irritability;
r. Emotional lability; and
s. Impaired speech.

[534] The assessment of injuries in this case engages, to a large degree, the reliability and credibility of the witnesses, including the plaintiff.

[535] I conclude I cannot fully rely on the evidence of the plaintiff. This was touched upon when considering the circumstances of the battery. I there found his evidence that the tasers were not deployed simultaneously a self-serving attempt to knowingly provide false evidence in order to enhance his claim. I have found his claim of being punched multiple times about the head and torso by both officers is not supported by the evidence nor are other factual assertions in the notice of civil claim supported by the evidence.

[536] In addition, I accept the evidence of Ms. Bowers concerning aspects of the plaintiff's life and conduct before and after the incident. Given this acceptance, and

my skepticism concerning the plaintiff's evidence, the weight to be afforded the evidence of the plaintiff is reduced and considered with a good deal of doubt. This impacts my conclusions concerning the injuries.

[537] I begin with the evidence of Dr. Waisman.

[538] The strength of the report of Dr. Waisman, and the weight to be afforded his evidence, is largely dictated by the accuracy and completeness of the information upon which his opinion is based. In this regard, to a large degree, this rests on the credibility and reliability of the plaintiff and, in turn, the reliability of his reporting.

[539] Consequently, the weight I afford to the diagnoses of Dr. Waisman is severely diluted.

[540] For instance, one criteria for the diagnosis of PTSD that was referenced by Dr. Waisman was that the plaintiff was having trouble falling or staying asleep. The plaintiff testified he sleeps five to six hours per night. The plaintiff adopted his evidence at the examination for discovery that he has had no sleep problems since the incident and has no difficulty falling asleep, although he has difficulties in the morning.

[541] It is unknown how important or otherwise this feature is to the overall diagnosis by Dr. Waisman, although it is an area that he reports one looks at from a psychiatric assessment point of view. The point however is that the information relied upon by Dr. Waisman, as opposed to the evidence, gives pause in having confidence in the reliability of the information and the assessment provided.

[542] The plaintiff testified that he has never been depressed, never been diagnosed as depressed, and has not taken medication for depression. A feature of Dr. Waisman’s overall diagnosis however is that the plaintiff was diagnosed with anxiety and depression in 2010. Again, how this particular issue impacted his general approach to matters is unknown, but it creates a good deal of concern relating to the integrity of the information the plaintiff provided either to the Court or to the medical professionals.

[543] The plaintiff testified concerning his decreased situational awareness in driving his truck. He testified it was not “near as it should be”. It wasn't up to par. He was having difficulties. He testified that this began not long after the incident. He testified to an incident in Tsawwassen in 2020 where he had an accident. He backed the fuel tank into a cement barricade. Subsequently, there was an incident in the spring of 2020 in Sicamous where he was “buggered” by the white light; lost his situational awareness, and again backed into a concrete barrier and smashed his fuel tank. He testified that at some point prior to 2020 but subsequent to 2016, in the context of his decreased situational awareness, he was driving and caught a gate at the Kal Tire in Kelowna. The context of this evidence, and clearly the implication of this evidence, was that he could no longer drive his vehicle as safely as he had in the past.

[544] That said, Dr. Waisman relied on information he said was provided by the plaintiff, namely in June 2020, that the plaintiff continued to be a safe driver.

[545] Dr. Waisman, like Dr. Mehdiratta, relied on the particulars of the assault, as provided by the plaintiff, in formulating his opinion. I have not found the plaintiff was beaten about the head inside the cab. I have found however that contrary to the evidence of the plaintiff, the plaintiff was punched by Cst. Spoljar once through the broken window. These represent changes in the factual assumptions and overall matrix. There was no effort to seek an opinion from Dr. Waisman based on the evidence of Cst. Spoljar. Evidence that generally had been available for months. This further dilutes the helpfulness of the report.

[546] In addition to the information provided by the plaintiff during the interview, Dr. Waisman reviewed certain medical records. The records referred to in the report are dated in 2020.

[547] Dr. Waisman noted in his report that he was not provided with the clinical records of the plaintiff's medical history from his family physician nor the clinical notes in that regard. He stated he believed those records would have been helpful to review for the purposes of his report.

[548] The reason this would have been helpful may be obvious, particularly in the circumstances of this case. Dr. Waisman testified these records are helpful because it is these records that provide what he termed a “longitudinal” view of the person and more insight into any pre-existing conditions and information concerning treatment over the years. Why these records were not provided is not before the Court.

[549] Dr. Waisman conceded that his conclusion, based upon the information provided, was that the plaintiff was experiencing “intense fear, horror or helplessness”. Dr. Waisman testified it was this finding that was critical in order to make a diagnosis of PTSD. In the event these features were not present he could not make the diagnosis.

[550] On balance, I am not confident the factual underpinnings of the report, and the evidence of Dr. Waisman, provided a secure anchor upon which to place reliance on the particular diagnosis of PTSD.

[551] The diagnosis of Dr. Mehdiratta, as well, relied primarily on the information provided by the plaintiff.

[552] In this regard, the report must be approached with caution as again, I find the plaintiff was not a particularly reliable witness.

[553] In addition, and in particular, I find some of the information relied upon by Dr. Mehdiratta to be ultimately too vague and uncertain to provide a solid factual underpinning to his opinion.

[554] The plaintiff reported to Dr. Mehdiratta that he experienced “disorientation” and “confusion” following the incident. In this regard, the plaintiff testified that following his arrest, he felt a little dazed. He also testified he was confused at the hospital.

[555] There is no evidence he reported to any medical personnel that he felt disoriented or confused. In the event he in fact felt disoriented or confused, it is

unclear why he didn't report this to anyone. Similarly, there is no evidence he felt weakness or loss of balance following the incident. In fact, the plaintiff testified he walked on his own after being taken from the cab of the truck.

[556] There is no evidence of a change in vision nor auditory sensitivity.

[557] In addition, the plaintiff testified he experienced no dizziness.

[558] The plaintiff testified that he had a headache while with the paramedics, while being examined by Nurse Dakin, when examined by Dr. Ghuman at Surrey Memorial Hospital, and as well the next day when attending at Abbotsford Hospital seeking treatment for his wrist. He did not testify that he reported this to any medical personnel. The evidence discloses he reported headache some weeks after the incident.

[559] Dr. Mehdiratta appeared to rely on information that the plaintiff experienced dizziness immediately following the event, and as well experienced pain in his head. As previously stated, the plaintiff testified that he had in fact no dizziness and there is no indication he reported to anyone that he had pain in his head. He testified what he reported to Dr. Ghuman was pain in his wrist, chest, and neck.

[560] The plaintiff submitted in final argument that evidence of lack of memory at the time of the event supports the indicia of mild traumatic brain injury reflected in Dr. Mehdiratta’s report; namely, a lack of memory for events immediately before or following the event.

[561] Dr. Mehdiratta however made note that there “is no memory missing of the incident details or the events immediately following the incident”.

[562] As well, Dr. Mehdiratta reported, for the purposes of his report, that he relied on the understanding that the plaintiff “was seen in the hospital with concussive symptoms”.

[563] The purport of this statement is unclear to me. There is no evidence the plaintiff reported any concussive symptoms in the hospital and certainly there is no

evidence from Dr. Ghuman such symptoms were reported (symptoms that Dr. Ghuman testified would be foremost in his mind upon his examination of the plaintiff in these circumstances).

[564] Similarly, Dr. Mehdiratta relied upon and reviewed the records of Dr. Ghuman at Surrey Memorial Hospital. This record would clearly reveal that there were few or no concussive symptoms reported.

[565] On balance, the weight to be afforded the opinion of Dr. Mehdiratta is severely impacted because of the reliability of the information provided by the plaintiff; or the information not provided by the plaintiff. It leaves me in a distinct state of uncertainty as to the extent to which the opinion is reliable.

[566] Dr. Wittenberg also provided evidence relating to injuries.

[567] Dr. Wittenberg provided her opinion from a more objective basis or foundation: upon a series of tests.

[568] The approach of the plaintiff to the evidence of Dr. Wittenberg is that Dr. Wittenberg:

> …misrepresented her professional expertise; was consistently argumentative, often trading one misleading statement for another. She ignored information that did not suit her purpose. Her evidence should be entirely discounted.

[569] I do not agree with the plaintiff's assessment of the evidence of Dr. Wittenberg. In fact, I found Dr. Wittenberg, like Dr. Mehdiratta and Dr. Waisman, to be a witness of professionalism, objectivity, and credit.

[570] The cross-examination of Dr. Wittenberg took the form of fencing with the witness concerning counsel’s own view of what should or should not be required in order for Dr. Wittenberg to practice in this area, to provide evidence in her field, and to go about her business. I found the approach unhelpful and the results unpersuasive.

[571] Dr. Wittenberg provided her evidence in an understandable, objective, and civil manner. She quite properly defended her professional integrity when attacked

by counsel, without advocating for the defendant or against the plaintiff. Her demeanour was patient and unruffled. Her evidence was, in my view, not undermined in the least.

[572] The evidence of Dr. Wittenberg and its reliability remained completely intact at the end of the day. I accept her evidence.

[573] Dr. Gupta also provided evidence relevant to injuries.

[574] The plaintiff remained consistent in his approach when it came to the evidence of Dr. Gupta.

[575] The plaintiff began by urging a finding that Dr. Gupta lied about her credentials. In addition, the submissions essentially took the form of inviting the Court to dismiss her evidence as not credible primarily based on the fact that she disagreed with the medical propositions put to her by counsel. This, submits the plaintiff, plainly discloses the unreliability of her evidence.

[576] There was a tendency to be somewhat imprecise in attacking the evidence of Dr. Gupta. For instance, it was submitted that Dr. Gupta admitted in cross-examination that the plaintiff reported brain fog and she did not ask any follow-up questions regarding confusion or “brain fog”. This, submitted the plaintiff, was remarkable. The plaintiff submitted that this was evidence that her intention was not to assist the Court in an unbiased fashion in the preparation of her report.

[577] Dr. Gupta’s actual evidence on this point however was that she may have asked about the brain fog but she doesn't always document information unless it's relevant. She did not “admit she did not ask any follow-up questions…”.

[578] In my respectful view, the cross-examination of Dr. Gupta enhanced her credibility. On balance, I found the evidence of Dr. Gupta to be helpful, honest, and delivered with civility and grace. I accept her evidence completely.

[579] Dr. Smith also provided evidence on behalf of the defendant. Unfortunately Dr. Smith was not provided an opportunity to meet with, or speak to, the plaintiff.

[580] The plaintiff submitted once again that, Dr. Smith, like other defence witnesses, is not credible and made a deliberate attempt to mislead the Court. He submits that Dr. Smith's report should be given no weight.

[581] I accept certain propositions elicited from Dr. Smith, for instance multiple blows increase the prospect of mild traumatic brain injury. As well, I also accept that certain indicia or symptoms are associated with, although not necessarily specific to, mild traumatic brain injury. There really was no controversy between Dr. Smith and Dr. Waisman on these issues.

[582] I do conclude however, on balance, the report of Dr. Smith is of little assistance. This is so through no fault of his own.

[583] The weight of judicial opinion does not endorse the prospect of affording a great deal of weight to psychiatric opinion, in these circumstances, where there is no opportunity to examine the person that is the subject of the diagnosis. See for instance *Wong v. Campbell*, 2020 BCSC 243.

Conclusions

[584] I conclude the weight of the evidence does not allow for a finding of mild traumatic brain injury ("MTBI") nor post-concussion syndrome. I am also of the view it has not been established the plaintiff has suffered or is suffering from post-traumatic stress disorder ("PTSD") including seizures. I do conclude however the plaintiff exhibits certain non-specific symptoms that can be associated with PTSD.

[585] The underlying information and evidence that underpins these diagnoses is tainted with real uncertainty. I prefer the evidence of Dr. Wittenberg and Dr. Gupta in this regard. This is not a criticism of the expertise and professionalism of Dr. Waisman and Dr. Mehdiratta. It is a finding that the foundation of their opinion is largely based on what I consider to be an unreliable source.

[586] In addition, I do not reject the general evidence of the friends of the plaintiff that provided evidence that compared and contrasted certain aspects of the

plaintiff's personality and character prior to and following the incident. It was evidence, however, based in large part on what the plaintiff was reporting to the witnesses.

[587] On these issues I prefer the evidence of Ms. Bowers over that of the plaintiff and the friends and family of the plaintiff.

[588] Ms. Bowers, in my view, was in the best position to observe the plaintiff over a long period of time and offer this kind of evidence. Her evidence, in contrast with much of the evidence of the friends of the plaintiff, was based on firsthand observation over a lengthy period, during the relevant time frame. Her evidence, as well, tended to support my own view concerning the reliability of the largely uncorroborated evidence of the plaintiff.

[589] The approach of the plaintiff in relation to the evidence of Ms. Bowers consisted of an all out assault on her credibility. The theme being, it appeared, was that her evidence was simply the false testimony of an embittered wife embroiled in a matrimonial dispute and a defamation action.

[590] I recognize the theme of the plaintiff concerning the credibility of Ms. Bowers is not unreasonable. That said, having watched the witness and listened carefully, her credibility emerged completely unscathed. I accept her evidence completely as truthful and reliable.

[591] All this said, I am not suggesting that the plaintiff did not suffer injuries following the incident.

[592] I find he did suffer consequences.

[593] Generally, I do not find, on the weight of the evidence, that the plaintiff is suffering from a cognitive disability. The evidence, as I stated, is simply too unreliable in this regard.

[594] I conclude the plaintiff has suffered and continues to suffer headache. It may not have been reported by the plaintiff following the incident; but, in fairness, it was

reported fairly soon thereafter. Given my findings of fact, I am satisfied that there is sufficient evidence to conclude that between the tasering and the activity during the arrest in close quarters in the cab, the incident has caused headache.

[595] This has developed to a chronic post-traumatic headache – whiplash tension-type.

[596] Dr. Gupta concludes however he is not disabled and she does not suspect that headache will worsen over time. I accept this evidence. Dr. Gupta reports that the plaintiff expressed the view the headaches do not significantly interfere with his social or occupational functioning. I recognize however there is some evidence chronic headache can and does interfere with concentration and cognition, and creates irritability.

[597] In other words, the chronic headache I find does, to some degree, intrude upon the life of the plaintiff. This intrusion must be taken into account in any assessment of damages.

[598] With particular regard to the pleadings, in the Second Amended Notice of Civil Claim (“NOCC”) the plaintiff claims he suffered lacerations as a result of the incident. I find he did suffer lacerations.

[599] The plaintiff claims he suffered a left wrist sprain as a result of the incident. I so find.

[600] The plaintiff claims he suffered a head injury and a brain injury as a result of the incident. I do not make this finding on the evidence. The evidence is not sufficient in this regard.

[601] The plaintiff claims he suffered dizziness. He testified in fact he did not suffer dizziness nor does he suffer dizziness.

[602] The plaintiff claims he suffers from sleeplessness. The evidence does not accord with this allegation. I do conclude, however, that, although the evidence is

somewhat contradictory, the sleep of the plaintiff has been impacted as a result of the headache to a certain degree.

[603] The plaintiff claims for impaired memory, impaired cognition, and impaired reaction time. The evidence, on balance, does not support a finding in this regard.

[604] The plaintiff claims for blurred vision. The plaintiff testified however he has no issues with his vision.

[605] The plaintiff claims for impaired concentration. This claim, on the evidence, is vague but I do find his concentration is somewhat and periodically impacted by headache.

[606] The plaintiff claims for psychological and psychiatric injuries. I take this to mean he claims he was injured in accordance with the diagnoses of Dr. Waisman and Dr. Mehdiratta. I do not find that the evidence establishes these diagnoses based upon my grave doubts concerning the integrity of the information the plaintiff provided to the medical professionals in this regard.

[607] The NOCC does not allege or claim for what the plaintiff has referred to as seizures. In any event, I find the evidence does not support a finding of seizure. It was anecdotal evidence from the plaintiff, ill defined, and not supported by medical evidence.

[608] The NOCC seeks damages for depression. The plaintiff resisted throughout the trial the notion he is or has been suffering from a diagnosis of depression. The evidence does not support a finding of depression.

[609] The plaintiff claims that the incident has caused anxiety. I conclude his long-standing pre-existing condition of anxiety is aggravated, somewhat, as a result of the incident; the emotional impact of the incident; and, as well, the chronic headache. The extent of the aggravation is impossible to quantify.

[610] The plaintiff claims the incident has caused irritability and emotional lability.

[611] The condition or symptoms of emotional lability were not addressed and I see no basis in evidence to conclude the incident has caused emotional lability.

[612] The plaintiff claims the incident has caused impaired speech. The evidence in this regard appears to have been the evidence of the plaintiff that he sometimes has to search for the right word when, prior to the incident, this never occurred. The plaintiff invited the Court to test this assertion by parsing the plaintiff's testimony and recognizing that on occasion throughout his testimony he searched for a word. The defendant countered in their submissions by pointing out not only his ability to find the right words, but words that one might consider the words of a very articulate person.

[613] I am unable to make a finding in this regard. The evidence is simply too vague, uncertain, and invites arbitrariness.

[614] The evidence of the plaintiff raised the claim that since the incident he is more sensitive to light and noise, and is more irritable; and that reading gives him a headache. In this regard, he submitted that his joy of reading is diminished.

[615] Again, counsel for the plaintiff invited the Court to assess the reliability of the plaintiff's evidence in this regard by assessing his conduct and demeanour in the witness stand. It is submitted that the light in the courtroom bothered him. I confirm that the record will disclose the plaintiff stated, immediately upon taking the witness stand, that the light bothered him.

[616] The plaintiff submitted that during his testimony he “went off on tangents, unable to focus on questions”. That was not my observation and in my view the testimony of the plaintiff does not support this submission.

[617] While I am skeptical of the evidence of the plaintiff regarding light and noise sensitivity, particularly given the evidence of Ms. Bowers and the medical evidence as a whole, I do conclude that headache may create these sensitivities from time to time.

[618] Similarly, reading can either cause or exacerbate a headache. I conclude his reading is therefore somewhat impacted.

[619] The plaintiff has testified concerning his compromised “situational awareness”; which in turn relates to his employment prospects.

[620] Again, I am reluctant to accept the evidence concerning “decreased situational awareness”. It appears to have only arisen, in any way of significance to the plaintiff, some years after the incident. There is no evidence as to how, objectively, it might impact his abilities nor how these particular instances of failed situational awareness were viewed by the employer; or whether in fact these concerns of the plaintiff would impact his employment. The only evidence in this regard was the anecdotal evidence of his friend Mr. Fehr who said he wouldn't hire the plaintiff.

[621] There is little, if any, helpful medical evidence, vocational evidence, or actuarial evidence addressing this issue. It is completely tethered to the evidence of the plaintiff and his unilateral and, frankly, self-serving opinion concerning his own driving abilities. I cannot, and do not, make a finding that the decreased situational awareness, however that might be medically defined, impacts his employment prospects as testified to by the plaintiff.

[622] Finally, the plaintiff submits that any failings relating to the reliability or credibility of the evidence of the plaintiff are simply corroborative of the allegation he has suffered cognitive injuries. I do not agree. Certainly the plaintiff’s position that he was tasered twice, minutes apart, is not evidence of a cognitive deficit. My interpretation of the evidence is that it is evidence of a witness that is not forthcoming and prone to overstate matters that he believes will assist him.

Damages

Non-Pecuniary Damages

[623] Non-pecuniary damages are intended to compensate plaintiffs for the pain, suffering, disability, and loss of enjoyment of life that they suffered both to the date

of trial and those they will suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39. *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, continues to provide the leading guidance on the principles to consider in assessing non-pecuniary damages. The inexhaustive list is found at para. 46:

> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: Giang v. Clayton, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[624] In addition, in the context of the kind of case at bar, the Court in *Hanisch v. Canada*, 2004 BCCA 539, stated:

> [60] Non-pecuniary damages are intended to compensate for the deprivation of liberty, public humiliation and loss of reputation and mental anguish. As such they reflect the nature of the events, the character of the person wronged and the community where the events occurred.

[625] In this regard the Court must take into account all of the circumstances of the tortious conduct; including the events following his arrest leading up to and including his release from custody later that day.

[626] The plaintiff seeks aggravated damages. It is appropriate to assess the principles of aggravated damages in the context of the overall circumstances of this case and fold those assessments into the award of non-pecuniary damages.

[627] This is so because aggravated damages are not a separate head of damages, but instead are an augmentation of general damages to compensate for intangible emotional injuries: *A. (T.W.N.) v. Clarke,* 2003 BCCA 670 at paras. 101–102:

> Aggravated damages are awarded to compensate for intangible emotional injury: see Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130 ¶ 188-189 and Huff v. Price (1990), 1990 CanLII 5402 (BC CA), 51 B.C.L.R. (2d) 282 (C.A.), where this Court said, at 299:
>
> > ...aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life, can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are aggravated but the injury. The damage award is for aggravation of the injury by the defendant's highhanded conduct.
>
> Aggravated damages are not a separate head of damages. Rather, they are an augmentation of general damages to compensate for aggravated injury: see Norberg v. Wynrib, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226 at 263 and Y.(S.) v. C.(F.G.) (1996), 1996 CanLII 6597 (BC CA), 26 B.C.L.R. (3d) 155 at ¶ 36 (C.A.).

[628] In addition, the plaintiff submits the *Charter* rights of the plaintiff were breached in violation of s. 10(b) of the *Charter* by failing to provide the plaintiff access to counsel within a reasonable time. The plaintiff submits he does not seek *Charter* damages; but says this circumstance ought to be taken into account in the award of non-pecuniary damages.

[629] That said, the significant focus must remain on the proven consequences of the assault and how, and to what extent, his condition has and will impact his life.

[630] It is the factual findings concerning the consequences that will provide the factual foundation in assessing damages. This was discussed recently by the Supreme Court of Canada in *Saadati v. Moorhead*, 2017 SCC 28:

> [2] This Court has, however, never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. Nor, in my view, would it be desirable for it to do so now. Just as recovery for physical injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support, recovery for mental injury does not require proof of a recognizable psychiatric illness. This and other mechanisms by which some courts have historically sought to control recovery for mental injury are, in my respectful view, premised upon dubious perceptions of psychiatry and of mental illness in general, which Canadian tort law should repudiate. Further, the elements of the cause of action of negligence, together with the threshold stated by this Court in Mustapha v. Culligan of Canada Ltd., 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 9, for proving mental injury, furnish a sufficiently robust array of protections against unworthy claims. I therefore conclude that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness. It follows that I would allow the appeal and restore the trial judge's award.

[631] The plaintiff has largely provided previous cases that assess damages based upon the injuries the plaintiff has alleged in his NOCC. The defendant has provided submissions based upon cases where the injuries more resemble the injuries as found in the case at bar.

[632] I have found the plaintiff suffers from chronic headache, whiplash-type. These headaches may not worsen but they may not improve. Headache interferes, to one degree or another, with his sleep, his mood, and his focus. It has impacted his enjoyment of life. Coping with the fallout of the wrongful act of the officers has aggravated his pre-existing anxiety and can manifest itself from time to time with fatigue.

[633] The plaintiff also alleges the *Charter* rights of the plaintiff to obtain legal advice pursuant to s. 10(b) of the *Charter* were violated and this fact ought to be taken into account in the award of damages. The submissions of the plaintiff in this regard consist of one sentence; namely "that the plaintiff was repeatedly denied his right to counsel notwithstanding his repeated requests".

[634] The plaintiff has testified that upon his arrival at the detachment he was placed in a room to facilitate contacting counsel. It contained a phone. He testified he was given a book and was asked what lawyer he would like to contact. The plaintiff testified he wanted to contact legal aid. An unknown officer indicated that legal aid would be contacted and that the plaintiff was to answer the phone when it rang because it would be legal aid.

[635] An officer, it is unclear whether it was the same officer, reported back to the plaintiff about ten minutes later that legal aid had been contacted and that a message had been left to call the plaintiff.

[636] There is some evidence that he requested that he be able to contact counsel while he was waiting in the emergency room for treatment. It is apparent he did not do so.

[637] The plaintiff testified that he spoke to duty counsel later in the morning after his return from the hospital.

[638] There is no suggestion, much less evidence, that at any time between the arrest and the plaintiff speaking to duty counsel did anyone in authority attempt to engage the plaintiff in any discussion concerning the circumstances of the arrest or the pending charges.

[639] It is plain from the jurisprudence that the police must provide a detained person, who so wishes, a reasonable opportunity to exercise the right to retain and instruct counsel without delay: see *R. v. Brydges*, [1990] 1 S.C.R. 190, 1990 CanLII 123, and the many cases building upon the principles articulated in *Brydges*. What constitutes a reasonable opportunity will depend on all the circumstances.

[640] On all the evidence I am simply not satisfied that the plaintiff has met his burden of establishing a breach of s. 10(b) of the *Charter*. Nevertheless, the overall circumstances following his arrest at the scene must be taken into account under this head of damages.

[641] I have considered the cases helpfully provided by counsel; including *Bancroft-Wilson v. Murphy*, 2009 BCCA 195; *Megaro v. Vanstone*, 2017 BCSC 2256; *Ranahan v. Oceguera*, 2019 BCSC 228; *Dueck v. Lee*, 2019 BCSC 1936; and *Lu v. Huang*, 2016 BCSC 1146.

[642] The defendant submitted that, should I find that the plaintiff suffers ongoing chronic headaches and sleep problems, an appropriate range of non-pecuniary damages would be $75,000–$100,000. The plaintiff submitted that an appropriate award of non-pecuniary damages would be $300,000.

[643] In conclusion, taking all the circumstances into consideration, I conclude $160,000 is a fit and proper award for non-pecuniary damages.

Past Income Loss

[644] The evidence in support of the claim for past income loss (as expressed by the plaintiff) or past loss of earning capacity (as expressed by the defendant) is sparse and not particularly compelling from the plaintiff's perspective.

[645] The plaintiff's position here is simple. It is submitted that he worked less after 2020. It is submitted his annual income from his last employment before he quit was $53,075.50. The plaintiff submits that this is the amount sought under this head of damage.

[646] I do not consider this a principled analysis nor do I consider the evidence supports an award of damages under this head other than a nominal award.

[647] The plaintiff returned to work as a truck driver immediately following the incident. He continued in this employment for approximately the next ten months until he hurt himself in May 2017 and was then off work for the next three months.

[648] He returned to work but quit his employment at Banner Transport in November 2017.

[649] He then operated a snow plow for a couple of months and quickly secured employment in the spring of 2018 with SW Events Technology. It appears on the evidence his employment came to an end with SW Events Technology when, again, he quit, after only two weeks because he didn't want to continue to perform manual labour because he was hired as a truck driver.

[650] He remained unemployed until near the end of 2018. It is not known why this was so nor what efforts he made in the particular to secure employment.

[651] Again, from late 2018 to early 2019 he operated a snow plow.

[652] Some months later, in July 2019, he secured a position as a truck driver with Jade Line Trucking. To this point it was not suggested in the evidence that his symptoms as alleged were impacting his employment.

[653] He continued in this employment for over a year. It appeared to be in 2020 that certain instances, as the plaintiff has described, occurred that caused the plaintiff to conclude he could no longer safely drive the truck as a result of diminished situational awareness.

[654] There is some evidence however in the summer of 2020 he believed he could safely drive the truck and intended on doing so. In any event, he declared his intentions to Jade Line Trucking in the fall of 2020 and quit his employment.

[655] There is no objective or corroborative evidence from his employer, or anyone in fact, as to whether his own apparent feelings of inadequacy concerning driving his truck were justified. Thereafter he undertook physical labour until the summer of 2021. Again, there is no evidence of any of his alleged complaints interfering with the physical labour in this regard.

[656] The evidence is simply too thin to support a claim as sought by the plaintiff. There is little evidence of his efforts to find employment, nor his capabilities in relation to the job market. Nevertheless, an award of this nature is to compensate a plaintiff for what he would have earned; not what he could have earned, but for the

injury. An award for past loss of earning capacity is intended to compensate a plaintiff for the value of the work they would have performed but were unable to perform because of injuries caused by the defendant's negligence. Notwithstanding the state of the evidence, I am prepared to recognize that the injuries as found would have impacted his emotional well-being and opportunities, although, on the evidence, it cannot be so found other than in a marginal way.

[657] I award under this head of damage $15,000 as a nominal recognition of income loss that is, on the balance of probabilities, related to the injuries as found.

Mitigation

[658] The defendant has pled the plaintiff has failed to mitigate his damages. The submissions in this regard focussed exclusively on the failure of the plaintiff to seek out employment or to seek additional training. Failure to mitigate was not argued regarding the plaintiff's injuries.

[659] Justice Brundrett discussed the law surrounding the failure to mitigate in *Skibo v. Senkler,* 2020 BCSC 1687 at paras. 74–75 as follows:

> Mr. Justice Low, writing for the court, summarized the test for mitigation of damages in Chiu v. Chiu, 2002 BCCA 618 at para. 57 [Chiu]:
>
> > [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in Janiak v. Ippolito, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146.
>
> In Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para. 56 [Gregory], Madam Justice Garson, writing for the court, further discussed the nature of the test as follows:
>
> > [56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment. The Turner case, on which the trial judge relies, uses slightly different language than this Court's

> judgment in Chiu: “there is some likelihood that he or she would have received substantial benefit from it ...”.
>
> [Emphasis in original.]

[660] The evidence in this case reveals that the plaintiff has determined he cannot safely drive a truck. The plaintiff also relies on the views of Dr. Waisman and Dr. Mehdiratta that his competitiveness concerning driving a truck is significantly impacted. It is unclear to me what sort of paralysis has set in, but there is little evidence the plaintiff has attempted to embark on any other kind of employment other than chopping wood. There is no question the defendant has proven on the balance of probabilities the plaintiff has failed in his duty to mitigate his potential past loss relating to employment. That said, however, I also find on the state of the evidence before me it is impossible to quantify.

[661] A finding of a failure to mitigate should necessarily result in a reduction of the award. However, in this instance the amount of reduction cannot be discerned or found on the evidence. That being said, I made my award for past income loss only on a nominal basis and therefore conclude that I have appropriately reflected the defendant’s concerns regarding mitigation relating to employment under that head of damages. I am therefore not prepared to reduce the damage award.

Future Income Loss

[662] An award for the loss of future earning capacity represents compensation for a pecuniary loss. It seeks to compensate the plaintiff’s loss of capacity to earn, rather than their actual earnings.

[663] As is the case with past earning capacity, the award is not strictly a calculation—it is an assessment. That said, it is an assessment that requires a comparison between the plaintiff’s likely future earnings if the accident had not happened and the plaintiff’s likely future earnings given the accident has happened: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157.

[664] This assessment necessarily engages a consideration of hypothetical events. The court will first determine whether the hypothetical event of future income loss is

a real and substantial possibility and not mere speculation. Such a finding must be based on some evidentiary foundation. Once the real and substantial possibility of a hypothetical event is established, the court must measure damages by assessing the likelihood of the event. As the awards are based on assumptions that may prove to be wrong, this exercise necessitate an allowance for either positive or negative contingencies that can impact the assumptions: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101, leave to appeal ref'd [2003] S.C.C.A. No. 221.

[665] Recently, our Court of Appeal in *Rab v. Prescott*, 2021 BCCA 345 at para. 47, reaffirmed the process referenced in the jurisprudence in this area. Justice Grauer, writing for the Court, set out again the questions for considering claims for loss of future earning capacity:

a) Does the evidence disclose a potential future that could give rise to a loss of capacity?

b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?; and

c) What is the value of the possible future loss, having regard to the relative likelihood of the possibility occurring?

[666] The final step in the damage assessment process is a determination by the court, in all of the circumstances, as to whether the damage award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

[667] There are two approaches to assessing damages for loss of earning capacity: an earnings approach and a capital asset approach. The earnings approach is often used for valuating future loss in cases that use expert actuarial or economic evidence and the plaintiff's past income history to determine the plaintiff's without-accident future earning capacity. The capital asset approach is often used in cases where the loss is "not measurable in a pecuniary way", such as where the plaintiff continues to earn income at or near pre-accident levels, and the loss may be valued through various methods, such as the use of one or more years of the plaintiff's pre-

accident income as a tool: *Kim v. Baldonero*, 2022 BCSC 167 at para. 91; *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[668] In addition, as stated, life's contingencies must be taken into account in ultimately assessing damages. The nature of contingencies differ and the parties must account for that fact. Certain general contingencies are very likely common to the future of most people; for instance matters relating to employment or health. The Court may take into account general contingencies, but in the absence of evidence relating to the particular plaintiff in this regard, any adjustment should be made with moderation.

[669] The plaintiff, as well, may have specific contingencies informed by their own personal circumstances. In this regard, there must be evidence that tends to support the suggestion of contingencies, whether they be positive or negative contingencies: see *Steinlauf v. Deol*, 2022 BCCA 96.

[670] The plaintiff takes the position that his last year of income was approximately $53,000 before he quit Jade Line Trucking. It is submitted that but for the assault he would have continued in that employment until a late retirement at the age of 70. Further, it is submitted that the only work he is capable of, is chopping wood at $15 per hour.

[671] The plaintiff submits Dr. Waisman and Dr. Mehdriatta concluded that as a result of the plaintiff's complaints the plaintiff is competitively unemployable.

[672] Aside from the fact that I do not find some of the complaints of the plaintiff have been established, I do not read Dr. Waisman's conclusion in accord with the plaintiff's submission. Dr. Waisman concluded, based on the information received from the plaintiff, the plaintiff has suffered significant compromise to his competitive employability. Dr. Waisman opines that there is a probability the plaintiff will encounter reduced prospects of promotion, career advancement, and an increased risk of job loss.

[673] However when asked, in the particular, how his neurological injuries may impair his economic independence or opportunities, Dr. Waisman deferred to a recommendation of a vocational assessment. There is no vocational assessment before the Court.

[674] Dr. Mehdriatta does indeed state he believes, notwithstanding the plaintiff was employed at the time of the assessment by Dr. Mehdriatta, that the plaintiff is "competitively unemployable in his pre-accident role given his current presentation".

[675] The defendant submits that both Dr. Gupta and Dr. Wittenberg have concluded he is quite capable of driving the truck and as well points to Dr. Gupta's opinion that the plaintiff reports to Dr. Gupta that his headaches do not significantly interfere with his activities. Dr. Wittenberg also offers the opinion that he is capable of supervisory roles. The defendant submits that the plaintiff has not established that there is a real and substantial possibility of future loss.

[676] On the whole of the evidence I am not convinced the injuries prevent the plaintiff from driving a truck. The fact is he continues to drive a vehicle. I accept the evidence of Dr. Wittenberg and Dr. Gupta that there is no cognitive issue that ought to prevent the plaintiff from driving a truck.

[677] That said, I do not agree with the position of the defendant that on balance, the plaintiff has not established that there is a real and substantial possibility of a future event leading to an income loss.

[678] In my view, notwithstanding the difficulties I have found overall with the evidence of the plaintiff, I do conclude the injuries I have found do give rise to a real and substantial possibility of a future event leading to an income loss.

[679] The real issue is assessing the value of that possible future loss, having regard to the relative likelihood of the possibility occurring.

[680] Given the position of the plaintiff that he cannot earn a living driving a truck, and in fact, apparently, cannot earn a living doing anything, the assessment of loss is best suited to a capital asset approach.

[681] I accept the plaintiff's capacity going forward is somewhat diminished. I do not accept that he is competitively unemployable, nor do I accept he is unable to earn a living in some capacity, including driving a truck in some capacity. Loss of earning capacity is assessed, not calculated. The award must make up for the harm and loss as if the loss had not occurred. The award must place the plaintiff in the same position as he was in the day before the incident.

[682] There is evidence the employment of the plaintiff prior to and following the incident was sometimes impacted by back issues unrelated to the incident. I also conclude that his history of anxiety, although apparently controlled by medication, has been aggravated by the battery suffered. It is unclear whether medication can offset any employment opportunities that may be impacted by the anxiety.

[683] What employment is available to him now and going forward has not been the subject of evidence. I cannot find on the evidence that it is established that he is competitively unemployable from driving a truck in any capacity, and certainly I cannot conclude he is competitively unemployable in relation to all employment opportunities.

[684] Similar to what I have already said, Justice Marchand of this province's Court of Appeal recently stated in *McKee v. Hicks,* 2023 BCCA 109 at paras. 77, 80:

> As the judge noted, there are two approaches to quantifying a loss of future earning capacity, namely the earnings approach and the capital asset approach. Both are intended to result in a fair estimate of the loss: Perren v. Lalari, 2010 BCCA 140 at para. 32; Grewal v. Naumann, 2017 BCCA 158 at para. 48 (Justice Goepel dissenting but not on this point). The earnings approach advanced by Mr. McKee is typically used in cases where there is an identifiable loss of income, for example, where the plaintiff has an established work history. The capital asset approach employed by the judge is typically used when that is not the case and the court makes an award for the plaintiff's loss of opportunity: Kringhaug v. Men, 2022 BCCA 186 at para. 43.
>
> …

> Having appropriately settled on the capital asset approach for assessing Mr. McKee's loss of future earning capacity, there were a number of methods open to the judge to assess that loss. In Pallos v. Insurance Corp. of British Columbia (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), this Court identified three acceptable methods for doing so:
>
> > 43 The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income.
>
> [Emphasis added.]

[685] In this case, the plaintiff does not have an established work history. Although he has driven trucks for many years, including in international settings, his work history since 2014 has been varied. I have no income tax returns for the years 2010 to 2013, and the plaintiff was either near or fully unemployed in 2014 and 2015. The plaintiff's full-time employment with Banner Transport was secured approximately six months prior to the incident. Given this backdrop, it is difficult to discern a pattern of employment, especially absent economic evidence.

[686] In this case, unlike *McKee,* there is neither available nor relevant economic evidence to any significant degree. In *McKee,* there was a vocational assessment prepared by an evaluator. Additionally, two economic consultants prepared future income loss reports. In the case before me, I do not have the benefit of a vocational assessment. Additionally, while I do have a present value calculation before me that uses the appropriate interest rate to discount future income losses to the present, that calculation is based on an assumption that is not founded in the evidence. Namely, that the plaintiff will earn zero income and that his salary would have remained steady at approximately $53,000 over the course of twenty years of hypothetical future employment. In my mind, this calculation is overly simplistic and I am not satisfied that it reliably captures the hypothetical future income of the plaintiff absent injury. Additionally, this calculation does not accord with the plaintiff's own

submission that he is capable of earning at least some income by chopping wood for $15 per hour.

[687] Given all of the above limitations in the evidence concerning the lack of identifiable loss of income, I find that the capital asset approach is the most appropriate approach to valuing the plaintiff's future income loss.

[688] The question then becomes which of the three acceptable approaches should be taken to assess the plaintiff's loss of future earning capacity. Given the general lack of evidence regarding the assessment of these losses, including possible contingencies, I consider myself limited to making an award of the plaintiff's income for one or more years or to calculate the present value of a nominal percentage amount loss applied against the plaintiff's expected income. An amount calculated using a minimum annual income loss seems overly speculative based on the evidence before me.

[689] I prefer the approach to award the plaintiff's entire annual income for one or more years in this case because the evidence does not provide me with a clear picture of an appropriate percentage loss to use in a present value calculation for the purposes of an award.

[690] When considering the overall fairness and reasonableness of an award, taking into account the evidence and contingencies, in my view an award of two-and-a-half year's salary is appropriate in these circumstances. The salary that shall be used for this calculation is the $53,000 that the plaintiff submits was his salary before he quit Jade Line Trucking. Accordingly, I award $132,500 for loss of future capacity.

Cost of Future Care

[691] An award for future care costs aims to restore plaintiffs, as far as possible with a monetary award, to their pre-accident position. The assessment is based on what is reasonably necessary on the medical evidence to promote the plaintiff's mental and physical health: *Gill v. Borutski*, 2021 BCSC 554 at para. 107.

[692] Justice Adair recently summarized the applicable law in this area in *Marshall v. Dyson,* 2020 BCSC 2052 as follows:

> [224] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70.
>
> [225] A little common sense should inform claims for cost of future care, however much costs may be recommended by experts in the field: Penner v. Insurance Corporation of British Columbia, 2011 BCCA 135, at para. 13. No award is appropriate for costs that a plaintiff would have incurred in any event: Shapiro v. Dailey, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

[693] Similar to the awards for loss of earning capacity, this award involves an assessment rather than a precise calculation. Further, as the award is not based on certainty and involves an exercise of prediction, the court must allow for contingencies depending on the specific needs of the plaintiff: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[694] Once again, the evidence in support of this claim was negligible.

[695] There is a recommendation for occupational therapy. There is also a recommendation that a regime of preventative headache medication should be developed. In addition the plaintiff must undertake, or at least should undertake, programs, and perhaps counselling, concerning stress management and sleep hygiene.

[696] Dr. Wittenberg observed the plaintiff was, at the time of his assessment, not reporting active psychological distress and so she made no recommendations concerning mood or anxiety. Nevertheless, I have found the injuries flowing from the incident have aggravated his anxiety issue.

[697] All that said, the plaintiff has offered no evidence, or certainly no constructive or helpful evidence, on the cost of any future care. The plaintiff submitted that some of these costs were addressed by a medical professional in a report, but the report was not tendered. The reason for this was not before the Court. In the result, the plaintiff acknowledged in submissions the evidence of future cost of care is "minimal". In my view, that overstates it. I am not satisfied that there is evidence before this Court from any health care professional that details the medical justification for treatment.

[698] It will be recalled Ms. Tammy Miller provided evidence. Ms. Miller happened to work at the Shoppers Drug Market in Spruce Grove, Alberta. Ms. Miller testified as to the cost of certain drugs on the shelf at her place of employment. This was the extent of the evidence in relation to costs in treating the plaintiff's injuries.

[699] The quality and quantity of the evidence is unfortunate. The defendant should pay for medications, occupational therapy, and the recommendations as set out above. There is no evidence however as to cost. The plaintiff seeks a future cost of care award in excess of $55,000. The evidence of Ms. Miller indicates that a combination of five particular medications that would be relevant to the alleged injuries suffered by the plaintiff may well cost just under $1,700 per year, and the plaintiff submits that I should award this drug cost based on a life expectancy of 83 years. I reiterate that I have limited evidence before me regarding the medical necessity of these particular drugs to treatment of the plaintiff's injuries.

[700] Recognizing that any award of cost of future care, based on this evidence, borders exceedingly close to rank speculation, I award $7,500 for the cost of future care.

Special Damages

[701] As recently stated by Chief Justice Hinkson in *Konnert v. Buonassisy,* 2019 BCSC 1648 at para. 213, "claims for special damages are subject to the standard of reasonableness."

[702] The plaintiff claims special damages in the amount of $3,620. It is this amount the plaintiff paid counsel to defend him in the criminal proceedings. There is no suggestion that these costs were unreasonably incurred. It appears on the evidence that Banner Transport, his employer, has paid $1,500 toward this cost. There is no suggestion in the evidence that Banner Transport has requested repayment of this amount. Consequently, I award $2,120 in special damages.

Punitive Damages

[703] Punitive damages are an exception to the general rule that damages are compensatory: *A. (T.W.N.)* at paras. 103–104:

> Punitive damages, on the other hand, are an exception to the general rule that damages are compensatory. Their provenance is described in Daniels v. Thompson, [1998] 3 N.Z.L.R. 22 at 28 (C.A.):
>
> > The origin of exemplary damages (probably better described as punitive damages), is usually said to lie in two cases decided in 1763, Huckle v. Money (1763) 2 Wils 205 and Wilkes v. Wood (1763) Lofft 1. In those cases substantial damages awarded by juries for improper interference by public officials with subjects were justified as "exemplary damages". The purpose of the awards was said to punish and deter, and to express the jury's outrage at the defendant's conduct. A related purpose mentioned in subsequent cases was to appease the victim and to discourage revenge: for example Merest v. Harvey (1814) 5 Taunt 442, where the Judge more specifically referred to the undesirable practice of duelling. Punishment and deterrence are of course purposes which are served by the criminal law. The introduction of criminal law purposes into the law of torts did not represent a new development, but reflected the common historical roots of the laws of tort and crime. Both branches of the law being addressed in large parts to same type of conduct, the modern separation of their different purposes and procedures was still being completed at that time.
>
> Punitive damages are triggered by conduct that may be described by such epithets as high-handed, malicious, vindictive, and oppressive. They are awarded where the court feels that the award of compensatory damages will not achieve sufficient deterrence and that the defendant's actions must be further punished. As explained by the Supreme Court of Canada in Hill v. Church of Scientology, supra:
>
> > [196] Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. ...They are in the nature of a fine which is

> meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[704] In other words, the purpose of punitive damages is in part retribution for the conduct in issue, part deterrence of similar conduct in the future, and part collective denunciation.

[705] The awarding of punitive damages should be approached with caution. Punitive damages should be awarded only if all other remedies have been found to be inadequate to accomplish sufficient punishment. The kinds of circumstances that generally attract some amount of punitive damages is where there is conduct that could be described as high-handed; vindictive; malicious; or arbitrary: *Whitten v. Pilot Insurance Co.*, 2002 SCC 18 at 123; also see *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189 at 77.

[706] The plaintiff seeks punitive damages in this case based upon four propositions: (1) malicious prosecution; (2) police brutality; (3) false statements by the arresting officers: the plaintiff was reaching for tools which they believed he intended to use as weapons – both in their unsworn documents and under oath at trial; and (4) deliberate purposeless humiliation of the plaintiff.

[707] I have found that there is no evidence to support the allegation of malicious prosecution.

[708] The plaintiff's claim also rests on what he describes as police brutality. It is unclear to me this is a legal concept but in any event the allegations or submissions appear to refer generally to the conduct of the police officers as reflected in the pleadings of the plaintiff.

[709] I have concluded the officers used more force than was necessary in tasering the plaintiff. This amounted to battery. I do not characterize this conduct, nor the

surrounding conduct, deserving of rebuke and condemnation in the context of the principles of punitive damages.

[710] The officers were proceeding to arrest the plaintiff based upon what I have concluded to be reasonable and probable grounds. I have also concluded the officers held a subjective belief the deployment of the CEWs was justified in the circumstances. It is telling in this regard that both officers deployed their tasers more or less at the same time upon observing the same circumstances before them. In other words, I find the officers proceeded at all times in good faith. While I recognize the conduct of the plaintiff during the initial stages of police involvement was at times marked by assaultive, belligerent, and obnoxious behaviour, I do not find there is a reasonable inference available on all the evidence this behaviour caused the officers to proceed with malicious intent or bad faith.

[711] The officers at the time of this event were relatively inexperienced. Neither officer had even deployed their respective tasers before this incident. The officers displayed a lack of judgment; but their conduct was not such that can be characterized as offending the court's sense of decency.

[712] Related to this allegation, in the context of seeking punitive damages, is the allegation of "deliberate purposeless humiliation of the plaintiff".

[713] In this context the plaintiff has raised the issue of the plaintiff's glasses. The plaintiff testified he was deprived of his glasses. The evidence concerning how the plaintiff was missing his glasses is vague. There is some evidence his glasses were placed in a locker. There is no evidence he was purposely or knowingly deprived of his glasses. Constable Nozifort testified that at no time did the plaintiff ask for his glasses. Had he asked, testified Cst. Nozifort, he would have done everything to accommodate the request.

[714] The plaintiff says his humiliation is also evidenced by the failures at the detachment to provide the plaintiff with clothing more than shorts and a T-shirt. This

complaint is in the context of the plaintiff having to wear his underwear into which he had voided during the tasering.

[715] Cst. Nozifort testified he understood the plaintiff was offered clothing at the detachment but that he, Cst. Nozifort, was not involved in providing the clothing. No other witnesses testified to any interaction with the plaintiff concerning a change of clothes. The aggravating feature to all of this, submits the plaintiff, is that all persons concerned at the detachment namely, Cst. Perkins, Cst. Spoljar, Cst. Nozifort, other unnamed officers, and Nurse Dakin, knew the plaintiff had wet himself and needed clean clothes, and that these persons failed to accommodate the plaintiff in this regard.

[716] It is accurate to state that Cst. Perkins and Cst. Spoljar knew the plaintiff had voided himself at the scene. There is no evidence however that Cst. Perkins and Cst. Spoljar had any dealings with the plaintiff that evening once the two officers left the scene. There is no evidence that Cst. Perkins and Cst. Spoljar interacted with anyone at the detachment that evening.

[717] Constable Nozifort testified he was not told by the plaintiff he had voided himself nor that the plaintiff was still wearing the underwear from the scene. Nurse Dakin testified she had no knowledge of the wet underwear. The evidence of the plaintiff concerning whether in fact he told anyone at the detachment, or at the hospital, that he had voided himself and was still wearing the underwear, is ambiguous.

[718] The plaintiff submits Cst. Nozifort and Nurse Dakin are effectively lying under oath on this issue.

[719] I do not agree. I am also concerned, once again, about the credibility of the plaintiff on this point. The evidence from the plaintiff relating to whether he made any complaint that he was wearing underwear in this state is, as I stated, ambiguous. The evidence of the plaintiff is that he requested clean clothes upon his arrival at the detachment, but this was the only time he requested clean clothes.

[720] The plaintiff submits the intention to humiliate him was attenuated by “presenting him in court” still in his “soiled and smelly underwear”. I am, in fact, troubled that the plaintiff appeared in court in shorts and a T-shirt. But again, the evidence does not support a finding that he was “knowingly presented" as described. The plaintiff testified he made no complaint about his underwear, or his attire, or lack of glasses for that matter, to the Court nor even to duty counsel prior to the court appearance.

[721] The plaintiff submits that the Court ought to find the conduct could only have been deliberately intended to humiliate the plaintiff. It is submitted the deliberate humiliation was as a result of a conspiracy between Nurse Dakin and the personnel in the detachment, all of whom collaborated to debase the plaintiff.

[722] With respect, the evidence, and the inferences to be drawn from the evidence, fall well short of the characterization urged by the plaintiff.

[723] These overall circumstances, however, are circumstances that are properly considered, and have been taken into account, in the award of non-pecuniary damages.

[724] Finally, the plaintiff says that Cst. Perkins and Cst. Spoljar made false statements that deserve rebuke in the form of punitive damages. It is an allegation that the officers made false statements in certain reports; and as well that the officers essentially committed perjury.

[725] The plaintiff submits “that both officers testified or claimed in their written reports that the plaintiff was reaching for the tools which they feared he would use as weapons against them. This threat, they claimed, justified the use of tasers. That assertion is an obvious lie”.

[726] This submission does not accord with the evidence.

[727] Cst. Spoljar consistently did not testify that the plaintiff was reaching for tools. He testified he didn’t know what he was reaching for but feared, given the plaintiff’s

behaviour leading up to this point, he was reaching for something that may pose a threat.

[728] Cst. Perkins did not testify the plaintiff was reaching for tools that he feared he would use as a weapon against the officers.

[729] There is no evidence Cst. Spoljar stated in a report that the plaintiff was reaching for tools. Cst. Spoljar was cross-examined on the Occurrence Report. There is a note in the Occurrence Report the plaintiff was reaching for tools. Cst. Spoljar testified this is not his note; but it may be the note of Cst. Perkins. This was not put to Cst. Perkins. The Occurrence Report is not before the Court.

[730] Cst. Perkins did not testify that the plaintiff reaching for tools caused and/or justified Cst. Perkins tasering the plaintiff. Cst. Perkins consistently testified that what caused him to deploy his taser was the perceived threat of the plaintiff striking Cst. Spoljar.

[731] Cst. Spoljar did not testify the threat of the plaintiff reaching for something caused Cst. Spoljar to deploy his taser. What caused Cst. Spoljar to deploy his taser, so testified Cst. Spoljar consistently, was that same perceived threat that Cst. Perkins reacted to.

[732] I do not accept the submission of the plaintiff on this point.

[733] In addition, the plaintiff submits Cst. Spoljar lied when he testified that in the course of the arrest of the plaintiff in the cab of the semi-truck, he observed a wrench or wrenches. The plaintiff submits this is false evidence because no wrenches were seized from the cab by other officers, and the wrench that was in the cab was not behind the passenger seat where apparently Cst. Spoljar says he observed the wrench.

[734] I have previously concluded that I find Cst. Spoljar to be a credible witness. I am not prepared to infer he is lying about this area of his evidence.

[735] In conclusion, in my view the evidence and the findings in this case do not rise to the kind of conduct that supports an award of punitive damages. I make no award of punitive damages.

Conclusion

[736] I find that the plaintiff is entitled to the following award of damages:

Non-pecuniary damages	$160,000
Past income loss	$15,000
Future income loss	$132,500
Cost of future care	$7,500
Special damages	$2,120
TOTAL	**$317,120**

Costs

[737] The plaintiff has been largely successful. Costs will follow the event and are awarded to the plaintiff at Scale B. The award of costs is subject to any party advising there are circumstances relevant to the issue of costs that ought to be brought to my attention. In that event, the parties may contact Scheduling and so advise.

"Crossin J."