

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Minchin v. Movsessian*,
2023 BCSC 144

Date: 20230201
Docket: S159202
Registry: Vancouver

Between:

Michael Anthony Minchin

Plaintiff

And

**Vicken Movsessian, The Corporation of Delta, His Majesty the King in Right of
the Province of British Columbia, as represented by the Minister of Public
Safety and Solicitor General, Constable John Doe and His Majesty the King as
represented by the Attorney General for Canada**

Defendants

Before: The Honourable Justice Iyer

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.
September 20-23, 26-29, 2022
November 7 and 18, 2022

Place and Date of Judgment:

Vancouver, B.C.
February 1, 2023

OVERVIEW

[1] In the early evening of November 7, 2013, the defendant, Cst. Vicken Movsessian, shot the plaintiff, Michael Minchin, during the course of a high-risk vehicle takedown. Mr. Minchin was a passenger in the rear seat of a vehicle the police had been following, but he was not the person the police were after. The intended target was Corey Foster, a person with a long criminal record who was at large on many outstanding warrants. There is no question that Cst. Movsessian shot the wrong person. The key issue in this trial is whether he was negligent in doing so.

[2] The three elements of a negligence claim require a plaintiff to prove (a) the defendant owed the plaintiff a duty of care, (b) the defendant breached the standard of care, and (c) the plaintiff suffered damages as a result of the breach. In this case, the parties agree that Cst. Movsessian was carrying out his duties as a police officer at the time of the shooting and owed Mr. Minchin a duty of care. They agree that Mr. Minchin suffered damages caused by the shooting but have not asked me to quantify them. That means the trial is about the applicable standard of care and whether Cst. Movsessian breached it.

[3] Importantly, Mr. Minchin’s claim does not allege negligence by anyone other than Cst. Movsessian. That narrows the focus significantly. It means that the conduct of other officers, including the decision about where to conduct the takedown and the surveillance team’s misidentification of Mr. Minchin as Mr. Foster, are not directly in issue.

[4] As Cst. Movsessian was acting in the course of his duties, the provisions of the *Police Act*, R.S.B.C. 1996, c. 367 governing liability for negligence apply. I will address them and the law governing the standard of care for police officers before turning to the factual context and my assessment of the evidence.

POLICE LIABILITY AND THE STANDARD OF CARE

[5] Sections 11(1) and 20(1) of the *Police Act* make the provincial Minister of Public Safety and Solicitor General (“Minister) and/or a municipality who employ a

defendant police officer vicariously liable for torts committed by police officers while performing their duties. As Cst. Movsessian was employed by the City of Delta (“Delta”) but seconded to the provincial Combined Forces Special Enforcement Unit (“CFSEU”) at the time of the shooting, this means that the Minister and Delta¹ are jointly and severally liable if Cst. Movsessian was negligent.

[6] Section 21 of the *Police Act* provides that Cst. Movsesian is only personally liable if his conduct amounts to gross negligence. As Mr. Minchin alleges that Cst. Movsessian’s conduct was grossly negligent, I must also consider the legal test for gross negligence.

[7] The standard of care required of a police officer performing their duties is “whether his or her conduct, when examined from the viewpoint of a police officer possessed of reasonable skill and experience, was reasonable in the particular circumstances”: *Bergen v. Guliker*, 2015 BCCA 283 at para. 106. In that case, the Court of Appeal reaffirmed the Supreme Court of Canada’s statement of the standard in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 73, emphasizing the following passages:

[73] ... [T]he 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

¹ Mr. Minchin discontinued his claim against the federal Attorney General during the trial.

reasonable professional might have made and therefore, which do not breach the standard of care.

[Emphasis added.]

[8] Justice Fleming of this Court put it this way in *Akintoye v. White*, 2017 BCSC 1094 at para. 102:

[102] Recognizing police officers often engage in dangerous and demanding work that requires them to react quickly, they are not expected to measure the level of force used "with exactitude". Put another way, they are not required to use the least amount of force necessary to achieve a valid law enforcement objective. Although entitled to be wrong in judging the degree of force required, an officer must act reasonably (*Crompton v. Walton*, 2005 ABCA 81 at para. 22). The common law accepts that a range of use of force responses may be reasonable in a given set of circumstances (*Bencsetler v. Vancouver (City)*, 2015 BCSC 1422 at para. 153). The reasonableness, proportionality and necessity of the police conduct are assessed in light of those circumstances, not based on hindsight.

[9] The parties also referred to s. 25 of the *Criminal Code*, R.S.C. 1985, c. C-46, which provides a defence for police officers who use force while performing police duties that would otherwise be tortious. Contrary to the plaintiff's submission, that defence is not available in negligence actions: *Emond v Surrey (City)*, 2021 BCSC 1331 at para. 71. The burden of proof remains on the plaintiff to prove the defendant breached the standard of care. It does not shift to the defendants to justify Cst. Movsessian's use of force as reasonable.

[10] That said, the subjective-objective framework developed under s. 25 is useful in assessing breach of the standard of care in this case. Under s. 25, the court must find both that the officer subjectively believed that it was necessary to use that degree of force and that its use is also reasonable, judged objectively from the perspective of a reasonable person with the officer's experience and training faced with the same circumstances and taking into account the human frailties of the officer: *R v. Pompeo*, 2014 BCCA 317 at paras. 36-41, 45. Using lethal force, as Cst. Movsessian did, is reasonable only if the officer believes, on reasonable grounds, that such force is necessary to protect themselves or others from death or grievous bodily harm (s. 25(3)).

[11] Gross negligence differs from negligence in that the plaintiff must prove a marked departure from the standard of care that elevates the risks posed by the conduct. In *Hildebrand v. Fox*, 2008 BCSC 842 at para. 16 (rev'd on other grounds 2008 BCCA 434), Justice Leask reviewed the jurisprudence on gross negligence and concluded:

[16] As these definitions suggest, the concept of "gross negligence" imports conduct, which, in terms of the surrounding circumstances, has aggravated, flagrant, or extreme characteristics. Unless carelessness goes substantially beyond mere casual inadvertence or momentary forgetfulness or thoughtlessness, it will not amount to gross negligence.

FACTUAL CONTEXT

[12] Much of the factual context surrounding Cst. Movsessian's shooting of Mr. Minchin is uncontroversial.

[13] Cst. Movsessian joined the Delta police in May 2006 and was seconded to the CFSEU in March 2012. The CFSEU is an integrated police unit comprised of municipal and RCMP officers that is aimed at disruption and suppression of organized crime.

[14] At the time of the shooting, Cst. Movsessian had been a police officer for about 7½ years and had been with the CFSEU for about 18 months. He had received training in the use of force as a regular police officer and had received additional use of force training as a member of the CFSEU. Among other things, the training addressed when a police officer should use their firearm and how to do so. In addition to classroom learning, much of his training was skills-based, using a variety of "real-life" or role-playing scenarios.

[15] Teams of officers within the CFSEU are divided into surveillance teams and uniformed teams. During an operation, the surveillance team's role is to locate and positively identify the target(s) of the operation. The role of the uniformed team is to support the surveillance team by remaining out of sight but nearby. It is called in to make an arrest after the decision has been made about when and how to do so.

[16] Cst. Movsessian was a member of a uniformed team. He has never worked on a surveillance team.

[17] On November 7, 2013, Cst. Movsessian's team consisted of four officers. He was the driver of an unmarked Chevy Tahoe and his superior, Cpl. Bulman was in the passenger seat. Two other uniformed officers, driving another vehicle, comprised the rest of the uniformed team.

[18] The uniformed team was assigned to provide support to a surveillance team. Their task was to locate and arrest Mr. Foster. Before leaving the detachment, Cst. Movsessian received a "target sheet" with information about Mr. Foster on his phone. It included a photograph of Mr. Foster's face and head, and basic information including his age (35), race (white), height (5'8"), weight (200lbs.), hair (dark brown, short and spiky), eye colour (blue), scars (ear and head) and tattoos (chest and arms). In contrast, Mr. Minchin was 28 years old at the time, white, 6'0", 175lbs., with short reddish-brown hair. Mr. Minchin also has tattoos on his chest and arms, but he was wearing a long-sleeved hoodie that day.

[19] Cst. Movsessian received a CFSEU press release describing Mr. Foster as having a lengthy criminal record with ties to the Independent Soldiers gang, and as wanted on 30 outstanding warrants, including charges related to violence and use of firearms. The press release described him as on the run from police and said it was not known whether he was armed. As well, Cst. Movsessian was informed that Mr. Foster might be at a particular address in Surrey, that he was looking to obtain a firearm and for two people to help him commit a home invasion, and that Mr. Foster was addicted to and actively using GHB.

[20] The surveillance team leader was the head of the operation. That officer communicated directly with Cpl. Bulman, who was the leader of the uniformed team. Members of the surveillance team communicated over an encrypted radio channel that was monitored by the uniformed team. Uniformed team members used a separate encrypted radio channel to communicate with each other. The leader of the surveillance team and Cpl. Bulman spoke directly with each other by cellphone.

[21] Cst. Movsessian had never seen or interacted with Mr. Foster or Mr. Minchin.

[22] Before heading out to support the surveillance team, Cpl. Bulman informed the uniformed team that if they found Mr. Foster, they would arrest him using a high-risk vehicle takedown.

[23] The teams drove to the Surrey address with the uniformed team staying out of sight. The surveillance team communicated that they saw a Toyota Camry leave that address with three occupants, two in the front seat and one in the rear. They said that there was a strong possibility that the rear seat passenger was their target. They followed the Camry to another residence where they reported that the target left the vehicle, went to the door of the home, and then into the carport. Surveillance officers saw him reach into the rafters and retrieve a package that they described as having “some weight or mass” and put it in his clothing near his waist.

[24] After the target returned to the Camry, the surveillance team told the uniformed team that the vehicle should be stopped at the next opportunity. The surveillance team followed the Camry as it pulled into the parking lot of a nearby strip mall and parked on the south side facing the street. As instructed by Cpl. Bulman, Cst. Movsessian drove the Tahoe into the strip mall, staying on the north side, out of sight of the Camry.

[25] The surveillance team reported that the driver and the target left the vehicle and went into a restaurant in the mall. It then reported that the target left the restaurant, returned to the Camry briefly and then went back into the restaurant. It identified the target as Mr. Foster, adding that he appeared to have lost weight and was “fidgety and twitchy”. He was described as wearing a baseball cap, jeans and a long-sleeved hoodie.

[26] After speaking with the surveillance team leader, Cpl Bulman told Cst. Movsessian that they would conduct the takedown when everyone was back in the Camry. The two discussed the situation and agreed Cst. Movsessian would drive the Tahoe behind the Camry and pin it in its parking stall.

[27] At this time, it was just after 5:00 pm on November 7, 2013. The sky was darkening and the lights in the strip mall's parking lot were illuminated. The pavement was wet and it may have been drizzling.

[28] When the surveillance team gave the takedown command, Cst. Movsessian drove the Tahoe towards the Camry's location. His progress was impeded by another vehicle so, when he arrived, the Camry had already backed out of the stall at an angle. Cst. Movsessian blocked its forward progress by driving in front of it. As a result, the vehicles were positioned differently relative to each other than planned. In particular, this meant that Cst. Movsessian was closest to and had a better line of sight to the person in the rear passenger seat than Cpl. Bulman. The Tahoe's lights were on and shining into the passenger side of the Camry.

[29] Cst. Movsessian opened his door and slid out of his seat, drawing his firearm. He testified that he aimed it at the rear seat passenger's torso, calling out that he was police and instructing that person to show his hands. He saw the rear seat passenger's face very close to the window and his hands near his face. He noticed that the person's eyes were darting from side to side. Cst. Movsessian saw that he was complying with the instruction and turned to shut his car door. However, before he actually did that, he noticed that the rear seat passenger had moved away from the window, out of the illumination of the lights, and that his hands were no longer visible. Cst. Movsessian could only see the upper part of the person's body through the car window. He said that he detected movement, which he inferred to be that of someone bracing or pushing their foot on the floor in order to arch backwards and partly lift their body. He described it as "wedging up". He said that he inferred from what he could see that the person was reaching for something like a wallet in a back pocket.

[30] Cst. Movsessian shot the person through the rear passenger window, shattering the glass, and hitting him in the upper left chest near his shoulder. He saw the person's body flung against the driver's side window from the force of the blow. He saw the person's hands in the air near his ears and heard him yell "don't shoot,

don't shoot." As he approached the vehicle, Cst. Movsessian saw the person cower away from him, with his hands remaining in the air. He holstered his firearm before opening the door of the Camry.

[31] He reached in, dragged the target out of the Camry onto the ground and away from the vehicle, and handcuffed him. Cst. Movsessian asked the person if he had been hit and whether he had a gun. The person replied he did not have a gun and asked repeatedly, "why did you shoot me?"

[32] Cst. Movsessian said he looked into the rear seat area for a gun and saw what he thought was a Ziploc baggie of marihuana but no firearm. Cpl. Bulman approached and asked the person his name, to which he replied, "Michael Minchin".

[33] Cst. Movsessian was escorted away. Mr. Minchin was treated by paramedics and taken to hospital by ambulance.

[34] Later that evening, an officer from the Independent Investigations Office, BC's civilian-led police oversight agency, arrived to document the scene, taking photos and videos, some of which were tendered in evidence.

[35] Cst. Movsessian was subsequently charged with careless use of a firearm. He was acquitted at his criminal trial in December 2016.

[36] At the trial before me, Mr. Minchin admitted he was carrying illegal drugs in his crotch area and that he moved back from the Camry's window just before the shooting to avoid being blinded by the Tahoe's lights. He also admitted that he had used crystal meth, GHB and alcohol earlier in the day.

APPLICABLE STANDARD OF CARE

[37] The parties agree that the standard of care that applies to Cst. Movsessian's use of his weapon to shoot Mr. Minchin is informed by the training he received as a police officer and, specifically as a member of the CFSEU.

[38] I heard evidence from three witnesses on this issue. Mr. Minchin called Steven Melling, a retired RCMP Staff Sergeant, as an expert witness. Cst. Movsessian called retired Sergeant Jim Gravel and Sergeant Wade Rodrigue as fact witnesses. Both had trained Cst. Movsessian on police tactics, use of force, and use of firearms.

[39] After an admissibility *voir dire*, I qualified Mr. Melling as an expert witness but excluded portions of his report because he disputed the facts he was given rather than opining on the inferences to be drawn from them.

[40] Having now heard Mr. Melling's evidence and considered it in light of all of the evidence on the applicable standard of care, I give it little to no weight. Specifically, I give Mr. Melling's opinions no weight to the extent that his conclusion that Cst. Movsessian's conduct was unreasonable is based on the misidentification by others of Mr. Minchin as Mr. Foster.

[41] Where Mr. Melling's evidence diverges from that of Mr. Gravel and Sgt. Rodrigue's, I prefer the latter. Unlike Mr. Melling, these witnesses have taken advanced courses on use of force, and are qualified to teach these and related techniques. Mr. Gravel was a full-time trainer for the Delta Police Department and taught use of force there as well as to many other police forces. Cst. Movsessian was one of his students. Sgt. Rodrigue was a member of the CFSEU at the time Cst. Movsessian was there and trained him on firearms and police tactics, including high-risk vehicle takedowns. I rely on their evidence about the training they provided to Cst. Movsessian and others to inform the standard of care in this case.

[42] These witnesses testified that both regular police and CFSEU training are based on the National Use of Force Framework ("NUFF") and the nearly identical Incident Management Intervention Model, which is used by the RCMP. As there is no material difference between them, I will refer to the NUFF.

[43] The NUFF is a training aid that outlines the basic principles and concepts related to use of force in potentially violent situations. It assists police officers to critically and continuously assess what use of force options are appropriate in

various circumstances. It teaches that a police officer's primary responsibility is to preserve and protect life, that the primary goal of any use of force is public safety, and that police officer safety is essential to public safety. Importantly, the NUFF does not prescribe particular responses to particular situations. It is a conceptual framework, not a rule book.

[44] At its core, the NUFF is focussed on a situation where circumstances are evolving and which the police officer must continue to assess. Assessment requires a police officer to consider the situation, subject behaviours, and their own perceptions and to apply tactical considerations in first planning and then acting with appropriate use of force for that particular situation.

[45] Each component of the assessment is comprised of a number of elements. These include consideration of the environment (weather, location, time of day, etc.), number of subjects, perceived subject's abilities (influence of substances, proximity to weapons, etc.), the police officer's knowledge of the subject (criminal record, demonstrated ability, etc.), time and distance (whether an immediate response is necessary, etc.), and potential attack signs. An officer assesses subject behaviour along a spectrum ranging from cooperative through passive resistance, active resistance, and assaultive, to likely to cause grievous bodily harm or death.

[46] Based on their assessment, the officer must plan and act on an appropriate use of force option. These range from simple presence, through verbal and/or non-verbal communications, physical control that does not involve a weapon, the use of non-lethal weapons, to use of lethal force. One or more options may be appropriate and something in the situation may change, requiring a different use of force. The officer must expect that circumstances may change very quickly.

[47] Cst. Movsessian also received training about the "action versus reaction cycle", which refers to the fact that it takes significantly less time to act than it does to react. Whereas a subject simply decides to act and then acts, the person reacting must perceive the action, evaluate it and then respond. The lag time occurs because the reacting police officer must go through the mental process of reacting to it. That

process is also described as the “OODA loop”: the person reacting must observe the situation, orient themselves to it, decide what to do, and then act.

[48] Mr. Gravel gave an example of one of the exercises he used to train officers to demonstrate that action is always faster than reaction. He had an officer hold a rubber knife a few millimeters away from his throat while he was holding his hands up near his head. He told the officer to touch him with the knife as soon as they saw his hands move. Despite this warning, Mr. Gravel was always able to sweep the knife away before it touched his neck every time.

[49] Another exercise involved the use of a firearm. Mr. Gravel had a firearm in his waistband and his arms in the air. A trainee officer had their firearm drawn with their finger indexed along the barrel. Mr. Gravel told the officer to shoot him as soon as they saw him reach for his gun. Most of the time, Mr. Gravel was able to draw, aim and shoot before the officer could shoot.

[50] Sgt. Rodrigue used the same conceptual tools. With respect to the action versus reaction cycle, he taught CFSEU officers that acting first confers a tactical advantage because it forces the other person to react, slowing them down. Specifically, with respect to firearm use, he taught that where CFSEU officers reasonably believe that a subject has a firearm, is reaching for it, and intends to use it, they should not wait to see the firearm before shooting their own weapon because it would be too late.

[51] Sgt. Rodrigue trained Cst. Movsessian and other CFSEU officers regularly, usually two days per month. The sessions included general use of firearms, the rules of firearm safety, and high-risk vehicle takedown techniques. The latter are used when the target(s) of police scrutiny are in a vehicle, and the police believe one or more is armed, presenting a danger to themselves or others. It requires multiple police officers working in teams in different vehicles. Their goal is to stop the vehicle, remove the target(s), and make the arrest(s). During such an operation, officers have their weapons drawn and pointing at the occupants of the vehicle.

[52] Like Mr. Gravel, Sgt. Rodrigue taught the officers he trained that the techniques were resources rather than rules. High-risk vehicle takedowns occur in a variety of circumstances, often in less than ideal conditions. Officers must adapt the best practices they have been trained in to adjust to the particular circumstances they face. They must be flexible and respond quickly to changing circumstances.

[53] Best practices Sgt. Rodrigue taught for high-risk vehicle takedowns included:

- Turn emergency lights and headlights on, but leave sirens off;
- When the subject vehicle is stopped, police exit their vehicles with weapons drawn and pointed;
- Police close their vehicle doors and move to the back of their vehicle for cover;
- Determine who is responsible for communicating with the subject(s) based on angles and lines of sight at the scene; and
- Focus on continually seeing and controlling the subject's use of their hands because hands are the "delivery system" for weapons.

[54] Sgt. Rodrigue taught officers that assigning responsibility for who will communicate with a target cannot reliably be determined in advance but must respond to the circumstances. The person issuing commands to the target should be the person with the best line of sight. While ideally, all involved should know who is in charge of issuing commands, that is not always possible.

[55] Both Mr. Gravel and Sgt. Rodrigue emphasized the importance of continuous observation of the target's hands.

[56] With respect to use of firearms, Mr. Gravel trained officers to always (a) assume that every firearm is loaded, (b) control where the muzzle is pointed, (c) keep their index finger along the barrel and off the trigger until they decide to

shoot, and (d) know their target as well as what's behind it (the "backdrop") because bullets can miss the target.

[57] It is apparent from this that deciding what force to use requires police officers to observe and assess multiple factors, some of which may be changing quickly. All of this informs the applicable standard of care.

[58] The plaintiff's submissions on the standard of care accord them a level of specificity not found in the NUFF or the evidence I heard about it. For example, he interprets NUFF as requiring officers to know many details about the backdrop. He submits that the training provided by Mr. Gravel and Sgt. Rodrigue to Cst. Movsessian falls below the standard of care because they did not know what the muzzle velocity of Cst. Movsessian's standard issue firearm was and therefore could not train him to assess how far a bullet that misses its target could travel.

[59] The evidence does not support this submission. There is no evidence that knowledge of muzzle velocity in particular is necessary to assess the possible consequences of missing one's target.² Awareness of the background is one among several criteria that NUFF requires officers to assess in determining what use of force is necessary and appropriate in particular circumstances. How detailed that assessment is depends on the circumstances.

[60] The evidence satisfies me that the standard of care applicable in this case requires a continuous assessment and balancing of the NUFF criteria. Some NUFF factors carry more weight than others depending on the particular (and perhaps changing) circumstances. I find that Mr. Gravel's and Sgt. Rodrigue's training of Cst. Movsessian consistent with the legal standard of care.

² The *Use of Force Regulations*, enacted under the *Police Act*, require firearms authorized by the chief constable to conform to certain specifications, including muzzle velocities. However, nothing in the *Regulations* or *Act* requires police officers or their trainers to know muzzle velocities.

[61] As I understand it, Mr. Minchin also submitted that the standard of care requires a police officer to correctly identify the person before they shoot:

All of Steven Melling, [Mr. Gravel] and Sgt. Rodrigue testified that the officer actually shooting someone has an obligation to ensure he is shooting the right person. Each agreed that the “*officer perception*” was rendered meaningless if the officer believed he was dealing with the wrong person.

[Emphasis in original.]

[62] If Mr. Minchin is saying that the standard of care requires an officer not to shoot a person the officer knows is not the “target”, that is self-evidently true. If he is saying that the standard of care requires an officer always to correctly identify a “target”, that is just as evidently false. If Mr. Minchin is saying that the standard of care requires that an officer to independently identify the target without relying on any other information, it would be virtually impossible for an officer such as Cst. Movsessian who did not know Mr. Foster, to arrest him in circumstances when there is any risk that the person would not cooperate with being asked for their identity. Nothing in the evidence supports that proposition. In my view, this submission is really about whether Cst. Movsessian breached the standard of care, which I address below, after considering the credibility and reliability of Mr. Minchin and Cst. Movsessian.

CREDIBILITY AND RELIABILITY ASSESSMENT

[63] Credibility and reliability are related, but not synonymous. Credibility is an assessment of whether the witness is telling the truth; reliability is an assessment of a witness’s ability to observe, recall and recount the events in issue. That means that a credible witness is not necessarily a reliable witness. However, a witness who is not credible is not capable of providing reliable evidence: *Johnson v Wentworth*, 2021 BCSC 50, at paras. 98-105.

[64] As the central issue in this case is Cst. Movsessian’s conduct, assessment of Mr. Minchin’s credibility and reliability is necessary only to the extent that it conflicts with that of Cst. Movsessian.

Mr. Minchin's Credibility

[65] Counsel for the plaintiff submits that Mr. Minchin was a credible witness, but does not identify any aspect of his testimony that is inconsistent with that of Cst. Movsessian. Cst. Movsessian says the key conflicting evidence is about how soon Cst. Movsessian shot Mr. Minchin after arriving in the Tahoe.

[66] In direct examination, Mr. Minchin testified that, as the Camry started to reverse out of the parking stall:

...I reached over my right shoulder to get my seatbelt, looked up, was blinded by high beams, there's sirens, there's an SUV at high speed stopping at a high speed, guns pointed at us, and the next thing I knew I was laid out on the back seat.

[67] He testified that he heard the police yelling at the same time as he was shot. He said that Cst. Movsessian was standing on the driver's side of the Tahoe. He said he leaned backwards to avoid the high beams.

[68] On cross-examination on this issue, Mr. Minchin could not recall whether he leaned forward to see what the approaching vehicle was, but agreed he quickly recognized it was a police vehicle from its red and blue lights. He testified that four officers got out of the Tahoe. He reiterated that he was shot at the same time that he heard yelling.

[69] Mr. Minchin candidly acknowledged that he had illegal drugs on him in his crotch area but denied that he lowered his arms to try and get rid of them. He said he had no time to react before he was shot.

[70] Cst. Movsessian did not testify that he turned his police siren on, only that he activated his emergency lights after an unrelated vehicle impeded his progress. He said that he and Cpl. Bulman were the only occupants of the Tahoe, and that he shot Mr. Minchin only after he had first yelled at him to put his hands up, had seen him comply, and had then observed that his hands were no longer visible.

[71] While Mr. Minchin admitted to lying on certain points at the 2016 criminal trial, I do not doubt Mr. Minchin's credibility in this proceeding. I accept that he was

genuinely telling the truth as he believes it. However, I doubt the reliability of his account. Mr. Minchin was likely under the influence of crystal meth, GHB, and liquor at the time of the shooting. Understandably, the shock and trauma of being shot could influence his ability to recall the seconds immediately preceding it.

[72] The uncontested evidence is that police activate their emergency lights but not their sirens in a high-risk vehicle takedown. It is obvious that sirens would make it very difficult to hear police commands. The plaintiff did not challenge Cst. Movsessian's evidence that he and Cst. Bulman were the only occupants of the Tahoe, and his closing submissions make no reference to four officers being in it.

[73] On the third point, absent very exigent circumstances not present here, when conducting a high-risk vehicle takedown, police exit their vehicle and command the target to raise their hands before shooting. Mr. Minchin testified that, in his experience, police routinely ask subjects to raise their hands. The shock of the confrontation and Mr. Minchin's use of substances at that time suggest that he may have perceived events that actually occurred in rapid succession as simultaneous.

[74] In conclusion, I find Cst. Movsessian's evidence more reliable than that of Mr. Minchin's on these points of conflict.

Cst. Movsessian's Credibility

[75] The plaintiff submits that Cst. Movsessian was not credible for five reasons. First, he says Cst. Movsessian gave inconsistent evidence in direct examination about whether or not he shut the Tahoe's door when he got out of the vehicle at the takedown, first saying that he had closed it and then, after the morning break, that he had not. Second, Mr. Minchin characterizes Cst. Movsessian's evidence as "self-aggrandizing". Third, Mr. Minchin says Cst. Movsessian misled the Court with respect to a document. Fourth, he says Cst. Movsessian made up a claim that he saw a bag of marijuana in the Camry. Fifth, he says it is not credible that Cst. Movsessian holstered his gun after shooting Mr. Minchin but before removing him from the vehicle.

[76] There is no inconsistency in Cst. Movsessian's evidence. He did not testify that he closed the Tahoe's door, only that he thought he had, realizing he was mistaken when he reviewed Crown disclosure prior to his 2016 criminal trial.

[77] I reject the plaintiff's characterization of Cst. Movsessian's evidence as self-aggrandizing. It is understandable that a person recounting their actions and events at a court hearing will place themselves at the centre of their story. There is no question that Cst. Movsessian was junior to Cpl. Bulman and he acknowledged as much. The fact that he recalled participating in discussions about whether a high-risk vehicle takedown was appropriate and who should issue commands does not mean he made those decisions. Having reviewed the evidence, it appears that the plaintiff has conflated Cst. Movsessian's account of his own thoughts and inferences with his account of the decisions made by his seniors. This is not a basis for doubting Cst. Movsessian's credibility or reliability.

[78] Contrary to the plaintiff's submission, Cst. Movsessian did not mislead the court. The paper copies of the target sheet and press release admitted into evidence during his direct examination included a reproduction of the information that Cst. Movsessian identified as having received on his phone. These documents included a standard police photo of Mr. Foster's face and shoulders. The photo in the paper copies was of low resolution. In cross-examination, counsel for Mr. Minchin put higher resolution copies of the photo of Mr. Foster to Cst. Movsessian, who agreed that what he received on his phone was the higher-resolution image.

[79] The plaintiff says that Cst. Movsessian's failure to volunteer in direct examination that the lower resolution photos were "incomplete or inaccurate versions of what he received" means he was misleading the court. The difference in resolution between the photos is not as great as the plaintiff claims. They are clearly both images of the same person, as Cst. Movsessian identified. This does not cause me to doubt Cst. Movsessian's credibility or reliability.

[80] Turning to the fourth objection, the plaintiff's characterization of Cst. Movsessian's evidence is inaccurate. Cst. Movsessian testified in direct examination

that after he had shot Mr. Minchin, dragged him out of the Camry and secured him before he knew his identity, he looked into the vehicle for a gun but did not see one, adding:

I glanced inside the vehicle and on the driver's side in the floor pan of the vehicle, so in the footwell of the rear seat on the driver's side of the car, I saw a Ziploc baggie of marihuana. So a decent amount of marihuana. And I began to – I thought that – is that what he reached for, is that – did he – did he throw a bag of marihuana. Is that why I shot him?

[81] On cross-examination, Cst. Movsessian was shown photos of the interior rear of the Camry and was questioned repeatedly about whether the photos accurately depicted the location of objects at the time when Cst. Movsessian removed Mr. Minchin from the vehicle and when he saw the baggie of marihuana. Cst. Movsessian agreed that there was a camouflage-patterned backpack in the rear area, but did not agree that it was in footwell of the rear seat on the driver's side of the car:

Q Yes, of course, yes. Okay. So, the camo pattern backpack, which is in the passenger footwell, that was there when you grabbed Minchin; correct?

A I remember there was a backpack, but not in any great detail. There was a backpack or a bag.

Q Okay. Well, there's a – there's a bag – a black bag that says Boss. Somebody's described that as a man purse, I think –

A Okay.

Q -- on the seat. But – but I'm interested in that camouflage pattern backpack.

A Okay.

Q Is that where it was when you were dealing with Minchin inside the car?

A I really can't say.

Q Okay. Was that where it was when you were dealing with Minchin on the pavement and you looked across and you saw the bag of marihuana in the driver's footwell – driver's side rear footwell?

A I don't recall.

[82] Cst. Movsessian was not shaken in this evidence:

Q Okay. So, if you're down on the ground with Mr. Minchin, over here, looking across at the Camry, could you explain to us how you were

able to see through the camo pattern backpack, into the rear driver's footwell for a bag of marihuana?

A I can't say if that bag was sitting there in that orientation. I can't – I remember it – I remember a bag. I remember seeing the baggie, specifically, the orientation of everything, I really can't properly speak to.

Q Okay. Sir, in answer to some questions from my learned friend –

A Mm-hmm.

Q -- you said you saw a baggie of marihuana in the rear passenger footwell –

A Yes.

Q -- while you were dealing with Mr. Minchin.

A Yes.

Q So, are you now saying you don't know if there was a baggie of marihuana in the rear footwell?

A No, I'm saying I did specifically see it but where – where the other items that you spoke about, you spoke about a Boss bag and then backpack, I can't really speak to exactly where they were.

[83] Cst. Movsessian also testified about his belief that a bag of marihuana was recovered at the scene:

Q Okay. As far as you know, was a bag of marihuana ever recovered at the scene?

A Yes.

Q. Where? Where was the bag of marihuana?

A. I know it was recovered. I think there's some – I don't remember specifically the log and how – where that – how that was presented. I know at one point, I think a member presented that to an investigator and that was logged at that point.

Q Did you observe that yourself?

A. I did not.

Q Okay. So, when you say that at some point that happened, that's just hearsay, you have...

A. I recall seeing that – in the report.

Q. You didn't see the bag of marihuana being presented to an investigator?

A. I did not.

[84] The photographs in evidence and the incident report do not depict a bag of marihuana.

[85] Based on this evidence, the plaintiff submits:

There was no bag of marijuana. There was no photo of it. There was no other witness who testified about it. Mr. Minchin denied it. The view that Cst Movsessian claimed he had of it is impossible. The foot well was covered by the various bags and other items while Cst Movsessian was inside the Camry. While Cst Movsessian was on the parking lot holding down Mr. Minchin, his view in was blocked by the backpack. This phantom bag of marijuana appears to have been invented by Cst Movsessian in order to make Mr. Minchin seem more guilty. What is especially aggravating about this fabrication is that it is of a supposed fact that Cst Movsessian could not have known before he shot Mr. Minchin.

[86] The evidence does not support this submission. The absence of a photo of a baggie of marihuana in evidence does not establish that Cst. Movsessian did not see one. Not all of the photos taken by Sgt. Lisa Deverinchuk are in evidence. Sgt. Deverinchuk arrived at the scene over two hours after the shooting. There is no evidence about whether objects had been moved before she arrived. The evidence does not establish that Cst. Movsessian's view of the rear driver's side footwell was blocked. As the evidence does not establish that Cst. Movsessian was untruthful in his evidence about the bag of marihuana, it is not a reason to doubt his credibility.

[87] Fifth, the plaintiff submits that Cst. Movsessian's evidence that he holstered his gun after shooting Mr. Minchin demonstrates he is not credible:

After he shot Mr. Minchin, Cst. Movsessian holstered his weapon – thus disarming himself – then walked towards a man he claims he believed had a long history of violence, was high on drugs, was erratic and irrational, and had a handgun within reach. Cst Movsessian's testimony that his action of walking toward who he believed to be Cory [*sic*] Foster somehow prevented the subject from shooting him, lacks any air of reality. Either this is evidence of stunning incompetence, or it is not credible.

[88] I disagree. The NUFF requires an officer to engage in continuous assessment, responding to changing circumstances. Consistent with his training, Cst. Movsessian had aimed at the target's torso, shot him, and had seen him thrown by the force of the shot across the rear seat landing against the driver's side rear window. Cst. Movsessian testified that he assessed his options as follows: (1) maintain his position keeping his firearm pointed; (2) retreat to the back of the police vehicle; or (3) advance. He chose the latter. As he approached the Camry

with his firearm pointed, Cst. Movsessian said he paid attention to the person's actions and saw him cowering away from him and yelling "don't shoot, don't shoot", but keeping his hands visible. Cst. Movsessian explained that he decided to holster his weapon before opening the car door because he knew that he would be physically removing the person from the car right after and did not want to do that with his gun out.

[89] In conclusion, I find that Cst. Movsessian was a credible witness. I accept his account of the events as reliable, bearing in mind that they occurred nearly 10 years ago.

Breach of Standard of Care

[90] I accept that Cst. Movsessian subjectively believed that the person in the rear passenger seat of the Camry was Mr. Foster and that he was reaching for a gun when that person's hands were no longer visible and he appeared to be arching his back and "wedging up". I accept that Cst. Movsessian shot the person he believed was Mr. Foster because he believed Mr. Foster was about to shoot him.

[91] Before considering whether Cst. Movsessian's belief was objectively reasonable, it is important to address the plaintiff's complaints about the inadequacy of the evidence tendered by the defendants. For example, he points to the fact that the defendants did not explain why the decision was made to conduct the takedown at the strip mall instead of elsewhere, and why it was to be done when the target had returned to the car rather than while he was in the restaurant or earlier.

[92] The plaintiff submits:

The Defendants chose not to call the [surveillance team leader] to explain why this takedown was ordered at this location, at this time. They chose not to call any of the surveillance officers who supposedly identified Mr. Minchin as Cory [*sic*] Foster. They chose not to call the female surveillance officer who supposed walked past Mr. Minchin at the stop sign on his way to the plaza – and was apparently not able to identify him as Corey Foster. They chose not to call the surveillance officer who supposedly went inside the Donair Affair and reported that this *could* be Corey Foster – but looked younger. They chose not to call Cst Movsessian's Team Leader – A/Cpl Bulman – who was in the Tahoe with him. A/Cpl Bulman would have been able to testify about what he saw, and whether Cst Movsessian usurping

A/Cpl Bulman's role as Contact Officer was in accordance with protocol. A/Cpl Bulman could have testified about his own observations of the surroundings: businesses, daycare, playground, parking lot, residences. The Defendants chose not to call either of the other [uniformed] team to testify about what they observed of the surroundings and of the takedown. The Defendants chose not to call any of the witnesses. Having failed to do so, they cannot discharge their burden pursuant to the *Criminal Code*, s. 25(4).

[Emphasis in original.]

[93] As the end of this passage indicates, these submissions are premised on the mistaken understanding that the onus is on the defendants to prove that Cst. Movsessian's use of force was reasonable. As I have explained, the burden of proof remains on the plaintiff. He could have called these witnesses and any additional evidence he considered necessary to prove his claim. The defendants determined what evidence they considered necessary to defend the claim and confined their case accordingly.

[94] The plaintiff's submissions about the misidentification of Mr. Minchin as Mr. Foster, and the location, timing and technique of the takedown are also misplaced. Cst. Movsessian did not make those decisions. I must consider whether it was reasonable for him to shoot Mr. Minchin based on the information he had and the circumstances that arose. It would be wrong to ascribe to Cst. Movsessian responsibility for decisions made by others.

[95] At its core, there are three prongs to the plaintiff's claim. First, he submits that Cst. Movsessian breached the standard of care by shooting when he ought to have recognized that the occupant of the rear passenger seat was not Mr. Foster. Second, he submits that it was not objectively reasonable for Cst. Movsessian to believe that the target was reaching for a gun. Third, he submits that Cst. Movsessian did not adequately assess the possible consequences if he fired his gun but missed the target, which the plaintiff referred to as insufficient consideration of the backdrop.

Identifying the Target

[96] Cst. Movsessian's evidence was that he relied on the surveillance team's identification of the target as Mr. Foster. In cross-examination, plaintiff's counsel suggested that his police training required him to independently verify the target's identity before acting, and that he had an opportunity to do so:

- Q Okay. So, why is it that you can't tell us whether this is the face of the person you shot?
- A. Because I was focused on – on the actions of the subject, the specific details of what he wore, shape of his face, when I – when I confronted him were – were not as important as his – than his actions.
- Q. Oh, I see. I see. So, identifying him was less important than watching his – his behaviour?
- A. Not exactly.
- Q. What is it exactly?
- A. I relied on – on the team who had identified him, that were following him around. I trusted their identification of this being Foster and yeah.
- Q. Okay. So, you trusted the information that you'd gotten from others that this was the right target; correct?
- A. Yes.
- Q. And does that mean you ignored the evidence of your own senses when you were looking at the person you shot?
- A. I would say I was acutely aware of my senses and what I was observing and the actions of the subject and that's what my focus was on.
- Q. But you didn't look at his face?
- A. I did look at his face.
- Q. Right. In fact, you testified earlier with my learned friend that you could see him clearly enough that his eyes were almost bulging out and he was looking from side to side. You were close enough to see the movement of his eyes; correct?
- A. Correct.
- Q. You were, in fact, about 10 feet away from him when you shot him?
- A. I can't say the distance, but I was relatively close, yes.
- ...
- Q. Okay. When you were doing training with Sergeant Rodriguez [*sic*], one of the things he taught you was sometimes the identification is wrong; correct?
- A. Correct.

- Q. Okay. And Sergeant Rodriguez [sic] taught you that before you engage a target, you have to be sure that it's the right target; correct?
- A. Correct.
- Q. And Sergeant Rodriguez [sic] taught you that you could not abandon that responsibility to someone else who says, yeah, that's the guy? He taught you that that was an independent observation and analysis that you had to make; correct?
- A. In part.
- Q. In part. Explain?
- A. In this situation, our role was to be completely out of the – out of the area, to not be anywhere near where the target was and where surveillance was. We didn't – this was our – this is the way our work was conducted. We relied on surveillance who we knew did this day in and day out and identified people in this fashion that –
- Q. Yes.
- A. -- this – our target was Corey Foster. I was not privy to – to the discussions that were had between Corporal Bulman and the investigators, but every indication from those various sources told me that this was Corey Foster. So, I relied on that identification of him in our action.
- Q. Oh sure. And there you are, about 10 feet away from this man, with your police vehicle headlamps shining in his face, all of the ambient lighting and as you described, his face almost pressed against the glass and you can see his face clearly; true?
- A. Correct.
- Q. And when you were looking and seeing his face clearly, you could also see his colouring; correct?
- A. Not in any real clear, discernible, specific way. Obviously, looking at him, I could see he was Caucasian but in terms of how light was his skin, how dark was his skin, how – what colour was his hair, what – I couldn't.

[97] There is no question that Cst. Movsessian assumed that the surveillance team had correctly identified the target as Mr. Foster, and that significantly influenced his own observations. As he said, the focus of his attention was the target's hands. When they were raised he also noticed that the target appeared white and male. He did not notice the colour of his hair or eyes, or the shape of his head. In the brief time before Cst. Movsessian fired his gun, he observed nothing about the target that displaced his assumption that he was Mr. Foster. Is that

consistent with the standard of care expected on a police officer in similar circumstances?

[98] In answering that question, as cautioned in *Hill*, the court must be careful not to “judge from the vantage of hindsight”.

[99] The focus of the plaintiff’s arguments that Cst. Movsessian’s failure to notice that his target was not Mr. Foster was on the physical differences between him and Mr. Minchin, especially facial characteristics, age, height and weight. However, as Mr. Minchin was sitting in the rear passenger seat, it would have been very hard for Cst. Movsessian to discern his height and weight.

[100] At the time of the shooting, Cst. Movsessian was not deciding whether he was pointing his gun at Mr. Foster or at Mr. Minchin in the sense of comparing the two. He had no information about Mr. Minchin. Cst. Movsessian was confirming his assumption that it was Mr. Foster.

[101] Cst. Movsessian’s view of the target was limited: he was looking at his face through a car window illuminated by red and blue police flashers and high beam headlights. He saw the person’s face and hands in the very brief interval when they were close to the window. I accept Cst. Movsessian’s evidence that he only noticed that the person was white and male, and his eyes were wide open and darting from side to side.

[102] Neither Mr. Gravel nor Sgt. Rodrigue testified that a police officer in such circumstances must independently verify the identify of the target before using force, including lethal force. Rather, the standard of care requires an officer to bring to bear all of the information they have and apply it to the particular situation when deciding how to act. In this case, that included the surveillance’s team’s positive identification of Mr. Foster as the rear seat passenger, the information that he had a history of violence, including with firearms, and that he might be armed.

[103] Cst. Movsessian was pointing his gun at the target because that was part of the takedown procedure. He did not intend to fire it as long as the target’s hands

were visible. When Cst. Movsessian saw that the hands had disappeared, he had very little time to react. He chose to shoot because he had not noticed anything that suggested to him the target was not Mr. Foster.

[104] In my view, Cst. Movsessian's failure to notice the differences between the person he actually shot and the person he believed he was shooting was reasonable in the circumstances. Those circumstances include the facts that it was dusk on a grey November day, there were bright headlights shining at the closed car window, Cst. Movsessian had only a partial view of the target seated inside the car and, most importantly, he had very little time to decide what to do. I accept his evidence that he assumed it was Mr. Foster and that nothing he saw displaced his assumption, and I find that it was reasonable for him to act on that basis.

Assuming the Target was Reaching for a Gun

[105] Cst. Movsessian's belief that the target was reaching for a gun was based on three considerations. First, the information he had received about Mr. Foster was that he had a history of committing crimes involving firearms, and was actively trying to find a gun and two accomplices to conduct a home invasion. Second, the surveillance team had reported that he was with two other people in the Camry and had stopped at a residence where he had retrieved and object "with some weight or mass" from the rafters of the carport and put it in his clothing before returning to the car and going to the strip mall. Third, in the face of a gun being pointed at him and having raised his hands, he moved them out of sight and also moved his body, "wedging" it upwards.

[106] It was reasonable for Cst. Movsessian to rely on the information he received at the outset of the operation. No one suggested otherwise. With respect to the second consideration, Cst. Movsessian testified that he inferred that the object taken from the carport was a gun:

- Q. For you, what was the significance of the description from surveillance of the target, and I'll simply use the term target – reaching into the rafters, taking something that appeared to be words of, your recollection, of some mass?

- A. Yes.
- Q. What was the importance to you?
- A. There were two parts, but to your specific question, that was consistent with what a firearm would be like, and I'd formulated the belief that that probably was a firearm, taking into context the information that we had and the information that we received.
- Q. You said there's two parts?
- A. Yes. The other part of the information we'd received is that the subject was looking for two people to assist him in a home invasion, and there were two additional people in the front seat of that vehicle, along with him. So it was the combination of those two things that were important to me.

[107] On cross-examination, Cst. Movsessian was asked whether he assumed that the other two occupants of the vehicle were also armed. He said he did not make that assumption, reiterating that it was surveillance's reporting of the fetching of the item from the rafters that led him to believe the person he thought was Mr. Foster was armed. This suggests that Cst. Movsessian was aware of the differences between warranted and unwarranted assumptions.

[108] The plaintiff emphasized the third consideration, questioning how much Cst. Movsessian could have actually seen, and the reasonableness of Cst. Movsessian's inference that the person was reaching for a gun rather than his wallet. In judging the reasonableness of Cst. Movsessian's inference, it is important to appreciate the very brief time within which he had to decide whether or not to shoot.

[109] I agree with Mr. Minchin that it was natural, even instinctive, to move his face out of the glare of the lights. However, in those circumstances, dropping his hands was not natural or instinctive. I accept Cst. Movsessian's evidence that, despite having moved out of the light, he was able to perceive that the person's hands had moved out of sight and his body position had changed as described. The change in body position and hand movements were consistent both with reaching for a wallet or some other innocuous item and for a firearm.

[110] Obviously, the wisest course for a person faced with a police officer's gun being pointed at them is to comply with their directions. However, it is certainly possible that an individual might panic, leading them to drop their hands. While another officer might have drawn a different inference, I find that Cst. Movsessian's inference, and his decision to shoot, are consistent with the reasonableness standard in *Hill*. He may have made an error in judgment, but it was not unreasonable in the circumstances.

[111] Before leaving this topic, I note that the plaintiff submitted that Cst. Movsessian admitted that he had his index finger on the trigger before he made the decision to shoot. If so, this would have been contrary to his training. However, the plaintiff could not say where in his evidence Cst. Movsessian made this admission, and the defendants say he did not. In cross-examination, Cst. Movsessian denied this:

- Q. Now, I know I've asked you this question before but I'm just asking it for context. When you drew your gun that night, I believe your evidence was that you drew your gun and as you drew it, you put your finger on the trigger, correct?
- A. No.
- Q. So you indexed your finger?
- A. Yes.
- Q. Okay well, again, our notes will assist. When did you put your finger on the trigger, then?
- A. Uh, when I shot him.
- Q. Okay and before that, at all times your finger was indexed?
- A. Yes.

Assessing the Backdrop

[112] The plaintiff pointed out in some detail the various risks of conducting high-risk vehicle takedown at approximately 5:00 pm on a weekday in November. Some of the businesses in the strip mall were open, other cars were parked in the lot, and the mall was at a busy intersection. A park, with paths, including a children's playground and daycare was located beyond the end of the strip mall in the direction

Cst. Movsessian’s gun was pointing. Cst. Movsessian testified that he was aware of aspects of the background in general, but not at the level of detail presented to him.

[113] While I agree with the defendant’s submission that the focus in this proceeding is on Cst. Movsessian’s duty to Mr. Minchin rather than to the public at large, I note that awareness of the background is a factor an officer has to consider along with many others. What is expected depends on the circumstances.

[114] Here, Cst. Movsessian’s assessment of the background was conducted in circumstances where he did not know that he would be the person with the best line of sight to the target until the Tahoe actually blocked the Camry. At that point, he drew on his prior observations of the area and testified that, in assessing the backdrop, he considered that he was relatively close to the vehicle and did not see anyone in that area of the strip mall or behind where he was pointing his gun. His assessment was reasonable in the circumstances.

CONCLUSION

[115] In conclusion, I find that the plaintiff has not proved that Cst. Movsessian breached the standard of care. Accordingly, it is unnecessary to consider gross negligence or the defendants’ claim of contributory negligence.

[116] My conclusion that Mr. Minchin’s injury was not caused by Cst. Movsessian’s negligence does not diminish the harm Mr. Minchin has suffered. Whether or not anyone was negligent, there is no question that he was the innocent victim of police error.

[117] The claim is dismissed. As requested, the parties have leave to apply to me to address costs by way of written submissions, not exceeding 10 pages.

“Iyer J.”