

CANADA / JUDGMENT

Emond v. British Columbia (Attorney General)

2023 BCCA 456

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 456 Emond v. British Columbia (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Emond v. British Columbia (Attorney General),

2023 BCCA 456

Date: 20231110

Docket: CA47657

Between:

Jean-Claude Emond

Appellant

(Plaintiff)

And

His Majesty the King in Right of the Province of British Columbia,

as represented by the Ministry of the Attorney General and

Ministry of Public Safety and Solicitor General,

His Majesty the King in Right of Canada, as represented by the

Ministry of the Attorney General and Ministry of Public Safety and

Solicitor General of Canada, Constable K. Meglic, Constable B. Williams,

Constable R. Heppell, Constable D. Thompson, and Constable J. Wilson

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Grauer

On appeal from: Orders of the Supreme Court of British Columbia, dated July 8, 2021, February 16, 2022 and April 8, 2022 (Emond v. Surrey (City), 2021 BCSC 1331, Vancouver Docket S055295 and Emond v. British Columbia (Attorney General), 2022 BCSC 1337 Vancouver Docket S055295).

Oral Reasons for Judgment

The Appellant, appearing in person:

J. Emond

Counsel for the Respondent, His Majesty the King in Right of the Province of British Columbia, as represented by the Ministry of the Attorney General and Ministry of Public Safety and Solicitor General:

S. King

L.F. de Lima

Counsel for the Respondents, His Majesty the King in Right of Canada, as represented by the Ministry of the Attorney General and Ministry of Public Safety and Solicitor General of Canada, Constable K. Meglic, Constable B. Williams, Constable R. Heppell, Constable D. Thompson, and Constable J. Wilson:

C. De Los Reyes

C.N. Landsiedel

Place and Date of Hearing:

Vancouver, British Columbia

November 1, 2023

Place and Date of Judgment:

Vancouver, British Columbia

November 10, 2023

Summary:

Mr. Emond was seriously injured when he was bitten by a police service dog in the course of his arrest. The judge found the Federal Crown liable in negligence as one of the RCMP officers involved in his arrest negligently failed to control the dog. On appeal, Mr. Emond disputes certain findings by the judge regarding the tort liability of the RCMP officers, Federal Crown, and Provincial Crown. Held: Appeal dismissed. Mr. Emond failed to demonstrate that the judge erred. The judge did not misapprehend evidence of the incident. She was faced with conflicting and unreliable evidence and her reasons describe how and why she arrived at her conclusions. Mr. Emond's argument that the judge failed to give effect to evidence relating to the adequacy of medical treatment he received at the scene is a new argument that is not in the interests of justice to permit on appeal, and the argument is without merit. Mr. Emond has not put forward any principled basis for challenging the judge's findings on damages. Mr. Emond is unable to demonstrate any error that would justify a reversal of the costs award.

- [1] BUTLER J.A.: On May 4, 2005, Jean-Claude Emond, the appellant, suffered multiple dog bites from a police service dog ("PSD"), named Jeck, during the course of his arrest on an outstanding warrant (the "Incident"). Following the arrest, he was taken to hospital where he underwent surgery for his injuries. He was then remanded to the Surrey Pre-Trial Services Centre ("SPSC"), where he spent 18 hours. Mr. Emond suffered long term physical and psychological injuries as a result of the Incident. He brought an action against: His Majesty the King in Right of the Province of British Columbia, as represented by the Ministry of the Attorney General and the Ministry of Public Safety and Solicitor General (the "Provincial Crown"); His Majesty the King in Right of Canada, as represented by the Ministry of the Attorney General and the Ministry of Public Safety and Solicitor General (the "Federal Crown"); and six individual RCMP officers (the "Named Officers").
- [2] At trial, Justice Francis found that the PSD handler, Cst. Heppell, was negligent in failing to control the PSD, and found the Federal Crown vicariously liable for the officer's negligence. The judge dismissed Mr. Emond's intentional tort claims against the other officers. She also dismissed Mr. Emond's claims in negligence against the Provincial Crown for allegedly failing to provide adequate medical treatment and care to him while in custody at the SPSC. The judge awarded Mr. Emond \$85,000 for non-pecuniary damages, but dismissed his claims for loss of income.

- [3] On appeal, Mr. Emond argues that the judge erred in failing to find five of the Named Officers involved in the arrest--Csts. K. Meglic, B. Williams, R. Heppell, D. Thompson, and J. Wilson (collectively, the "Five Officers")--liable for the intentional torts of assault and battery, in failing to make additional findings of negligence against Csts. Meglic, Williams, Thompson, and Wilson (collectively, the "Four Officers"), and in awarding insufficient damages. He also challenges the costs award.
- [4] Mr. Emond's grounds of appeal all challenge findings that are entitled to deference by this Court. He has not alleged that the judge erred in law, and it is my view that he is unable to demonstrate that the judge made any palpable or overriding errors of fact or of mixed fact and law. For the reasons that follow, I would dismiss the appeal.

Reasons for Judgment

- [5] Mr. Emond represented himself at trial which took place over three weeks. In reasons indexed at 2021 BCSC 1331, the judge set out the background and her findings in some detail. The court's task was difficult as the Incident took place 16 years earlier. As the judge noted, given the passage of time, the witnesses' ability to recall what happened was likely compromised. There were important differences in the versions of events given by Mr. Emond and the Named Officers that the judge had to resolve. As Mr. Emond's grounds of appeal criticize the judge's findings of fact and the inferences that she drew from the evidence, I will refer to the reasons for judgment in some detail.
- [6] The judge began by describing the "uncontested facts". The circumstances leading to the arrest involved Mr. Emond's high conflict relationship with his first wife. In November 2004, based on information received from Mr. Emond's spouse, charges of assault and assault with a weapon were approved and a warrant was issued for his arrest. On the evening of May 4, 2005, the RCMP received a Crime Stoppers tip that Mr. Emond had returned to the family home. A PSD was assigned to assist Csts. Williams, Meglic, Wilson, and Heppell (the "Arresting Officers") in effecting the arrest. The decision to use a PSD was made because of safety concerns and the fact that Mr. Emond had previously fled from the police. Cst. Thompson, who was nearby, also attended at the scene of the arrest.
- [7] When the police attended at his home, Mr. Emond fled and a chase ensued. At some point in the chase, Cst. Heppell issued the command for the PSD to apprehend Mr. Emond who was brought to the ground, handcuffed, and arrested. He received multiple dog bites which resulted in deep lacerations on his left leg, right knee, right bicep, and left ankle. The witnesses' recollections differed on the sequence of the events and, in particular, whether the PSD continued to bite Mr. Emond after he was handcuffed.

- [8] With reference to *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) and *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 187, the judge set out the proper approach for resolving conflicts arising from witnesses' differing recollections of events. She proceeded to consider which version of the events was most consistent with the preponderance of probabilities.
- [9] Mr. Emond testified at trial, as did Csts. Heppell and Meglic. Excerpts from the examination for discovery transcripts of the other three officers were read into evidence. The judge identified important differences in their evidence and stated:
- [35] I have carefully considered the evidence of all five officers. I accept that each of them made a good faith effort to recall events that happened many years ago, during a high stress, confusing, physical altercation. However, there are sufficient inconsistencies among their accounts that the reliability of each of their recollections must be questioned. For example, Cst. Meglic's recollection that Jeck pulled off Mr. Emond's pants prior to Mr. Emond being taken to the ground by the Arresting Officers is not consistent with Cst. Heppell's recollection that the PSD removed Mr. Emond's pants after being called off by Cst. Heppell. More consequentially, none of their recollections were consistent as to when Mr. Emond would have sustained the various bites to his legs, feet, torso, and arms. Cst. Williams could not recall anything about the PSD's engagement with Mr. Emond, including whether the PSD was present when he and Cst. Meglic took Mr. Emond to the ground. Cst. Wilson testified that Csts. Meglic and Williams were engaged with Mr. Emond before the PSD arrived. Cst. Meglic testified that he first saw Mr. Emond with Jeck attached to his leg and only then did he issue the command for Mr. Emond to show his hands and get on the ground. Cst. Heppell testified that there was a short struggle between Mr. Emond and the PSD before Mr. Emond complied with police commands and got on the ground.
- [36] The problem with all of the police officers' accounts is that none of them explain how Mr. Emond could have ended up with multiple wounds, not only on his left leg, which clearly appears to be the part of the body where the PSD had the longest and deepest hold, but to his right leg, feet, buttocks, groin, arms, and torso. According to two of the Arresting Officers, Csts. Meglic and Williams were engaged with Mr. Emond before the PSD arrived on the scene. Cst. Meglic recalls the PSD being at the scene before he arrived, but he only saw Jeck attached to Mr. Emond's left leg; he did not see any other biting.
- [37] Given the evidence of the Arresting Officers about the timing of the arrival of the PSD in the yard, it is not probable that the PSD could have attacked Mr. Emond and bit him in the foot, leg, arm, torso, knee, buttocks and groin prior to Mr. Emond being taken to the ground by Csts. Meglic and Williams.
- [38] From the time he was taken to the ground to the completion of handcuffing, Mr. Emond had three police officers controlling him, one with his shin on Mr. Emond's shoulder and another lying face down on Mr. Emond's backside, with his legs covering Mr. Emond's legs. It is not probable that Mr. Emond could have sustained the multiple bites he suffered while

the Arresting Officers had him restrained in this way, at least not without the three police officers who were restraining him noticing. This is particularly true because, on Cst. Meglic's account, a large portion of Mr. Emond's body was physically covered by Csts Meglic and Williams, both of whom were sitting or lying on top of him.

- [39] The only probable sequence of events therefore is that Mr. Emond continued to be bitten by the PSD after the handcuffs were placed on his wrists. The Arresting Officers described the Incident as taking place in near total darkness, in a dynamic and confusing manner. It is not surprising that they would not have been immediately aware that the PSD was continuing to attack Mr. Emond after the handcuffs had been placed on his wrists.
- [40] While Mr. Emond's testimony was not credible in every respect, I find that Mr. Emond's account of the PSD continuing to bite him, and removing his pants, after the handcuffs were put on his wrist, is the most probable sequence of events.
- [10] The judge then considered the distinction between intentional torts and negligence in the context of actions against police officers. She noted the difficulty in drawing a line between those causes of action, particularly where injuries are caused by a PSD ostensibly under the control of an officer. The judge noted, with reference to *Green v. Lawrence* (1998), 163 D.L.R. (4th) 115, 1998 CanLII 19429 (Man. C.A.), that in claims against police officers, the intentional application of excessive force beyond that which is justified constitutes battery. The judge found:
- [46] Cst. Heppell testified that he issued a command for Jeck to apprehend Mr. Emond, and that he later issued a command calling Jeck off. While there remains an issue about whether Cst. Heppell was negligent in failing to call off the PSD before Mr. Emond had been seriously injured, which I will discuss below, there is no evidentiary basis on which I could find that Cst. Heppell intended to perpetuate assault or battery on Mr. Emond beyond what was reasonably required to apprehend him. Therefore, I find that the more appropriate framework for this case is negligence as the requisite intention cannot be established on the evidence to make out any of the intentional torts pleaded by Mr. Emond.
- [Emphasis added.]
- [11] The judge made a similar observation later in her reasons, when she considered s. 20 of the Police Act, R.S.B.C. 1996, c. 367, and stated:
- [80] I cannot find on the evidence that any of the Named Officers are guilty of dishonesty, gross negligence, or malicious or wilful misconduct. There has been simply no evidence tendered that would support such a conclusion.
- [12] Turning to negligence, the judge acknowledged that the applicable standard of care was that of a "reasonable police officer, acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case": *Doern v. Phillips Estate* (1994), 2 B.C.L.R. (3d) 349, 1994 CanLII 1869 (S.C.) at para. 76. She noted that the circumstances of this case were unique because Mr. Emond admitted that "it was reasonable for the Arresting

Officers to use a PSD to bring him under police control": at para. 51. He took the position that while a single bite would have been justified, the number and extent of the bites he suffered demonstrated that the force employed was excessive. The judge agreed and rejected the Federal Crown's submission that because it was reasonable for the PSD to have been used to effect the arrest and that it is difficult for a PSD to be controlled in a dynamic situation, the extent of Mr. Emond's injuries should have no bearing on liability.

- [13] The judge concluded that Cst. Heppell's failure to control the PSD was negligent:
- [59] Cst. Heppell testified that he only issued two commands. He sent Jeck to retrieve Mr. Emond and, at some point, he called Jeck off. Whether Jeck continued to bite Mr. Emond after he was called off by Cst. Heppell is not at all clear on the evidence but in my view not much turns on this. Either Cst. Heppell negligently failed to call Jeck off after Mr. Emond was handcuffed, or Jeck continued to attack Mr. Emond after he had been called off. Either way, Cst. Heppell lost control of the PSD and Jeck continued to bite Mr. Emond after he was handcuffed and after Csts. Meglic and Williams removed themselves from sitting on top of him.
- [60] A reasonable police officer would have ensured that the PSD was called off immediately upon being satisfied that the suspect was no longer a danger to the Arresting Officers. It is clear on the evidence that Mr. Emond was lying on the ground, physically restrained by three officers, within seconds of his first bite from Jeck. In this case, a reasonable officer would have called off Jeck, if not at the point that Mr. Emond was on the ground, then at the latest when Mr. Emond was handcuffed. This did not happen.
- [14] The judge found that the other Arresting Officers were not negligent as they were not authorized to issue commands to the PSD and not in control of the dog's actions. The judge also concluded that Cst. Thompson had no meaningful involvement in the Incident, and therefore, was not negligent.
- [15] The judge examined Mr. Emond's actions and concluded that he was contributorily negligent for failing to take reasonable care for his own interests when he ran from the Arresting Officers. Finding that his injuries vastly exceeded anything he could reasonably have foreseen, the judge found Mr. Emond 25% contributorily negligent. This finding has not been appealed.
- [16] The judge turned to Mr. Emond's claim in negligence against the Provincial Crown. The gist of his claim was that the employees at the SPSC breached their duty to take reasonable care of Mr. Emond by not providing him sufficiently prompt access to nursing care and medication: at para. 92.
- [17] When Mr. Emond was released from the hospital after his surgery, he was given a prescription for Keflex and Tylenol 3 and a brochure containing post-operative care instructions (the "Instructions"). On intake to the SPSC, those documents were taken from him and placed with his personal belongings. He was given over-the-counter pain

medication, but did not receive the prescription medication until later that night. He alleged that he suffered excessive pain because he did not have the proper medication. Some time after admission to the SPSC, Mr. Emond removed his bandages because of a concern about seepage from his wounds. He subsequently learned from the Instructions, that removal of the bandages was not recommended. He argued that this caused additional pain and suffering. However, the evidence established that a nurse rebandaged the wounds during the night and also attended to the wounds the following morning.

[18] The judge rejected the claim against the Provincial Crown concluding:

[93] I cannot find that the actions of the Provincial Crown fell below the standard of care. During his time at SPSC, Mr. Emond was placed in a medical observation unit, given access to nursing care, and was prescribed the necessary medication. While he may not have received attention as quickly as he would have liked, there is no evidence to support the conclusion that the medical and nursing care he received was less than adequate.

[94] Even if I had found that the Provincial Crown fell below the standard of care, Mr. Emond has provided no evidence in this case to suggest a causal link between the treatment he received at SPSC and his injuries.

...

[96] Mr. Emond has failed to establish that any act or omission of anyone at SPSC caused or contributed to his injuries. As such, even if the Provincial Crown were negligent in its provision of treatment to Mr. Emond while he was at SPSC, no causal link has been established between any treatment delays and Mr. Emond's injuries. As a result, no liability attaches to the Provincial Crown.

[19] Turning to damages, the judge noted that Mr. Emond sought non-pecuniary damages of more than \$2.5 million and loss of income earning capacity of more than \$3 million.

[20] Mr. Emond did not present any medical evidence at trial, but gave evidence about his injuries and ongoing difficulties. The judge described the sequelae of Mr. Emond's injuries, noting he had suffered blood clots, PTSD, ongoing pain in his left leg, and restrictions to his mobility. As of trial, he was unable to crouch and his left leg "gives out" on him. Further, he had ongoing emotional problems. The judge rejected the defendants' contention that Mr. Emond had not suffered any long-term injuries. The judge concluded that he had been "profoundly negatively affected by the injuries he suffered in the Incident, both physically and psychologically". However, the judge also found that Mr. Emond's family life had improved greatly since 2005. He had remarried, had "a very happy life", and was able to work steadily in construction in spite of his injuries. The only cases provided to the judge for guidance on non-pecuniary damages were *Robinow v. City of Vancouver & Star*, 2003 BCSC 661 and *Carpenter v. Vancouver (City of)* (1995), 13 B.C.L.R. (3d) 201, 1995 CanLII 300 (S.C.), dated cases involving dog bites with less serious injuries. The judge assessed damages at \$85,000: at para. 112.

- [21] The claim for loss of earning capacity was based on Mr. Emond's theory that he lost the opportunity to continue working on particular mining claims. He had been prospecting for gold in the Yukon since 1981, and had established a permanent encampment. The evidence showed that he had never earned more than \$20,000 from the sale of gold in any year. Further, there was no evidence of the profitability of his mining operations.
- [22] The judge rejected Mr. Emond's contention that he lost his mining claims in the Yukon because of his inability to work the claims in the summer of 2005. She found that he had failed to establish a causal link between the Incident and his loss of the claims, in part because someone had stolen his equipment which prevented a friend who was prepared to work the claims from doing so. The judge concluded that he had not established a real and substantial possibility of an income loss arising from the injuries.
- [23] The judge also found that since 2012, Mr. Emond had worked as a construction supervisor and that his income had increased substantially compared to the years before the Incident when he was mining for gold. The judge dismissed his claim for any loss of capacity to earn income.
- [24] In reasons indexed at 2022 BCSC 1337, the judge found that Mr. Emond was entitled to costs at Scale B against the RCMP defendants represented by the Federal Crown. She concluded that the Provincial Crown was entitled to costs at Scale B against Mr. Emond. The judge dismissed Mr. Emond's application for a Sanderson or Bullock order to have those costs paid by the Federal Crown. She also ordered that Mr. Emond pay costs, limited to costs associated with their attendance at examinations for discovery, to the named RCMP officers who were not found to be negligent.

On Appeal

- [25] Mr. Emond alleges that the judge made several errors in judgment and particularizes those against the Federal Crown and the Provincial Crown. I have restated the errors alleged and the inferences and conclusions that Mr. Emond says should have been drawn by the judge:
- a) The judge erred by misconstruing evidence about the Incident. In particular, she misconstrued evidence about the available light sources at the time of the arrest. He argues that had the judge correctly found that Cst. Thompson was present with his flashlight during the Incident, she would have drawn the proper inference: that there was sufficient light for the officers to see what occurred during the PSD attack and the extent of the dog bites. He submits the judge should have concluded that:
 - i. the Five Officers acted with malice and committed the intentional tort of assault or battery; or
 - ii. at a minimum, the Four Officers were negligent for failing to stop the attack.

- b) The judge erred by misconstruing the evidence about the actions of the Five Officers immediately after the Incident when they failed to provide care to Mr. Emond in breach of their obligation as set out in the RCMP Operational Manual.
- c) The judge erred in misconstruing the evidence about the nature and extent of his pain when he was admitted to the SPSC and in failing to find the Provincial Crown negligent for failing to provide him with timely and adequate medical assistance.
- d) The judge erred by awarding an amount for non-pecuniary damages that was inadequate and wholly erroneous and by failing to award any amount for past income loss.
- e) The judge erred in awarding costs to the Named Officers, as they should have been found liable in negligence.

Standard of Review

- [26] The errors raised relate to: misapprehensions of evidence; the drawing of inferences of fact, or of mixed fact and law; and the exercise of discretion in awarding damages and costs. The grounds of this appeal must be considered within the framework of foundational principles of appellate review.
- [27] Where it is alleged that a trial judge misapprehended evidence that goes to the core of the outcome, the misapprehension must be palpable and overriding to warrant appellate intervention: *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294 at para. 43, citing *Bayford v. Boese*, 2021 ONCA 442 at para. 28. Findings of fact and the factual inferences drawn by the trial judge are also reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 21-25. The same deferential standard applies to a finding of negligence--a finding of mixed fact and law--unless the finding rests on an incorrect statement of the legal standard: *Housen* at paras. 29-31. Findings of credibility of witnesses are reviewed on the same standard: *Sellathurai v. Bremjit*, 2023 BCCA 268 at para. 26, citing *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 388, 1991 CanLII 69.
- [28] A palpable and overriding error is one that can be plainly seen, or is obvious, and that changes the outcome of the case fundamentally: *Kuhnke v. Karner*, 2022 BCCA 399 at para. 38.
- [29] Damage assessments are primarily fact-finding exercises and involve questions of mixed fact and law. This Court may only intervene where the trial judge could not have reached their conclusion on the evidence, proceeded upon a mistaken or wrong principle, or awarded an amount "so inordinately high or low that it must be a wholly erroneous estimate of the damage": *Deegan v. L'Heureux*, 2023 BCCA 159 at para. 41, citing *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435-436, 1980 CanLII 17.

[30] Similarly, an appellate court may only interfere with an award of costs if the "judge misdirected themselves on the applicable law, made an error in principle, made a palpable error in assessing the facts or otherwise made an award that is so clearly wrong as to amount to an injustice": *AM Gold Inc. v. Kaizen Discovery Inc.*, 2022 BCCA 284 at para. 63, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[31] With these principles in mind, I consider Mr. Emond's grounds of appeal.

Analysis

Misapprehension of evidence about the Incident

[32] Mr. Emond challenges the trial judge's factual finding at para. 39 that the Incident took place in "near total darkness, in a dynamic and confusing manner". He submits that the judge should have concluded that the scene was illuminated enabling some or all of the officers to see the PSD attack because Cst. Thompson was present with a flashlight. He goes further and says that if the judge had arrived at a correct finding on the illumination of the scene, she would have found that the Five Officers acted with malice and that they intended to cause harm. At the very least, he argues that the Four Officers should have also been found negligent.

[33] Mr. Emond points to portions of evidence from the transcript in support of this argument. He notes that Cst. Meglic stated that the floodlight came on after Cst. Thompson shone his flashlight on Mr. Emond, which was when he saw the injuries. He notes that Cst. Thompson stated, in discovery evidence that was read in at trial, that when he arrived at the scene of the Incident, the officers were telling Mr. Emond to get on the ground and show his hands, and that the PSD was still barking. He also refers to Cst. Williams' statement, in discovery evidence that was read in, that Cst. Thompson was with him when he arrived at the scene of the Incident and assisted in bringing Mr. Emond to the ground.

[34] Mr. Emond also relies on portions of Cst. Heppell's testimony, including these statements:

At this time -- sometime in that time frame a flashlight was being used by Constable Meglic or other members and at that time everything was just a bright light in my face, I couldn't really see who was at the other end of the shed. And Mr. Emond and the dog were blacked out, obscured by the -- by the light, there was so much light coming towards me.

It's hard to actually describe it with great detail and accuracy mostly because of the fact I was blinded by the bright light or disadvantaged by the -- the dark shadows that they were fighting in, but all I could see was very explosive movements

[35] There are multiple difficulties with this argument, the first being that Mr. Emond asks this Court to use isolated portions of the evidence to make findings and draw conclusions about the Incident that differ from those made by the judge. The evidence at trial about what took place from the time the officers attended at Mr. Emond's home until the PSD was called off

was extensive. The judge had to evaluate the evidence of each witness for credibility and reliability and decide what portions to accept. She had to do so recognizing that all of the witnesses were recalling events that had taken place 16 years earlier. Her detailed reasons describe how and why she arrived at her conclusions on credibility and the contested facts. It is not the task of this Court to second guess the weight assigned to various parts of the evidence to arrive at a different conclusion: *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 38.

- [36] Another difficulty with Mr. Emond's argument is that the portions of evidence he relies on demonstrate the difficult task the judge faced, and therefore, lend support to her conclusions. Mr. Emond refers to Cst. Heppell's testimony, presumably to show that there was light shining during the Incident. But that testimony also highlights the fact that the light, and the dark shadows it created, obscured what was happening in the dynamic circumstances. As Cst. Heppell stated, it was hard to describe what happened in detail and with accuracy because he "was blinded by the bright light or disadvantaged by the -- the dark shadows that they were fighting in, but all I could see was very explosive movements". This echoes the judge's conclusion based on all of the evidence that the Incident took place in "near total darkness, in a dynamic and confusing manner". Quite clearly, there was evidence that the judge could, and did, accept to support her findings.
- [37] Finally, and importantly, Mr. Emond's argument misses the judge's crucial finding that, "irrespective of the source of illumination, it is clear that Mr. Emond's injuries were immediately apparent to the Arresting Officers once they could see them" (emphasis added). From this, it is evident that the judge directly considered this issue. However, she did not find the extent or timing of the illumination of the Incident to be determinative of the Named Officers' liability. Quite simply, the judge drew a different inference from the evidence about the available light than Mr. Emond would like her to have drawn.
- [38] As was the case in *Deng v. Zhang*, 2022 BCCA 271, the judge was faced with conflicting and unreliable evidence and her task was "difficult and unenviable": at para. 61. Mr. Emond has not been able to draw this Court's attention to any palpable and overriding errors. Accordingly, her conclusion is entitled to deference.
- [39] There is a further difficulty with Mr. Emond's submission. Even if the judge could have weighed the evidence differently, there is no possible basis for the speculative inference that he asks this Court to draw: that the Five Officers acted with malice and committed the intentional tort of assault or battery. The judge noted that there was no direct evidence to support that inference and Mr. Emond has not drawn any such evidence to this Court's attention.
- [40] There was, however, direct evidence to support the judge's conclusion that the Five Officers did not intend to harm Mr. Emond. Cst. Meglic stated that the PSD was employed because their intention was to effect Mr. Emond's arrest "in the safest manner possible". The Incident occurred only when Mr. Emond attempted to evade his arrest.

- [41] Mr. Emond's submission that the judge should have concluded that the Four Officers were negligent also lacks merit. The conclusion that their actions did not amount to negligence is entitled to the same deference as the judge's findings of fact: *Housen* at para. 29. Further, his argument ignores a key finding of fact: that the Four Officers were not authorized to issue commands to the PSD and were not in control of the dog's actions.
- [42] In summary, I would reject Mr. Emond's argument that the judge misapprehended the evidence such that she should have concluded that the Five Officers were negligent or that one or some of them should be found liable for assault or battery.

Failure to provide medical aid after the Incident

- [43] Mr. Emond argues that the judge erred in failing to give proper effect to section 33.1 of the RCMP Operational Manual dealing with dog bites. It states, in part, that in all instances where a PSD injures anyone, "action must be taken, medical aid provided and the injury and action taken documented." It notes that an officer can be civilly liable in negligence for improper handling of a PSD or for failure to assist when that is required. Mr. Emond argues that if the judge had given proper effect to these provisions, she would have concluded that the actions of the Five Officers after the Incident did not meet the standard of care of a reasonable officer in the circumstances.
- [44] The Federal Crown says that this argument was not pursued at trial, and that it is not in the interests of justice to support a departure from the general rule precluding new arguments on appeal: *R. v. Gill*, 2018 BCCA 144 at paras. 9-12. Alternatively, it submits that there is no merit to this argument as Mr. Emond is asking this Court to arrive at a different conclusion from that reached by the judge through reconsideration of the evidence. As stated above, that is not the role of an appellate court: *Khela v. Clarke*, 2022 BCCA 71 at para. 6.
- [45] The amended notice of civil claim did not specifically seek damages for failure to provide adequate medical treatment immediately after the Incident. However, in his lengthy (101 paragraphs) statement of facts, Mr. Emond alleged that inadequate treatment was provided to him after the Incident. It appears that Mr. Emond did not pursue this specific allegation at trial, although he has now raised it directly on appeal. To consider this allegation of negligence on appeal, this Court should have the benefit of the trial judge's analysis of the relevant evidence. We do not have that, although it is clear from the judge's findings at para. 17 that she heard evidence about the steps that were taken after the extent of Mr. Emond's injuries were noted.
- [46] It is not in the interests of justice to permit new arguments based on allegations of negligence that were not dealt with at trial: *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 44. However, I need not rest my decision on that principle. It is clear that this allegation is without merit. Emergency services attended to Mr. Emond very shortly after he was restrained, and he was immediately taken to the hospital where surgery was performed. In the absence of any evidence about the standard of care of

officers in this situation, a finding of negligence against the officers would not have been possible. I would dismiss this ground of appeal.

Negligence of the Provincial Crown

- [47] Mr. Emond challenges the trial judge's finding at para. 93 that the actions of the employees at the SPSC did not fall below the standard of care. His submission is based on two arguments: (1) he was not given the Instructions; and (2) the medical assistance provided was untimely and inadequate.
- [48] This ground of appeal is also without merit. First, there was no evidence led as to the appropriate standard of care or how the actions of the SPSC staff fell short of that standard. Mr. Emond has not pointed this Court to any evidence that the Provincial Crown departed from their usual procedures or acted unreasonably in the circumstances. Second, even if they did, there was no evidence on which the trial judge could find that Mr. Emond suffered loss or damage as a result. In fact, Mr. Emond concedes that the judge did not err in finding that no act or omission of the staff at the SPSC caused or contributed to his injuries. Instead, he argues that the judge should have been able to conclude from the photographs of his injuries that he was in extreme pain. Additionally, he says that the degree of pain he was suffering should have been obvious because it caused him to remove his bandages. He says that the level of pain he was evidently suffering is probative of a breach of the duty of care.
- [49] Mr. Emond is unable to point to any error in the judge's findings, let alone a palpable and overriding error, and I see no merit in the suggestion that such an inference could be drawn. There is nothing in the reasons to suggest that the trial judge did not take Mr. Emond's pain into account when considering his injuries. In fact, at para. 109, she details the severity of his injuries and continued pain in her damage assessment. Additionally, there was no evidence on which she could base a finding that the actions of the SPSC staff caused Mr. Emond to suffer additional pain. I see no error in the trial judge's conclusion that the Provincial Crown met the reasonable standard of care.
- [50] Mr. Emond's arguments also fail on a more fundamental basis: the judge's conclusion that he failed to prove negligence is a finding of mixed fact and law. That finding is entitled to deference on appeal: *Housen* at para. 29.

Damage awards

- [51] Mr. Emond has not put forward any principled basis for challenging the trial judge's findings on damages. He states simply that "the facts in evidence support the awarding of greater damages". The trial judge heard extensive testimony over 15 days of trial and, based on the evidence and submissions, made damage awards. It would be inappropriate for this Court to reweigh the evidence and substitute our view for that of the judge: *Mother 1. v. Solus Trust Company Limited*, 2021 BCCA 461 at para. 47. It must be remembered that damage assessments are fact-specific and subject to a stringent standard of review: *Deegan* at para.

41.

- [52] Regarding Mr. Emond's claim for a greater non-pecuniary damage award, the trial judge cited relevant case authority and recognized the severity of his injury and the effect it continues to have on his life: at paras. 107-109, 111. Mr. Emond has not established any basis for interfering with the trial judge's award.
- [53] Regarding past income loss, Mr. Emond claims that the trial judge erred in failing to make any award. The respondents submit that the trial judge reasonably determined that Mr. Emond's loss of income-earning capacity relating to his mining activities were speculative and there was insufficient evidence to establish any loss. It must be remembered that Mr. Emond's claim at trial was entirely based on a loss of income arising from an alleged inability to work his mining claims. On the evidence available to her, and responding to the arguments at trial, the trial judge made the supportable finding that Mr. Emond had failed to prove a loss of earning capacity: at para. 130. I see no basis on which this Court could interfere with that conclusion.
- [54] Additionally, on appeal, Mr. Emond argues that the trial judge should have awarded punitive damages. Mr. Emond did not make submissions on this claim at trial as evidenced by the trial judge's summary of his claims for damages at para. 97 of her reasons. This is a new argument on appeal and is not properly before this Court.
- [55] In my view, there is no basis on which this Court can interfere with the trial judge's award of damages.

Costs

- [56] Mr. Emond's argument for reversing the costs award is predicated on his argument that the Four Officers were, at a minimum, negligent. As set out above, Mr. Emond has not established that the trial judge committed any error in concluding they were not. Mr. Emond has not articulated any other basis for setting aside the costs award. I would dismiss this ground of appeal.

Disposition

- [57] I would dismiss the appeal.
- [58] FITCH J.A.: I agree.
- [59] GRAUER J.A.: I agree.
- [60] FITCH J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Butler"

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