

CANADA / JUDGMENT

McLellan v. Canada (Public Safety and Solicitor General)

2022 BCSC 419

COURT

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2022 BCSC 419 McLellan v. Canada (Public Safety and Solicitor General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McLellan v. Canada (Public Safety and Solicitor General),

2022 BCSC 419

Date: 20220315

Docket: S45169

Registry: Kamloops

Between:

Michael Lenard McLellan

Plaintiff

And

Her Majesty the Queen in Right of Canada,

the Minister of Public Safety and Solicitor General,

Constable Evan Elgee and Constable Carla Peters

Defendants

Before: The Honourable Mr. Justice Groves

Reasons for Judgment

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Place and Date of Trial:

Kamloops, B.C.

May 3-7, 10-14, 17-19 and 21, 2021

Place and Date of Judgment:

Kamloops, B.C.

March 15, 2022

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Introduction

- [1] In this litigation, the plaintiff, Michael Lenard McLellan, brings action against Her Majesty the Queen in Right of Canada, the Minister of Public Safety and Solicitor General, and two police officers, Constable Evan Elgee and Constable Carla Peters.

- [2] The action is framed as an action in negligence and injury as a result of the detention and wrongful arrest of the plaintiff on February 11, 2010.
- [3] In summary, the plaintiff alleges that his back was significantly injured as a result of the actions of Constable Elgee. He claims further psychological or psychiatric injury, including residual post-traumatic stress disorder ("PTSD") as a result of his interactions with the RCMP on that day. The usual heads of damage, including a significant claim for loss of future earning capacity are at play in the damage assessment aspect of this case.
- [4] Again, in brief, the circumstances appear to be that on February 11, 2010, in Kamloops, British Columbia, specifically in the school yard of the Twin Rivers Educational Centre (known and identified in this proceeding as "TREC").
- [5] TREC, as the evidence suggests, is a non-traditional school for students who have learning or behavioural problems. It is not a traditional high school in that sense.
- [6] On that date, someone from the school placed a call to the RCMP in Kamloops indicating that a student, who they identified in the telephone call as Kyle Browne, had threatened a teacher with a knife. They further indicated in that telephone call that Kyle Browne was currently outside of the school, in the parking lot, with his case worker. The identity or the name of the case worker was not communicated to the RCMP, but that case worker was in fact the plaintiff, Mr. McLellan.
- [7] It is as a result of the plaintiff's interaction with the police on that day, when they arrived en masse at the school, that give rise to the allegations of negligence, the allegations of injury and the subsequent alleged damages.
- [8] Crucial to any determination the court has to make in this case is a determination of what actually happened in the school yard of TREC on February 11, 2010.
- [9] The trial of this matter began in mid-May 2021; over 11 years after the incident of February 11, 2010. There are a number of witnesses as to the circumstances in the school yard on that given day.
- [10] The four main witnesses as to the circumstances are the plaintiff, Mr. McLellan, the student who had brandished the knife, Kyle Browne, then Constable Peters and Constable Elgee.
- [11] In addition, other persons at the school and associated RCMP officers in attendance that day also provided evidence as to what happened. From the RCMP perspective this includes Constable Kent Novakowski, Constable Regan Brocklebank and Constable Stephen Zaharia. Sean Lamoureux, then the principal at TREC and a teacher, Anthony Morasco, also testified.
- [12] In this case, the court has to make a number of determinations. As was noted above, the first of those is what actually happened in the school yard of TREC in Kamloops, British Columbia on February 11, 2010? This will involve an analysis and findings of credibility and reliability of the numerous witnesses noted above.

- [13] Once those facts are found, the court must then turn its mind to whether or not there was an act of negligence or some other form of tortious actions by any of the police officers involved that caused injury to the plaintiff. In this regard, the court will have to analyze the expert evidence of two use of force experts who testified, being Dr. Orville Nickel, who appeared and testified as an expert on behalf of the plaintiff and Kelly Solinsky, who appeared as an expert on use of force on behalf of the defendants.
- [14] If liability is found and causation of the injuries determined, then the court will have to consider the issue of damages. Crucial to that assessment would be an analysis of the evidence of the plaintiff, his lay witnesses who witnessed him after the incident, as well as the medical experts who appeared on behalf of both the plaintiff and the defendants. The plaintiff called an expert psychiatrist, Dr. Keven Solomons, a physical medicine and rehabilitation specialist, Dr. Duncan Laidlow, and an occupation therapist, Sheila Branscombe. The defence called a psychiatrist, Dr. Paul Latimer, and a physical medicine and rehabilitation specialist, Dr. Lyle Gross.
- [15] In addition to the expert evidence, there were numerous lay witnesses who testified as to their involvement with the plaintiff and their observations of him, which provides information to the court about the affects of the alleged injury on Mr. McLellan, the limitations on his activities, employment options, his general disposition and his medical recovery.

What Happened on February 11, 2010?

- [16] As noted earlier, there are a number of people who testified as to the circumstances on February 11, 2010 at the TREC school yard in Kamloops.

Michael Lenard McLellan

- [17] On the date of the incident in question, February 11, 2010, Mr. McLellan was 31 years of age. In his evidence, he described that he worked for Axis Family Resources ("AXIS") as a live-in caregiver in one of the group homes operated by that agency. He had been employed in this capacity since 2009. Kyle Browne was one of the residents in the facility in which he worked.
- [18] As for the circumstances on February 11, 2010, he testified that he received a call from his supervisor that Kyle Browne, who was in attendance at the TREC school had to be removed because of a problem. He attended at the TREC school and, after showing his AXIS identification, entered the school and spoke with the vice-principal. He then encountered Kyle Browne in a school room with a counsellor. Kyle Browne was clearly tense and the circumstance was difficult. Kyle Browne initially denied having said he had a knife, but as he was agitated, the school wanted him removed for the day. After about 15 to 20 minutes of discussion they left the school.

- [19] The plaintiff stated in his evidence that they walked outside to where vehicles were parked and specifically walked to a place where Kyle Browne could retrieve his bike. Within a few minutes they heard sirens and there was a discussion about if in fact this was the police attending for Mr. Browne. Mr. McLellan then testified almost simultaneously four police cars arrived followed by a CFJC television crew and van. Mr. McLellan described himself as wearing runners, jeans and a t-shirt. He had a modest amount of stubble, essentially a "five-o'clock shadow", but not a beard. He was shorter than Kyle Browne and Kyle Browne was wearing a long leather jacket. He was not. He described the circumstances where the police arrived, possibly as many as six. Some of them had their guns unholstered and were being followed by the camera crew. He said he presented himself, his AXIS identification in hand on a lanyard and that "I told them my name and what I do". He recalls receiving instructions from the police who were yelling "Hands in the air", "On your hands and knees", "Crawl forward", "You are not doing it right, on your belly". He testified that in addition to identifying himself and giving his name, he complied completely with the police officers' instructions. As he was laying on the ground, he testified how an RCMP officer ran over to him and dropped a knee on the small of his back. He said it was with such force that he made an "ommph" sound. His hands were grabbed and he was handcuffed and the knee remained on his back. He was not asked for identification. He was not asked if he had a knife. A search then began. He was rolled on to one side and then the other to complete the search. Items were taken from his person and thrown to the side. During this process, a knee was again aggressively dropped again onto the small of his back. At some point a male officer with a gun said "Who has the knife?" At this point, the plaintiff believed Kyle Browne admitted that he had the knife. He apparently opened his jacket and took it out.
- [20] Mr. McLellan also testified to a disturbing circumstance which he suggests is a cause of his injury. He says that he was "planked". He says he was told by the police officer to get up. He was in a prone position and handcuffed. As he did not immediately comply, and perhaps could not comply considering his position, he says that a male police officer grabbed him by the handcuffs and/or his arms and lifted him off the ground so that only his toes were touching. At this point he heard a snap. He says he yelled "My back, my back". He was then dropped on to the ground essentially face first. After this happened, a female officer then attended and helped him up. He was taken, while still handcuffed, to a police car and at some point he was bent over or splayed over on the hood of the police car on the passenger side and left there. He was still handcuffed. This was uncomfortable and he asked for the handcuffs to be loosened. He received no response. At this point, Kyle Browne was already in another police car. Mr. McLellan testified that he remained handcuffed for a total of 15 to 20 minutes and he had photos showing the marks on his wrists as a result of the cuffing.
- [21] It is fair to say that in cross-examination, though vigorous and pointed, there were no inconsistencies in the evidence of Mr. McLellan of note. He did add, when asked, that he was told by the male officer that they arrest everyone and then sort it out later. He further clarified that on two or three occasions, while he was on the ground, an officer dropped a knee on to his back. He was challenged about no mention of the cracking sound or snapping

sound in his back as his examination for discovery and he admitted that it was not mentioned then.

Kyle Browne

- [22] Kyle Browne is currently 28 years old and was the student that Mr. McLellan was working with in February 2010. At the time, Mr. Browne indicated he was 17 years of age. He described Mr. McLellan as one of his workers. Mr. Browne noted that he was quite overweight at the time and Mr. McLellan got him to focus on being more active. He spent time with him, including going for drives and just chatting. He thought he was an "awesome" worker.
- [23] Mr. Browne was anxious, it appears, to admit that he was a very troubled youth back when he had his interaction with Mr. McLellan as a 17-year-old. He described himself as coming from an abusive family, that his family wanted to get rid of him at a young age, and that he became a client of AXIS, Mr. McLellan's employer, as a result of that. He recalls Mr. McLellan being positive in his interaction with him, often saying "you are better than you are being," and he often encouraged and challenged Mr. Browne to be better than he was.
- [24] As for the incident on February 11, 2010, Mr. Browne described how he had biked to school and had a knife in his jacket. He was wearing a long, leather coat and the knife, perhaps six inches in total length, including the handle, was placed inside the lining of his coat, near his shoulder.
- [25] He was in art class that afternoon, when he leaned forward and another student saw the handle of the knife and reported the incident to the teacher. Mr. Browne then noted that he had an interaction with the vice-principal and he refused to acknowledge or turn over the knife. Mr. McLellan then arrived at the TREC school on Holt Street in Kamloops and, after some discussion inside, they proceeded out of the school. Mr. Browne recalls a conversation again that "you are better than this" emanating from Mr. McLellan.
- [26] He said that he first heard and then saw the police vehicles with sirens and lights approaching TREC. At this point, he said he wanted his time-out and began to walk away from the situation, leaving Mr. McLellan there to deal with the police. He said that as he was walking away, he would continuously look back at the circumstances of police arrival. He saw the police arrive when he was about 20 to 25 feet away. He looked back and noted Mr. McLellan showing his AXIS badge, which he described accurately in his evidence. He noted the police say to Mr. McLellan "Shut up and get your hands behind your back." Though he did not see the handcuffing, he noted later that Mr. McLellan was handcuffed.
- [27] In his attempt to exit, though keeping eyes periodically on what was happening behind him, Mr. Browne testified to the police approaching Mr. McLellan in an aggressive manner, yelling "Where's the knife, where's the knife?" He noted the police to have a gun in hand and felt they were ready to engage. He noted at one point that Mr. McLellan was on the ground and the police did not seem to care about him showing his identification. He described

everyone around Mr. McLellan as aggressive and combative. They were saying things like "Where's the knife?" In response to, apparently attempts to identify himself, he noted the police to say "I don't care what you have to say."

- [28] In terms of the episode of the police moving Mr. McLellan while handcuffed, Mr. Browne described this circumstance as Mr. McLellan being grabbed by the "cuffs" and that they "planked him". He heard Mr. McLellan scream and, when he screamed, he was told to "shut up." He noted at one point earlier an officer with a knee on Mr. McLellan's back while Mr. McLellan was still in handcuffs.
- [29] He described himself as wearing baggy clothes with a long, leather coat on. He described himself as clean-shaven. He described Mr. McLellan, to the best of his recollection, having a black and grey polyester jacket and, though wearing shorts, he described him as "looking like an adult."
- [30] He described, after viewing the "planking" episode with Mr. McLellan by the police, that he turned around and began to walk back to the circumstance, waving the knife in his possession in what he described as a "high five" motion and then throwing the knife to the ground. He said "I'm the guy you're looking for" and put his hands behind his back. He said he stated that Mr. McLellan was innocent and that "You've got the wrong guy."
- [31] When asked by the court what he meant by the term "planked," he described that as someone being lifted off the ground from behind while handcuffed, by the handcuffs. He described Mr. McLellan saying "My back, my back, what are you doing, please" and then he described Mr. McLellan as being dropped to the ground by the police officer.
- [32] In cross-examination, the key aspects of Mr. Browne's testimony was made more clear. When asked about contact after the incident, he said that he had no real contact with Mr. McLellan since the incident, they have not been in touch and did not realize Mr. McLellan was injured until lawyers contacted him.
- [33] He confirmed that he was wearing a black leather coat and that the knife itself had a "few-inch" blade with a four inch handle. He described the lanyard and identification badge that Mr. McLellan was wearing, and that he had to have it to get Mr. Browne out of school. In cross-examination, he further described that, upon seeing the police vehicle, he decided to walk away and leave the issue to Mr. McLellan and that he headed towards a field beside the school. Knowing the police might be following him, he regularly and casually looked back.
- [34] During these look-backs, he recalls Mr. McLellan being handcuffed while standing up, or so he believes. He described that when Mr. McLellan squealed as a result of the "planking" episode, that was when he began to focus and started to head back. In regards to the badge, he confirmed that it was shown and that Mr. McLellan said words to the effect that he was from AXIS and that "you're looking for Mr. Browne" and the police officers' response, while they had their guns out was "Shut up, where's the knife, shut up." He recalls the police officer saying "Put your hands behind your back." He described his concern that the police

appeared to fixate on Mr. McLellan, who was not dressed like him and had identification. He described the circumstance as "they didn't care, they just hurt him."

- [35] He described Mr. McLellan's appearance as "well dressed, surfer-type hair, slicked back, well-groomed and presentable. He had facial hair, not a full beard, but facial hair that was still visible."
- [36] In regards to the "planking" incident, in cross-examination, he clarified that, while being picked up in the "planking" motion, he was projected approximately two to three feet to a grassy area, which he described as the "smoking tree" and dropped on to the ground. He described that the officer who did this he believed to be male with tattoos. He also described a circumstance where he observed police officers to have their knee on Mr. McLellan's back after the "planking".
- [37] In regards to this testimony, it is fair to conclude, as suggested by plaintiff's counsel, that much of Kyle Browne's testimony was a romanticised version of events designed to show him in a good light, despite Kyle Browne being the source of the difficulties on that day. Much of this relates to the suggestion in his evidence that there was considerable activity between when Mr. McLellan was arrested and when he was ultimately arrested. The dispatch summary in evidence suggests that these matters all happened relatively quickly, there being approximately four minutes between when the dispatch was made and Mr. Browne was apparently in custody.
- [38] That being said, he was cross-examined at length about the crucial issues of the police behaviour towards Mr. McLellan. He was not challenged when he mentioned in cross that he had had no contact with Mr. McLellan after the incident and that he did not realize Mr. McLellan had been injured until he was contacted by Mr. McLellan's lawyer. This adds credibility, in my view, to his version of events consistent with Mr. McLellan's about being planked and treated somewhat disrespectfully and haphazardly by a male police officer through that process.
- [39] Additionally, the fact of Mr. McLellan attempting to identify himself as a worker and showing his AXIS badge, which Mr. McLellan clearly had in his possession in order to get into TREC, is consistent with the evidence of Mr. McLellan.

Sean Lamoureux

- [40] On the date in question, Mr. Lamoureux was the principal of TREC. He was not at the TREC location when the telephone call was placed to the RCMP, but he arrived shortly after the RCMP arrived and had initially detained both Mr. McLellan and Kyle Browne.

- [41] When he first arrived and parked his car outside of the school yard on Holt Street, Mr. Lamoureux observed one person handcuffed and on the ground and one person, as he put it, "being taken down". He testified he observed this from about 40 to 50 feet. On balance, these seem to be casual observations because, though the events were interesting, he was determined to attend at the school and see what was happening with his staff and students as he had been informed while driving there that the school was on lockdown.
- [42] He observed that by the time he walked to the school door from where he parked his car, both individuals were on the ground handcuffed. When he got to the school and had spoken with his staff, he returned to view what was happening in the school yard. At this point, he noticed that one person was still handcuffed on the ground, being Kyle Browne, a student that he was familiar with, and the other individual was standing. It was his initial impression that the police, at this point, were removing his handcuffs, though he testified that in fact he did not see the removal of the handcuffs; that was his impression as to what might have been happening. He did not witness the person who was standing actually get up.
- [43] In cross-examination, he confirmed that he was not present to see Mr. McLellan handcuffed. He was 40 to 50 feet away from the events on the ground involving the plaintiff and Kyle Browne at all times and, when he arrived, there were five or six police officers there. He confirmed he did not see the handcuffs being removed, though he indicated that he saw the other person, Mr. McLellan, walking around afterwards.
- [44] In cross-examination, he agreed that when he saw the person walking around afterwards that this was six to ten minutes after he had seen the person in handcuffs. He confirmed that he was more focussed on the circumstances of the school staff and his students. He stated in cross-examination that when he saw Mr. McLellan standing, the officer was behind him and Mr. McLellan's hands were also behind him, suggesting that he was in fact still handcuffed.
- [45] It is fair to say in conclusion that Mr. Lamoureux was, as one would expect, primarily focussed on the teachers, staff and students within TREC when he arrived at the TREC location, after the RCMP officers had. On balance, he was not able to confirm that he saw Mr. McLellan unhandcuffed and, the fact that when he did see Mr. McLellan, his hands were still behind his back, suggesting, as noted, that he was in fact handcuffed.

Anthony Morasco

- [46] On February 11, 2010 and at the date of trial, Mr. Morasco was a teacher at TREC. He was present on the day in question.
- [47] He described his interaction that day as beginning after the police had been called and after Sean Lamoureux had arrived at the school. He recalls walking out into the parking lot "once it was clear" with Sean Lamoureux. He indicated that he walked towards the police officers and saw Mr. McLellan still in handcuffs. He says he saw Mr. McLellan being assisted up by an officer to his feet, though he did not note the gender of the police officer and that he was

assisted to his feet while still in handcuffs. He did not view this as forceful or anything out of the ordinary. He stated that he assumed that Mr. McLellan was put in a police car, but cannot confirm that as his attention was diverted by a police officer approaching him and asking questions.

[48] In cross-examination, Mr. Morasco indicated that his evidence as to what happened outside that day only began, and he only had observations of the events after the "all clear" was given. He clarified that when he observed Mr. McLellan in handcuffs, Mr. Browne was already in a police car as he did not see him present or on the ground.

[49] In regards to how long Mr. McLellan was in handcuffs, at trial he did not have a recollection, but his memory was refreshed with a more contemporaneous statement which he gave to an investigating police officer, which statement was in evidence before the court. He accepted the statements referred to in that statement were true. The statements in evidence in that regard shows the following:

Q. Okay. Did could you could you say how long he would've remained in handcuffs?

A. Well they helped him up. He was in handcuffs on the ground and they helped him up and and into the vehicle. Probably 10 minutes 10 to 15 minutes maybe.

[50] Additionally, he was asked in cross-examination if he recalled Mr. McLellan making any complaints of pain. He did not. However, again, when referred to his statement, which he accepted, he was reminded that Mr. McLellan was complaining of either leg or back pain at the time of the observations.

[51] Of note, the interview appears to have happened on December 2, 2010, approximately 11 months after the incident. His testimony was well over 11 years after the incident.

[52] This witness' evidence was particularly informative, though clearly after 11 years he had little, if any, detailed, personal recollection of what happened. It is of note from his statements made approximately 11 months after the incident, that he clearly noted that Mr. McLellan remained in handcuffs for a substantial period of time and that he believed Mr. McLellan was placed in the police vehicle. This is consistent with Mr. McLellan's recollection of being handcuffed well after Mr. Browne was detained in a police vehicle. It is inconsistent with the police officers' recollection of events.

[53] Of particular note, Mr. Morasco's involvement with the unfolding scene in his evidence only began, and in that sense he only focussed on what was happening outside the school, "once it was clear", which is suggestive of no involvement until the police had given an "all clear" message to allow those in the school to attend outside. This confirms that Mr. McLellan was detained in handcuffs long after Mr. Browne was in a police vehicle under control and under arrest.

- [54] As noted earlier, five RCMP constables attended at the TREC school yard location in Kamloops on February 11, 2010. Those five RCMP officers, all constables, testified in this trial. In analyzing their testimony, it is important to note what information was available to them via information provided from the RCMP Operations Communication Centre about the circumstances they were approaching when they attended at the TREC location. The dispatch information is found in Exhibit "1" at tab 12 of this proceeding.
- [55] A summary of what was communicated over the police dispatch airwaves includes the fact that there was a threat with a knife at 655 Holt Street, that that was the TREC school, and the suspect was a student named Kyle Browne, who was currently in the parking lot with a case worker. As for the severity of the circumstances, it was communicated that Kyle Browne had threatened he would cut a teacher's throat with a knife in his possession, though only the handle of the knife had been seen. It was communicated that the suspect was wearing a black leather jacket, blue jeans, and was a Caucasian male with short brown hair. It was communicated that the leather jacket was a long leather jacket and that he was standing by a blue Honda with a male worker. Of note, his name was communicated twice. The fact that he was outside with a male worker was also communicated twice. That in summary is the information available to the police officers at the time.

Constable Kent Novakowski

- [56] Constable Novakowski testified that on February 11, 2010 he was a relatively new constable with five months experience. He recalled receiving a call that a male with a knife had made a threat and that this was considered a high priority call involving the use of lights and sirens. He recalls being informed that both males were wearing black jackets, though that does not appear in the dispatch recording.
- [57] When Constable Novakowski arrived, he noted two men by a blue car. Constable Brocklebank was interacting with one and Constables Elgee and Peters with the other. He acted as back-up for Constable Brocklebank. He had limited interaction, virtually none, with the plaintiff.
- [58] In terms of the incident, he recalls that there was a lot of yelling, but that the gentlemen were complying and were prone on the ground. He recalls the person that he and Constable Brocklebank were attending to as being asked if he had a knife and that the person, later identified as Kyle Browne, confirmed he did. Constable Brocklebank found the knife, took it and handcuffed Mr. Browne. Neither he nor Constable Brocklebank drew their guns.
- [59] In cross-examination, Constable Novakowski was taken to his statement to Dale Einarson of the Professional Standards Unit, and confirmed that he told Mr. Einarson that when he arrived there were two males and one of the males was pushing a bike, and the younger male was wearing a trench coat. Of note, the dispatch indicated that the suspect was wearing a long leather jacket. Constable Novakowski confirmed that Mr. Browne was not hurt in the incident and that they were able to do their job detaining Mr. Browne without

incident, and without pulling out a gun.

Constable Regan Brocklebank

- [60] Constable Brocklebank testified that on February 11, 2010 he was a five-year constable. He recalled hearing the call to attend at TREC. He drove to that location and was the fourth car to arrive, with Constables Peters, Elgee and Novakowski there in advance of him.
- [61] He testified that the information he had was that a student named Kyle with a long leather jacket was the suspect, and that he was with a male worker by a blue Honda in the parking lot. He approached the male in the long leather coat, arrested him and, later in the day, released him from custody.
- [62] In cross-examination, he confirmed that his total involvement was to arrest Mr. Browne. He confirmed that he asked for a knife, was told by Mr. Browne that he had it, removed the knife from Mr. Browne, and Mr. Browne was cooperative. He confirmed that he knew at the time that it was the student that had the knife, and that Kyle Browne looked younger. He confirmed in cross-examination he had no involvement at all with the plaintiff.

Constable Stephen Zaharia

- [63] Constable Zaharia was the fifth officer in attendance at TREC on February 11, 2010 and, at the time, he was a seven-year constable. He testified that he knew from the dispatch that there was a knife incident at a school and that a teacher had been threatened. When he arrived, there were people on the ground in handcuffs and he went to the school to talk to witnesses. He confirmed that later that day he spoke with Mr. McLellan at about 3:07 p.m., and that he asked the plaintiff what had happened, not specifically about Mr. McLellan's arrest, but about the youth in his care. During this conversation, which was at the group home, where he attended to ensure no further knives were available for Kyle Browne, Mr. McLellan reported no verbal indication of being in pain.
- [64] In cross-examination, he confirmed that the purpose of his attendance at the residence where Mr. Browne lived was to search the residence, and the focus was the search.

Constable Carla Peters

- [65] On February 11, 2010, Constable Peters was a three and a half to four-year constable. In January 2017, she received a medical discharge and is now retired from the RCMP. That medical discharge is in no way related to this case. I will still however refer to her in these reasons as Constable Peters.
- [66] Constable Peters testified to the circumstances of that day, starting with a tone alert, which she characterized as a high risk call. She recalls being informed that there was a male at the school who possessed a knife and who had threatened to cut a teacher's throat. She recalls that the male was described as wearing a black leather jacket and blue jeans. She recalls suggestions from dispatch that the male had said that the police had better bring a Taser.

She testified about her state of mind and that she was instantly fearful for the teachers and school members, and that it brought to mind "Columbine" (thinking this was perhaps a reference to the plant of that name, I asked the witness to clarify and she made mention of a high school in Colorado named Columbine, where some 11 years previously there had been a mass shooting involving 15 deaths).

- [67] She describes with that state of mind arriving at TREC within minutes and noting two males by a blue car in the parking lot. She described both as in dark jackets. She could not distinguish between the student and the case worker. She exited the police vehicle and immediately drew her gun. She directed the two to come out from behind the car with their hands up. She then began to interact with one of the two persons there, being Mr. McLellan. She instructed him to get on to his knees with his hands up and he did. She instructed him to stretch out on the ground on his stomach and he did. She testified she did not see anything in his hands. She says throughout this time he did not say anything or, better put, she did not hear him say anything. She claims she did not see any identification.
- [68] Around the same time, Constable Elgee arrived and had also drawn his gun. She approached and handcuffed Mr. McLellan. She apparently did not ask who he was. Other police officers arrived and began to deal with the other person there. Once handcuffed, she checked Mr. McLellan's waistband, searched him from head to toe and confirmed that he did not have a knife. She then says she helped him up and, within a few minutes, the handcuffs were removed. At this point, he was asked for identification. No other conversation occurred. She denied that people were laughing at the circumstances. She denied causing any physical injury. She denied that Mr. McLellan made any complaints of pain.
- [69] In cross-examination, Constable Peters was pressed extensively about her use of force training and about the Use of Force IM/IM. She agreed that in analyzing those guidelines and the process called for in the IM/IM, that Mr. McLellan was cooperative.
- [70] She disagreed with the suggestion that she was acting in a more severe manner and more forcefully than the circumstances required. She confirmed that she knew the suspect's name, that there were two people there, and that the suspect had a long coat. She was not able to confirm that Mr. McLellan had a long coat, only that he had a jacket. She confirmed she did not ask his name. She asked him if he had a weapon, which he denied. She was challenged that she would have known that an innocent person was present and that there was a worker on the scene; an innocent person. In that context, she was again asked if she asked for identification and indicated that she did not do so until the threat had been located and she was comfortable to start a conversation. She confirmed kneeling on Mr. McLellan's shoulder at some point during the handcuffing. She confirmed that she was taught to do that in a high-risk situation. It is the practice to put a knee on a suspect so they cannot jump. She disagreed that this was a low risk situation, even when it was noted that there was only two people there, that there was no one else within the vicinity of possible interaction with a knife, and that there were multiple police officers present. She felt that the risk was high because it was a school. Yet, of note, this was not in a school, but in fact in a yard outside of

the school and there was no one else in the vicinity, and there were at least four officers present at the time. The evidence suggests the school was between 50 and 100 feet from where the two individuals, Mr. McLellan and Mr. Browne, were located.

[71] Constable Peters was firm in her evidence that she felt the force that was used that day against Mr. McLellan was justified and disputed the assertion that if someone is not resisting that there is no need to use force. She confirmed that the dispatch details were that Kyle Browne was a student wearing a long leather jacket and was accompanied by a male worker. She confirmed that Mr. McLellan, who she detained or arrested, was not wearing a long leather jacket. She denied the suggestion that Mr. McLellan had a badge in his hand and that he held it up or that he verbally attempted to identify himself. She confirmed that both she and Constable Elgee were giving verbal directions and, though there was no sign of aggression or struggle, and no sign of anything other than compliance, there was still a risk to officer safety. She was concerned to keep herself safe. She confirmed that she searched Mr. McLellan and Constable Elgee did not. She does not recall if she told Mr. McLellan why he was being handcuffed.

[72] The veracity of this witness' memory is very much in question as a result of the cross-examination of Constable Peters. Specifically, this arose when her examination for discovery evidence from July 19, 2012 was put to her. Questions 186 to 195 of the discovery were put to her. Those questions read as follows:

Q Is it possible that it was another officer who search Mr. McLellan?

A I don't believe so. I've read reports. I understand that it was myself that searched him. I don't know. I can't elaborate on that. I can't comment on that.

Q You don't remember?

A Pardon me.

Q You don't remember?

A I don't remember specifically searching him. I would assume I would have checked him for that knife.

Q Is it possible that it was another officer who put the handcuffs on Mr. McLellan?

A I want to say no because I have read reports from other members on scene that say they saw me handcuffing him and I believe I did handcuff him.

Q But you don't remember?

A I understand I did.

Q Do you or do you not have a specific memory of doing that?

A Of handcuffing him?

Q Yes.

A Not specifically, no.

Q Do you or do you not have a specific memory of pulling Mr. McLellan to his feet?

A No.

Q Is it possible that it was another member?

A I don't - I can't. If - I feel like if I say yes then it's going against what I've read in statements. Like I don't believe it was another member.

Q So you're basing your memory on what you've read in the reports?

A Well, to remember the incident, yes.

[73] That examination for discovery confirms that her evidence to her handcuffing Mr. McLellan was not her personal memory, but was repeated, it seems, in an effort to be consistent with what other officers' reports had said. I specifically note questions 194, which reads:

Q. Is it possible that it was another member?

A. I don't --- I can't. If - I feel like if I say yes then it's going against what I've read in statements. Like I don't believe it was another member.

Q So you are basing your memory on what you read in the reports?

A. Well to remember the incident, yes.

[74] Additionally, at trial, Constable Peters was equivocal about whether or not Mr. McLellan complained about a sore back at the time of his arrest or detention. She was reminded of her discovery evidence from 2012 where she confirmed that she recalled Mr. McLellan referring to a sore back.

[75] Constable Peters was asked from a number of different approaches about the necessity of the physical interference with Mr. McLellan on February 11, 2010, and whether the actions she and Constable Elgee took were necessary. She disagreed with the proposition that she did not have enough grounds to arrest Mr. McLellan. On numerous occasions, she repeated the mantra of officer safety as justifying her actions completely. She repeated that she perceived there to be risk, despite the complete compliance of the person she was detaining or arresting, the fact that there was initially considerable distance, the fact that there were four other police officers, and the fact that she knew one person had a knife and the other did not. She did not see any problem in the apparent failure to even identify the person they were dealing with. She disagreed that she did not have reasonable and probable grounds to do what she did. She disagreed that there was any significance to the fact that she could have asked for his name and identification. She disagreed that anything in her actions exceeded a reasonable officer in her situation.

- [76] Overall, I have considerable problems with Constable Peters' evidence. Even at the time of her discovery in 2012, she appeared to have very little recollection of what happened, and she appeared at the discovery to be repeating evidence that she had read prior to the discovery from other officers and was attempting to be consistent with that.
- [77] I have no reason to believe, nor is it rational generally, that one's memory from 2012 would have improved by the time of trial in 2021, some nine years later. That fact leads the court with the overwhelming conclusion that Constable Peters' evidence cannot be viewed as reliable or that her testimony is in fact her own memory as opposed to refreshed memory from others, as it clearly was at the discovery nine years previously.
- [78] Additionally, Constable Peters was particularly intransigent about her actions that day and about the necessity of force that was used. Despite given numerous opportunities to back down in cross-examination to seemingly reasonable suggestions that perhaps the force exerted was not necessary, her reliance on the mantra of officer safety was, in my view, an exaggeration and justification, rather than a reflection of what she felt or perceived that day, noting again that her evidence was more likely than not from notes and review rather than from memory. Also, of note, the real perpetrator, Kyle Browne, the one who was a potential threat, the one who had the knife, was detained without the use of weapons and the physical interaction imposed on the plaintiff.
- [79] Finally, this arguable over-reaction of Constable Peters goes back to her suggestion in evidence that she was thinking of the Columbine massacre as she approached this scene. That comparison is completely inappropriate. She knew when approaching the scene that there were two people in a parking lot. One of them was a student with a knife and another was a worker. This was not a circumstance of a deranged student killing 14 people within a school. The comparison is not appropriate.

Constable Evan Elgee

- [80] On February 11, 2010, Constable Evan Elgee was a six-month constable with the Kamloops RCMP. He testified in this proceeding and said that his involvement with this case began at about 14:00 hours that day when an audible tone was issued and which he described as a most serious or concerning call, requiring immediate attention by seemingly any officer that was available. He described how he, at the time, was at the then North Kamloops office of the RCMP and that the distance to TREC, a place he was familiar with, was two to three kilometers away and he immediately began to attend there. During this time, he said that he heard that the incident involved a student with a knife and that there had been a threat to cut the teacher's throat. He heard the words "black jacket" and "by the blue vehicle".
- [81] In evidence is the dispatch call and what was actually said was "standing by a blue Honda with a male worker". The dispatch notes on two occasions make mention of Kyle Browne and another person. Despite this, Constable Elgee testified that when he arrived and saw two males, that this caught him off guard. He said he arrived about the same time as Constable

Peters. He exited his vehicle with his gun drawn. For reasons that are uncertain, through the entirety of his evidence, he suggests that he and Constable Peters focused on one of the two individuals and, despite there being no other police officers there, according to his evidence, and thus no one focused on the other person present.

- [82] Constable Elgee testified that verbal instructions were given as noted by others, to Mr. McLellan to raise his hands, get down on his knees, get onto the ground and ultimately in a prone position. He was asked in direct "what did you hear him say?" and Constable Elgee's testimony was that he was "non-talkative". He further testified that while Constable Peters began the process of handcuffing the prone "suspect" on the ground, he lowered his gun and did what is called "lethal overwatch", which I understand to be having his gun drawn but pointed more at the ground than at any individuals. He confirmed that Constable Peters' left knee was on the upper shoulder of Mr. McLellan. He further testified that eventually Constable Peters, with coaching, helped Mr. McLellan get up. It was when Mr. McLellan was being handcuffed that he noticed other police officers arrive.
- [83] He confirmed that Mr. McLellan complied when asked to step away from the other individual, when asked to put his hands above his head, get on the ground and eventually in a prone position. Constable Elgee said that Mr. McLellan had nothing in his hands.
- [84] In regards to interaction with Mr. McLellan, he says he had no physical interaction with him. He denied that he attempted to get the plaintiff off the ground by pulling him up by his arms while handcuffed, resulting in what has been referred to in the evidence as "planking". As for getting him off the ground while handcuffed, Constable Elgee testified that after Constable Peters got him off the ground, she would have brought him to the vehicle. He says at this point, it is uncertain if Mr. McLellan was handcuffed or not. He described the purpose of the attendance at the vehicle was to ascertain his identification. Of note at this time, the suspect, identified as Kyle Browne, was already in the other vehicle. He then said that he told Mr. McLellan why they did what they did and, to his understanding, Mr. McLellan understood.
- [85] Constable Elgee did not come across well in cross-examination. He was cross-examined at length about the need for risk assessment, about the overwhelming force of at least four police officers, and about how he and Constable Peters had guns drawn. He was further questioned about the distance they initially had from Mr. McLellan, and specifically how him and Constable Peters focused on one individual who had nothing in his hands. He was adamant that because of officer safety and potential risk, that his actions were completely justified and normal. He did not resile from his view of significant risk when the proposition of there being two police officers, at some distance, having weapons drawn, with only one known culprit who at most was known to have a knife. He still testified that he felt a risk to officer safety, which justified all the actions of he and Constable Peters.

- [86] Additionally, he was adamant that he did not hear, despite it being mentioned twice over the course of very brief transmissions, that there was another person present. He admitted to hearing of a leather jacket, but not a long leather jacket, though the two were said in the same phrase.
- [87] He was also challenged about his ability to come to some of the conclusions he did. It is seemingly inconsistent that from 30 to 40 feet away, he was able to say, as he did on more than one occasion, that he noted tension between the two individuals, but apparently was unable from the same distance to differentiate between a 30-year-old and a 17-year-old, when the 30-year-old had scruffy facial hair, consistent with a "five-o'clock shadow". One cannot help but conclude this alleged observation of tension, from a fleeting glance, 30 to 40 feet away, was imagined or a fabrication of a potential danger that would justify the acts that followed. Of note, there was no evidence that this "tension" that allegedly existed was confirmed through any direct action or verbal interaction between these two people observed from a distance. Tension, such as a physical confrontation, a threatening movement of arms or fists, yelling or verbal hostility, none of these indicators were testified to as a basis to observe alleged "tension".
- [88] I have, upon reflection, a number of problems with Constable Elgee's testimony, which caused me to doubt the veracity of his evidence. As I have noted, there is problem with the distance and the fact that he could recognize tension from 30 to 40 feet away between two individuals, but could not differentiate their age.
- [89] In cross-examination, he said that he and Constable Peters arrived simultaneously and that they arrived before the others. Upon reflection, this makes no sense. If there were two officers with guns drawn and no other officers, why would it be that these two officers would concentrate on one person, Mr. McLellan, and not each concentrate on one? Why would he have "lethal overwatch" over Constable Peters as she began handcuffing one suspect while the other remained in the general vicinity unwatched? This struck as a statement made not because it was true but because it fit better with the overall narrative, and would provide an explanation for why he and Constable Peters drew guns to detain an innocent party while other officers were, implicit in his evidence, able to detain Mr. Browne without weapons. Also, the tenor of Constable Novakowski and Constable Brocklebank's evidence as to when everyone arrived was to the contrary.
- [90] Additionally, and on that point, from the time of the dispatch on February 11, 2010, recorded in evidence as 14:03:07 hours to the time shortly after which car Alpha 15 indicated to dispatch that one person was in custody, was approximately four minutes. There was a dispatch record of a conversation beginning at 14:06:45 hours, which, half-way through, Alpha 15 indicates one in custody. It is simply not possible that in this approximate four minutes, that he would drive to the location, two to three kilometers away, would get out of his vehicle, he and Constable Peters would begin to deal with one suspect, other police officers would arrive later, even if only seconds or minutes later, and deal with the second suspect, all of which was within four minutes from dispatch.

- [91] Additionally, as noted, it is odd and concerning about Constable Elgee's evidence that he apparently did not hear the reference to Kyle Browne in the dispatch. He did not hear, although it was mentioned twice, that there was a second person there, and did not hear the term "long leather jacket" but only the term "leather jacket". Again, his evidence of his memory seemed tailored to support an exculpatory narrative he wanted the court to consider.
- [92] Constable Elgee was challenged in cross-examination about his knowledge and interpretation of the IM/IM, the RCMP use of force guide on which he was then recently trained. His response to the questions showed a hostile disposition. He came across as a witness who did not objectively agree with anything that detracted from a police officer's right to act as they chose, relying on the mantra of officer safety to do whatever they chose to do at any given time, or so his evidence appears. For example, he would not agree that when there was a cooperative and compliant potential suspect, that that suspect posed minimal risk. That is what the IM/IM suggests. That is what his then recent training on the IM/IM clearly suggests. His justification for his actions, the mantra of officer safety, the significant apparent threat to them, makes absolutely no sense when compared with the balance of his evidence; that is that he and Constable Peters were alone and no one else was present when they began their interaction with Mr. McLellan. He was cooperative, with hands in the air, with nothing in his hands. His version of events additionally begs the question of how it is safe for police officers, when encountering two people, one of whom is a suspect, to simply chose to deal with one and ignore the other.
- [93] Constable Elgee gave somewhat confusing and inconsistent evidence about these few minutes of his "lethal overwatch" of Constable Peters' interaction with Mr. McLellan.
- [94] He testified that Constable Peters did the handcuffing of Mr. McLellan, but contemporaneous with that, her evidence was that she did this and then conducted a physical search. He says he did not observe all of this. During cross-examination, he said that he was spending his time, when conducting "lethal overwatch" over Constable Peters, not only observing Constable Peters, but observing the entirety of the situation. He said words to the effect that "[his] eyes were around" and to use his language "I was on a swivel." Yet, earlier on in his examination he stated that he could not observe what the others were doing because they were obstructed by vehicles.
- [95] On several occasions, he referred to his responsibility in the circumstances of "lethal overwatch" of Constable Peters, yet he could not answer directly about what Constable Peters did because he was not providing "overwatch", he was looking around at other matters. One cannot have it both ways. It is odd, and I find unbelievable, that he would have "lethal overwatch", with gun drawn, over Constable Peters, for her protection, while she detained or arrested and searched the plaintiff, yet you were looking at others, who you really could not see because of other vehicles, and in doing so you then could not comment on the force used or not used by Constable Peters. I find his lack of candour on this point concerning. It is really not believable. One is drawn to a conclusion that he did not want to

testify about any allegations of force used by Constable Peters, particularly with her knee, during the handcuffing and searching process.

Finding of Facts Drawn from the Evidence Regarding February 11, 2010

- [96] As noted, there were nine people who testified about the circumstances in the parking lot of TREC on February 11, 2010, as a result of police attendance to deal with a complaint regarding a student, Kyle Browne.
- [97] As noted earlier, Mr. McLellan states that he was physically injured during an encounter with Constable Peters and Constable Elgee. The allegations are that the injuries occurred when Constable Peters dropped on to his back on her knee with significant force in the process of handcuffing him and in the process of conducting a search of his person. The allegations are that his lower back was significantly injured when a male constable, the process of elimination confirming this constable as Constable Elgee as the other male officer present had no dealings, directly or indirectly, with Mr. McLellan, attempted to get him off the ground by lifting up his handcuffed arms to pull him off the ground, resulting in what was described as him being "planked".
- [98] Additionally, he alleges psychological injuries as a result of the way he was treated by the RCMP and, specifically, what he views as his unlawful arrest and what he views as his unnecessary continued detention once the identity of the student complained of, Kyle Browne, was made, a mere few minutes after the police arrived.
- [99] In regards to those who testified, Sean Lamoureux and Anthony Morasco had little to no opportunity to review the circumstances unfolding near the parking lot of TREC prior to Mr. Browne being in custody. Specifically, there was not an opportunity for Mr. Morasco to observe anything regarding Mr. McLellan's initial detention, handcuffing and treatment. Mr. Lamoureux's observations of that circumstance were only fleeting as he arrived after the police and immediately went to the school to check on his staff and students. Constables Novakowski and Brocklebank were focussed on the arrest, search and detention of Kyle Browne. They did not have any opportunity to observe what happened directly with Mr. McLellan and Constables Peters and Elgee.
- [100] Constable Zaharia appears to have arrived late on to the scene. He testified that when he arrived people were on the ground in handcuffs and he went into the school to speak to witnesses.
- [101] The only four people who had the opportunity to testify as to what transpired on that date to Mr. McLellan are Mr. McLellan, Kyle Browne, Constable Peters and Constable Elgee. Kyle Browne's evidence is consistent with Mr. McLellan's as to the planking incident, but some caution must be exercised in regards to Mr. Browne's testimony in light of his youth and the fact that a number of the factual circumstances that he described surrounding the police arrival, his location and actions in that regard are significantly different from others in attendance. I do not, however, completely dismiss his evidence. His evidence is somewhat

supported by the fact that he was not in contact with Mr. McLellan for a number of years after the incident on February 11, 2010, and the evidence suggests he has only had contact in regards to Mr. McLellan through inquiries made from his lawyer.

- [102] As noted in my summaries of the evidence, I have considerable difficulty with the evidence of Constable Peters. Her evidence as to the comparison of a report of a student outside a school who had made a threat against a teacher inside the school with a knife to the Columbine, Colorado mass shooting involving the death of 14 students, suggests a lack of perspective. That, however, is not a crucial concern. What is a concern appears to be her lack of memory about the circumstances generally. It is of note that when she was examined for discovery in 2012, she stated under oath that she had limited memory of the circumstances, that she had read the statements of other police officers about the circumstances, and was attempting, it appears, to answer the questions based on the other officers' written reports as opposed to her own memory. She based her memory of the incident, then, on reports of others. By the time of trial, a further nine years had elapsed. This casts doubt on the ability of this witness to have a recall that was not significantly influenced by the reports of others. Frankly, it is hard to know how it is possible that she would have an independent recollection at trial of circumstances in 2010, when in 2012 she did not appear to have an independent recollection.
- [103] In regards to Constable Elgee, I found his evidence to be troubling and inconsistent. He was a very young and junior constable at the time. The eagerness to draw weapons, displayed by both he and Constable Peters, is concerning. It is of note that more experienced officers were able to detain the actual suspect by simply inquiring as to whether or not he had a knife and disarming him. It does not appear that Constables Elgee and Peters relied on their training to even take a few moments to assess a situation before they drew their guns, began yelling and, I find, ignored the representations and explanations being offered by Mr. McLellan, including his statements, which I accept he made, that he was merely a worker for the student, and by his showing his badge to confirm this.
- [104] There are numerous inconsistencies with Constable Elgee's evidence which cause me to conclude that he is an inaccurate historian of what happened and that his evidence was tailored for the purpose of litigation as opposed to the purpose of abiding by his oath to tell the truth.
- [105] On the other hand, Mr. McLellan's evidence was straightforward and believable, and he was not seriously challenged as to the circumstances of that day in cross-examination. He described the circumstances as being immediately approached by RCMP officers with their guns drawn and being yelled at continuously to follow instructions, which he did. He testified that while following instructions completely he attempted to identify himself and produced his AXIS worker badge, which he had in his hand while his hands were up. Despite all this, police officers treated him in a fashion as if he were the actual suspect and, both police officers, Constables Elgee and Peters, knew or ought to have known that the suspect was a student by the name of Kyle Browne. Neither made an inquiry of him as to

whether or not he was that person.

- [106] While on the ground, Mr. McLellan testified that he was treated roughly by Constable Peters in that she landed on his back on at least two occasions with a knee while handcuffing him and searching him. He describes the circumstances of being "planked" by a male constable, I find to be Constable Elgee, as he is the only male officer to have any significant interaction at the scene with the plaintiff. I find that this happened.
- [107] I further make this finding because it appears from the entire confluence of the circumstances that Constable Peters and Constable Elgee were overly excited and overly aggressive during this circumstance. For the most part, they ignored their training as to risk assessment and acted in a cavalier and egregious way towards someone who was simply there at the scene. Such cavalier and overly aggressive behaviour is noted by the immediate drawing of the weapons, the yelling, the failure to assess the situation prior to acting and the failure to listen to someone saying who he was. They made a seemingly calm yet concerning circumstance on their arrival an increasingly difficult situation. That, coupled with Constable Elgee's exaggeration of the alleged tension between the parties, all suggest officers acting aggressively and inconsistent with their training. It is mere speculation, of course, but it is noted that a television camera was allegedly following this circumstance, according to Mr. McLellan's evidence, on which he was not seriously challenged. The overly aggressive, non-thinking and excessive use of force demonstrated by these two officers in their dealing with an innocent party, would be consistent with a male police officer being overly aggressive in attempting to get Mr. McLellan to his feet, resulting in him being pulled up while handcuffed and being "planked".
- [108] I prefer the evidence of Mr. McLellan as to what happened that day and I specifically reject the denial of Constables Elgee and Peters that they did not act in a physically aggressive way towards Mr. McLellan, and that they did not cause him injury.
- [109] A further reason for rejecting the evidence of the police officers as to their actions that day is the evidence of an independent witness, Anthony Morasco. Mr. Morasco's evidence was that he only went to the scene of the police arrest after he was given the "all clear". This was after Kyle Browne, someone known to him, was in a police car and detained. Despite the detention of Kyle Browne, Mr. Morasco stated shortly after the incident, in a sworn statement to a police investigator, that Mr. McLellan remained detained in handcuffs for a period of around 10 to 15 minutes. This is disputed by the two police officers, but I find that it in fact happened. Mr. McLellan further states that during the time that he was handcuffed, he was pushed over the front of a vehicle while being detained in handcuffs. I find, more likely than not, this also happened. The independent witness, Mr. Morasco, tells a completely different story from Constable Peters as to the length of time Mr. McLellan was handcuffed, and Mr. Morasco's evidence is consistent with that of Mr. McLellan. I accept his evidence on that point, as I accept the evidence of Mr. McLellan. I specifically reject the evidence of Constables Peters and Elgee.

- [110] In conclusion, what I find happened that day is that Constables Peters and Elgee, in an overly aggressive manner, in a manner inconsistent with the Police Use of Force training in the IM/IM document, unlawfully arrested and detained Mr. McLellan. During the course of that detention, and specifically while he was on the ground prior to being handcuffed, Constable Peters landed overly aggressively with her knee on Mr. McLellan's back in the process of handcuffing him. Further, in the process of searching him, she also landed her knee overly aggressively on his back. I find these actions consistent with a shoulder injury that Mr. McLellan complained of shortly after the incident. I further find, on a balance of probabilities, that Constable Elgee, in an overly aggressive attempt to get Mr. McLellan to his feet, grabbed him, while handcuffed, by the handcuffs and attempted to pull him off the ground and, in doing so, lifted him slightly and dropped him back to the ground. According to Mr. McLellan, this resulted in injury to his lower back. I find that action would be consistent with the complained of back injury.
- [111] I further note in accepting Mr. McLellan's evidence as to his injury that this injury was reported immediately, both to medical practitioners and to his employer. I note as well that it has been reported and accepted as an injury by WorkSafeBC, though that in and of itself is not proof of anything other than their acceptance of his complaint. Throughout this time, Mr. McLellan has been consistent to his employer, to WorkSafeBC, and ultimately to the court through the litigation that he was injured by the police officers acting in a manner described above. I find that, on a balance of probabilities, his evidence is to be believed.

Negligence, Detention, Arrest and the Lawfulness Thereof

- [112] Having made the determinations of fact that I have, that while in handcuffs, it is more likely than not that Constable Elgee attempted to lift Mr. McLellan to his feet in an improper manner, by grabbing the handcuffs and lifting him up, subsequently dropping him, in an effective motion of what has been referred to as "planking," it is really unnecessary to deal at length with the issue of detention and arrest.
- [113] In summary, even if Mr. McLellan was lawfully detained, that physical act of damage, intentional or otherwise, was negligent in my view.
- [114] In order to establish negligence, the plaintiff must show he is owed a duty of care by the two constables, that there is a standard of care expected of police officers in dealing with people they arrest or detain, that there was a breach of this standard, and that the breach caused injury and damage.
- [115] As for the first aspect of the test, the two use of force experts, Dr. Orville Nickel and Mr. Kerry Solinsky agreed that police officers have a duty to the public to take reasonable efforts to protect those they come in contact with, be they suspects or just members of the public. A duty of care exists.

- [116] As for the standard of care, Kerry Solinsky confirmed in his evidence that there is a correct way in which to assist a person to their feet while handcuffed. The proper procedure as explained to the court was, with a prone handcuffed individual, to help him by guiding him at his arms first to his knees, then to a standing position. This was the method Constable Peters eventually followed. She assisted the plaintiff first to his knees, then off the ground. Planking him, or attempting to get them off the ground by pulling on their handcuffed arms, is not a proper way. Constable Peters' method is the standard of care, Constable Elgee's actions as I find them, the planking, is a breach of the standard of care.
- [117] The police use of force expert, Mr. Solinsky, confirmed that the proper way to handcuff a prone individual is, if needed, to lightly put pressure with one's knee on the back while handcuffing. This has the effect of restraining the prone individual. I find it is more likely than not that Constable Peters' dropped on to Mr. McLellan's back with such force as to cause injury, force that in the circumstances was not required or justified. That is a breach of the standard of care.
- [118] Finally, as I will deal with later under causation, there is no doubt that Mr. McLellan was injured by the actions of Constable Elgee. I further find that there was also injury caused to the shoulders of Mr. McLellan by the actions of Constable Peters. The fact that improper methods were used, intentionally or otherwise, and injury was caused as a result to the plaintiff, is a sufficient nexus of causation for the reasonable damages resulting from that negligence to flow to the defendants.
- [119] That being said, I will make some comments about what happened that day in light of the law related to detention and arrest. It is the plaintiff's position that Mr. McLellan was arrested, it is the defendants' position that he was detained. It seems clear that there was no basis in law to arrest Mr. McLellan. The question is whether or not the police officers, in all the circumstances, had the right to detain him.
- [120] *R. v. Nguyen*, 2013 BCSC 950 tells us that whether or not an act is an arrest or a detention is for the court to decide. This decision must be made in the totality of circumstances and not based only on the label applied to their actions by the officers.
- [121] *R. v. Chaif-Gust*, 2011 BCCA 528 tells us that the use of handcuffs does not necessarily make a lawful detention an arrest.
- [122] *R. v. Mann*, 2004 SCC 52 tells us that in following their duty to preserve the peace, prevent crime and protect life and property, police have the power of detention for safety and investigation, and the power of detention for search. Mann also tells us that a police officer only has to have reasonable suspicion that their safety or the safety of the public is at stake, or that the detention, possibly connected to a crime, for them to show that a detention is necessary.

- [123] R. v. Chehil, 2013 SCC 49 tells us that a reasonable suspicion in light of a concern of their safety, or the safety of the public, is something more than a mere suspicion, but less than reasonable and probable grounds. It engages reasonable possibility, not probability.
- [124] In light of those factors, I have concluded that Constables Elgee and Peters did not have the right to detain Mr. McLellan as they did. The simple facts are these. The police officers, at least two, perhaps four, were approaching two individuals outside a school, on the evidence, a school at least 50 to 100 feet away. They, in fact, were themselves 40 to 50 feet away from the two individuals. The two noted officers who approached the plaintiff had their guns drawn.
- [125] At this point, there is no apparent risk to anyone, nor is there any risk to the police officers in terms of officer safety. They clearly had strength in numbers and, with two guns drawn, strength in fire power. There was distance between the officers and both men, only one of whom was a suspect. There was a considerably larger distance from the two men and the school, and anyone who might be in there. Constables Peters and Elgee directed the plaintiff to step away from the other man. He complied. They directed him, again while two service revolvers were aimed at him, to raise his hand over his head. He complied.
- [126] Reasonable police officers in an emergent situation would have listened to the radio while driving to this emergent event. They would have known, as it was repeated twice, that there were two individuals outside of the school setting, one being a case worker and one being a student who had threatened a teacher with a knife. They would have known from the police broadcast that the student's name was Kyle Browne. They would have known that the suspect was wearing a long leather coat. The police officers had every right to detain and potentially arrest Kyle Browne, based on the information they had that he had threatened a teacher with a knife.
- [127] With this overwhelming show of force, and the plaintiff away from the other person, with his hands in the air, having complied fully to this point with direction, meant that a simple inquiry about who he was would have been a reasonable act of these police officers - a simple inquiry such as "Are you Kyle Browne?", or "Who is Kyle Browne?"
- [128] I note in particular *Mason v. Turner*, 2014 BCSC 211, on the issue of when the police can detain or arrest a large group of persons. A fair reading of *Mason* is that a detention or arrest of a large group can be reasonable when there are reasonable grounds for arresting one individual within the group, but there is no certainty as to which individual the grounds for arrest attach to.
- [129] This was not a large group. It was two people, one a suspect and one an innocent bystander. These police officers knew they had grounds to arrest Mr. Browne. They knew, or should have known, that there was another individual there who was a case worker. At minimum, if I accept the evidence of Constable Elgee, which as earlier noted, I have considerable problem with, that he was surprised to find two individuals, a simple inquiry as to who was Kyle Browne would have determined and answered that surprise. When facing two people,

when you are only looking for one, you would know one is a suspect and the other is not.

- [130] In my view, these police officers did not have a reasonable suspicion that their safety, or the safety of the public, was at stake when they detained the plaintiff because they easily could have determined that he was not Kyle Browne by simply listening or asking. I say listening because I accept the evidence of Mr. McLellan that he in fact identified himself and held up his identification pass when confronted at gunpoint by Constables Elgee and Peters.
- [131] In terms of the issue of detention and/or arrest, based on my findings of fact, there is a further problem with the actions of the police officers. Although Constable Peters testified that once Mr. Browne was arrested, she assisted the plaintiff to his feet and released him from the handcuffs, I find in fact that this did not happen. First off, Constable Elgee confirmed in his evidence that Constable Peters, having gotten Mr. McLellan to his feet, then escorted him in handcuffs to the police car. Mr. Morasco testified that he only interacted with the entire arrest circumstances of that day after Mr. Browne had been detained and an "all clear" had been given. He noted in his evidence, and accepted his earlier statement to this effect, that Mr. McLellan was detained in handcuffs for 10 to 15 minutes afterwards. Though I do not necessarily accept his estimate of time as 10 to 15 minutes, any detention of Mr. McLellan after the sole known perpetrator, Mr. Browne, is detained, is completely unnecessary detention. There is no issue of officer safety. There is no issue of further threat to the public. At that point, the detention was completely unnecessary, and yet it continued.
- [132] Despite Constables Peters and Elgee asserting their subjective belief that officer safety required them to act as they did, there is no objective basis for that. There was no immediate threat to them, because of distance and overwhelming fire power. They had a cooperative person before them. Simply asking who he was or if he was Kyle Browne, and simple confirmation through identification, should have been the end of the matter. It is simply not the law that police officers can chose to detain or arrest everyone at every scene, and "sort it out later" as is suggested in the evidence Constable Elgee verbalized to the plaintiff.
- [133] As earlier referred to, the RCMP Use of Force IM/IM is a chart which depicts a number of principles designed to be guidance to RCMP officers in the use of force. The outside ring of this IM/IM depicts options for police response. Starting at the top, it indicates "Officer Presence". Around the ring, it includes the options of "Communication", "Soft Force", "Physical Control", all the way to "Lethal Force". The interior ring of the IM/IM deals with perceptions and situational factors, which as I understand the chart, starts at a circumstance of a cooperative encounter, moving to a circumstance of active resistance, moving to a circumstance of assaultive aggression and concluding at a circumstance of a perception of grievous bodily harm or death.

[134] All RCMP officers who testified, as well as the two experts, confirmed that the IM/IM is the model for police use of force. For the most part, they agreed that this model suggests that when an RCMP officer encounters a cooperative suspect, officer presence and/or communication are the suggested approaches. This approach may also extend to soft control. A circumstance calling for responses as far as physical control, all the way to lethal force, appear from the IM/IM to be limited to circumstances where there is active resistance, assaultive behaviour or a threat of grievous bodily harm.

[135] As for the RCMP powers of arrest, those powers are, for the most part, defined in s. 495(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. Section 495(1) provides:

Arrest without warrant by peace officer

495 (1) A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- (b) a person whom he finds committing a criminal offence; or
- (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

[136] Additionally, s. 9 of the Charter guarantees the following:

Detention or imprisonment

9 Everyone has the right not to be arbitrarily detained or imprisoned.

[137] On the facts as I find them, it is clear that Mr. McLellan was arrested on February 11, 2010. He was not merely detained. Specifically, the facts seem clear, particularly from the evidence of the independent witness, Mr. Morasco, that Mr. McLellan remained in handcuffs and under police watch long after the only person known that day to have a knife, Kyle Browne, was already in the back of a police vehicle and the knife had been seized.

[138] It may not be that a lot turns on that determination, but it is somewhat disingenuous to suggest that the conduct of Constables Peters and Elgee was proper in all the circumstances and a mere detention, a detention with the goal of "just sorting everything out" based on the facts noted above as I find them.

[139] Again, not a lot turns on that because in fact I find that the police officers in question, whether they had the right to detain or the right to arrest, acted in a manner that had significant disregard for the safety of Mr. McLellan and acted in such a manner as to cause him injuries. There was a duty of care owed to him, they breached the standard of care expected, and they caused him injury.

- [140] Turning to the expert evidence on the RCMP use of force, before the court was the plaintiff's generated report of Dr. Orville Nickel and a defence-generated report of Kelly Solinsky.
- [141] I will start by saying that an expert's report is often only as good as the assumptions on which it is based. Having reviewed the report of Dr. Orville Nickel, and particularly the assumptions set out in a letter of instruction of April 19, 2017, I find the assumptions posed to Dr. Nickel to be consistent with the facts as I have found them, specifically, that Mr. McLellan complied with every direction given to him by the RCMP, that one police officer jammed his knee into Mr. McLellan's back and another officer at another time tried to pull him up by the handcuffs. Further, the Nickel report is based upon an assumption that Mr. McLellan had an identification badge with his picture and credentials, and that he was ignored when he tried to identify himself.
- [142] Conversely, the assumptions of the Solinsky report are not assumptions that I have found to be factual. Those include an assumption that Mr. McLellan was not "planked" and his arms were not hyper-extended behind his back and he was not lifted off the ground. Further, the Solinsky report is based on a significant finding of fact that he was not directly or required by his instructing letter to consider. That fact is that the Solinsky report is predicated on the writer's determination that Constables Elgee and Peters could not immediately identify the subject of the complaint, Kyle Browne. I find that the plaintiff did identify himself and was ignored. Additionally, even if that did happen, there is simply no evidence at all that either Constable Elgee or Constable Peters attempted to identify who was who prior to taking all the actions that they did. In that sense, that fact is clearly wrong. They did not even inquire, according to their own evidence, so it cannot be concluded that they could not identify the suspect.
- [143] Going back to the Nickel report, I find it persuasive. In regards to the issue of powers to arrest, Dr. Nickel identifies s. 495 of the Code as the basis for police power to arrest. He notes, correctly, based on his assumed facts, facts which I as well find, that Mr. McLellan "was not suspected of having committed any crimes and was not disrespectful to the police and followed all instructions during his arrest". The writer determines that the arrest and handcuffing of Mr. McLellan was unnecessary, inappropriate and excessive. He concludes that Constables Elgee and Peters did not have lawful authority to arrest Mr. McLellan and they arrested him using excessive force. He was also concerned that the arrest of Mr. McLellan at gunpoint in front of a public school was dangerous, based not so much on use of force training, but on "strong common-sense factors".

[144] Further, Dr. Nickel opines as follows:

The information the police officers were working with was that Kyle Browne was the subject of the complaint and he had been seen with a knife in the school. Mr. McLellan had told the police members who approached him, who he was and the reason for his presence. The two police officers with their guns drawn and pointed at him seem to disregard his efforts and continued to

proceed with the deadly force scenario. This is treatment reserved for seriously dangerous offenders. Even if they were arresting Kyle Browne, this would be excessive in that there was no display of any resistance.

[145] Further in his report, Dr. Nickel makes the following statement, a statement with which I agree:

In the case of Michael McLellan, he indicated cooperativeness from the moment he made contact with the police and made every attempt to identify himself as Kyle's social worker. The communication cues were ignored by the two police officers who mistakenly arrested Mr. McLellan using a deadly force option. Mr. McLellan's cooperativeness is aligned with communications in the IM/IM framework. The lethal force options applied by the two constables are reserved for serious threats to officers and public safety. Mr. McLellan was not a threat to the police or anyone else in any way. The situation was perceived to contain a potential threat but not an existing one. Lethal force was not the option advocated by RCMP IM/IM framework in the circumstances involving Mr. McLellan.

[146] Additionally, Dr. Nickel notes the following in his report:

In the case of Michael McLellan, the perceptions associated to Constable Elgee's fears were not based in reality. They were more based on a "what if" scenario. Constable Elgee exaggerated the need for physical force, beyond communications. In that context, the actions of Constable Elgee and Constable Peters may have caused injury to Mr. McLellan. The strength of the RCMP IM/IM based training would not favour this level of police approach. The two other officers arresting Kyle Browne appeared to have a more complete understanding of the IM/IM use of force concepts.

[147] Dr. Nickel concludes by disagreeing with his review of an internal investigation done by the police after a complaint was made by Mr. McLellan. Specifically, he disagrees with an assumption that a police officer is not required, when there is a third-party complaint, to confirm the information before they make an arrest. He further disagrees with the internal investigation which included that police officers have the authority to use as much force as necessary when enforcing the law. In that regard, I agree with Dr. Nickel's assessment of the police powers found in s. 495 of the Code. I note and agree with his concern that this internal report appears to be based on a view inconsistent with realistic obligations on police officers generally, under s. 495 of the Code and under the RCMP Use of Force IM/IM, to inform themselves of the circumstances and take a holistic view of the circumstances prior to acting, if at all possible.

[148] Clearly here, there was that opportunity. These officers should have assessed the circumstances in a meaningful way, determined identity, which neither of them indicated they even attempted to do, before making the decision they did.

- [149] I note as well that it seems clear from both the evidence of Dr. Nickel and Terry Solinsky that attempting to lift someone up by handcuffs in the manner which I find Constable Elgee did, is not consistent with RCMP training. The way in which Constable Peters eventually helped Mr. McLellan to his feet was.
- [150] Turning to the report of Terry Solinsky, the report is again based on facts that I find not to be the case. Terry Solinsky was not asked to opine about the appropriateness of what I have referred to as "planking" because he was asked to assume that that did not happen. Again, I find it did. Additionally, on a number of occasions, Terry Solinsky determines, in support of his opinion, that Constables Peters and Elgee could not determine immediately who was who when they arrived. Again, I find that no effort was made to make that determination and, in fact, Mr. McLellan attempted to identify himself as not being Kyle Browne and as being Kyle Browne's worker, and he was ignored.
- [151] Additionally, in regards to the report of Mr. Solinsky and in regards to his evidence, and with respect, he appears to me to be an advocate for the police and appears to accept only the police version of events as to what happened on February 11, 2010. In his objective view of the facts, as noted earlier, he concludes that Mr. McLellan's identification badge was not produced. Again, I find it was.
- [152] Overall, Mr. Solinsky's opinion appears to be somewhat circular. He relies too heavily on the mantra of officer safety and, perhaps in doing so, was only relying on the facts posed to him as opposed to an objective view of all the evidence. That being said, one could not help but conclude, based on his report and particularly his evidence on the stand, that the approach to the opinion of Mr. Solinsky was that if an officer said they did something for safety reasons, that was a complete justification for their actions. There was no attempt to opine, based on an objective standard as opposed to a subjective one, whether or not there were police safety concerns. This was particularly made note of in cross-examination when the concept of overwhelming police force was put to him and he did not resile from an opinion that all the police officers' actions were justified. This was particularly noteworthy in the different circumstances that happened that day in regards to the actions of Constables Elgee and Peters, as opposed to Constables Novakowski and Brocklebank. In cross-examination, he agreed that it would have been reasonable for the police officers to investigate further and ask for identification seeing two people and knowing that one of them was a suspect and one was either a case worker, or at least not a suspect.
- [153] Having reviewed the evidence of the two experts and reviewing their reports, I accept the expert opinion of Dr. Nickel and his criticisms of Constables Elgee and Peters. I do so primarily because his reported opinion is based on facts that I find. Mr. Solinsky's opinion is based on facts which I do not find.
- [154] I accept Dr. Nickel's opinion that the two RCMP officers, Constables Peters and Elgee, did not have the authority to arrest and detain Mr. McLellan. Further, I accept his opinion that Constable Elgee acted in a manner inconsistent with training and proper police

procedures, when he "planked" Mr. McLellan. I accept his opinion that Constable Peters used excessive force in landing on his back with her knee while handcuffing him. Mr. McLellan was a completely cooperative witness in a prone position and such an effort at restraint was not required.

- [155] It is these two physical acts which more likely than not caused injury to Mr. McLellan. It was the lengthy detention of Mr. McLellan and his being placed, while in handcuffs, over the front end of the police car, for no apparent reason, after Kyle Browne had been arrested and the knife being extracted from Kyle Browne, that more likely than not caused the mental anguish and near PTSD symptoms that the plaintiff suffered from as a result of his interaction with the RCMP on February 11, 2010.

Causation

- [156] Having determined the facts as I have, it is still necessary to deal with whether or not on a balance of probabilities the plaintiff has shown that the cause of his injuries are related to the negligent actions of Constable Elgee and/or Constable Peters on February 11, 2010. These injuries include notably his back injury and his near PTSD mental anguish symptoms, which he alleges continue to the date of trial, but also his shoulder injuries and other modest soft tissue injuries that resolved after a short time.
- [157] Serious issue or argument is not taken with the concept of causation. There was reference in the evidence to a motor vehicle accident in August 2009, but the evidence suggests that any complaints resulting from this accident were resolved shortly as there were no further doctors appointments past August 2009. There was reference to serious physical injuries as a result of being injured in Burnaby in 2001, some nine years or so prior to February 11, 2010, which resulted in a significant number of stitches and a period of physical recovery being required. In regards to that, there is simply no evidence that at any time near the incident of February 11, 2010 the plaintiff had any residual complaints from that apparently brutal assault.
- [158] It is conceded that perhaps going back to this incident in the year 2001 that in the past the plaintiff has had some difficulty with mental anguish and emotional difficulties. Again, however, none of that was present at any time prior to the incident on February 11, 2010 and, as such, is not an explanation for the near PTSD symptoms that the plaintiff suffered from, and alleges he continues to suffer from, as a result of how he was treated by police officers on February 11, 2010. The consensus of the evidence appears to be that his past history made him more susceptible to feelings of mental anguish, but that absent this circumstance they would not necessarily have arisen. As such, he is more of a "thin skull" plaintiff than a "crumbling skull" plaintiff.
- [159] Further on the issue of causation, it is of note that the complaints about injury to the back were almost immediate.

[160] In all the circumstances, I am satisfied that the above-noted injuries were caused by the negligent acts of the two police officers, Constables Elgee and Peters.

Evidence Related to Damages

- [161] The plaintiff testified in these proceedings about being an active individual prior to February 11, 2010, both in terms of his ability to work and his ability to involve himself in significant recreational activities. His primary recreational activity, almost employment activity better said, related to the plaintiff's playing baseball at a very high level. Prior to the incident in question, in the spring and summer of 2009, the plaintiff played what was described as semi-pro baseball. For a short period of time in years prior to the incident, he played in Australia. He played out-field, but was a catcher and was also a switch-hitter, an attribute that made him a particularly valuable team mate. His last major stint with a league was when he played for the Swift Current 57s baseball team, formally the Swift Current Indians, in the early 2000s. Baseball was clearly something Mr. McLellan was good at and was a long-term dream in which he wanted to excel, though his age suggests that might have been a fleeting prospect. It was certainly a considerable part of his life growing up and through his 20s, and something he enjoyed doing on a recreational basis, at a high level.
- [162] Since playing for the Swift Current Indians, it would appear that his commitment to baseball centred around tournaments throughout the summer, including as late as the summer of 2009.
- [163] Since the incident, the plaintiff has not played baseball and there are no prospects that this option will be open to him again.
- [164] The evidence leads to the conclusion that prior to the incident he was not accident-prone or, better put, did not let difficult circumstances that befell him prohibit him from doing what he wanted to do recreationally.
- [165] Of note, he testified that in 2001, while living in Burnaby, he was involved in a violent, criminal altercation in which he was the victim and in which he suffered 70 stitches. He testified to having some PTSD and depression after that incident and, clearly 70 stitches in the head, is a considerable injury. This did not prohibit him from a quick recovery with him continuing to enjoy his baseball activities despite the assault.
- [166] As a result of the incident before the court, the plaintiff testified that his injuries were lower back, shoulders, injuries to his wrist, and the emotional injury which was diagnosed by some as PTSD and diagnosed by others as not meeting that category, but still emotionally significant. It is of little consequence how the injury is characterized if I find, and I do find, that the injury has affect on the plaintiff's disposition towards life and activities, and has affect on his ability to operate as a functional employee.

- [167] While the shoulder and wrist injuries resolved shortly after the incident, he has and continues to suffer, according to his evidence, from significant low back pain. He has tried a number of remedies. The most successful has been a rhizotomy, an annual surgical-type intervention which has the effect of providing some relief from pain by deadening the nerves. The benefits are temporary and unfortunately not all encompassing.
- [168] It is as a result of the back pain that he cannot involve himself in his major love in life, which was baseball. Additionally, he testified that activities like car rides, physical intimacy and other sports, such as golf or basketball also have limitations as a result of his injuries. He cannot sit or stand for long periods, making even sedentary employment somewhat problematic.
- [169] To deal with his pain he uses cannabis on a seemingly daily basis. Prior to its legalization he had medical authorization to do so, which now is no longer required.
- [170] As for personal relationships, these have been difficult. The woman he was living with and in a long-term relationship with at the time of the incident, Janna Hall, he is no longer with. Their relationship ended in the summer of 2010, which he blames on his irritability, which itself he opines was caused by his pain and an inability to sleep. His last relationship was with Acacia Brovedani, a relationship which broke down shortly after a number of unfortunate incidents with police officers.
- [171] Since the incident and with the assistance of WorkSafeBC, who as noted accepted the plaintiff's disability claim due to what they characterized as a police assault on him, the plaintiff made the unfortunate decision to pursue a horticultural certificate with the hope of getting into the cannabis or marihuana business. Though successful in the academic side of this horticultural certificate, he was unable to complete the practicum associated with the certificate program.
- [172] It is fair to conclude that the plaintiff was somewhat naïve about the job prospects available to him with a horticultural certificate in light of his physical limitations. Clearly, most every job, with the possible exception of management in the horticultural or agricultural business, involves some degree of physical activity. It is the physical aspect of the job that the plaintiff is unable to undertake due to the injuries to his back. His ability to lift, for example, appears limited. His ability to maintain and undertake even modestly heavy physical exertion seems limited on balance. It is, of course, this physical limitation that leaves an unskilled worker such as the plaintiff with considerable challenges when it relates to future employment. He testified that through a WorkSafeBC program he attempted to secure an office job, but could not sit at a desk due to the low back pain. This would also prohibit any computer training or similar type of "high tech" activity. He cannot perform physical labour, which appears to have been what he did prior to the incident for the most part. He could not continue in his work as a case worker in a group home because of the necessity in dealing with "rambunctious" teens and pre-teens. The potential physical exertion that he would have to display on occasion was not open to him.

- [173] It is fair to conclude that since the incident and his loss of employment with AXIS, the plaintiff has been adrift. He has received on occasion support from WorkSafeBC, but they have since bought out of his claim. He has experienced times of virtual homelessness and has had to rely on family for assistance. He described his daily activities now as getting up, consuming marihuana, going to the gym for a few hours, coming home, having dinner and going to bed.
- [174] It is fair to conclude, and I do conclude, that the plaintiff has limited to no prospects for enjoyment of life, and is in near constant pain.

Amanda McFarlane

- [175] Amanda McFarlane is a Client Service Manager with Brain Trust Canada out of Kelowna. She testified that she worked with Mr. McLellan as his case manager from 2017 to 2018. She described the services provided by herself as a case manager as one in which she assists clients, persons who have suffered from brain injuries, with general support, including assisting them in regards to housing, food sourcing, finances, basic medical assistance, such as obtaining a family doctor, and assisting persons who qualify with applying for a Persons with Disability designation under the Provincial Social Services legislation.
- [176] She noted her work with Mr. McLellan, especially at the beginning, was that she viewed him as suffering from anxiety or depression. Though not medically trained to provide such a diagnosis, she reported tearfulness and visible anxiety, such as visible tension and shaking, as well as the noted tearfulness and a general sense of being overwhelmed. She noted him as needing reminders and having poor follow-through. She noted concern about him showing signs of being in a lot pain. She noted one circumstance where he had come in and had to lay flat on the floor as a result of reported pain. She described his demeanour as pleasant and thankful for the services she provided, but noted that he would often quickly withdraw into himself and he appeared to, as she noted "shut down."
- [177] As for triggers, she described his difficulty in coming to terms with what happened to him. She noted his disposition towards the police as he appeared to be afraid of them, expressing concern about contact with the police and a desire not to get into trouble. She noted from her experience that this is not uncommon with people with brain injuries.

Acacia Brovedani

- [178] Acacia Brovedani is a senior consultant with Ernst & Young in Vancouver. She has an honours degree in psychology from the University of Calgary. She described having met Mr. McLellan after the incident and dated him in 2016. They were a couple for a few months. They met in March 2016, and their relationship began in May 2016.

- [179] She described Mr. McLellan as kind and thoughtful, but someone who was anxious, stressed and suffered occasional panic attacks. Despite this, she described him as a fantastic partner. She had no personal information in regards to the incident in 2010, but she described herself as aware of it in a general sense.
- [180] She also had the opportunity, during their relationship, to observe his reported pain and behaviours which he exhibited, which she felt was associated with the pain. She described him as having a hard time standing or sitting, and that he would have to move around a lot. She described that even going to a movie was difficult because he could not sit for that period of time. She described herself as physically active, but noted that they could not go together on long hikes because of his back pain. She described occasional spasms in his back when he would have to lay on the ground in order to get relief. She described observing him waking up in the middle of the night in pain and having to lay on the floor. She described his interrupted sleep at times as him being apparently unable to sleep due to the "agony" of the symptoms. She described "agony" as breaking into a sweat, gritting his teeth, groaning in pain, and lying on the ground in order to try to relax.
- [181] She described him showing signs of anxiety, her words, and the details of what she considered to be anxiety included his shaking, lack of ability to concentrate, rapid breathing and focus problems. She described anxiety as a mental stress which can pull the reign away from acting rationally because of worry. She noted that one of the triggers for what she perceived as anxiety was his interaction with the police.
- [182] In that regard, she described three incidents that she observed. On one occasion, she described Mr. McLellan as driving down the highway when a police car pulled in behind them. She noted him to tightly grab the wheel and to focus on his driving, and that the police behind him made him anxious and seemingly frightened. She described this incident as resolving when he pulled into a gas station and the police officer moved on. She described him at the gas station as hyperventilating, shaking and tearing up, and that it took him 20 minutes to calm down.
- [183] A second incident occurred when they were in or about Nelson, British Columbia and were driving to a hotel. She described how a police car began to follow them and followed them into the parking lot, blocking the car. She described both he and her being "grilled" by the police officers apparently due to the fact that their license plate was crooked. She observed Mr. McLellan showing signs of stress, shaking and tearing up. She noted the police officer to demand both his and her personal information. Though nothing came of the incident, she described that he was "wrecked" for the rest of the night and the next day. After the incident, he had broken down crying, he was pacing the room agitated and had difficulty staying calm.

[184] A third interaction with police occurred when they were walking in downtown Kelowna on an evening when there were dine-out events at various restaurants. They noted a police officer standing outside of a restaurant and, though some distance away, she described Mr. McLellan as "freezing up". She described that he was stressed about going into a restaurant that the police were in front of and that, as a result of that, they simply went on to another location.

David Lang

[185] David Lang is the Executive Director of the B.C. Amateur Baseball Association. He has been with that association for 17 years, though he has been involved with baseball as a coach and in other capacities for 40 years. He was a coach at Douglas College when he coached Mr. McLellan in the early 2000s or perhaps 2001.

[186] Mr Lang described Mr. McLellan as having considerable abilities in baseball; an attractive player because of his ability to switch-hit. He also described him as a versatile athlete adapt at playing several positions, including catcher, which is an important position. A switch-hitter was a rare bonus for a coach and apparently a prized skill in a player in the baseball world.

[187] Mr. Lang described that he last saw Mr. McLellan play baseball in the 2009 World Baseball Challenge in Prince George. He described this as a high-end activity with national collegic teams from the United States, Germany, as well as Team BC and Team Canada all participating. He was the coach on Team Canada and noted Mr. McLellan to be a key player on Team BC. He noted Mr. McLellan's participation in the tournament in Prince George and that he contributed to his team and did what his coaches wanted. In terms of this being a high-end event, he described that many of the collegic athletes at the event have gone on to professional careers.

[188] While describing Mr. McLellan over the years, Mr. Lang noted him to have a high level of athleticism. He was quick, strong, powerful and was team leader. Mr. Lang has had no contact with Mr. McLellan since July or August 2009, other than a recent telephone call before court to confirm the dates of coaching in 2001.

Ed Perszon

[189] Ed Perszon testified in this trial as well. He is now a retired counsellor, but through a contract with WorkSafeBC provided counselling services to Mr. McLellan from May 2010, shortly after the incident to sometime in 2012. The work was assigned to Mr. Perszon it seems because of Mr. McLellan's diagnosis of PTSD from a WorkSafeBC psychiatrist.

[190] Ed Perszon met with Mr. McLellan monthly and provided progress reports to WorkSafeBC. The counselling that Mr. Perszon was involved with involved exposure therapy, which I understand to be a therapy that involved constant repetition of exposure to the source of the stressor, in this case, police officers, with the hope that constant exposure would reduce

the trauma associated with periodic exposure. This witness was clear that from his perspective there was modest improvement with Mr. McLellan, and that the anxiety related to encounters with police were still present at the end of his short-term counselling. The counselling appears to have ended either because Mr. McLellan moved away or the WorkSafeBC contract ran out.

Oliver Hutchen

[191] Oliver Hutchen met Mr. McLellan at a pain centre in Vancouver shortly after the incident in 2011. This was a WorkSafeBC program that Mr. Hutchen attended, as did Mr. McLellan. They have been friends since that time. He testified as to seeing pain behaviours in Mr. McLellan when he walks. Being a resident of Kamloops, the plaintiff stayed with Mr. Hutchen during the trial. They appear to be close friends who rely on each other for support.

Jose Demelo

[192] Mr. Demelo owns a hydroponic garden shop in Kamloops and took the plaintiff on for a practicum following his completion of the academic portion of the horticultural certificate program at Thompson Rivers University. He testified that the plaintiff was unable to complete the three-week practicum because of his inability to perform the physical side of the job, which included loading and unloading items for store purposes, as well as for customers. He noted Mr. McLellan exerted some effort to do the physical aspect of the job, but that he appeared unable. He saw facial expressions of pain.

[193] He viewed Mr. McLellan as an unreliable employee, as he would often call in sick. As noted, he did not complete the practicum program, nor was he offered employment afterwards as was sometimes the case with students taken on for practicums.

Harv Martinez

[194] Harv Martinez testified. He was a coach of the plaintiff's during the time that the plaintiff played for what is now the Swift Current 57s baseball team in the early 2000s. Mr. McLellan billeted with Mr. Martinez during a five-month stint when Mr. McLellan played in Swift Current in 2004. He described Mr. McLellan as someone who he enjoyed having as a billet, and someone who was responsible and respectful while he stayed with him.

[195] Mr. McLellan was not offered a return position in the summer of 2005 because there were local players who were wanting to play. Absent that, he would have been. During the 2004 season, Mr. McLellan was observed to be a leader both on and off the field. This witness was aware that Mr. McLellan was able to find a spot on a Lethbridge team in the summer of 2005, and that suggested to Mr. Martinez that the plaintiff was highly regarded as a baseball player.

Sandra Sirianni

- [196] Ms. Sirianni was a landlord of Mr. McLellan for a period of time after the incident in 2010 for approximately four years. With her interactions with him after the incident she noted observations of apparent pain. She observed him to be interested in gardening, but unable to do it. While renting and having garden space, she testified that he left that work to others, which she took to be because of his physical limitations.
- [197] She described him as a responsible tenant who paid rent, though sometimes paid it late. When he could no longer afford to stay in her rental unit, she noted that he stayed for a short period of time in one of her tenant's travel trailer. She was of the belief that he regularly attended at the Food Bank.

Brenda Wagner

- [198] Ms. Wagner is currently the Director of Human Resources for AXIS, which is the agency that employed Mr. McLellan at the time of the incident. She noted that he was hired in May 2009 and his rate of pay was \$302.94 for a shift. It was Mr. McLellan's evidence that he worked three days on and four days off. She described that it was not encouraged for persons in Mr. McLellan's position to become physically involved with the youth in their care in the sense of physical restraint or physical discipline. She did, however, testify that workers are trained to de-escalate and sometimes physical intervention was required, especially if the youth was creating a dangerous situation in the home.
- [199] She described the need for persons in Mr. McLellan's position, as essentially a temporary foster parent to an often-troubled teen, to be physically fit. She described that interactions with the police were a regular occurrence considering the nature of the troubled youth in the care of AXIS.
- [200] She described Mr. McLellan as being good at his job. She further described that absent this incident, Mr. McLellan would have been able to stay working for AXIS and that, on occasion, coordinator or manager positions become available within their organization. Further, she was able to confirm the presence of identity badges on lanyards for workers, which the employees needed and used to identify their employer and their role.
- [201] In regards to the incident, Ms. Wagner was able to confirm what the plaintiff explained as a delayed complaint to the police. The plaintiff testified that he had told his employer about the circumstance and that based on that the employer intended to make the police complaint. When they never did, the plaintiff made the complaint himself, resulting in the investigation by Dale Einarson. Ms. Wagner confirmed that AXIS had some discussions about filing a complaint with the RCMP in relation to the incident, but that they did not.

Medical Evidence

Dr. Solomons

- [202] Dr. Solomons is a psychiatrist. He provided an expert opinion in a report dated April 19, 2013, following an assessment on March 18, 2013. As such, his report is informative as it is was done at a time closer in proximity to the incident of February 11, 2010, but is somewhat limited as to the plaintiff's current condition. Dr. Solomons' opinion is that as a result of the incident on February 11, 2010, the plaintiff suffered a relapse of depression, a depression that was pre-existent but non-active at the time. He further opined that the plaintiff, like many people, run the risk of relapse because depression tends to be a re-occurring proposition. He was not of the opinion that the plaintiff suffered from PTSD, as the traumatic incident was not "life or limb threatening".
- [203] Dr. Solomons was asked about the effect of cannabis use by Mr. McLellan on his mental health. He was unable to provide an opinion as to any potential negative effects as he viewed it as dependent upon the person's individual disposition and tolerance.

Dr. Laidlow

- [204] Dr. Laidlow is a physiatrist. He provided a report dated June 8, 2013 and a rebuttal report dated May 9, 2017. Dr. Laidlow was of the opinion that the probable cause of the plaintiff's low back pain and the conditions associated with that was the incident on February 11, 2010. He finds in his examination objective evidence of joint damage, caused by the incident and not driven by an emotional state. He provides no opinion on the existence of PTSD, preferring to leave that to a qualified expert, but he is not of the belief, because of the physical manifestations of the injury, that his emotional condition is a factor in his recovery. He notes by June 2013, the plaintiff was fully recovered from the wrist and shoulder injury.
- [205] In regards to a motor vehicle accident that the plaintiff was involved in in August 2009, it was Dr. Laidlow's opinion that any injuries from that were short-lived and there was no ongoing treatment for that injury by the time of the incident.
- [206] It was Dr. Laidlow who recommended the rhizotomies, which Mr. McLellan has found to be useful though somewhat temporary in relieving the pain associated with the chronic lower back injury.
- [207] In regards to ability to work, it was Dr. Laidlow's opinion that there would be work available to Mr. McLellan, but that it would have to respect the physical limitations that he suffers from. It was Dr. Laidlow's opinion that because of the injury and what he knew about the job description as a live-in care worker for youth in care that Mr. McLellan's current physical condition was not a fit for that type of work.
- [208] Finally, Dr. Laidlow's second report related to the opinion of a mechanical engineer by the name of Gerald Sdoutz. He challenged this opinion, as in his view, the limitations to the engineer's report were that it assumed a dead weight in terms of an ability to lift a person

of Mr. McLellan's size and that dead weight analysis did not consider a person's natural ability to assist on a move. Dr. Laidlow was of the view that the hyper-extension of the arms, as described by Mr. McLellan during the "planking" incident, was sufficient to cause injury to the spine, as could the dropping of a knee on to Mr. McLellan's back as Mr. McLellan described.

Sheila Branscombe

[209] On August 13 and 14, 2013, Ms. Branscombe, an occupational therapist, performed a functional capacity evaluation of Mr. McLellan. During that evaluation, she had no concerns about effort, or that his use of marihuana affected the ultimate result.

[210] In her evidence, Ms. Branscombe testified that though some of the job features of a residential care worker were within the plaintiff's abilities, he would not be able to address a violent or unresponsive person in his care due to his physical limitation. Further, she noted the psychological factors that might be at play with Mr. McLellan not being able to return to that type of position. These made him vulnerable to any future episodes of aggressive behaviour.

[211] Ms. Branscombe further testified that Mr. McLellan's initial choice to attempt to be re-trained in the field of horticulture was not something he was physically capable of doing. Additionally, in regards to his past efforts to start the training to become a massage therapist, this was not an option for him because of the physical exertion required, notably the bending and stooping. His thought at that time, in 2013, of working towards being a kinesiologist was a possible job option for him. There is no evidence that this was more than a passing thought. It does not appear to be something he has been able to pursue.

[212] She confirmed he was able to do the majority of the tasks of daily living. She recommended an exercise program of a short duration, as did Dr. Laidlow. Further, she recommended vocational counselling, counselling to address pain management, and the then potential medical remedy of a rhizotomy. The plaintiff has clearly followed the recommendations as to the rhizotomy, and his efforts at daily exercise have become an important part of his current routine.

Dr. Etheridge

[213] Dr. Etheridge is a physician who operates a chronic pain clinic in Kelowna. He has been treating Mr. McLellan infrequently since 2012. His treatment included facet joint injections (2018), as well as a number of rhizotomy treatments for pain (2014 and 2021). He further noted a rhizotomy by Dr. Brownlee in 2015. Additionally, from 2018 to 2020, on four occasions, this practitioner provided the plaintiff with Platelet Rich Plasma injections (PRP). This procedure has provided temporary, though not complete, relief from pain, for about a six-month window.

- [214] Dr. Etheridge impressed the court with his fees charged for services. For a rhizotomy he charges around \$200 while other practitioners, he said, charge between \$3,000 and \$5,000. He expects that Mr. McLellan will require rhizotomies on a regular basis for the rest of his life. Additionally, the PRP treatments, seemingly required every six months, cost \$350.00 per session. Over two years, the total cost for these treatments, rhizotomies being performed every two years, would be modest, totalling \$900. He suggested that most of his patients get about 50% relief for somewhere between ten and 12 months from a rhizotomy, although that can be for as little as six months, depending on the speed at which nerves grow back after a rhizotomy.
- [215] This doctor further testified that Mr. McLellan has been using cannabis to control his pain and not using any other pain medication.

Dr. Latimer

- [216] Dr. Latimer is a psychiatrist who performed a medical examination at the request of the defendants on March 12, 2014. Dr. Latimer was of the view at that time that Mr. McLellan was not suffering from PTSD, though he conceded that perhaps he might have suffered from it right after the incident.
- [217] Dr. Latimer was concerned about Mr. McLellan's use of cannabis generally and the amount that he uses, opining that there could be an addiction to cannabis, although his questionnaires he employed did not appear to justify that diagnosis in and of itself.
- [218] Dr. Latimer confirms what appears to be chronic back pain, noting the discomfort that Mr. McLellan displayed during the interview and the need to stretch his back during the interview.
- [219] Overall, the opinion of Dr. Latimer, in the somewhat dated assessment from 2014, formed after a three-hour assessment, including some time spent on testing, suggests mild depression, which he looks to as coming from his finances, lack of employment, and "perhaps by his medical problem", which I take from his evidence to be the injuries from the incident on February 11, 2010. In cross-examination, Dr. Latimer confirmed that Mr. McLellan could meet the general diagnosis for major depression.

Dr. Gross

- [220] Dr. Gross is a psychiatrist. He was called on behalf of the defendants and tendered two reports, one dated April 21, 2014 and the second dated May 18, 2017. The first report, based on an interview, an assessment and a review of medical documents, confirmed an injury to Mr. McLellan's lower back and chronic disabling pain. This report, despite being at its origin a report of the defendants, is relied upon by the plaintiff.

[221] In the second report dated May 18, 2017, Dr. Gross was asked to give an opinion based on the facts which I reject. Those facts are the version of events offered by Constables Peters and Elgee, which I have rejected. As such, that opinion is of no use to the court. Based on those unproven assumptions, it is Dr. Gross' opinion that the disabling pain he suffers from must come from other sources beyond physical injury. For this second report there was no further assessment and no up-dated medical information. At its core, it calls for an opinion that I am not satisfied is generally with the gambit of a physiatrist, but in any event is based on assumptions not proven, in fact assumptions specifically rejected. I view his opinion as merely speculative, based on unproven facts, and outside his general area of expertise.

Gerald Sdoutz

[222] I agree with counsel for the plaintiff that the expert evidence of Mr. Sdoutz, a mechanical engineer, is of no benefit to the court. This report appears to be predicated on an assumption that the person who did the "planking" of Mr. McLellan was Constable Peters. This report suggests that someone of Constable Peters' size and weight would not be able to lift Mr. McLellan's body weight. As noted earlier, I have factually found that the "planking", for lack of a better term, was done by Constable Elgee and, as such, the report is of no moment.

Factual Conclusions Related to Damages

[223] Although I will deal under the various heads of damage noted below in detail the specific factual findings related to the plaintiff's injuries, it is appropriate to generally summarize what the evidence shows about the plaintiff's injuries suffered as a result of the incident on February 11, 2010. In drawing these conclusions, I have considered both the medical evidence noted above and the lay witnesses' evidence which I have summarized.

[224] Mr. McLellan is very much a broken individual. He suffers from overwhelming physical pain which limits his ability to function at anything close to a practical level. "Practical level", in my view, is a level of functioning which would allow, despite pain, the ability of someone to seek out remunerative employment with a cooperative employer who could adjust requirements for an injured worker.

[225] Additionally, it is fair to conclude, and this will be noted under the loss of opportunity claims below, that the plaintiff did not have a significant track record of employment, but at the time of injuries, was employed in work which had a somewhat significant physical component which he clearly pre-injury was able to do. His lack of academic or vocational training at the time of injuries suggest that physical labour, or labour at least that requires a significant physical component, was what he was going to do with his life. That option does not appear to be open to him now because of his physical limitations, but in addition, because of the overwhelming sense of loss that he has suffered which has manifested in a level of depression and anxiety which further detracts from his ability to work.

- [226] Although this has been noted earlier in these reasons, it is again of note, sadly, that as a result of the combined effect of physical injuries and emotional damage, the plaintiff's life involves a daily routine of getting exercise, eating and sleeping. He manages his pain with the use of marihuana, which he has been able to obtain at minimal cost through, initially, a medical marihuana license and now with legalization through his ability to produce his own product.
- [227] There is no prospect of significant improvement in the evidence for Mr. McLellan. Optimistically, once litigation is behind him, it may be possible, with personal counselling and counselling related to the emotional harm suffered as a result of the incident on February 11, 2010, to move past the emotional harm and get to the stage where a modest amount of employment would be available to him in some capacity, while he attempts to accommodate the continuous pain. Unfortunately, that prospect is dampened by the reality that there is no source available to Mr. McLellan to obtain that personal or trauma-based counselling, and at trial, nine years after the incident, the trauma is still a present factor in his presentation and his life.
- [228] It is fair to conclude, and I do conclude, that Mr. McLellan is a damaged individual who has limited prospects for employment and limited prospects for much enjoyment of life because of the overwhelming pain that he suffers from.

Damages

- [229] Having reviewed the evidence related to damages from the numerous lay witnesses who testified, as well as from the various medical experts, I now turn to the heads of damages advanced by the plaintiff and the position of the defendants in regards to those claims.

Non-pecuniary Loss

- [230] The starting point for an analysis of non-pecuniary loss is the often-cited case of *Stapley v. Hejslet*, 2006 BCCA 34. In that case, the Court cites a number of factors to be considered in a non-pecuniary award, including the age of the plaintiff, the nature of injury, the severity and duration of pain, any disability, emotional suffering and loss or impairment of life. Additionally, the Court of Appeal in *Stapley* adds to that traditional analysis of factors the somewhat nuanced consideration of impairment of family, marital and social relationships, impairment of physical and mental ability, loss of lifestyle, and the plaintiff's stoicism.
- [231] In terms of the more traditional factors, I note that at the time of the injury, February 11, 2010, the plaintiff was 31-years-of-age. He had just begun a career which he enjoyed and which met both his financial needs and the needs for flexibility in employment, so that he could continue his significant and long-term recreational activity of playing baseball. He described himself as a semi-pro baseball player and the independent evidence suggests that although he was unlikely to make this his career that would be financially remunerative, it

was a considerable passion. It was something in which he had considerable skill. He was sought after by coaches. He played baseball at a very high level.

- [232] As for the injuries themselves, they have been particularly impactful on this plaintiff. Despite a failed and somewhat misguided effort to retrain in the area of horticultural work, including a re-education program to obtain a horticultural certificate, the effect of the injuries have been so severe so as to prohibit his ability to work effectively. This is a combination of both the physical injuries, which in and of themselves are significant, but there is an overlay of mental health injury, something close to PTSD, but not meeting the actual criteria, which seems to have profoundly affected the plaintiff. He has become somewhat isolated. He has been unable to maintain personal relationships. He has been unable to work. His life appears to consist at this point, on a daily basis of getting exercise to try to reduce the symptoms of his pain, using medical marihuana to ease the symptoms of his pain, and not much more.
- [233] When previously injured in 2001 in what was described in the evidence as an assault by a gang of youths in 2001, or for that matter when previously injured in a motor vehicle accident in 2009, a full recovery happened. After the incident of February 11, 2010, recovery did not happen. Clearly those noted physical injuries are severe and permanent.
- [234] Additionally, I am satisfied on the evidence that the assault in 2001 resulted in some PTSD and depression, but he was able, once physical recovery was had, to put those issues behind him. Here, he has not recovered from the physical injuries. He has also not recovered from the mental health difficulties that arose from both the injuries and the context in which they were received.
- [235] He was clearly fully recovered on February 11, 2010 from both the 2001 attack and there is no evidence that the motor vehicle accident of August 10, 2009 was still a factor affecting his health. That motor vehicle accident resulted in minor low back strain that appears to have resolved within a few weeks. His last attendance to the doctor with concerns from that motor vehicle accident was on August 28, 2009. He was working at AXIS at the time and there does not appear to be any significant wage loss as a result of that motor vehicle accident.
- [236] I am satisfied on a balance of probabilities that the process of handcuffing and searching with a knee being jammed into his back on two occasions, and the lifting or planking of Mr. McLellan, are the direct causes of the injuries to his lower back. The manner in which he was treated by the RCMP officers on that day have contributed significantly to an ongoing fear of the police, and a modest level of anxiety and depression, again something close to PTSD, that he has suffered as a result.

- [237] The evidence of Ms. Branscombe suggests that these injuries make it impossible for Mr. McLellan to return to work, and though that will be dealt with in more detail under a loss of wages claim, it is a factor that the injuries are so severe that his options for work are limited and that the satisfaction that an individual gets from supporting one's self and being independent financially, is now lost to Mr. McLellan.
- [238] In terms of personal relationships, after the injuries he ended his long-term relationship with his then girlfriend. He cited pain, mood swings and an inability to sleep as factors which contributed to the end of that relationship, as well as an inability to involve in intimate personal relations. His relationship with Acacia Brovedani ended shortly after an encounter with the police in 2017, which was just a routine traffic stop, which had significantly profound effects on Mr. McLellan. The relationship was ended by Ms. Brovedani.
- [239] As a result of his injuries, the plaintiff has suffered severe financial deprivation, including periods of times of virtual homelessness. There are indications of periods of significant lows in terms of his mental health, including contemplating suicide. Although the plaintiff claims that he would very much like to have his life back, this is not possible. While a relatively young man at 31-years-of-age at the time of the incident, he now has ongoing and chronic pain which he will have to deal with for the rest of his life. While I note in the absence of evidence, one could safely imagine to be a period of time in excess of 40 years, based on average life expectancy, he will have to deal with the constant pain, limitations on many aspects of his life, loss of recreation, and seemingly loss of familial support. That is a long period of time over which he will have to deal with his various losses.
- [240] The plaintiff suggests in his submissions non-pecuniary damages in the range of \$150,000 to \$170,000.
- [241] In *Noffle v. Bartosch*, 2018 BCSC 766, the court awarded a 46-year-old who suffered from neck, shoulder and mid-back injuries of a chronic nature as well as headaches and sleep disturbance, \$170,000 in non-pecuniary damages. That plaintiff is modestly older than the plaintiff before the court, although the disruption in life is similar.
- [242] In *Hauk v. Shatzko*, 2020 BCSC 344, a 49-year-old female plaintiff suffered neck, back and shoulder soft tissue injuries, of a chronic nature, as well as chronic pain, headaches, sleep disturbance and mood problems. Non-pecuniary damages were awarded in the amount of \$150,000.
- [243] In *Moreira v. Crichton*, 2018 BCSC 1281, a 41-year-old plaintiff was described as an active individual before the accident but who suffered chronic pain in her neck and back after the accident, and whose family and personal relationships were significantly hampered by the pain and injuries from the accident. Damages were assessed at \$130,000. Her injuries were again treated by rhizotomies, which on a near annual basis, like Mr. McLellan, provided temporary relief but were not permanent amelioration of the problem.

[244] For the most part, the cases advanced by the defendants are not applicable to the actual circumstances that I find Mr. McLellan faces. The defendants' approach to damages is predicated on an analysis that the injuries suffered by Mr. McLellan should be restricted to damages incurred prior to March 2012. They rely on an application for admission to the Thompson Rivers University Horticultural program, penned by Mr. McLellan, as evidence that there is virtually no compensable loss from that date. In that application form, Mr. McLellan wrote the following:

Although there are a lot of physically demanding time in this job area, the equipment used in this profession seriously decreases the overall physicality of the job. I have been and will continue to build back my strength and endurance. With continue effort on my part and having a career that will keep me moving, always seeking to improve, I see nothing but a happy long career in this field of work.

[245] With respect to the thoughtful submissions advanced by the defendants, I disagree that this effort to gain admission to a horticultural certificate program, with a profound sense of optimism, is sufficient to determine and end the damages suffered by the plaintiff at the two-year limit. Of note, in the words he wrote himself, Mr. McLellan did not admit an ability to necessarily meet the physical demands of the job in that he predicated his comment that equipment used in the profession had significantly decreased the overall physicality of the job. Even at that point, this statement of Mr. McLellan recognized his physical limitations but advanced the hope that with use of equipment, he could succeed in that industry. It turns out that he was wrong.

[246] Additionally, in March 2012, a period slightly in excess of two years from the date of injury, this application to gain admission shows a sense of optimism which has not been borne out over time. The simple facts are that Mr. McLellan continues to suffer from injuries resulting from the incident and there is no medical evidence to suggest that there is an intervening cause which has extended the nature and effect of these injuries suffered on February 11, 2010 beyond a "normal" period of time before recovery. Simply put, there is no intervening act or omission which can be explanatory of the condition that Mr. McLellan currently finds himself in. Again, that situation is that he continues, some 11 years after the injury, to suffer pain, discomfort and loss as a result of the incident.

[247] Having considered all the evidence related to the pain and suffering by McLellan, noting no intervening factors which caused or contributed to his current condition, and noting the overwhelming medical evidence that the pain that Mr. McLellan suffers from is real and is unlikely to reasonably dissipate, I award non-pecuniary damages in the amount of \$170,000.

Past Wage Loss

[248] At the time of the incident, the plaintiff was working for AXIS. He had been working there for approximately eight months when the injuries occurred.

- [249] Christiane Clark, an economist, in a report dated April 23, 2001, calculated the wage loss for Mr. McLellan from the date of his leaving employment at AXIS to the date of trial. I accept the analysis that \$39,623 represents the income earned by someone in the plaintiff's line of work at AXIS for a twelve-month period prior to the incident. Based on that determination, Table 3 of her report calculates the gross amount of wage loss is \$474,436. She then in that report calculates negative contingencies, an amount to be deducted for contingencies at 18.5%, which would reduce the wage loss to \$386,681. Further, she calculates negative contingencies at 9.7% and that would have the effect of reducing the wage loss to \$428,644.
- [250] Contingencies to be applied to past wage loss are perhaps more certain than contingencies to be applied to future loss of opportunity, in the sense that a reduction to future loss of capacity for early demise, or for voluntary reduction of employment, are either not applicable or less significant on a past wage loss analysis.
- [251] As noted in regards to the report of Ms. Clark, I accept her calculation as to the gross wage loss with no contingencies. It is not challenged by contrary evidence. However, in determining actual past wage loss, I am of the view that a larger percentage reduction needs to be applied in light of the contingencies that would be applied for Mr. McLellan.
- [252] In that regard, I note although he testified that he enjoyed the job, and the evidence suggests that he was good at the job, Mr. McLellan had a very limited track record for sustained employment. Conversely I note and agree with his evidence that he found this job to be particularly beneficial in terms of the flexible hours, which he desired to have for the purposes of meeting his life-long passion of playing competitive baseball. I note as well, that in the past he has regularly sacrificed his employment, or so it appears, to pursue his passion of baseball and perhaps his dream of a career in baseball. This suggests with 20/20 hindsight that there is a substantial possibility that this plaintiff would have sacrificed his employment opportunities for the purposes of his recreational activities of following his dream to play baseball. I note, however, that at age 31, which he was at the time of the incident, his ability to succeed at competitive baseball would be limited. Nonetheless, he presented to the court as someone who has regularly sacrificed his employment opportunities for his desire to play a sport.
- [253] In all the circumstances, I would reduce the gross wage loss with a 30% contingency and would assess the gross wage loss at \$332,105. As this is past wage loss, an amount for income tax need be deducted. I do however note that that amount is likely to be modest, as the annual amount is not high. I will leave it to counsel to hopefully agree on that further reduction. In the event they are unable to agree, there is liberty to apply.

Loss of Future Capacity

- [254] In the case of *Perren v. Lalari*, 2010 BCCA 140, our Court of Appeal has confirmed that to succeed in this claim for loss, the plaintiff must show:

- [32] that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in Steenblok, or a capital asset approach, as in Brown.
- [255] I start by noting there is an absolute loss here. The plaintiff cannot work at present. That is not speculation. He suffers from severe chronic pain and can barely function. He cannot stand or sit for long periods of time. He has limited lifting capacity. The evidence is that he cannot sit in a car for a long period of time. He needs to move, he needs to stretch and he needs to change positions for seemingly momentary comfort. He seemed destined for a job involving his physical capabilities. That is lost to him as the matter currently stands.
- [256] Again, in evidence before the court, it is the same report of Christiane Clark dated April 23, 2021. In Table 3 of that report, the gross loss of income to age 67, based on Mr. McLellan continuing to work as a residential care worker to age 67, suggests a gross loss of \$1,085,328. Further, the report applies a number of negative contingencies at 30.2% resulting in a loss of \$757,139, or alternatively an 11.6% negative contingency resulting in a loss of \$959,305.
- [257] In my reading of the report, the larger reduction, the 30.2% reduction for negative contingencies, represents contingencies related to risk and choice. Risk and choice itself appears to relate to the contingencies of either being out of work generally, but also being out of work by choice or choosing to work part-time rather than full-time. The risk contingency relates only to being, for lack of a better term, forced by market conditions, to be either unemployed or to work part-time.
- [258] In analyzing these two contingencies, the most significant difference appears to be a difference which starts around the time when someone reaches their late 50s or early 60s when the contingencies increase significantly as a result, no doubt, of a choice that many workers make during those latter years of expected employment. What is not calculated into these contingencies is a factor which I noted earlier in the claim for past wage loss, and that in my view is an enhanced fact in regards to Mr. McLellan, that his past history of sacrificing employment for the purposes of activities of personal fulfillment rather than activities related to only financial considerations. What I am saying here is that in the past Mr. McLellan has sacrificed his work opportunities for baseball. Although I recognize that sacrifice is something unlikely to be of significance in his 40s and 50s, it is still an additional negative contingency which I find relevant to the "crystal ball" type of projection as to what the future would hold for Mr. McLellan had he not been injured in the incident.
- [259] Additionally, and perhaps optimistically, a further contingency has to be applied in my view for the hopeful prospect that once this litigation is over, that the overwhelming emotional impact of what happened to Mr. McLellan on February 11, 2010 may improve his mental health disposition in such a way so as to provide him with the opportunity for some limited part-time employment. That may be a faint hope in light of the overwhelming

nature of the physical difficulties he suffers as a result of the incident, but it is still a modest hope for which a contingency can and should be applied.

[260] Clearly, as directed in Perron, the Court is entitled to quantify the loss based on an earning capacity approach. That is the approach that often works best when the court can calculate what a plaintiff was able to earn, and is faced, as I find here, with a circumstance of absolute loss. He has not worked effectively since the incident. There is no evidence of an ability to work. At best, there is a slight possibility of part-time work, at some future point, particularly if his mental health concerns are ameliorated.

[261] Based on what has been said, I would determine the loss of future capacity claim at \$650,000.

Special Damages

[262] In terms of special damages, I note in the evidence and in submissions of counsel, that WorkSafeBC has advanced considerable expenditures to this plaintiff for the purposes of assisting him in his recovery. This includes \$44,517.71 for various healthcare costs paid for by WorkSafeBC, and \$45,234.25 for vocation rehabilitation costs. That claim, which is a subrogated claim in this litigation, totals \$89,751.96.

[263] Additionally, the plaintiff has paid for rhizotomies and PRP treatments not covered by WorkSafeBC, but rather incurred after they terminated his benefits. In addition to the \$89,751.98 paid by WorkSafeBC, the plaintiff claims as special damages the further sum of \$5,472, being \$672 for a YMCA membership for two years and approximately \$4,800 for rhizotomies and PRP treatments performed by Dr. Etheridge.

[264] I conclude that the plaintiff has proven that these damages are as a direct result of the injuries. Though I have determined that the vocational rehabilitation training that he took through the Thompson Rivers University in the Horticultural program was not well thought through, I cannot say with certainty that it was inappropriately incurred. This was an area of particular interest of the plaintiff and clearly the application form that the defendants rely upon in their submissions shows that the plaintiff undertook this program with the belief, mistaken at it appears to be, that with technological assistance and equipment in this area, he could successfully succeed in this re-training. Again, this process was done at a time when he was relatively early on in his injury. It is clear that he did not appreciate at that point the extent of his injuries and/or the lack of recovery, nor did he appreciate the fact that his chosen profession had a physical component to it which he was not capable of meeting. It was naïve and somewhat misguided, but it was nonetheless a seemingly reasonable endeavour to begin.

[265] As such, I fix special damages payable in the amount of \$95,223.96

Cost of Future Care

[266] Despite the suggestion in the medical evidence that the plaintiff would benefit from personal and trauma-related counselling, at least as I read the report of the occupational therapist, Sheila Branscombe, there is not a claim advanced for that as a cost of future care item.

[267] The test for cost of future care was articulated in *Aberdeen v. Township of Langley*, 2007 BCSC 993. At para. 120, I noted as follows:

[120] Thus, I think the solution is to consider "full" compensation espoused in *Andrews* in the context of the more pragmatic and widely-followed test set out in *Milina*, namely that there should be medical justification for a cost of future care expense, and the expense must be reasonable. In this sense, the inquiry is more directed to the fact-based determination of whether each individual item is medically justified, rather than approaching the question from a purely functional analysis of whether a particular item will make the plaintiff whole again. The difference is in many respects semantic, but the former question maintains the focus on the pecuniary loss aspect of the cost of future care, and helps to prevent the Court from extending the award to fulfill the non-pecuniary goal of providing solace for what has been lost. Even in *Andrews*, Dickson J. recognized that *restitutio in integrum* was not possible (at ¶ 25). If the plaintiff fails to demonstrate that a particular future care item is medically justified, the plaintiff in essence has failed to prove his damages, and therefore cannot receive compensation on that ground. That said, the analysis of what is "medically justified" is not as narrow as what is "medically necessary," and all of the parties agree with this proposition.

[268] The items which are identified in the claim for cost of future care include the following.

[269] Numerous doctors have recommended the importance in pain management and pain recovery of the plaintiff being active. A claim is advanced for a gym membership in the amount of \$336 per year. That is supported in the evidence generally and supported specifically in the report of Sheila Branscombe. Reimbursement for that cost is requested at \$336 per year. That is a reasonable claim and it is medically justified.

[270] Additionally, Dr. Etheridge testified to the cost of a rhizotomy of approximately \$200. Rhizotomies seem to be called for once a year, or, at least, once every two years. As I noted in the evidence earlier, however, Dr. Etheridge's charge for a rhizotomy is nominal compared to what other doctors charge, more in the neighbourhood of \$2,000 to \$3,000 per treatment. In all the circumstances, recognizing that the treatment is currently available for \$200, but recognizing that other providers may charge as much as \$2,000 to \$3,000 for such treatment, I would balance out those opportunities and costs at a cost of \$1,200 per year for rhizotomies.

[271] In addition to rhizotomies, Dr. Etheridge provides PRP injections which have had the effect of ameliorating the plaintiff's pain in a manner similar to a rhizotomy, but for a shorter period of time. These are costed at \$350 per treatment. The treatments are required twice a year. As such, there is a cost of \$700 annually for these.

[272] These three claims total an annual cost of \$2,236.

[273] In her cost of future care report dated April 23, 2001, Ms. Clark concludes that to calculate the cost of \$1,000 in medical expenses to the age of 81, the multiplier to be applied for each \$1,000 is 25.098. As such, with a total cost of \$2,236 annually, the cost of future care award would be, rounded up, \$56,120.

[274] I note in fixing this cost that one of the usual claims advanced for someone suffering from pain is the cost of medication for pain management. The evidence before me suggests that the only pain management medication used by the plaintiff is cannabis. The evidence suggests that he is able to manufacture this himself. As such, no costs are requested for that, but that is noted.

[275] I have determined the cost of future care as such at \$56,120.

Judgment

[276] Defence counsel has suggested that the true defendant in this action is the Minister of Public Safety and Solicitor General, as they were effectively the employers of Constable Peters and Constable Elgee at the time of the incident on February 11, 2010. The defendants argue that the case against the federal Crown is prohibited by s. 10 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50. They say this legislation prohibits proceedings against the federal Crown in respect of acts or omissions of servants of the Crown unless that act or omission gives rise to cause of action for liability against that servant.

[277] Additionally, they argue s. 21(2) of the Police Act, R.S.B.C. 1996, c. 367 prohibits actions against police officers for anything they have done in the performance of their duty, including any acts of negligence or default in the performance of their duty.

[278] Based on those submissions, it would be appropriate the action against Her Majesty the Queen in right of Canada, Constable Evan Elgee, and Constable Carla Peters are dismissed with no order to either party as to costs of those actions.

[279] In regards to the remaining defendant, the Minister of Public Safety and Solicitor General, judgment is granted in the following amounts:

Non-pecuniary damages:

\$170,000.00

Past wage loss:

\$332,105.00

Loss of future capacity:

\$650,000.00

Special damages:

\$95,223.96

Cost of future care:

\$56,120.00

Total:

\$1,303,448.96

[280] The plaintiff has been successful in his action against the defendant, the Minister of Public Safety and Solicitor General, and is entitled to his costs. If there are issues related to costs based on information not available to the court, such as offers to settle, and the parties are unable to resolve those issues, there is liberty to apply. I note as well, as mentioned earlier, that there is liberty to apply in the event the parties are unable to agree on any reduction for tax applicable to the award of damages for past wage loss. Finally, I will grant liberty to the plaintiff to raise any issue about the form of judgment noted above in paras. 276-279 of these reasons.

[281] Finally, I wish to thank all counsel for the respectful and competent way they handled this litigation before me. They were an example of the finest aspect of the bar. All parties were ably represented by their chosen counsel.

"J.R. Groves J."

GROVES J.

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