
CANADA / JUDGMENT

Pacheco v. Degife

2014 BCSC 1570

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1570 Pacheco v. Degife

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pacheco v. Degife,

2014 BCSC 1570

Date: 20140819

Docket: S101644

Registry: Vancouver

Between:

Enrique Alexander Pacheco

Plaintiff

And

Tesfay Arega Degife and Faron Tyler Bilitaki Wong

Defendants

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

A. E. Kuntze

Counsel for the Defendant ,

Faron T. B. Wong:

A. C. Ward

The Defendant, Tesfaye A. Degife:

In Person

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 23 - 26, 2014

Place and Date of Judgment:

Vancouver, B.C.

August 19, 2014

Introduction

- [1] The plaintiff, Enrique Pacheco, claims damages for battery arising out of an incident that occurred in the early morning hours of May 31, 2008 on Beach Avenue in Vancouver. A minor rear-end collision involving Mr. Pacheco's car and a car driven by the defendant, Tesfaye Degife, led to an altercation in which Mr. Pacheco was struck in the head with a baseball bat (the "Incident").
- [2] A central issue to be determined is the identity of the person that struck Mr. Pacheco. As there is no direct evidence on this point, it is necessary to review the evidence of each witness in some detail. I will first deal with the issue of liability and will then address Mr. Pacheco's claimed damages separately.

Liability for the Plaintiff's Injuries

The Plaintiff's Evidence

- [3] Mr. Pacheco was born in El Salvador on December 29, 1981 and moved with his family to Canada in 1988. He is currently 32 years old.
- [4] He lives in Vancouver with his mother and younger brother.
- [5] Mr. Pacheco has a high school education, having graduated from Burnaby Central Secondary School in 2000.
- [6] Mr. Pacheco claims to remember very little about the Incident. He said that he was at a bar in Vancouver on the evening of May 30, 2008. Early in the morning of May 31st, he left with two friends, Chris Herada and Nazanin Tanidegar. He has known Mr. Herada since high school but had only recently met Ms. Tanidegar.
- [7] Mr. Pacheco testified that he recalled leaving the bar with them and getting into his car to drive home. The next thing he remembers is waking up in Vancouver General Hospital.

- [8] It was put to Mr. Pacheco in cross-examination that he was the aggressor in the Incident. Specifically, it was put to him that after leaving the bar, he stopped his car in the middle of Beach Avenue. The car driven by Mr. Degife came up behind him, honked and went around him. It was suggested that Mr. Pacheco then chased Mr. Degife's car and bumped into it. It was suggested further that when Mr. Degife got out of his car, Mr. Pacheco punched him and then Mr. Pacheco and his passenger, Mr. Herada, chased down Mr. Degife's passenger, Mr. Wong, and beat him.
- [9] In response to each of these questions, Mr. Pacheco again professed to have no recollection of any details of the Incident.
- [10] It was also put to Mr. Pacheco that he has a problem with alcohol and that when he drinks he gets aggressive. He denied this. He did however agree that he was involved in a subsequent incident in 2010 when he punched a police officer and that he was drunk at the time.
- [11] Mr. Pacheco testified that this subsequent altercation occurred during the 2010 Olympics when he got into a scuffle with someone on the street after a hockey game. He said he was holding the person by the shirt collar when he was grabbed from behind. He turned and punched the person who had grabbed him, who turned out to be a police officer. He said that this was the only similar incident before or after the Incident in issue.
- [12] It was put to him that he was drunk on the night of the Incident. While he agreed that he had been drinking at the bar that evening, he denied being drunk when he left.

The Plaintiff's Witnesses

- [13] Mr. Pacheco called evidence from four additional witnesses.
- [14] At the time of the Incident, Camila and Maciej Slusarczyk lived on the 12th floor of an apartment building in the 1000 block of Beach Avenue.
- [15] Ms. Slusarczyk testified that she was woken up by honking and the sound of a crash early in the morning of May 31, 2008. It was a warm evening so she and her husband had their bedroom window open. She went to the window, looked down and saw two cars on the street below. The one in front was a newer car and the one in the rear was older.
- [16] While she was somewhat unclear on the details, at one point she saw people outside the two cars then she saw the driver of the older car start to chase one of the people from the newer car who was wearing white pants. She described the driver of the older car as being larger than the people in the newer car. They disappeared from view, however she then went out onto her balcony and saw the man with the white pants lying motionless on the grass outside of the Vancouver Aquatic Centre, just down the block.

- [17] Ms. Slusarczyk testified that the driver of the older car came back into view, walked to the newer car and began to punch it. He then went back to his car and it looked like he was going to get into the driver's seat when he was hit in the back of the head with a baseball bat.
- [18] She said the driver of the older car fell and struck his head on the pavement. He got up quite quickly, which surprised her, then he lay down in the back seat of the older car.
- [19] She could not identify who swung the bat but said that person was then chased by two other men. She saw the person who had swung the bat throw it away.
- [20] The police and ambulance arrived and the driver of the older car and the man in the white pants were taken away.
- [21] In cross-examination, Ms. Slusarczyk said she saw three people being taken away by ambulance: the driver of the older car, the man in the white pants and the man who had swung the bat.
- [22] Mr. Slusarczyk similarly testified that he was woken up by sounds in the street below their apartment. When they heard the sound of the cars colliding, his wife got up and went to the window but he stayed in bed. She then called him to come and look.
- [23] He looked into the street below and saw two cars, one of which he identified as a Mitsubishi Eclipse and the other as an older Honda Civic. He later agreed, based on a review of photographs, that the older car was a Toyota Corolla.
- [24] Mr. Slusarczyk testified that the two people in the Eclipse got out to, in his words, confront the driver of the Corolla. He then saw the driver of the Corolla chase one of the men from the Eclipse who was wearing white pants. Mr. Slusarczyk moved to his balcony and he saw the man in white pants lying motionless on the grass in front of the Vancouver Aquatic Centre.
- [25] Mr. Slusarczyk said that the driver of the Corolla walked back to his car when the passenger from the Eclipse pulled a baseball bat out of the Eclipse's trunk and struck the driver of the Corolla in the back of the head. Mr. Slusarczyk said that the driver of the Corolla fell and struck his head on the ground. Mr. Slusarczyk heard the sound both of the bat striking his head and his head hitting the ground.
- [26] Mr. Slusarczyk also expressed surprise that the driver of the Corolla was able to get up quite quickly and then he lay down in the back of the Corolla.
- [27] Mr. Slusarczyk was unable to identify any of the people that he saw other than to note that the driver of the Eclipse was wearing white pants and that both people in the Eclipse were smaller than the driver of the Corolla.
- [28] In cross examination, Mr. Slusarczyk agreed that the driver of the Corolla appeared to be the aggressor and that he chased the man in the white pants, who was later seen lying prone on the grass in front of the Vancouver Aquatic Centre.

- [29] Mr. Slusarczyk agreed that he could not say for certain that the man in the white pants was the driver of the Eclipse but that was his clear impression from what he observed.
- [30] Mr. James Beatty lives on the 15th floor of a building located at 1011 Beach Avenue.
- [31] Mr. Beatty testified that in the early morning of May 31, 2008, he heard what sounded like a fight in the street below. It was a warm evening so he had his balcony door open.
- [32] He went to the balcony and looked down where he saw one man lying on the grass in front of the Vancouver Aquatic Centre and another man standing over him beating him. He could not identify either man and the only distinguishing feature that he could recall was that the man doing the beating was wearing a white or light coloured t-shirt.
- [33] Mr. Beatty said that the police arrived and the man in the light coloured t-shirt ran away, heading down to a grassy picnic area adjacent to the Vancouver Aquatic Centre.
- [34] It would seem likely that this man was Mr. Herada, who apparently ran off when the police arrived rather than returning to Mr. Pacheco's car.
- [35] Ms. Nazanin Tanidegar was a passenger in Mr. Pacheco's car at the time of the Incident. She testified that earlier in the evening she had been at a club downtown with some friends. At some point she left with Mr. Pacheco, and a man that she identified as Chris. She did not know his last name.
- [36] Ms. Tanidegar said that they were driving along Beach Avenue when Mr. Pacheco's car bumped into another car. She said that Mr. Pacheco was on the phone at the time, speaking to his girlfriend.
- [37] According to Ms. Tanidegar, the driver of the other car, which she said was green, got out of his car, came to Mr. Pacheco's car and punched Mr. Pacheco through the driver's side window. She said that Mr. Pacheco got out and was fighting with the two men from the other car. Chris then got out of their car so it was a two on two fight.
- [38] Ms. Tanidegar testified that she heard sirens and Mr. Pacheco went to his car, she thinks to move it. Someone then came up behind him and hit him in the head with a baseball bat causing him to drop to the ground.
- [39] Ms. Tanidegar could not identify either of the men in the green car, other than to say that one of them was wearing white pants. She believes that was the passenger in the green car.
- [40] She said that she saw the bat taken from the trunk of the green car.
- [41] In cross-examination, she agreed that she saw Mr. Pacheco and his passenger chase the man in the white pants and beat him until he was unconscious. She agreed that the other man from the green car was calling 911 and that she swore at him and told him to get off the phone.

- [42] She denied that Mr. Pacheco was the instigator of the altercation. She said the instigator was the man who punched Mr. Pacheco.
- [43] Ms. Tanidegar testified that after seeing Mr. Pacheco get hit with the bat, she went and sat at a bus stop then caught a taxi home. The most that she could say about the person who swung the bat was that he appeared to be "middle eastern".

Evidence from the Defendants' Examination for Discovery

- [44] The plaintiff read in excerpts from the examinations for discovery of both Mr. Degife and Mr. Wong that established that Mr. Degife and Mr. Wong were in the green Mitsubishi Eclipse when it was hit from behind by the car driven by Mr. Pacheco. The car was owned and was being driven by Mr. Degife. Mr. Wong was in the front passenger seat.

The Defendants' Evidence

- [45] Of the two defendants, Mr. Wong testified and Mr. Degife did not.
- [46] Mr. Wong was born on September 21, 1982 and is currently 31 years old. At the time of the Incident he was 25 years old.
- [47] He is currently employed full time as a shipper/receiver at a technology company. In 2008, he was employed full time in a book bindery and also worked in a warehouse.
- [48] He has known Mr. Degife since they were both about 18 years old. They met playing soccer and became close friends, living together for a period of time.
- [49] Mr. Wong testified that on the evening of Friday May 30, 2008, he and Mr. Degife went to someone's house in the West End of Vancouver to attend a poker game. The game did not in fact materialize so they, along with another friend of Mr. Wong's, took a taxi to a pub in Gastown.
- [50] Mr. Wong said that when they arrived, he realized that he did not have his identification so they could not get into the pub. They decided to go home so they took a taxi back to the West End, where Mr. Degife had left his car.
- [51] Mr. Wong testified that by the time they returned to the car, he had consumed three to five beers from a six pack that he had brought to the intended poker game. He did not see Mr. Degife consume any alcohol.
- [52] When they got into Mr. Degife's car, they headed towards Beach Avenue and turned to travel eastbound. While on Beach Avenue, they came up behind a car stopped in the middle of the street. According to Mr. Wong, Mr. Degife waited for a bit, then honked his horn. When the car did not move, Mr. Degife honked again then went around the stopped car, passing it on the left side.

- [53] He said they proceeded down the block and then slowed as they came to the intersection of Beach Avenue and Thurlow Street, thinking there was a stop sign. As they slowed down, their car was bumped from behind by another car. Mr. Degife then pulled his car forward a bit and put it into park.
- [54] According to Mr. Wong, Mr. Degife got out of the car while he stayed in the passenger seat for 30 seconds or so. He then got out to see if there was any damage to Mr. Degife's car. He said while he was looking at the rear of Mr. Degife's car, he heard the sound of scuffling feet then loud talking. He also heard Mr. Degife swear. He said he looked up and saw the driver of the other car swinging wildly at Mr. Degife.
- [55] Mr. Degife was crouching down trying to ward off or block the blows. Mr. Wong said that he then went to Mr. Degife's aid. He swung his arm at the other driver, knocking him into the other car. He then stepped in between Mr. Degife and the other driver.
- [56] According to Mr. Wong, the passenger of the other car then got out and he and the other driver came after Mr. Wong. They chased him around several parked cars and then followed him as he ran towards the front door of the Vancouver Aquatic Centre. He said that at one point a bystander tried to stop the other driver by putting up his hand. The other driver punched the bystander and continued after Mr. Wong.
- [57] Mr. Wong said that he fell onto the grass by the Vancouver Aquatic Centre and the two men from the other car kicked and punched him and stomped on his head against the curb until he was unconscious.
- [58] His next memory is of waking up in the hospital.
- [59] Mr. Wong testified that he did not see anyone with a baseball bat prior to being rendered unconscious. He said that he had no knowledge of the bat or where it came from. He did not know if there was a bat in the trunk of Mr. Degife's car as he did not look in the trunk.

Liability Findings

- [60] Mr. Pacheco submits that the altercation that occurred in the early morning of May 31, 2008, which resulted in him being struck with a baseball bat, was started by the defendants Mr. Degife and Mr. Wong. He says that it was Mr. Degife's punch through the driver's side window and Mr. Wong's "attack" on him that escalated the matter.
- [61] While he did not say so directly, the impression he sought to leave with the court was essentially that of an innocent victim. Certainly, there was no acknowledgment by him either in his evidence or during his counsel's submissions, of the role that he played in the Incident.

- [62] Mr. Pacheco is not an innocent victim. He was the aggressor and the main catalyst that led to the Incident resulting in his injuries. The Incident started when Mr. Pacheco caused his car to bump into the rear of the Eclipse. This was either done on purpose or as a result of Mr. Pacheco following too closely in an attempt to intimidate the occupants of the Eclipse. The Incident escalated from there.
- [63] Counsel for Mr. Wong submitted that Mr. Pacheco was the "author of his own misfortune". Based on the evidence, that is a fair characterization.
- [64] That said, it does not disentitle him to damages if he can establish that he was the victim of a battery and if there is no lawful defence to the battery.
- [65] I will deal with Mr. Pacheco's claims against each of Mr. Degife and Mr. Wong separately.
- [66] Starting with the claim against Mr. Wong, while Mr. Pacheco has sued both of the defendants in battery, it was his submission that the evidence leads to the conclusion that Mr. Degife swung the bat. With respect to Mr. Wong, he says that while he may not have swung the bat, his actions accelerated the altercation and caused or contributed to Mr. Pacheco being injured. The specific action referred to is what he again characterized as Mr. Wong's "attack" on him.
- [67] Mr. Wong did not attack Mr. Pacheco. I accept Mr. Wong's evidence that he saw his friend Mr. Degife being put upon by a much larger man and he moved to protect his friend. He did that by knocking Mr. Pacheco sideways and then inserting himself between Mr. Pacheco and Mr. Degife.
- [68] His reward for coming to his friend's aid was to be pursued by Mr. Pacheco and Mr. Herada and then beaten senseless with multiple punches, kicks and stomps to his head.
- [69] There is no evidence that would permit a finding that Mr. Wong is liable for Mr. Pacheco's injuries. Indeed, the evidence clearly establishes that when Mr. Pacheco was struck by the bat, Mr. Wong was lying unconscious on the grass in front of the Vancouver Aquatic Centre as a result of what Mr. Wong's counsel quite properly described as Mr. Pacheco and Mr. Herada's cowardly and savage attack.
- [70] The claim against Mr. Wong is therefore dismissed.
- [71] With respect to Mr. Degife, Mr. Pacheco submits that Mr. Degife ignited the altercation by punching him through his driver's side window. However, the only evidence of such a punch came from Ms. Tanidegar, and I did not find her to be a credible witness. Her recollection of events was selective, which she put down to the fact that the Incident occurred some six years ago, and her evidence seemed tailored to assist Mr. Pacheco.
- [72] Mr. Slusarczyk testified that he saw the two men from the Eclipse get out of the car to confront the driver of the Corolla but he did not say that he saw a punch being thrown.

- [73] I am not satisfied on the evidence that Mr. Degife in fact instigated the Incident by punching Mr. Pacheco. In fact, I think it is highly unlikely, given the significant size difference between the two men, which would have been apparent even with Mr. Pacheco sitting in his car.
- [74] With respect to the battery on Mr. Pacheco, there is no direct evidence identifying the person who swung the bat. None of the witnesses were able to identify any of the individuals involved in the Incident, other than of course Ms. Tanidegar who knew Mr. Pacheco and was in his car.
- [75] The person closest to the scene was Ms. Tanidegar and the best that she could say was that the assailant appeared to be "middle eastern." Of note, Ms. Tanidegar agreed that she had previously seen the driver of the Eclipse on the phone to the police and she had yelled at him to hang up. That person was obviously Mr. Degife. However, in her testimony she did not identify the person who swung the bat as the same person that had been making the phone call.
- [76] It also is telling that when the police arrived, likely in response to Mr. Degife's phone call, Ms. Tanidegar did not stay to help identify Mr. Pacheco's attacker, or even to check to see if Mr. Pacheco was alright. Instead, she caught a taxi and left the scene.
- [77] The other people who testified to seeing Mr. Pacheco get hit with the bat similarly could not identify the assailant with any certainty.
- [78] Ms. Slusarczyk said that the person who swung the bat was then chased by two other men. If this is accurate, it is not clear who these men were. One may have been Mr. Herada although, according to Mr. Beatty's evidence, Mr. Herada likely ran from the scene after beating Mr. Wong when he heard the sirens. On the evidence, Mr. Pacheco did not chase the person who struck him as he immediately lay down in the back of his car after being struck.
- [79] Mr. Slusarczyk testified that the passenger from the Eclipse took the bat from the trunk and hit Mr. Pacheco. He was obviously mistaken about the identity of the person as the evidence clearly establishes that Mr. Wong was the passenger and he was incapacitated when Mr. Pacheco was struck. Mr. Slusarczyk was also mistaken in his belief that it was the driver of the Eclipse who was wearing the white pants.
- [80] Notwithstanding these apparent errors, Mr. Slusarczyk's evidence could be taken to mean that it was the person in the Eclipse other than the man in the white pants who took the bat from the trunk and struck Mr. Pacheco.
- [81] Mr. Pacheco places considerable weight on the evidence of Mr. Slusarczyk that the bat came from the trunk of the Eclipse. He submits that the only people likely to know both that the bat was there and how to pop the Eclipse's truck were Mr. Degife and Mr. Wong. If Mr. Wong was incapacitated, it follows that it was Mr. Degife who took the bat from the trunk and struck Mr. Pacheco.

- [82] While, as noted, Mr. Slusarczyk was mistaken in various aspects of his testimony, his evidence that the bat came from the trunk of the Eclipse was not seriously challenged. Further, while there was some evidence of other people in the vicinity, for example the person who sought to intervene to prevent Mr. Pacheco from attacking Mr. Wong, there is no evidence of any person other than Mr. Degife in immediate proximity to the two vehicles when Mr. Pacheco was struck. Thus the theory, advanced by counsel for Mr. Wong, that some unknown third party struck Mr. Pacheco, has no basis in the evidence.
- [83] While acknowledging again that there is no direct evidence that Mr. Degife struck Mr. Pacheco with the bat, considering the evidence as a whole, the preponderance of probabilities supports a finding that it was Mr. Degife who struck the blow (*Bradshaw v. Stenner*, 2010 BCSC 1398 at para 187).
- [84] I therefore find that on a balance of probabilities Mr. Pacheco has succeeded in establishing Mr. Degife committed the intentional tort of battery on him.

Defences Available to Mr. Degife

- [85] In his response to civil claim, Mr. Degife pleads that it was Mr. Pacheco who assaulted him. While he does not plead the doctrine specifically, I read the response as raising the defence of *ex turpi causa non oritur actio* ("ex turpi"). Mr. Degife also pleads that by instigating the incident, Mr. Pacheco voluntarily assumed the risk of injury i.e. *volenti non fit injuria* ("volenti"), and that he acted in self-defence. Lastly, he pleads that any injuries suffered by Mr. Pacheco were caused or contributed to by Mr. Pacheco's own fault. I will consider each of these issues in turn.

Ex Turpi

- [86] In *Hall v. Hebert*, [1993] 2 S.C.R. 159, the Supreme Court addressed the policy underpinnings of the *ex turpi* doctrine in these terms (179-180):

I conclude that there is a need in the law of tort for a principle which permits judges to deny recovery to a plaintiff on the ground that to do so would undermine the integrity of the justice system. The power is a limited one. Its use is justified where allowing the plaintiff's claim would introduce inconsistency into the fabric of the law, either by permitting the plaintiff to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law. Its use is not justified where the plaintiff's claim is merely for compensation for personal injuries sustained as a consequence of the negligence of the defendant.

- [87] As reflected in this passage, McLachlin J. (as she then was), speaking for the court, drew a distinction between compensatory damages recoverable by a plaintiff for personal injuries suffered as a consequence of tortious conduct, and a profit or gain obtained from illegal conduct.

- [88] More recently, the Supreme Court considered the *ex turpi* doctrine again in *British Columbia v. Zastowny*, 2008 SCC 4, in the context of a claim for damages for past wage loss resulting from a sexual battery which included periods of time where the plaintiff was incarcerated. The Court addressed its earlier decision in *Hall* and said:
- [20] The question is, "under what circumstances should the immoral or criminal conduct of a plaintiff bar the plaintiff from recovering damages to which he or she would otherwise be entitled" (p. 169). The following principles and approach are established in *Hall v. Hebert* and are applicable in the present case.
1. Application of the *ex turpi* doctrine in the tort context invalidates otherwise valid and enforceable actions in tort (p. 169).
 2. Therefore, its application must be based on a firm doctrinal foundation and be made subject to clear limits and should occur "in very limited circumstances" (p. 169).
 3. The only justification for its application is the preservation of the integrity of the legal system. This concern is only in issue where a damage award in a civil suit would allow a person to profit from illegal or wrongful conduct or would permit evasion or rebate of a penalty prescribed by the criminal law (p. 169).

It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which -- contract, tort, the criminal law -- must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to "create an intolerable fissure in the law's conceptually seamless web": Weinrib, *supra*, at p. 42. We thus see that the concern, put at its most fundamental, is with the integrity of the legal system. [p. 176]

4. The *ex turpi* doctrine generally does not preclude an award of damages in tort because such awards tend to compensate the plaintiff rather than amount to "profit":

Such damages accomplish nothing more than to put the plaintiff in the position he or she would have been in had the tort not occurred. [A plaintiff should get] only the value of, or a substitute for, the injuries he or she has suffered by the fault of another. He or she gets nothing for or by reason of the fact he or she was engaged in illegal conduct. [pp. 176-77]

5. The *ex turpi* doctrine is a defence in a tort action. The plaintiff's illegal conduct does not give rise to a judicial discretion to negate or refuse to consider the duty of care which goes to the relationship between a plaintiff and a defendant. It is independent of that relationship. The defendant may have caused harm by acting wrongly or negligently, but the "responsibility for this wrong is suspended only because concern for the integrity of the legal system trumps the concern that the defendant be responsible" (pp. 181-82).

6. Treating the *ex turpi* doctrine as a defence places the onus on the defendant to prove the illegal or immoral conduct that precludes the plaintiff's action. And as a defence, it allows for segregation between claims for personal injury and claims that would constitute profit from illegal or immoral conduct or the evasion of or a rebate of a penalty provided by the criminal law.
- [89] Various academics have taken different views on the applicability of the doctrine in personal injury cases in light of the Supreme Court's decision in *Hall*. In Allen M. Linden & Bruce Fieldthusen, *Canadian Tort Law*, 9th ed. (Markham, Ont.: LexisNexis Canada, 2011) the writers interpret *Hall* to mean that *ex turpi* is "no longer available at all in personal injury cases, for there is no profit in receiving compensation for injury" (at 533). The opposite view is espoused in G.J.L. Fridman, *The Law of Torts in Canada*, 3d ed. (Toronto: Carswell, 2010), where Fridman states that in a mutual fight between two willing participants, "the defendant can rely not only on the plea of consent but also on the maxim *ex turpi causa*" where consent is not available (at 89), but "the damage suffered by the plaintiff must be a direct and readily foreseeable result of the criminal purpose of the plaintiff" (at 102). Finally, in Lewis N. Klar, *Tort Law*, 5th ed. (Toronto: Thomson Reuters Canada, 2012), the author takes a more pragmatic approach, noting that though a defence in the case of mutual fights can be grounded on the basis of either the defence of consent or illegality, the defence of illegality was severely curtailed by *Hall* (at 135), and as such it is "now very unlikely that the defence of illegality can be successfully used in personal injury cases to deny compensation to a wrongdoing plaintiff" (at 567).
- [90] I do not read *Hall* as foreclosing entirely the possibility that *ex turpi* can ever be invoked in a personal injury claim, however it is clear that the doctrine has limited application and is restricted to those cases in which the damages claimed can clearly be characterized as profits for the plaintiff's illegal conduct.
- [91] That is not the case here. While I have found that Mr. Pacheco was the aggressor in the Incident, his claim for damages arises not as a direct result of his own illegal or immoral conduct, but by reason of the battery committed by Mr. Degife. As such, the doctrine of *ex turpi* has no application.

Volenti

- [92] The doctrine of *volenti non fit injuria*, otherwise known as voluntary assumption of risk, is premised on the "moral supposition that no wrong is done to one who consents" and, because it is a complete bar to recovery, courts have found it "only applies in situations where the plaintiff has assumed both the physical and legal risk involved in the activity" (*Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186 at 1201-1202).

[93] To establish *volenti*, it must be "clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part" (*Dube v. Labar*, [1986] 1 S.C.R. 649 at 658). The test was further explained by the Court in *Dube* as follows (658-659):

The acceptance of the risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise, in cases such as the present, only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.

To permit the defence to succeed on facts showing merely that the plaintiff knew of the risk and yet chose to undergo it is inconsistent with the decisions of this Court, *supra*, which require not merely knowledge, but express or necessarily implied acceptance of the risk of harm without recourse to law by the plaintiff, along with an inference that the defendant, for his part, took no responsibility for the plaintiff's safety.

[94] The doctrine of *volenti* is more frequently considered in the context of an action for negligence causing personal injury. In terms of intentional torts, specifically battery, the same doctrine is typically referred to as the defence of consent (*Fridman, The Law of Torts in Canada* at 99). The difference between the two concepts, as described by Klar at 128, is the difference between actually consenting to being struck versus engaging in an activity in which one assumes the risk of being struck by virtue of the nature of the activity.

[95] The defence of consent to physical interference must be established by the defendant (*Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at paras. 3-6), and, whether express or implied, is a complete defence to battery where the consent is genuine and freely given (*Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 246-247).

[96] It has been held that those who engage in mutual fights cannot complain of injuries suffered in the course of the fight, unless the force which is used by one of the combatants is excessive or unnecessary (Klar, *Tort Law* at 134).

[97] In the case at bar, it is again clear that Mr. Pacheco instigated the Incident and was the aggressor. Thus, on the evidence, it can be said that he engaged in a voluntary physical confrontation first with Mr. Degife, immediately following the collision, and then in his pursuit and attack of Mr. Wong.

[98] However, at the time he was struck, Mr. Pacheco was not physically engaged with either Mr. Degife or Mr. Wong and, in fact, had his back turned to Mr. Degife. Further, even if it could be said that he engaged in consensual fisticuffs with Mr. Degife, that does not necessarily translate into consent to be struck with a weapon. See for example *Dolson v. Hughes*, 107 D.L.R. (3d) 343, [1979] B.C.J. No. 832 where Taylor J. found the defence of *volenti* inapplicable in circumstances where the plaintiff initiated a fist fight and was struck in the face with a broken beer bottle by the defendant.

[99] I find that the defence of consent is not available to Mr. Degife. However, as will be seen below, the fact that Mr. Pacheco created the risk of harm by violently instigating the Incident, is relevant as a mitigating factor in the assessment of damages.

Self Defence

[100] The onus of proving justification for a counter assault and proving that the force used was not excessive rests on the defendant. This was addressed by the Supreme Court in the case *Mann v. Balaban et al*, [1970] S.C.R. 74, where the court held the following (at 87):

In an action for assault, it has been, in my view, established that it is for the plaintiff to prove that he was assaulted and that he sustained an injury thereby. The onus is upon the plaintiff to establish those facts before the jury. Then it is upon the defendant to establish the defences, firstly, that the assault was justified and, secondly, that the assault even if justified was not made with any unreasonable force and on those issues the onus is on the defence.

[101] See also *Thomson v. Friedmann*, 2008 BCSC 703, aff'd 2010 BCCA 277, where the court quoted Professor Fridman's explanation of the defence at para. 17:

Self defence imports the idea that the defendant is under attack at the hands of the plaintiff, or reasonably believes that he will be subject to such an attack, even if the plaintiff has neither the intention nor the power to make such an attack. Even if the circumstances entitle the defendant to claim he was acting in self defence, he cannot escape liability unless he discharges the burden of proving that the amount of force he used was reasonable in all the circumstances. This will depend on the court's assessment of the situation, taking into account the form and nature of the plaintiff's attack on the defendant and the reasonableness of the response of the defendant.

[102] As Mr. Degife led no evidence, it cannot be said that he satisfied the burden on him to prove that in striking Mr. Pacheco with a baseball bat from behind he was acting out of an instinct of self-preservation and used no more force than was necessary in the circumstances. As such, he has not satisfied the onus on him of establishing the defence of self-defence.

Provocation

[103] Section 1(1) of the Negligence Act, R.S.B.C. 1996, c. 333 provides:

If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

[104] "Fault" as used in this section has been interpreted to apply not only to negligence actions but also to intentional torts like battery (*Valerio v. Silveira*, 2011 BCSC 1055 at para. 207). Thus, where a plaintiff provokes an assault or battery by reasons of his or her own conduct, the plaintiff may be found at fault, leading to an apportionment of liability under s. 1.

[105] In *Bruce v. Coliseum Management Ltd*, 165 D.L.R. (4th) 472, [1998] B.C.J. No. 2339 at para. 18 (C.A.) the court adopted the definition of provocation in Canadian Tort Law as follows:

In A.M. Linden, *Canadian Tort Law*, 6th ed. (Vancouver: Butterworths, 1997) at 81, provocation is explained as follows:

In order to amount to provocation, the conduct of the plaintiff must have been "such as to cause the defendant to lose his power of self-control and must have occurred at the time of or shortly before the assault." Prior incidents would have relevance only "if it were asserted that the effect of the immediate provocative acts upon the defendant's mind was enhanced by those previous incidents being recalled to him and thereby inflaming his passion". One cannot coolly and deliberately plan to take revenge on another and expect to rely on provocation as a mitigating factor.

[106] The court endorsed the analysis and findings of the Newfoundland Court of Appeal in *Hurley v. Moore* (1993), 107 D.L.R. (4th) 664 (Nfld. C.A.) where it held that provocation does not operate as a defence but is a factor to be considered in assessing damages; see also *Kuehn v. Hougen*, 1997 ABCA 325, [1997] A.J. No. 982.

[107] *Valerio* involved an alleged battery between ex-spouses. The court held that the initial battery (the defendant grabbing the plaintiff's wrist) arose as a result of the plaintiff refusing to stop throwing away the defendant's personal items, and was escalated by the plaintiff kicking the defendant, who grabbed her foot in response leading to her injuries. The court found that s. 1 of the Negligence Act applied, and held the plaintiff 25% responsible for her injuries.

[108] Similarly, in *Adkens v. Hunter*, 2003 BCSC 97, the plaintiff was found 25% responsible for the injuries he suffered as a result of a vicious attack by the defendant by reason of the plaintiff's provocative conduct. In coming to this conclusion, Slade J. held that the loss of self-control necessary to establish provocation may be inferred from the evidence:

[104] Where clear evidence of provocative behaviour by a victim of assault is present, the loss of self-control on the part of the assailant may be inferred (*Bruce v. Coliseum Management Ltd.*, [1998] B.C.J. No. 2339, at para. 20).

[105] Such an inference cannot be made if it is contrary to the evidence. There is clear evidence of provocative behaviours, including implied threats, on the part of Mr. Adkens. These would naturally have been on Mr. Hunter's mind as he walked away from the Adkens residence with Mr. Adkens in pursuit.

[109] In *Bruce*, the plaintiff was found 30% responsible for his injuries because he initiated the confrontation with the defendant bouncer at a bar, who in turn responded with disproportionate force.

[110] In the case at bar, there is no evidence from Mr. Degife about his state of mind. However, there is clear evidence of extensive provocative behaviour on the part of Mr. Pacheco. As noted, he instigated the Incident by bumping his car into the rear of the Eclipse, either on purpose or as a result of following too closely behind in an attempt to intimidate the occupants of the Eclipse, he engaged the much smaller Mr. Degife in a fist fight, he, along

with Mr. Herada, pursued and beat senseless Mr. Wong and, when he returned to his car, he beat on the Eclipse.

- [111] In the circumstances, a loss of self-control on the part of Mr. Degife is easily inferred. It is true that the physical confrontation between Mr. Degife and Mr. Pacheco had ended by the time that Mr. Pacheco was struck but, on the evidence, the entire Incident happened very quickly and the degree of violence exhibited by Mr. Pacheco throughout was significant, particularly his stomping Mr. Wong's head into the curb. Thus, it cannot be said that Mr. Degife's actions in striking Mr. Pacheco were "cool and deliberate" so as to eliminate provocation as a mitigating factor.
- [112] In Valerio and Adkens, the plaintiffs were found 25% liable for their provocative conduct. In Bruce, the plaintiff was found 30% liable. The conduct of Mr. Pacheco here was far more egregious than the conduct of the plaintiffs in those cases. As noted in paragraph 63 above, it is fair to characterize Mr. Pacheco as the principal author of his own misfortune. As such, he bears primary responsibility for his injuries. That said, Mr. Degife is not entirely blameless, as he chose to swing a bat at Mr. Pacheco's head when Mr. Pacheco had his back turned.
- [113] Taking all of the circumstances into account, I find that Mr. Pacheco is 75% liable and Mr. Degife 25% liable for Mr. Pacheco's injuries.

Damages

[114] Mr. Pacheco claims the following damages:

- a) \$125,000 in non-pecuniary damages;
- b) \$15,000 for past wage loss;
- c) \$50,000 for loss of future earning capacity;
- d) \$5,000 for the cost of future care; and
- e) \$11.34 in special damages.

[115] In addition, Mr. Pacheco seeks recovery of \$13,636.02 on behalf of the Ministry of Health pursuant to the Health Care Costs Recovery Act, S.B.C. 2008, c. 27 (the "HCCRA").

The Plaintiff's Evidence

[116] Mr. Pacheco said that he was in the hospital for about a week. He experienced considerable pain in his face and head. When he returned home, he was still in a great deal of pain. He said that for the next few months he largely stayed at home to rest, sleeping 12 or more hours per day.

- [117] He attended treatment at Vancouver Coastal Health's post-concussion clinic where he was given exercises to help with his brain function. He said that he was experiencing dizziness and memory problems. He was also sensitive to bright light which is also why he stayed at home following the Incident.
- [118] On the recommendations he received at the post-concussion clinic, he tried to deal with his memory issues by writing things down in a notebook. He said that he still experiences periodic memory problems.
- [119] Mr. Pacheco testified that prior to the Incident, he spent his leisure time going out with friends to the beach, swimming at the lake and playing football and baseball. Since the Incident, he no longer goes out to bars or night clubs as he said he does not want to put himself in a position where something similar could occur again. He is back playing baseball with friends and he likes to fish, which he finds relaxing.
- [120] Mr. Pacheco had a girlfriend at the time of the Incident who he had dated for about a year and a half. That relationship ended two or three months after the Incident. Mr. Pacheco partly blames the injuries he suffered in the Incident for the break up. He said he rarely went out and even found talking on the phone difficult.
- [121] He has a new girlfriend now with whom he has been in a relationship for about a year and a half.
- [122] Mr. Pacheco testified as to his earnings history. In 2002 and 2003 he recorded no income and from 2004-2007 he did not file income tax returns. Mr. Pacheco admitted on cross-examination that prior to 2008, he largely earned income through the sale of illegal drugs. At some point prior to 2008, he spent four months in jail.
- [123] In 2008, he reported \$20,312 in gross business income. This was from a painting business that he started with a friend under the name Brothers Different Colours Painting Ltd. His net income was reported as \$7,927, subsequently revised to \$7,316.
- [124] Mr. Pacheco did not file an income tax return in 2009.
- [125] In 2010, he reported total income of \$9,802. That comprised approximately \$8500 earned working in a greenhouse and a further \$1,300 working as a movie extra.
- [126] In 2011, the only income he reported was \$1,350 earned delivering appliances for Legion Transport Ltd.
- [127] In 2012 he reported just under \$18,000 in income derived from ongoing work with Legion Transport and work installing kitchen cabinets.
- [128] In 2013, he reported total income of \$21,055, comprising just over \$18,000 in employment income and about \$2,600 in employment insurance benefits. The employment income came from work at Grier Sprayfoam Contracting, a company that does spray insulation and fireproofing.

- [129] Also in late 2013, Mr. Pacheco completed a course in civil structural drafting at Vancouver Community College. He says he hopes to get work in this field at some point but has been unsuccessful so far due to a lack of experience.
- [130] With respect to the painting business, Mr. Pacheco testified that he tried to return to painting a few months after the accident but he had difficulty climbing ladders due to his dizziness. His partner therefore took on more of the work. This ultimately led to a disagreement about who would be paid what and they ended up terminating the business.
- [131] As can be seen from his earnings history, he has largely had odd jobs since.

The Medical Evidence

- [132] Mr. Pacheco tendered three expert reports, one dated March 26, 2014 from his family physician, Dr. Martinez, and two reports dated December 27, 2010 and May 19, 2012 from a neuropsychologist, Dr. Cohen.
- [133] The reports were served in accordance with the Rules and neither doctor was required to attend for cross examination. Accordingly, the three reports were admitted into evidence pursuant to Rule 11-7(2)(b)(ii).
- [134] Both doctors opine that Mr. Pacheco suffered a mild Traumatic Brain Injury ("TBI") as a result of the Incident.
- [135] Dr. Martinez notes in his report that Mr. Pacheco consulted him on July 18, 2008 following his discharge from hospital. He recorded Mr. Pacheco complaining of mild headaches but he denied experiencing any balance issues, dizziness or visual problems. According to Dr. Martinez, Mr. Pacheco's neurological examination was normal.
- [136] Mr. Pacheco was next seen on September 12, 2008. Dr. Martinez notes in his report that Mr. Pacheco "was alert, orientated to person, time and place, and he had a completely normal neurological examination."
- [137] Dr. Martinez states in his report that after the September 12, 2008 visit, he saw Mr. Pacheco several times between that date and January 13, 2013 for reasons unrelated to his injuries. He conducted a telephone interview with Mr. Pacheco on March 26, 2014 for the purpose of preparing his report.
- [138] During that telephone interview, Mr. Pacheco apparently reported symptoms of decreased concentration, recurrent episodes of mild postural dizziness, problems with "word finding" and the need for more sleep.
- [139] Dr. Martinez notes in his report, under the heading of prognosis, a concern for increased possibility of epilepsy after a TBI, particularly where the patient suffered a subdural hematoma as did Mr. Pacheco. He also noted an increased risk of developing Parkinson's disease.

[140] These were general observations as Dr. Martinez did not note any symptoms of those afflictions in Mr. Pacheco. In fact, as of the date of his report, Dr. Martinez had not seen Mr. Pacheco in connection with his injuries for approximately five and a half years.

[141] Dr. Cohen provided two very detailed reports. His first report, dated December 27, 2010, sets out the results of extensive testing that Dr. Cohen conducted. At page 20 of his report, Dr. Cohen provides the following summary:

Mr. Pacheco presents with largely intact cognitive functioning on a range of cognitive tests. Globally, both Enrique's IQ and memory capacity are at least Average. Executive functioning was largely intact as well, with no marked deficits in deductive or conceptual reasoning, sequencing, or verbal fluency and output more generally. However, significant deficits in visual working memory, visual sustained attention and visual response control were observed. In the main, these were the principal cognitive deficits recorded in the present assessment.

The present findings are for the most part consistent with Mr. Pacheco's report that he is not currently experiencing extensive cognitive difficulties and that he has returned to his previous level of functioning. The present findings do however suggest deficits in visual attention in particular.

[142] At page 22 of his report, Dr. Cohen states that the identified cognitive deficits "do not appear to have resulted in broad effects on Mr. Pacheco's daily functioning." However, he goes on to note that the identified deficit in visual memory and attention may impact his ability to learn and maintain new information. In terms of the effect on Mr. Pacheco's employability, Dr. Cohen opines at page 26:

From a cognitive perspective however, I would not anticipate that the presently identified deficits would affect Mr. Pacheco's capacity to perform most tasks associated with his more recent employment roles, such as painting, general construction labour, or the type of greenhouse work he described to me on interview. Therefore, overall Mr. Pacheco's prognosis for continued adequate functioning within his current work is generally positive. However, difficulties with visual attention may result in errors on novel visual tasks, when otherwise reading or learning new skills, jobs or task that require attention to visual details, and/or when completing some clerical jobs. The degree to which the presently identified deficits might affect Mr. Pacheco's future employability would therefore depend on to the type of and to what degree he engages in vocational training.

[143] Dr. Cohen's second report, dated May 19, 2012 followed an updated assessment of Mr. Pacheco on December 8, 2011.

[144] While the second report reiterates much of what was set out in the original report, Dr. Cohen notes Mr. Pacheco reporting some cognitive difficulties experienced during the drafting program that he took at Vancouver Community College. Specifically, he records Mr. Pacheco as saying that he struggled to learn new information and that he required help from a tutor.

[145] In his conclusions in the second report, Dr. Cohen states:

Test findings reveal that Mr. Pacheco presents with largely intact cognitive functioning in most respects, at least as measured on the present tests. Average range memory skills were present for the most part, with Enrique demonstrating High Average overall visual memory. Visual Working memory is adequate, but significantly low for an individual with his visual memory capacity.

[146] With respect to Mr. Pacheco's employability, Dr. Cohen states:

With respect to vocational capacity, Mr. Pacheco remains with mild cognitive difficulties as revealed by the assessment findings, and there would therefore be at least some potential concerns about his employment prognosis over the longer term. I note that Enrique is reporting that he is coping in his vocational training program, albeit with extra help and effort, in his current college program. Mr. Pacheco's cognitive weaknesses would therefore likely affect his work performance to a limited degree only. I would describe his prognosis with respect to vocational capacity as overall positive, with only some mild concerns about his ability to keep up with new learning. Principally, as noted above it may take Enrique longer and require more effort for him to learn and retain new vocational skills. It is possible that this could in turn affect such aspects of his employment as advancement or promotions.

[147] Thus, as I read Dr. Cohen's opinions, Mr. Pacheco's cognitive functioning is largely intact subject to some mild degree of deficit with visual working memory and attention functioning which may impede his ability to process new information.

[148] One thing that is lacking in Dr. Cohen's reports is a clear opinion that the ongoing deficits were caused by the battery with the baseball bat. Dr. Cohen did not have available to him information that would have enabled him to measure Mr. Pacheco's visual memory and attention functioning baseline, as evidenced by his comment at the end of his first report that it would be helpful to have collateral information from family members to better assess any changes to Mr. Pacheco's cognitive functioning after the Incident.

Non-Pecuniary Damages

[149] Mr. Pacheco cites *Zhang v. Law*, 2009 BCSC 991, and *Traynor v. Degroot*, 2002 BCSC 441, in support of his claim for non-pecuniary damages in the amount of \$125,000.

[150] In *Zhang*, the court awarded \$125,000 to a plaintiff who suffered serious injuries, including depression that was subsequently exacerbated by tragedy in the plaintiff's personal life. The combined effect of the physical and emotional symptoms had a profound impact on the plaintiff's life.

[151] In *Traynor*, the court awarded \$120,000 to a young woman, 22 years old at the time she was struck by a taxi while crossing the street, who suffered a significant traumatic brain injury as well as various fractures.

- [152] In my view, the Zhang and Traynor decisions are of little assistance in that the injuries suffered by the plaintiffs in those cases are far more severe than those suffered by Mr. Pacheco.
- [153] Counsel for Mr. Wong referred me to *Moore v. Briggs*, 2011 BCSC 599, where Madam Justice Dillon awarded the plaintiff \$40,000 in non-pecuniary damages following an assault. Madam Justice Dillon described the plaintiff's injuries as follows:
- [4] The plaintiff remained in hospital for two weeks following the assault. Initially, he could not walk or eat. He had severe pain in his head and neck. He could not talk properly.
- [5] Following release from hospital, the plaintiff stayed with his mother who took two weeks off work as a care aid to look after her son. The plaintiff suffered headaches, numbness in his neck, and vomiting. He required assistance with walking and personal care. After these two weeks, he was able to maintain food but could not walk without assistance for another month. He had dizziness when he looked downwards.
- [11] As a result of the assault, the plaintiff continues to have some problem with memory. This has improved over time such that it does not interfere with work or enjoyment of life, but still lingers. He also has difficulty with attention span and focus. He continues to have almost daily headaches. These often interrupt his sleep. He noticed that eye near the indentation in his temple was "lazy", a couple of times a week at first and now hardly noticeable.
- [12] For about four years after the assault, the plaintiff had problems with balance such that he could not walk a straight line and was dizzy when he looked down.
- [154] Madam Justice Dillon reviewed a number of cases, including three assault cases, *Matthew v. Tattrie*, 2009 BCSC 263, *Coutts v. Truong*, 2000 BCSC 1561 and *Sage v. Renner*, 2007 BCSC 1357, in arriving at her determination of \$40,000 in non-pecuniary damages.
- [155] Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered as any award of damages is intended to compensate for the pain and suffering experienced by that person. Moreover, the compensation award must be fair and reasonable to both parties; see *Miller v. Lawlor*, 2012 BCSC 387 at para. 109 citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, and *Trites v. Penner*, 2010 BCSC 882 at paras. 188 - 189.
- [156] The factors that the court must consider when assessing non-pecuniary damages are well known and have been set out in a number of cases, including by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I have taken those factors into consideration.

- [157] The evidence in this case establishes that Mr. Pacheco suffered a mild TBI when he was struck with the bat. He was taken to hospital by ambulance where he remained for a week. On his release, he largely stayed home for a few months as a result of his symptoms, which included dizziness and memory loss. He was treated at the Vancouver Coastal Health post-concussion clinic where he was provided with exercises to assist with his memory issues.
- [158] By September 2008, approximately three months after the Incident, he reported to Dr. Martinez that he was completely asymptomatic.
- [159] Dr. Cohen again notes minimal cognitive impairment with the exception of a mild deficit in visual attention and memory, which Dr. Cohen says does not limit Mr. Pacheco in his activities of daily life.
- [160] Mr. Pacheco has modified his activities somewhat as a result of the Incident. For example, he says that he no longer goes to night clubs as he does not want to put himself in a position where something similar could occur again. He is back playing baseball with his friends and he enjoys fishing. He also claims some lingering memory problems.
- [161] On the evidence, Mr. Pacheco's injuries and their lingering effects are significantly less severe than those suffered by the plaintiff in Moore, who was awarded \$40,000 in non-pecuniary damages. Taking all of the circumstances into account, I find that a reasonable award of non-pecuniary damages for Mr. Pacheco is \$30,000.

Past Wage Loss

- [162] Counsel for Mr. Pacheco concedes that quantification of past income loss is difficult given Mr. Pacheco's earning history but submits that \$15,000 is a reasonable award.
- [163] As noted above, there is no evidence of any income earned in the years prior to 2008. That year, Mr. Pacheco started the painting business with his friend and reported gross business income of approximately \$20,000, with a net income of approximately \$7,300.00.
- [164] Mr. Pacheco testified that he missed at least a couple of months of work at the painting business and that when he returned he could not climb ladders. He said that the fact that his partner had to pick up the slack for him led to the dissolution of the business.
- [165] However, there is no evidence on which the court can quantify any wage loss during that period as there is no evidence as to how Mr. Pacheco was paid, how income was divided between him and his partner or whether they lost business as a result of first his absence and then later his alleged diminished ability to work.
- [166] As also noted above, Mr. Pacheco's subsequent work history is spotty. He did not file an income tax return in 2009 and said that he does not remember if he worked that year. In 2010, he reported income of \$9,802, largely earned working in a green house, but in 2011 his reported income dropped to \$1,350.

- [167] His most remunerative years, at least in terms of reported income, were 2012 when he earned approximately \$18,000 and 2013 when he earned approximately \$21,000. In 2013 he was also going to school for his drafting course.
- [168] Mr. Pacheco did not testify that he is unable to find work in the drafting field as a result of his injuries suffered in the Incident but rather because he lacks experience. Apart from the few months that he missed painting right after the Incident, Mr. Pacheco has provided no evidence of any actual income loss, or of any lost opportunity to earn income, due to the injuries suffered in the Incident.
- [169] In short, the evidence does not establish that Mr. Pacheco has suffered an identifiable past wage loss and I decline to award him damages under this head.

Loss of Future Earning Capacity

- [170] The principles governing an assessment of damages for lost earning capacity are well described by Mr. Justice Voith in *Brewster v. Li*, 2013 BCSC 774:
- [142] The legal framework for the assessment of the plaintiff's future wage loss claim has been described numerous times. The decision of *Reilly v. Lynn*, 2003 BCCA 49, 10 B.C.L.R. (4th) 16 contains a useful summary of some of the principles and approaches that are to be used when assessing future earning capacity:
- [100] An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, *supra*. A capital asset has been lost: what was its value?

- [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* (2001), 84 B.C.L.R. (3d) 158, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is

unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, supra, at 79. In adjusting for contingencies, the remarks of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, supra, at 253, are a useful guide:

First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small[.][Underlining added in *Reilly v. Lynn*.]

[171] In *Morgan v. Galbraith*, 2013 BCCA 305, the Court of Appeal, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge when assessing a claim for loss of future earning capacity. Madam Justice Garson stated at para. 53:

in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach or the capital asset approach

[172] As I understand Mr. Pacheco's position, the loss of earning capacity claim is based largely on the fact that he lost the painting business when he and his partner could not agree on how to divide the money after Mr. Pacheco's return to work. He attributes the loss of the business to the symptoms resulting from his injuries.

[173] Mr. Pacheco testified that they started the painting business in 2008. While no exact date was given, presumably it was in the spring some time before the Incident on May 31, 2008. As noted, Mr. Pacheco reported gross income from that business for all of 2008 of approximately \$20,000 but there was no evidence of where that figure came from apart from Mr. Pacheco's vague testimony that they had painting jobs throughout 2008.

[174] In his evidence, Mr. Pacheco identified only one specific painting job that the business had, that being a car wash on First Avenue. However, there was no evidence of any other jobs that they had lined up and no basis on which the court can assess whether the business would in fact have continued and, if so, how much Mr. Pacheco would have earned.

[175] In any event, Dr. Martinez again reports that Mr. Pacheco was free of symptoms by September 2008 and Dr. Cohen opined that Mr. Pacheco has no vocational limitations in his current chosen fields of employment.

- [176] Mr. Pacheco did testify that he had some difficulty with the course work in the drafting program and that he required the assistance of a tutor. However, he did successfully complete that program. He also said in his evidence that he likely would have had difficulty with the program regardless of the injuries from the Incident given that he has always had difficulty with math.
- [177] Mr. Pacheco's recent spotty employment history is unrelated to his injuries from the Incident. Again, he said that he has not found drafting work due to lack of experience. The job he had in 2013 for Grier Sprayfoam ended because he thought there was no opportunity for advancement.
- [178] Taking all of the evidence into account, Mr. Pacheco has not proven a real and substantial possibility that his earning capacity has been impaired and I decline to award damages under this head.

Cost of Future Care

- [179] Mr. Pacheco claims \$5,000 for the cost of future care. He submits that the basis for this claim is found in Dr. Cohen's reports. For example, in his first report, Dr. Cohen states that Mr. Pacheco would benefit from Occupational Therapy support given his "possible" need to address his ongoing cognitive difficulties.
- [180] In his second report, Dr. Cohen notes the "potential" need for a moderate level of psychotherapy support if Mr. Pacheco were to develop symptoms of depression or poor social adjustment.
- [181] On the evidence, Mr. Pacheco has not sought treatment for any injuries suffered in the Incident since he last saw Dr. Martinez in September of 2008. Further, Dr. Cohen's recommendations are based on the possibility of Mr. Pacheco needing treatment in the future if his condition changes. I do not read Dr. Cohen's reports as recommending specific treatments to address the injuries that Mr. Pacheco suffered in the Incident.
- [182] In my view, Mr. Pacheco has not established that he is entitled to damages for the cost of future care.

Special Damages

- [183] The only special damages claim is \$11.34 for pain medication following the Incident. That claim is not contested.

The HCCRA Claim

- [184] I now turn to the claim under the HCCRA. In support of that claim, Mr. Pacheco has filed a Minister's certificate under s. 16 of that Act establishing health care costs incurred of \$13,636.02.

- [185] A very helpful review of the HCCRA can be found in *MacEachern v. Rennie*, 2009 BCSC 652. Essentially, the statute creates a mechanism by which the provincial government can recover the costs of health care services provided to a beneficiary under the Medicare Protection Act, R.S.B.C. 1996, c. 286, resulting from the negligence or wrongful act of another person.
- [186] Section 2 of the HCCRA establishes a beneficiary's right of recovery and s. 3 obliges a plaintiff who commences a legal proceeding for damages for personal injury to include a claim under the HCCRA. That is what occurred in this case. Independent of this obligation, the government is empowered under s. 8 to commence its own action for recovery of such health care costs.
- [187] I have not been referred to any cases in which the court has considered a situation, as in the case at bar, where liability has been apportioned between the person who incurred the health care costs i.e. the beneficiary, and the person who caused the injuries, i.e. the wrongdoer.
- [188] Section 17 of the HCCRA provides that where it is determined in a legal proceeding that the personal injury of a beneficiary was caused, in whole or in part, by the negligence or wrongful act or omission of two or more wrongdoers, those wrongdoers are jointly and severally liable for the percentage of the health care costs that is equal to the percentage of fault attributable to them.
- [189] That section has no application here as the definition of "wrongdoer" expressly excludes the beneficiary who received the health care services.
- [190] As noted, s. 2(1) of the HCCRA establishes the beneficiary's right to recover from a wrongdoer. Section 2(2) provides that this right exists "whether or not the personal injury was caused in whole or in part by the wrongdoer." Thus, the fact that Mr. Degife was found only 25% liable for Mr. Pacheco's injuries does not preclude a claim under the HCCRA.
- [191] However, I do not read s. 2(2) as making a wrongdoer 100% liable for the health care costs where, as here, the wrongdoer has been found only partially liable for the injuries giving rise to the costs. Rather, the HCCRA is silent on that point.
- [192] In the circumstances, it is in my view appropriate to apply, by analogy, the principles of apportionment drawn from the Negligence Act, R.S.B.C. 1996, c. 333. Pursuant to ss. 1 and 2 of that Act, where a plaintiff is found to be contributorily negligent, he or she may recover from the defendant wrongdoer only that proportion of the loss that corresponds to the defendant's fault. Under s. 4 of the Act, if the plaintiff is blameless and there are two or more wrongdoers, those wrongdoers are jointly and severally liable for the whole of the plaintiff's loss (*Leischner et al. v. West Kootenay Power & Light Ltd. et al.* (1986), 24 D.L.R. (4th) 641, 70 B.C.L.R. 145 (C.A.).

- [193] In the case at bar, the plaintiff Mr. Pacheco has been found to be 75% responsible for his injuries and Mr. Degife 25%. I therefore find Mr. Degife liable for 25% of the HCCRA claim, or \$3,409.00.
- [194] Under s. 20(1) of the HCCRA, the court is obligated to designate the amount of any judgment applicable to the health care costs recovery claim. Thus, for the purposes of section 20(1), the designated amount is \$3,409.00.
- [195] Under s. 20(2), the designated amount is a debt due to the government by Mr. Degife.
- [196] Under s. 20(3), if the amount of the debt has been paid out as part of the judgment, the person receiving the funds holds them in trust for the government. However, the HCCRA does not direct that the health care costs recovery amount must be paid to the plaintiff as part of the judgment.
- [197] Accordingly, on the unique facts of this case, the appropriate approach in my view is to designate the sum of \$3,409.00 as the amount applicable to the health care costs recovery claim in accordance with s. 20 of the HCCRA, but to exclude it from the amount payable by Mr. Degife to Mr. Pacheco.
- [198] It will then be open to the government to determine whether it wishes to pursue recovery of this debt from Mr. Degife. I note that the government has a broad discretion as to whether to pursue claims under the HCCRA. For example, while s. 6(1) authorizes the government to intervene in a proceeding in which there is a health care services claim and/or to assume conduct of that claim, s. 6(2) provides that the government may "as it sees fit, pursue, discontinue or settle all or any part of the health care services claim."

Mr. Degife's Counterclaim

- [199] Mr. Degife brought a counterclaim against Mr. Pacheco seeking damages for the injuries he says that he sustained as a result of being assaulted by Mr. Pacheco.
- [200] Pursuant to Rule 3-4, a counterclaim is to be heard at the same time as the main action, unless an order to the contrary is issued under Rule 3-4(7.1). Here, there was no such order thus Mr. Degife's counterclaim was before the court.
- [201] Mr. Degife provided no evidence of any injuries sustained. Absent any evidence on which to base an award of damages, Mr. Degife's counterclaim must be dismissed.

Conclusion

- [202] In summary, Mr. Pacheco is entitled to damages totalling \$30,011.34, reduced by 75% to account for his proportionate fault. As a result, Mr. Pacheco is entitled to judgment against Mr. Degife in the amount of \$7,503.00.

- [203] I recognize that providing Mr. Pacheco with damages of any magnitude may be seen as compensating him for his deplorable conduct in initiating a violent altercation. However, as the authorities have made clear in their interpretation and application of the doctrines of *ex turpi* and *volenti*, engaging in illegal or antisocial behaviour is not by itself a bar to recovery of damages for personal injury.
- [204] That said, it should be apparent from the apportionment of liability between Mr. Pacheco and Mr. Degife that in awarding damages to Mr. Pacheco, the court in no way condones Mr. Pacheco's actions and in fact considers him principally responsible for the injuries that he sustained. At the same time, it acknowledges that Mr. Degife must also bear some responsibility for his actions, given that there were other courses of action available to him, including walking away after the worst of the violence had subsided.
- [205] In terms of costs, the normal rule as encapsulated in Rule 14-1(9) is that the successful party is entitled to recover its costs, unless the court orders otherwise. In deciding whether to depart from that rule, reference is often made to the decision of Mr. Justice Bouck in *Fotheringham v. Fotheringham*, 2001 BCSC 1321, where he set out a four part inquiry (at para. 46):
1. First, by focussing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side bear their own costs.
- [206] The central issue in dispute at this trial was whether Mr. Pacheco was entitled to recover damages for the injuries that he sustained as a result of the Incident. While I have awarded him damages, given that he was found 75% liable, it cannot fairly be said that he was substantially successful in the action. That point is made even clearer when comparing the amount awarded of \$7,503.00 to the amount claimed of approximately \$195,000.00.
- [207] I therefore decline to award Mr. Pacheco his costs. Mr. Pacheco and Mr. Degife will bear their own costs. Mr. Wong is entitled to recover his costs from Mr. Pacheco.

"Skolrood J."

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