

CANADA / JUDGMENT

Giesbrecht v. Hansen

2022 BCSC 1673

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Supreme Court of British Columbia

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2022 BCSC 1673 Giesbrecht v. Hansen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Giesbrecht v. Hansen,

2022 BCSC 1673

Date: 20220923

Docket: 193646

Registry: Victoria

Between:

Clayton Giesbrecht

Plaintiff

And

Ole Marvin Hansen

Defendant

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for Plaintiff:

M.H. Martin

Counsel for Defendant:

M. Plett

Place and Date of Trial:

Victoria, B.C.

March 7-9,

April 11, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 23, 2022

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INTRODUCTION

- [1] Between 4:30 a.m. and 5 a.m. on January 22, 2018, the plaintiff, Mr. Giesbrecht, was sitting in his car in the parking lot of Castaways store checking the Internet to see if he had any eBay orders. According to Mr. Giesbrecht, he had an arrangement with Castaways that he could use their Internet in exchange for him helping them out at the store.

- [2] After about 15 minutes, Mr. Giesbrecht was ready to leave. He backed across the parking lot to a spot right beside the defendant, Mr. Hansen's, home. He tried to go forward but his car would not move. Being a cold morning, Mr. Giesbrecht thought his car would not move because the engine was cold. He sat in that spot revving his engine in an effort to warm it up.
- [3] Mr. Hansen was woken by the loud revving of the engine. He got out of bed "not happy", got dressed and went outside. On his way out the door, he grabbed a piece of wood similar to a 2x4. Wielding the piece of wood like a baseball bat, Mr. Hansen repeatedly struck Mr. Giesbrecht's car, shattering the front and rear windshields and denting the window frames. Mr. Hansen then struck the driver's side window, breaking it and hitting Mr. Giesbrecht's arm, causing injury.
- [4] Mr. Giesbrecht seeks awards under several heads of damage including non-pecuniary, punitive and aggravated damages and loss of earning capacity (past and future).

ISSUES

- [5] The issues to be decided are as follows:
- 1) Liability;
 - 2) Causation;
 - 3) Non-pecuniary damages;
 - 4) Aggravated damages;
 - 5) Past wage loss;
 - 6) Loss of earning capacity;
 - 7) Special damages; and
 - 8) Subrogated claims.
- [6] I will consider each issue in turn. Before I do I will address the issue of credibility.

CREDIBILITY

- [7] The defendant submits that Mr. Giesbrecht's evidence is questionable as he has what the defendant characterises as unrealistic ideas or ideals. I disagree that that makes him an untrustworthy witness. Mr. Giesbrecht has ideas that can perhaps be characterised as not mainstream. He lives a simple life. He is not driven by money but rather by his passions. For example, he testified to the allure of a surfing lifestyle, which means if there are waves, everything else takes a back seat to surfing. According to Mr. Giesbrecht, he has told employers and prospective employers that if there were waves he would not be at work. While Mr. Giesbrecht's ideals might not be financially savvy or even perhaps realistic, there was nothing disingenuous about his evidence. He struck me as a sensitive, unsophisticated

man. While some of his ideas are unconventional and may not make sense to some, I did not find that he was anything but honest in his evidence.

ISSUE 1: LIABILITY

- [8] As Mr. Hansen wound up to strike the driver's side window, Mr. Giesbrecht testified that he put his left arm up, crooked at the elbow, to shield his face and head. When Mr. Hansen broke through the window, he struck Mr. Giesbrecht in the elbow. Glass flew into Mr. Giesbrecht's car hitting him on the left side of his neck and cutting his skin. Mr. Giesbrecht immediately felt a sharp pain in his wrist. He told Mr. Hansen that he had broken his elbow.
- [9] When he was able to drive away, Mr. Giesbrecht immediately went to the hospital. Emergency room records indicate abrasions to Mr. Giesbrecht's left neck and elbow. Glass had to be cleaned from the elbow. A photo filed as an exhibit depicts Mr. Giesbrecht's left elbow area as bruised, swollen and abraded.
- [10] Mr. Hansen admits losing his temper and taking a 2x4 to Mr. Giesbrecht's vehicle, smashing windows and a taillight. He admitted being ashamed of his actions. Of significance, he did not deny striking Mr. Giesbrecht in the wrist when he broke through the driver's side window.
- [11] I have no difficulty finding that in his fury, Mr. Hansen struck Mr. Giesbrecht's elbow with the piece of wood when he smashed through the driver's side window. Mr. Giesbrecht's evidence was straightforward. It makes sense. His elbow was positioned behind the driver's side window. The photos corroborate that Mr. Giesbrecht's elbow was injured, as do the hospital records.

ISSUE 2: CAUSATION

- [12] Causation is established when the plaintiff proves on a balance of probabilities that the defendant caused or contributed to his or her injury. This is the "but for" test as set out by the Supreme Court of Canada in the seminal decision *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey]. The question that must be posed is whether, but for the defendant's negligence, the plaintiff would have suffered the injury.
- [13] Causation is established when the plaintiff proves on a balance of probabilities that the defendant caused or contributed to his or her injury. Having concluded that Mr. Hansen struck Mr. Giesbrecht in the elbow, the question becomes whether Mr. Hansen caused injury to Mr. Giesbrecht's elbow. Again, I have no trouble finding that he did.
- [14] As stated above, I found Mr. Giesbrecht to be a credible witness. His injuries were corroborated by the photo of his elbow and observations of medical officials. Mr. Hansen did not deny causing the injury.

- [15] As a result of this injury, Mr. Giesbrecht reports being in constant pain. He can no longer do things that he enjoyed including cycling and off-road biking. He became fearful of Mr. Hansen and continues to experience anxiety. He was no longer able to fix bikes which, beyond being a source of income, gave him a sense of contributing to the tight community of Tofino. He felt that he was supplying the people of Tofino with good bikes for a reasonable amount. When he could no longer salvage parts and rebuild bikes, he lost his purpose.
- [16] Mr. Giesbrecht's enduring injury to his wrist was corroborated by his family doctor, Dr. Yagos. Dr. Yagos testified that she has prescribed prescription drugs, ordered an MRI, and had Mr. Giesbrecht seen by orthopaedic surgeon, Dr. Botsford. The clinical records of Drs. Yagos and Botsford were filed as exhibits.
- [17] The court's ability to rely on clinical records as evidence was clarified by Mr. Justice Steeves in *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2018 BCSC 859:
- [13] There is also a legal issue as to the admission of medical records generally. This too has been discussed in a previous ruling (2016 BCSC 1896). I reproduce the following from that ruling:
- [10] The treatment of [medical evidence] evidence is well established and has been usefully surveyed by Justice Metzger in a previous judgment (*Seaman v. Crook*, 2003 BCSC 464):
- [14] The cases *Ares v. Venner*, supra; *Sandu and Brink*, *Olynyk v. Yeo*, supra; *Butler v. Latter*, [1994] B.C.J. No. 2358 (B.C.S.C.), *McTavish v. MacGillivray*, supra; *Coulter and Ball et al.*, 2002 BCSC 1740 (CanLII); and s. 42(2) which provides:

In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if...

when taken together, [it] stand[s] for the following:

- (1) That the observations by the doctor are facts and admissible as such without further proof thereof.
- (2) That the treatments prescribed by the doctor are facts and admissible as such without further proof thereof.
- (3) That the statements made by the patient are admissible for the fact that they were made but not for their truth.
- (4) That the diagnoses made by the doctor are admissible for the fact that they were made but not for their truth.
- (5) That the diagnoses made by a person to whom the doctor had referred the patient are admissible for the fact that they were made but not for their truth.

- (6) That any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not admissible for any purpose and will be ignored by the trier of fact. It is not necessary to expunge the statements from the clinical records as this is a judge alone trial.
- [15] Therefore any, and I emphasize the word "any", opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time.
- [18] Both doctors note symptoms and observations about Mr. Giesbrecht's elbow and the continuing pain. In April 2021 Dr. Botsford injected Mr. Giesbrecht's elbow with a steroid. In June 2021 he noted some improvement from the injection but queried whether there was a nerve injury. He referred Mr. Giesbrecht to a physiatrist for nerve conduction studies to investigate this. At the time of trial, Mr. Giesbrecht testified that he was still on the waiting list.
- [19] In *Dahliwal v. Greyhound Canada Transportation Corp.*, 2015 BCSC 2147, Mr. Justice Silverman summarized the principles to be applied in assessing credibility in a personal injury case:
- [280] A number of principles emerge from the case law which address the question of assessing credibility in a case such as this, all of which I am guided by:
- 1 It is well accepted that courts should be careful in assessing compensation where there is little to no objective medical evidence supporting a plaintiff's self-reported symptoms, particularly where those symptoms persist beyond the usual course of recovery: *Price v. Kostryba*, (1982) 70 B.C.L.R. 397 (SC), at 399 [*Price*] *Tai v. De Busscher*, 2007 BCCA 371, at para 41 [*Tai*].
 2. To justify an award of damages in the absence of corroborating evidence, the plaintiff's own evidence must be examined with "a skeptical eye": *Sevinski v. Vance*, 2011 BCSC 892, at paras 42-46.
 3. Where the plaintiff's self-report is in doubt, the court should place the most reliance on objective medical evidence that does not depend on the credibility of the plaintiff: *Sharifi v. Chaklader*, 2012 BCSC 685, at paras 97-98.
 4. There must be compelling evidence that the plaintiff's complaints are a true reflection of a continuing injury: *Price*, at p. 398-399.
 5. While Mr. Dhaliwal's physicians are entitled to take Mr. Dhaliwal's complaints at face value, this court is required to take a more critical view: *Edmondson v. Payer*, 2011 BCSC 118 at para 77, *aff'd* 2012 BCCA 114.

6. Credibility involves an assessment of the reliability of a witness' testimony based on their apparent sincerity and truthfulness and the accuracy of their evidence: *Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.) as cited in *Karim v. Li*, 2015 BCSC 498 [Karim] at para 88.
 7. As a starting point, a witness is presumed to be truthful; however, this presumption is displaced by evidence of deliberate falsehood: *Hardychuk v. Johnstone*, 2012 BCSC 1359, at para 9.
- [281] The plaintiff acknowledges that when dealing with chronic pain cases, there are few objective symptoms of injury and that, therefore, the Court must be extremely cautious in assessing the credibility of the claimant.
- [282] The Court must review the evidence in this case as a whole when looking at Mr. Dhaliwal's credibility, rather than looking at small inconsistencies here and there.
- [20] Taking those principles into consideration, I find the following facts:
1. Mr. Giesbrecht did not have issues with his left elbow prior to being struck by Mr. Hansen. When Mr. Hansen hit him, Mr. Giesbrecht felt an immediate sharp pain in his elbow.
 2. Since being struck, Mr. Giesbrecht has suffered constant pain in his elbow that he describes as a pinching feeling. While topical cream and stretching provide some relief, nothing has given him long term relief.
 3. He suffers numbness in his fingers and swelling in his elbow.
 4. Over four years after the assault, the injury continues to cause Mr. Giesbrecht pain and has impacted his ability to do things he likes to do, thus impacting his enjoyment of life.
 5. There is no remedy in sight.

ISSUE 3: NON-PECUNIARY DAMAGES

- [21] A plaintiff is entitled to reasonable damages for his or her pain and suffering. The general rule is that the plaintiff is to be restored to his or her original position and not to a better position: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [22] An award of non-pecuniary or general damages does not depend upon the seriousness of the injury, but on its ability to ameliorate the condition of the victim considering his or her particular situation. The gravity of the injury alone is not determinative. An appreciation of the individual's loss is the key. There is no "tariff". An award will vary to meet the unique circumstances of each case: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637.
- [23] I find the following facts that are relevant to the assessment of damages under this heading:
1. Mr. Giesbrecht lives in constant pain;
 2. Mr. Giesbrecht is no longer able to engage in activities that he enjoyed like dirt biking;

3. He suffers nightmares about Mr. Hansen chasing him;
 4. Because of the trauma of this assault, Mr. Giesbrecht moved from Tofino, the community that he loved and felt a part of, to a town where there is no surfing, which is his passion, and where he has no sense of belonging.
- [24] Mr. Giesbrecht seeks an award of \$80,000 for general or pecuniary damages. In support, he cites *Fleming v. Ontario*, 2016 CarswellOnt 22152 [Fleming] and *Bouvier v. Behrend*, 2014 BCSC 1208.
- [25] The defendant submits that the appropriate award for non-pecuniary damages is \$6,000. In making this submission the defendant takes the position that Mr. Giesbrecht suffered only a soft tissue injury and, as there is no objective expert medical evidence saying otherwise, the injury resolved within two or three months.
- [26] I disagree with the defendant. As stated above, I am satisfied based on all of the evidence that the injury is chronic, that Mr. Giesbrecht continues to suffer pain and that it has impacted his ability to engage in some activities that were important to him.
- [27] As such, I do not find the defendant's cases helpful. The most factually analogous case is *Fleming*. In *Fleming*, the 48-year-old plaintiff (55-years-old at the time of trial) was arrested by police during a protest and held in jail for approximately 2 and a half hours. While being handcuffed, he sustained an injury to his elbow which resulted in chronic pain. While he was able to engage in most activities of daily life, he could no longer play some sports that had been a big part of his life. He also suffered anger issues stemming from the arrest. The court awarded him \$80,000.
- [28] The court in *Fleming* heard evidence from experts regarding the extent of Mr. Fleming's injury, including that he suffered nerve damage. I do not have that evidence here.
- [29] Having regard to all of the evidence and the authorities I am satisfied the appropriate award under this heading is \$60,000.
- [30] That, however, does not end the analysis. The defendant argues that Mr. Giesbrecht has failed to mitigate his damages by not taking recommended treatment and as such his award under this head of damages should be reduced by 25%.

Failure to Mitigate

- [31] There is a duty on a plaintiff in a personal injury action to take reasonable steps to limit his loss.
- [32] In order to prove a failure to mitigate a defendant has to prove two things:
- i. the plaintiff acted unreasonably in not taking the steps that the defendant says ought to have been taken; and
 - ii. the plaintiff's loss would in fact have been eliminated or reduced had the step been taken.

See *Karst v. Foster*, 2019 BCSC 1043 at para. 147.

[33] As Justice Horsman, as she then was, states in *Karst*, the court will not readily find a failure to mitigate:

[149] In considering the defence of mitigation, courts are slow to determine that a plaintiff has acted unreasonably in making good-faith decisions about what treatment and employment steps they will take to address an injury. As stated in *Paniccia Estate v. Toal*, 2012 ABCA 397 at para 86, cited in *Gallina* at para. 128:

the court only lightly reviews the decision of a person injured to try to mitigate his loss. Courts are extremely slow to criticize good-faith decisions by victims of torts about both whether to take steps in mitigation, or which steps, or how much expense or risk to incur in doing so.

[34] Here the defendant submits that Mr. Giesbrecht failed to mitigate his damages by failing to attend physiotherapy as recommended by Dr. Yagos. Mr. Giesbrecht testified that he only had physiotherapy on his elbow when he was in treatment for his back (a separate injury), nearly two years after the assault. Mr. Giesbrecht explained that he did not go to physiotherapy before that because it was in Port Alberni, about a two-hour drive from Tofino, and he did not have a car to get there. When in cross-examination it was suggested to him that he take a bus, Mr. Giesbrecht explained that due to the bus schedule he would have had to stay overnight and he could not afford a hotel. Mr. Giesbrecht did testify that the physiotherapy he received did provide him some relief and aided his range of motion.

[35] The defendant further argues a failure to mitigate on the part of the plaintiff for not attending a specialist's appointment because the office could not reach Mr. Giesbrecht as he had changed his phone number. The defendant argues that a reasonable person would have advised their medical providers of a change of phone number.

[36] I reject the defendant's arguments. I am unable to conclude that it was unreasonable for Mr. Giesbrecht to not attend physiotherapy given the length of the trek and the expense. Nor do I find that he was unreasonable, given his personality, in failing to advise the specialist's office of his change of contact information. As above, the court will be slow in reaching the conclusion that a plaintiff has failed to mitigate their losses.

[37] I do not find that Mr. Giesbrecht failed to mitigate his damages. Accordingly, the award for non-pecuniary damages of \$60,000 remains.

ISSUE 4: AGGRAVATED DAMAGES

[38] Mr. Giesbrecht seeks aggravated damages in the amount of \$3,000.

[39] In *Thomson v. Friedmann*, 2008 BCSC 703, aff'd 2010 BCCA 277, Madam Justice Gerow discussed aggravated damages and the distinction between aggravated damages and punitive damages:

- [29] Ms. Thomson is seeking both aggravated and punitive damages. Aggravated damages are a compensatory award that takes account of the intangible injuries such as distress and humiliation caused by a defendant's insulting behaviour. Aggravated damages are often claimed as compensation for mental distress caused by a defendant's behaviour. Aggravated damages will frequently cover conduct which would also be subject to punitive damages, but their role is compensatory. They are designed to compensate a plaintiff and are measured by the plaintiff's suffering such as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, and similar matters caused by the conduct of a defendant: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085.
- [30] There is a close relationship between aggravated and punitive damages. The harshness of a defendant's conduct may give rise to both types of damages. However, it is important that a plaintiff not be compensated twice for the same harm or a defendant punished twice for the same type of moral culpability: *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.).
- [31] In my view, the conduct of Mr. Friedmann in striking Ms. Thomson with a baseball bat when she had her hands up and had indicated that she was going to leave the premises showed a wilful or reckless indifference to Ms. Thomson's rights. Although Mr. Friedmann argues that a landlord has the right to protect his property, it was obvious from Ms. Thomson's conduct prior to the assault that she presented no threat and was going to leave the property on her own accord. Even though Ms. Thomson was defenceless and trying to leave, Mr. Friedmann struck her at least three times with a baseball bat, fracturing her arm.
- [32] The evidence is that Mr. Friedmann's behaviour caused mental distress for Ms. Thomson. Ms. Thomson testified that the assault will always be with her. She suffered from anxiety and sleeplessness after the incident. Her evidence is that she still occasionally has flashbacks to the incident when someone makes a movement around her head. In the circumstances, it is my view that an award of \$2,500 is appropriate for aggravated damages.
- [40] The defendant argues that aggravated damages are not warranted. He says that the incident happened at night and there were no other witnesses; the injuries did not mar or disfigure Mr. Giesbrecht; and that Mr. Hansen has admitted his moral culpability by pleading guilty to the criminal charge of mischief and being sentenced to a term of probation.
- [41] I reject the defendant's argument. With respect to the last point, in pleading guilty to mischief, Mr. Hansen admitted responsibility for his attack on Mr. Giesbrecht's car only -- not on Mr. Giesbrecht himself.
- [42] I find that aggravated damages are appropriate in this case. As a result of Mr. Hansen's attack, Mr. Giesbrecht's emotional state has been wounded. He suffers nightmares. His sense of self-esteem and confidence has been impacted. He no longer feels safe.
- [43] To compensate Mr. Giesbrecht for the mental distress caused by Mr. Hansen's acts, I award him \$3,000 in aggravated damages.

ISSUE 5: PUNITIVE DAMAGES

- [44] Mr. Giesbrecht seeks an award of \$10,000 in punitive damages.
- [45] Our Court of Appeal recently set out the law respecting punitive damages in *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189:
- [72] Aggravated damages and punitive damages are discrete sets of damages potentially available for wrongful dismissal. In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Court set out the distinction between aggravated and punitive damages as follows:
- [62] Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.
- [73] As punitive and aggravated damages are independently available, the Court in *Honda* noted the danger of duplicative awards that result in double damages or double compensation: *Honda* at para. 60. However, the same underlying conduct can ground both aggravated and punitive damages without being duplicative. The danger is awarding punitive damages to condemn behaviour that has already been adequately rebuked by the compensatory damage awards: *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147 at para. 116.
- [74] In *Honda*, the Court held it was an error for the lower courts to not have considered the aggravated damages already awarded when they awarded punitive damages:
- [69] ... In this case, the same conduct underlays the awards of damages for conduct in dismissal and punitive damages. The lower courts erred by not questioning whether the allocation of punitive damages was necessary for the purposes of denunciation, deterrence and retribution, once the damages for conduct in dismissal were awarded.
- [75] The combined general, aggravated, and punitive damages should not exceed the amount necessary for the purposes of denunciation, deterrence, and retribution. Given that compensatory damages are awarded first, punitive damages would only be necessary if the total award is not yet sufficient to achieve these three goals.
- [76] Unlike aggravated damages, which are compensatory in nature, punitive damages are directed toward punishment. The leading authority remains *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.
- [77] The three objectives of punitive damages are retribution, deterrence, and denunciation. Punitive damages awards should be approached with caution and restraint and resorted to only in exceptional circumstances: *Whiten* at para. 69. Punitive damages awards are rational only when compensatory damages do not adequately achieve the objectives of retribution, deterrence, and denunciation: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 87.

[78] In *Whiten* at para. 94, the Court set out the factors that should be taken into account when considering an award for punitive damages. The factors include:

- a) Punitive damages are the exception rather than the rule, imposed only if there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour;
- b) Punitive damages are generally awarded only where the misconduct would otherwise be unpunished or where other penalties are unlikely to achieve the objectives of retribution, deterrence, and denunciation;
- c) Punitive damages are awarded only if compensatory damages (which to some extent are punitive in nature) are insufficient to accomplish these objectives, and the amount awarded is no greater than necessary to rationally accomplish their purpose;
- d) The purpose of punitive damages is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened;
- e) Punitive damages should be assessed in an amount reasonably proportionate to the harm caused, the degree of the misconduct, the plaintiff's relative vulnerability, and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant; and
- f) Moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[79] The question for determination is whether, in light of the Appellants' conduct, the compensatory damages awarded to Ms. Ojanen are sufficient to accomplish the objectives of denunciation, deterrence, and retribution

[Emphasis added.]

[46] The court gave the following reasons for awarding Ms. Ojanen punitive damages:

[80] The conduct described by the trial judge can properly be described in the language of *Whiten* as "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." The awards of general and aggravated damages are not sufficient to achieve the goals of denunciation, deterrence, and retribution but must be taken into account in determining the appropriate award. Taking into account those awards, I would award \$25,000 in punitive damages. Absent the awards for general and aggravated damages, the award for punitive damages would be higher. The punitive damages award is against both Acumen and Mr. Doroshenko jointly and severally.

[Emphasis added.]

- [47] The defendant argues that punitive damages are not justified as his behaviour was not malicious nor did it depart from the ordinary standards of decent behaviour. Further, he argues that he has already been punished in criminal court, the harm to Mr. Giesbrecht was minor and compensatory damages suffice.
- [48] I disagree. Mr. Hansen's behaviour was unprovoked, malicious, and uncontrolled. It was definitely a marked departure from the ordinary standards of decent behaviour. While I can appreciate Mr. Hansen's annoyance at being woken by Mr. Giesbrecht revving his engine, his actions in taking a 2x4 and smashing Mr. Giesbrecht's car over and over again without any regard to the damage or injury he was causing or could cause is highly reprehensible. The principles of deterrence, denunciation and retribution were not fully addressed in criminal court as Mr. Hansen did not admit his guilt to his assault of Mr. Giesbrecht. While the assault was part of Mr. Hansen's frenzied attack on the car, it was a foreseeable consequence of smashing the driver's window with Mr. Giesbrecht sitting behind it. Further, I am not satisfied that deterrence, denunciation or retribution have been satisfied by the awards under other headings of damage. Mr. Hansen's conduct is so egregious that it must be punished.
- [49] Having regard to the other awards, I order \$8,000 in punitive damages. This award is intended to convey to Mr. Hansen the message that this type of behaviour will not be condoned.

ISSUE 4: PAST WAGE LOSS

- [50] Mr. Giesbrecht seeks \$15,250 ($\$8,000 + \$22,500 / 2$) in past wage loss for 2018, 2019 and 2021 (conceding that 2020 would have been impacted by the COVID-19 pandemic) for a total of \$45,750 in past wage loss from his bicycle business.
- [51] The essential purpose of an award for past loss of opportunity and diminished earning capacity is to provide the plaintiff with full compensation for all of his or her pecuniary losses, subject to rules of remoteness and mitigation: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. It is to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the negligence not occurred. It is the difference between the plaintiff's original position just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission, that comprises the plaintiff's loss: *Athey* at paras. 34-35.
- [52] Mr. Giesbrecht testified that at the time of the assault he was supplementing his monthly disability allowance by picking mushrooms, selling things on eBay and fixing and rebuilding bikes and selling them. He said that he was known as "Travis the bike guy" in the community. His evidence regarding his income from the bike business was vague. He testified that he did not report the income from that business on his tax returns. Mr. Giesbrecht testified that he continued to work in his bike business until he "had to move" from Tofino in 2019.

- [53] Overall, Mr. Giesbrecht's evidence regarding his bike building business was unclear. No records were filed. He testified that the injury did "not necessarily" impact his ability to earn. He went on to state that he had trouble with some aspects of the business including removing rusty bolts, and that although he tried to continue the business in 2019, he could not build enough bikes to make his business a success. He did not testify as to how, if at all, his ability to pick mushrooms or sell things on eBay was impacted.
- [54] Mr. Giesbrecht testified that in 2019 he worked for Commissionaires Canada for "the whole season" until he hurt his back on the job and that he applied for jobs but did not get them. It is unclear what efforts he made to earn an income.
- [55] On all of the evidence, I am unable to find, to the standard required, that Mr. Giesbrecht suffered a loss of income as a result of the assault. Accordingly, there is no award for past loss of income.

ISSUE 5: LOSS OF EARNING CAPACITY

- [56] Mr. Giesbrecht seeks an award of \$200,000 for loss of earning capacity.
- [57] Our Court of Appeal restated the principles to be applied in assessing the loss of earning capacity in three recent decisions: *Dornan v. Silva*, 2021 BCCA 228 [Dornan]; *Rab v. Prescott*, 2021 BCCA 345 [Rab]; and *Lo v. Vos*, 2021 BCCA 421. In *Dornan* at para. 156, Justice Grauer cites *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, where the court described the proper approach in these terms:

An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened

- [58] In *Rab* at para. 47, Justice Grauer set out a three-step process for assessing claims for loss of future earning capacity:

1. Ask whether the evidence discloses a potential future event that could lead to a loss of earning capacity, for example, chronic injury;
2. Ask whether on the evidence there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and
3. If the answer to the above is yes, the judge must assess the loss, applying either the earnings approach or the capital asset approach, and assessing the relative likelihood of the possibility occurring.

- [59] Mr. Giesbrecht's claim is based on his inability to continue his bike business. He says that as a result of the injuries suffered and his need to leave town after the assault due to the ongoing harassment and his fear, he was unable to continue his business. In the town he moved to a bike business was not feasible.

- [60] Again, the evidence regarding Mr. Giesbrecht's ability to work following the assault is unclear.
- [61] On the evidence, I am unable to conclude that the assault has hindered Mr. Giesbrecht's ability to work or earn income. While I accept that he suffered an injury to his elbow that continues to cause him pain and may impact some of his ability to perform manual labour (although this is unclear), there is insufficient evidence to show how his earning capacity is impacted.
- [62] As such I make no award for loss of earning capacity.

ISSUE 6: SPECIAL DAMAGES

- [63] Mr. Giesbrecht claims reimbursement for prescription cream that he had to pay out of pocket. He testified that he gets relief from the cream and continues to use it.
- [64] The defendant takes the position that he is only responsible for the costs incurred in the first three months and that any claim beyond that is speculative. I disagree. Again, I am satisfied that Mr. Giesbrecht's pain and injury persists. It did not resolve within three months. Mr. Hansen is responsible for the impact of his actions.
- [65] I order special costs of \$355.01.

ISSUE 7: SUBROGATED CLAIMS

- [66] There are two subrogated claims being advanced:
1. The Ministry of Health has a claim pursuant to s. 16 of the Health Care Cost Recovery Act, S.B.C 2008, c. 27 [HCCRA] in the amount of \$2,197.55; and
 2. The Crime Victims Assistance Program ("CVAP") claims \$2,252.69 pursuant to ss. 15, 16 and 17 of the Crime Victim Assistance Act, S.B.C. 2001, c. 38.
- [67] The defendant disputes the HCCRA claim, arguing that only the first three months of charges relate to the assault. This is premised on the defendant's position that the injury resolved after two or three months. As I have stated several times, I reject this position.
- [68] The particulars of the claim were marked as an exhibit. I am satisfied that all of the claim relates to Mr. Giesbrecht's elbow injury.
- [69] The CVAP claim includes the cost of moving Mr. Giesbrecht away from Tofino. Mr. Giesbrecht testified to a course of harassment by people in the community, including Mr. Hansen, following the assault, which caused him to feel unsafe in Tofino. The harassment included threats by local mechanics who worked with Mr. Hansen. It also includes Mr. Hansen driving his excavator to Mr. Giesbrecht's bike shop and waving at him -- something Mr. Hansen never did before the assault.

[70] I am satisfied on all of the evidence that as a result of the attack Mr. Giesbrecht's feeling of safety and security was affected. While the actions of others have not been linked to Mr. Hansen, I accept Mr. Giesbrecht's evidence that Mr. Hansen drove in front of his shop in his heavy machinery and waved. I further accept that in doing so Mr. Hansen made Mr. Giesbrecht feel intimidated. I am therefore satisfied that the whole of the CVAP claim is tied to the assault.

[71] I order the defendant to pay \$2,197.55 owing under the HCCRA and \$2,252.69 to CVAP.

CONCLUSION

[72] I order that Mr. Hansen pay to Mr. Giesbrecht the following damages:

Non-pecuniary damages

\$60,000.00

Aggravated damages

\$3,000.00

Punitive Damages

\$8,000.00

Special Damages

\$355.01

HCCRA

\$2,197.55

CVAP

\$2,252.69

TOTAL AWARD

\$75,805.25

[73] Unless there are matters of which I am unaware, Mr. Giesbrecht is entitled to his costs of this proceeding on Scale B.

"The Honourable Madam Justice Murray"

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