

CANADA / JUDGMENT

R.T. v. Lowe

2022 BCSC 1781

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1781 R.T. v. Lowe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.T. v. Lowe,

2022 BCSC 1781

Date: 20221012

Docket: S20423

Registry: Nelson

Between:

R.T.

Plaintiff

And

Allen William Lowe, Bradley Anton Navratil, Shawn Leon Mansfield,

Chris Anthony Rolufs, Raymond Leonard Rutledge, Jamie Charles Weagle, and John Doe

Defendants

before: The Honourable Madam Justice Lyster

Corrected Judgment: The Reasons for Judgement were corrected

at para. 91 on November 25, 2022

Reasons for Judgment

Counsel for the Plaintiff:

R.W. Sookorukoff

No other appearances

Place and Dates of Trial:

Nelson, B.C.

June 29 and 30, 2022

Place and Date of Judgment:

Nelson, B.C.

October 12, 2022

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Introduction

- [1] On November 1, 2016, R.T. was attacked by a group of men. He claims against the defendants Allen William Lowe, Bradley Anton Navratil, Raymond Leonard Rutledge, Shawn Leon Mansfield and Chris Anthony Rolufs for damages for assault and battery, false imprisonment, and intentional infliction of mental suffering.
- [2] On June 20, 2019, R.T. obtained default judgment against all defendants, except Jamie Charles Weagle, with damages to be assessed. That order was set aside as against Mr. Lowe and Mr. Mansfield only, on October 21, 2019. On March 31, 2021, summary judgment was granted by Mr. Justice Marchand, then of this Court, against Mr. Lowe and Mr. Mansfield for assault and battery and false imprisonment: [R.T.] v. Lowe, 2021 BCSC 590. The issue of their liability for the intentional infliction of mental suffering was referred to the trial list.
- [3] All of the defendants were prosecuted criminally for their role in the incident. All of the defendants, except Mr. Weagle, pleaded guilty on December 19, 2017 to three counts for their part in the events of November 1, 2016: assault on R.T., contrary to s. 266 of the Criminal Code, R.S.C. 1985, c. C-46 [Code], uttering threats to cause death or bodily harm to R.T. or his family, contrary to s. 264.1(1)(a) of the Code; and possession of brass knuckles, a baseball bat and a retractable baton or a knife, for a dangerous purpose, contrary to s. 88(1) of the Code. On December 19, 2017, the sentencing judge accepted a joint submission and sentenced all of the defendants who pleaded guilty to a conditional sentence order of 15 months and 12 months probation. In addition, Mr. Rutledge was sentenced to a further 52 days in jail, to be served intermittently.
- [4] As a result of the preceding judgments, all that remains to be determined by this Court at trial is whether Mr. Lowe and Mr. Mansfield committed the tort of intentional infliction of mental suffering, and the assessment of R.T.'s damages generally against all defendants, with the exception of Mr. Weagle. All future references to the "defendants" in this decision do not include Mr. Weagle.
- [5] R.T. was represented by counsel before me. None of the defendants appeared in person or by counsel. R.T. testified, as did his friend, B.C. I have had the benefit of full oral and written submissions from counsel for R.T.

Facts

Background

- [6] R.T. was born on February 12, 1980. He was 36 when the incident occurred and is now 42. He is single.
- [7] R.T.'s mother passed away in 2020. His father is retired and resides in Rossland.
- [8] R.T. has three children:

- a) T., who is 19 years old and lives in Saskatoon;
 - b) H., who is 16 years old. She splits her time between R.T. and his father.
 - c) J., who is four years old. She splits her time between R.T. and her mother.
- [9] R.T. was born in Trail and raised in Rossland, where he completed school, graduating in 1999. In 2000, he moved to Alberta, where he lived for ten years and worked various jobs in the oil fields, and also as security in night clubs.
- [10] In 2010, R.T. moved back to Rossland because work in Alberta was slow and he wanted to be closer to family. He worked a number of jobs before starting as a Heavy Equipment Operator for Teck Coal Limited on March 25, 2013, where he stayed until May 9, 2019.
- [11] R.T. was working for Teck Coal Limited when the incident occurred. His job location at that time was at Fording River, about 26 kilometres north of Elkford, B.C. He commuted between his home in Trail and rental accommodation in Elkford, where he stayed during his shifts.
- [12] In the months preceding the incident, R.T. had been off work for a period of time, first due to neuropathy in his feet, and then bronchitis. He had received treatment for the neuropathy, and the bronchitis resolved, and his doctor assessed him as fit to return to work on October 25, 2016.
- [13] R.T. now resides in Trail in a home that he purchased in January 2017. At the time of the incident he was living with his friend, B.C.

The Incident

- [14] R.T. was the only witness who testified about the incident. His evidence establishes the following.
- [15] The incident occurred in the dark, with no one else around, in the rural community of Elkford. At the time, R.T. was sitting in his car, a four-door 2014 Honda Civic, outside the house in which he rented a room, as he had misplaced his house keys and was texting people to see if someone could let him in.
- [16] A white van and a white Jeep pulled up next to R.T., and a group of eight to 11 males got out and surrounded his vehicle. They were wearing dark clothes, hoodies, and carrying weapons - a collapsible baton, several knives, brass knuckles and a baseball bat. They were carrying these weapons in an obvious manner. One of them was wearing a mask on his face and an air cast on his leg.
- [17] The group accused R.T. of being seen riding a Harley-Davidson motorcycle while wearing a Hells Angels vest, all which he denied. They said they were there to collect the Hells Angels vest. They said they had pictures of him wearing the vest, and showed him a photo on one of the individual's cell phone. It showed a person from the back, and it was not a picture of R.T.
- [18] Members of the group took photographs of R.T. while they confined him to his vehicle.

- [19] The group opened all the doors and the trunk to R.T.'s vehicle. They searched his car and went through his bags.
- [20] R.T. was punched in the head at least five times. Members of the group attempted to pull R.T. from his vehicle, ripping his shirt and jacket in the process.
- [21] Members of the group made various threats, including that:
- i. They would "beat the shit out of him";
 - ii. They would "fuck him up";
 - iii. They would put him in the van and "do him" up the Valley. This was understood by R.T. to mean that he would not come out of the bush alive;
 - iv. The Edmonton, Calgary and Kelowna chapters of the Hells Angels knew who he was;
 - v. As one man sat in the passenger seat, he smacked R. T.'s cell phone out of his hand, and threatened to break R. T.'s jaw if he touched it again;
 - vi. They would go and "get" his daughter in Rossland or Trail (H., then 11); and
 - vii. They made various threats to kill him and his family.
- [22] R.T. recognized two of the individuals -- Mr. Mansfield and Mr. Lowe -- from a different shift at his work site. He did not know the other men.
- [23] After ten to 15 minutes, R.T. was able to start his vehicle while the group was distracted, and drove away. He called 911. Believing he had nothing left to lose, and fearing for the safety of his child, R.T. turned around and drove back towards the Jeep and the van in order to read the license plate numbers to the 911 operator. He then tried to follow the van as it drove away. The 911 operator told him to stop, but he refused, because he wanted the license number. The vehicle he was following pulled over and five or six members of the group jumped out with weapons in hand. At that point, R.T. drove off again. While still on the phone with 911, R.T. encountered a police officer on the road. The officer had already heard about the incident on police radio. The officer told him to park in the RCMP parking lot, which he did. The defendants were arrested shortly thereafter.
- [24] There are number aspects of this event that are particularly disturbing. These include that the attack was premeditated and unprovoked; the defendants tracked R.T. to his residence, approaching him while he was alone and vulnerable.
- [25] The defendants knew R.T. had a family and made a point of threatening his daughter.
- [26] There were eight to 11 men present for the assault, yet only five were found and ultimately convicted.
- [27] Had R.T. not been able to escape and call 911, the situation could have been significantly worse.

Subsequent Events

- [28] R.T. remained off work from November 2, 2016 until March 8, 2017. He testified he did not go back earlier as he had a lot of depression; he was worried and scared about his and his family's safety. He described being under extreme stress and anxiety, not sleeping, and virtually hiding in his house for many months.
- [29] By a week after the incident, R.T.'s physical injury - redness around his eye - resolved. He continued to be anxious and afraid. He stayed in his room, not talking to people.
- [30] R.T. saw his doctor on four occasions after the incident, on November 10 and 21, 2016, February 8, 2017 and March 7, 2017. R.T. took medication for a few months to help him sleep, and attended counselling on 11 occasions between November 18, 2016 and April 14, 2021. Seven of those sessions occurred in the first few months after the incident, and three were some time later, two in March 2019 and one in April 2021.
- [31] R.T. purchased his current house in January 2017 from a friend. He installed a security system with four security cameras, door and window sensors, and upgraded locks. By this time, he was only getting about two hours of sleep a night and was still not leaving the house except to get groceries.
- [32] R.T. was fearful for his daughter's safety, and making excuses to leave her with his parents, who then had her about 50% of the time. He did not tell his parents what had happened out of fear and embarrassment. He told them that he was working more to provide an excuse for not having his daughter with him.
- [33] On October 18, 2017, R.T. was awarded 24 additional counselling sessions by the Ministry of Public Safety and Solicitor General (Crime Victim Assistance Program). However, he did not follow through. He was overwhelmed and anxious. He also did not follow through on providing further information for income support benefits through the Crime Victim Assistance Program.
- [34] R.T. had a recurrence of his symptoms when the reasons for judgment from his summary judgment application received some limited media attention in April 2021, linking his name to the Hells Angels. He described having nightmares and flashbacks, and said that friends and family were distancing themselves from him. Within a couple days of the articles being published, he noticed vehicles stopping in front of his house and revving their engines. This occurred at least a dozen times for a few weeks. As a result, he again limited time with his daughters (with H. for about six months, and with J. for around nine months). He attended for further counselling with Ms. Robertson on April 14, 2021.
- [35] R.T. greatly reduced his social and recreational activities. Before the incident, he engaged in many sporting and social activities, including: "mud bogs", golfing, hunting, and softball tournaments. He has stopped going to ball tournaments but does play on occasion.

- [36] R.T. still has anxiety and stress today. He is sleeping better, but still avoids large groups. He ensures he has an escape route when at events.

Clinical Records

- [37] No expert evidence was adduced by R. T. He did introduce affidavits from his family physician, Dr. Andrea Jenkins, and his counsellor, Barbara Shields, both of whom attached some clinical records as exhibits. R.T. does not seek to rely on the patient-made statements recorded in the records, nor does he rely on the records for the truth of any diagnoses made. Their primary intended use is for the observations made by the clinicians and treatments prescribed. I am satisfied such use is consistent with the relevant authorities, in particular: *Seaman v. Crook*, 2003 BCSC 464 at paras. 14-15; *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 35-36; and *Chauhan v. Welock*, 2021 BCCA 216 at para. 36.
- [38] Consistent with these admissible purposes, I note that Dr. Jenkins provided R.T. with a note for work on October 25, 2016. It indicates that at that time he was fit to return to work on a full-time basis, having recovered from the physical conditions that had prevented him from working for the preceding months.
- [39] On November 10, 2016, Dr. Jenkins' locum, Dr. Michael Scully, provided R.T. with another note for work in which he indicated that R.T. had been and continued to be unable to work since November 1, 2016 due to the incident. He wrote that R.T. would need to see a counsellor and take medication for sleep. He was to be reassessed in two weeks.
- [40] On November 21, 2016, Dr. Jenkins wrote a note indicating R.T. needed to be off work. On February 8, 2017, Dr. Jenkins wrote a note indicating R.T. could not return to work in Sparwood, but could do so in Trail.
- [41] On March 7, 2017, Dr. Jenkins wrote a note stating that R.T. was physically fit to return to work, but she was concerned about his safety in Elkford.
- [42] During counselling sessions in November 2016, Ms. Shields provided R.T. with information about trauma, suggestions for coping and strategies for self-care. In February 2017, her notes indicate they discussed R.T.'s readiness to return to work and calming strategies. In March 2017, her notes indicate that they discussed the assault.

Analysis

Intentional Infliction of Mental Suffering

- [43] As mentioned above, Marchand J. referred the issue of whether Mr. Lowe and Mr. Mansfield were liable for the tort of the intentional infliction of mental suffering to the trial list, and it falls to me to determine if they are.
- [44] In his reasons for summary judgment on this issue, Marchand J. wrote at para. 50:

- [50] The elements of intentional infliction of mental suffering are: (1) conduct that is flagrant and outrageous; (2) calculated to produce harm; and (3) resulting in a visible and provable illness: *Young v. Borzoni*, 2007 BCCA 16 at paras. 24, 35-39. Generally, a visible and provable illness requires proof of a recognizable psychiatric illness: *Young* at paras. 35-38. The threats made to [R.T.] provide some foundation for this tort. However, the finding of the sentencing judge that [R.T.] suffered psychological or emotional harm was not based on expert evidence and, in my respectful opinion, falls short of establishing that [R.T.] suffered a "visible and provable illness" as contemplated by the authorities.
- [45] Mr. Justice Marchand's decision was based solely upon the findings of the sentencing judge. This Court has the benefit of the additional evidence which I have outlined.
- [46] I find that R.T. has established all three elements of the tort of the intentional infliction of mental suffering. The defendants' threats to harm and kill R.T., and to go and "get" his young daughter, constitute conduct that is flagrant and outrageous and calculated to prove harm, thereby establishing the first two elements.
- [47] The third element, which is that that conduct resulted in visible and provable illness, requires further consideration. Justice Marchand wrote in the paragraph previously quoted that this generally requires proof of a recognizable psychiatric illness. He also wrote that the findings of the sentencing judge were not based on expert evidence, and fell short of establishing a visible and provable illness.
- [48] Counsel for R.T. submits that the absence of expert evidence is not fatal to his claim. Counsel (who was also counsel before Marchand J.) submits that Marchand J. was not provided with a full review of the authorities on this issue. He cites the decision of Madam Justice McLachlin (as she then was) in *Rahemtulla v. Vanfed Credit Union*, [1984] 3 W.W.R. 296 (B.C.S.C.) [*Rahemtulla*]. The plaintiff in that case had been dismissed from her position as a teller on the basis of unfounded allegations of theft. At para. 57, McLachlin J. found that:

Notwithstanding the absence of expert medical evidence, I am satisfied that the plaintiff suffered depression accompanied by symptoms of physical illness as a result of [her employer's] accusations.

[emphasis added].

- [49] Counsel submits that the effects on the plaintiff in *Rahemtulla* were somewhat similar to those suffered by R.T., referring to McLachlin J.'s findings at para. 33:

Her initial reaction was one of shock and despair. For a period in excess of a month she suffered severe depression, such that she was unable to leave the house or engage in any of her normal pursuits. She felt life was not worth living. She suffered from sleeplessness and she stopped eating. She had blackouts and headaches. On several occasions medical attendants were called to the home and she was twice briefly hospitalized. While other problems such as the tumour she discovered in her chest may well have contributed to her distress, I am satisfied that the most

significant cause of her depression and continuing unhappiness has been the treatment she has received at the hands of the defendant and the effect that has had upon her prospects for employment.

[50] I agree there are some similarities between the effects on the two plaintiffs.

[51] The Court of Appeal followed *Rahemtulla in Topgro Greenhouses Ltd. v. Houweling*, 2006 BCCA 183 [Topgro] at paras. 60-68, a case involving a dispute over a share purchase. One of the shareholders, Mr. Houweling, had engaged in a course of targeted harassment against Mr. Breederland, Topgro's manager, making allegations against him of conspiracy and fraud, which the trial judge held caused him "a significant amount of stress", to consult with his doctor, and to take medication (reviewed at paras. 36 and 65-66). The Court of Appeal upheld the trial judge's award of \$20,000 for damages for nervous shock, which had been made in the absence of expert evidence.

[52] Counsel for R.T. also relies upon the decision of the Supreme Court of Canada in *Saadati v. Moorehead*, 2017 SCC 28 [Saadati]. Saadati addresses the extent to which expert evidence of a mental health condition is required to prove damages for mental injury. At para. 28 the Court cites *Young v. Borzoni*, 2007 BCCA 16 (the case referred to by Marchand J.), among others, as an example of the more stringent approach taken by lower courts prior to Saadati. The Court rejected this restrictive approach and summarized its conclusion at para. 2:

[2] This Court has, however, never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. Nor, in my view, would it be desirable for it to do so now. Just as recovery for physical injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support, recovery for mental injury does not require proof of a recognizable psychiatric illness. This and other mechanisms by which some courts have historically sought to control recovery for mental injury are, in my respectful view, premised upon dubious perceptions of psychiatry and of mental illness in general, which Canadian tort law should repudiate. Further, the elements of the cause of action of negligence, together with the threshold stated by this Court in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 9, for proving mental injury, furnish a sufficiently robust array of protections against unworthy claims. I therefore conclude that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness. It follows that I would allow the appeal and restore the trial judge's award.

[emphasis added]

[53] At para. 37, the Court provided further clarification of what a claimant must show to establish mental injury:

Mental injury, however, will often not be as readily apparent [as physical injury]. Further, and as *Mustapha* makes clear, mental injury is not proven by the existence of mere psychological upset. While, therefore, tort law protects persons from negligent interference with their mental health,

there is no legally cognizable right to happiness. Claimants must, therefore, show much more -- that the disturbance suffered by the claimant is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come with living in civil society (Mustapha, at para. 9). To be clear, this does not denote distinct legal treatment of mental injury relative to physical injury; rather, it goes to the prior legal question of what constitutes "mental injury". Ultimately, the claimant's task in establishing a mental injury is to show the requisite degree of disturbance (although not, as the respondents say, to show its classification as a recognized psychiatric illness).

[emphasis added]

- [54] At para 38, the Court made clear that, while expert evidence may be of assistance in establishing mental injury, it is not essential, and the lack of a diagnosis on its own is not a fatal flaw.
- [55] I find that R.T. has established a visible and provable mental injury. He remained off work following the incident until March 8, 2017. He felt depressed, he was anxious, and had difficulty sleeping. He was essentially a prisoner in his own room, hiding in his room in the upstairs of B.C.'s house, going out only for groceries. He minimized his contact with his daughter H., and lied to his parents about his reasons for doing so. He went to his doctor on four occasions, went to a counsellor to help address his symptoms, and took medication to help with his sleep.
- [56] Importantly, R.T.'s evidence about the stress, anxiety and depression he was experiencing was corroborated by B.C. When B.C. first saw R.T. after the incident he described him as "pale and gray", his hands were shaking, and he appeared to be in shock. B.C. said R.T. became a "shell of himself", stopped helping out around the house, and locked himself in his room. He also noticed his daughter H. was not coming around as much as she was before. After R.T. bought his own home, they remained neighbours and in close contact. B.C. testified that when the news articles came out in 2021, R.T. "reverted back" to what he was before for a couple of months. He said R.T. is now better than he was, but still seems "paranoid", particularly when this matter is brought up.
- [57] The "disturbance" suffered by R.T. was "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come with living in civil society.
- [58] I therefore find that Mr. Lowe and Mr. Mansfield committed the tort of the intentional infliction of mental suffering.

Damages

Non-pecuniary Damages

- [59] I have already set out my findings with respect to the pain and suffering experienced by R.T. as a result of the defendants' misconduct. It is not necessary to repeat them here.

- [60] Counsel for R.T. submits that an appropriate award for non-pecuniary damages would be in the range of \$20,000 to \$40,000. In addition to Topgro (\$20,000, now \$27,436) and Rahemtulla (\$5,000, now \$12,442), counsel referred to the following cases in support of an award in this range.
- [61] *Qiao v Owners, Strata Plan LMS 3863*, 2020 BCSC 818 [Qiao] was an assault, battery and false imprisonment case. It arose from an altercation between the 52-year-old female plaintiff and a security guard at the Crystal Mall in Burnaby. Physically, the plaintiff suffered left arm and lower back pain for a short period of time (para. 320). In terms of mental injury, she suffered emotional distress, with feelings of humiliation, embarrassment, anger and loss of hope and confidence (paras. 321-326). Madam Justice Donegan awarded \$40,000 for what she described as a "narrow mental injury and minor physical injury" (para. 331).
- [62] *Thomson v. Friedmann*, 2008 BCSC 703 [Thomson], affirmed 2010 BCCA 277, was an assault and battery case. The plaintiff was hit by the defendant with a baseball bat during a landlord-tenant dispute. She suffered bruising to her back and a broken arm, which resolved within six months. She was off work for 18 weeks. She was depressed and anxious for one month but continued to have some anxiety on occasion. Madam Justice Gerow awarded \$20,000 (now \$26,396) for non-pecuniary damages, as well as \$2,500 for aggravated damages and \$2,500 for punitive damages.
- [63] *B.J.M. v. J.W.W.*, 2019 NBBR 274 (NBQB) [B.J.M.] was an assault and battery, false imprisonment and intentional infliction of nervous shock case. The plaintiffs were the victims, B.J.M., and his mother, M.D.H. I will focus on the damages awarded to B.J.M. Counsel submits that B.J.M.'s physical injuries were much more severe than those suffered by R.T., but the psychological harm was roughly similar. B.J.M.'s psychological injuries included complaints of anxiety, fear for his safety and of being in public, difficulty coping with stress, and memory loss. He underwent counselling, but continued to have some residual fear and paranoia, especially from a threat the defendants made to kill him. There was no medical opinion evidence on psychological harm.
- [64] The plaintiff, B.J.M.'s damages for assault and battery were assessed at \$60,000. His damages for false imprisonment were assessed at \$10,000 (now \$11,015) and for nervous shock they were assessed at \$10,000 (now \$11,015). The Court also awarded aggravated damages of \$5,000.
- [65] *Henderson v. Nataluk*, 2001 MBQB 19 [Henderson] was an assault and battery case. Counsel submits that this case is probably the most similar on the facts to R.T.'s case. The plaintiff was a sex worker who was assaulted by the defendant outside a vehicle on an isolated, dark country road. She was punched approximately 25 times and kicked in her body, tailbone and legs. The defendant threatened to kill her. She suffered multiple bruises, a bump to her forehead, a black eye, a cut to her lip, and bruises to her legs and tailbone. Most of her physical injuries healed within one to two weeks. She also suffered a laceration that left a permanent but very faint scar below her left eye, and was not disfiguring. It was not clear

how much of her emotional trauma was due to the assault as opposed to pre-existing schizophrenia.

- [66] The Court awarded compensatory damages, including aggravated damages, at \$13,000 (now \$19,912). The Court declined to award punitive damages given the defendant's conviction and nine-month sentence.
- [67] Each of these cases is quite unique, and the damages awarded turn on the distinctive facts of each. I agree that the psychological injuries in Henderson and B.J.M. do bear some resemblance to those suffered by R.T. The damages award in Henderson is low in my opinion, perhaps due to the fact that the case is an older one, having been decided in 2001, and the difficulty the Court had in differentiating the causes of the plaintiff's emotional trauma. It is somewhat difficult to compare the damages in B.J.M. with R.T.'s case, because B.J.M.'s physical injuries were so much worse.
- [68] I find the more recent decision of the Court in Qiao of more assistance in assessing R.T.'s non-pecuniary damages. Ms. Qiao had pre-existing conditions which the Court had to distinguish from her compensable injuries. It was this analysis which led Donegan J. to refer to the plaintiff's compensatory damages as being limited to a narrow mental injury and a minor physical injury. This renders her case somewhat analogous to R.T.'s, given that his physical injury was also minor. Ms. Qiao's mental injury was described at para. 345 as including ongoing emotional distress which had "impacted her life in a number of ways". It negatively impacted her relationships with others, as noted at para. 346. She felt shame, humiliation and embarrassment. These are very similar impacts to those R.T. has experienced.
- [69] I find that, as in Qiao, an award of \$40,000.00 for non-pecuniary damages is appropriate in the circumstances of this case.

Loss of Past Earning Capacity

- [70] R.T. seeks damages for loss of past earning capacity. He seeks damages equivalent to the wages he would have earned while he was off work due to the incident, between November 2, 2016 and March 8, 2017.
- [71] R.T. submits that he would have continued to work throughout this period but for the actions of the defendants. He submits that his decision to stay off work was reasonable in light of the threats against his life and family, and while pursuing counselling.
- [72] The earnings R.T. would have earned during this period are calculated in an affidavit from Cheryl Jeffrey, a payroll supervisor with Teck Coal Limited. If R.T. had worked November 2 to 19, 2016 he would have earned approximately \$6,364.01. Instead, he took vacation pay. If he had worked between November 20, 2016 and March 8, 2017, he would have earned \$31,198.96. R.T. therefore claims the total sum of \$37,562.97 (\$6,364.01 + \$31,198.96).

- [73] I find that, but for the incident, R.T. would likely have worked throughout the period claimed. R.T.'s decision to remain off work for this period was reasonable, and causally linked to the tortious conduct of the defendants. I find that it reasonable to calculate R.T.'s damages for past loss of earning capacity on the basis of the wages he would otherwise have earned during the period he was off work: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 30-31.
- [74] I am aware that this Court has varied in how it has treated lost vacation days: see the discussion in *Bergeron v. Malloy*, 2020 BCSC 963 at para. 109. I find that it is appropriate to include the earnings R.T. would have earned during the period he took vacation pay in calculating his damages, as he lost the use of those vacation days for their intended purpose.
- [75] I therefore award R.T. \$37,562.97 in past loss of earning capacity.

Special Damages

- [76] R.T. seeks only modest special damages: an estimated \$250.00 to replace his torn shirt and jacket; and \$120.00 for a counselling session on April 14, 2021. I find these special damages to be caused by the defendants' tortious conduct, and reasonable, and award a total of \$370.00.

Aggravated Damages

- [77] R.T. seeks aggravated damages in the range of \$5,000 to \$10,000. He relies on *Thomson*, in which \$2,500 was awarded for aggravated damages; *B.J.M.*, in which B.J.M. was not awarded aggravated damages, but his mother, M.D.H., was awarded \$5,000 in aggravated damages; and *Henderson*, in which aggravated damages were included in the total compensatory damages awarded of \$13,000.
- [78] The Court at para. 29 of *Thomson* discussed the purpose of aggravated damages in these terms:

Aggravated damages are a compensatory award that takes account of the intangible injuries such as distress and humiliation caused by a defendant's insulting behaviour. Aggravated damages are often claimed as compensation for mental distress caused by a defendant's behaviour. Aggravated damages will frequently cover conduct which would also be subject to punitive damages, but their role is compensatory. They are designed to compensate a plaintiff and are measured by the plaintiff's suffering such as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, and similar matters caused by the conduct of a defendant: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085.

- [79] In Qiao at para. 418, Madam Justice Donegan declined to order aggravated damages because she was satisfied that "the issue of intangible injuries was completely addressed in the large award of non-pecuniary damages". Like the Court in Qiao, I have ordered \$40,000 in non-pecuniary damages. I am satisfied that R.T.'s intangible injuries have been fully compensated by that award, and decline to order aggravated damages.

Punitive Damages

- [80] R.T. seeks punitive damages in the range of \$20,000 to \$30,000. He cites *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 [Whiten] at paras. 36 and 94 for the purposes of punitive damages, and the criteria to be considered in deciding whether to award them. As explained by Madam Justice Gerow in *Thomson* at para. 30, there is a close relationship between aggravated and punitive damages. The same conduct may give rise to both types of damages, but a plaintiff must not be compensated twice for the same harm or the defendant punished twice for the same type of moral culpability.
- [81] There is no doubt that the defendants' behaviour was "'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency'": *Whiten* at para. 36.
- [82] The hurdle R.T. faces in seeking an award of punitive damages is the fact that the defendants have already been found guilty and sentenced in criminal proceedings for assault, uttering threats and possession of weapons for a dangerous purpose. In *Whiten* at para. 94 the Court stated that punitive damages are very much the exception rather than the rule, that regard must be had to any other penalties suffered by the defendants for the misconduct, and that "punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation".
- [83] In seeking to overcome this hurdle, R.T. relies on *McCaffery v. Arguello*, 2017 BCSC 1460 [McCaffery], where Justice MacNaughton ordered \$30,000 in punitive damages despite the fact the defendant had been convicted of assault with a weapon and assault causing bodily harm. This was in addition to substantial compensatory damages totalling \$789,016.40. In ordering punitive damages, MacNaughton J. emphasized the dangerousness of the "road rage" incident committed by the defendant, and the fact that his submissions indicated that he had not entirely understood the community's condemnation of his behaviour: at paras. 125-126.
- [84] Counsel for R.T. submits that his damages are modest, and not sufficient to the degree of the defendants' misconduct, to deter future misconduct, and to express the community's condemnation of their behaviour. He submits that this rationale applies in particular to Mr. Lowe and Mr. Mansfield, who alone among the defendants denied liability, and defended this litigation, up until trial. He also emphasizes that all the defendants "took the blame, and to some extent have shielded, an additional three to five men who have escaped justice". As a result, they have restricted R.T.'s ability to recover damages from a larger pool of defendants.

He submits that this is, in the words of the Court in Whiten at para. 94, an "advantage or profit gained", that was not taken into account by the sentencing judge.

[85] I am persuaded that punitive damages are warranted in the egregious circumstances of this case. The defendants' conduct was planned and deliberate and designed to intimidate R.T. They lay in wait for him outside his home, in the dark, and menaced him as a group. Their threats, not only to harm him, but to harm his young daughter, are particularly reprehensible and worthy of denunciation.

[86] Taking into account the punitive damages awarded in McCaffery (\$30,000), Thomson (\$2,500) and Reimer v. Rooster's Country Cabaret Ltd. 2013 BCSC 2211 (\$20,000), and considering the compensatory damages I have already awarded, I conclude that a punitive damages award of \$20,000 is appropriate in this case.

Health Care Recovery Costs

[87] A certificate from the Ministry of Health, pursuant to s. 16 of the Health Care Costs Recovery Act, S.B.C. 2008, c. 27, was entered as evidence, setting out the amount of health care costs paid on R.T.'s behalf.

[88] The amount claimed in the Certificate is \$152.95, which is comprised of four of R.T.'s visits to his family doctor's office between November 10, 2016 and February 8, 2017.

Anonymity and Sealing Order

[89] R.T. applied for an order protecting his identity in the following terms:

- (i) The style of cause in this proceeding shall be amended to refer to the plaintiff and his family by initials;
- (ii) The whole of the court file shall be sealed on the following condition: third parties may apply to the court for an order for release of any of the documents from the sealing provisions upon notice to the plaintiff and the defendants. Absent court order, only the parties and their counsel will have access to the court file; and
- (iii) No person shall publish in any document or broadcast or transmit in any way any information that could identify the applicant as a party to this proceeding, including any descriptions or links to print or internet publications containing any information that identify the applicant as a party to this proceeding which were published prior to the issuance of this order.

[90] At trial, I granted the sealing order sought in the second paragraph. I have also decided to grant the anonymization order sought in the first paragraph and the limitation on publication sought in the third paragraph. I have expanded the anonymization order to include R.T.'s friend, B.C., and to make clear that R.T., his family, and B.C. are to be anonymized in this decision.

- [91] In seeking these orders, counsel for R.T. relied on Madam Justice Dardi's decision in *X. v. Y.*, 2011 BCSC 943, in which she granted the first two orders sought in this case. At paras. 17-19, Dardi J. provided the following helpful summary of the principles to be applied in considering such orders:
- [17] The curtailment of public accessibility to judicial proceedings is justified only where social values of a superordinate importance require protection: *MacIntyre* at 186-187. The common law test for a publication ban, involving twin requirements of necessity and proportionality, was articulated by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, and then reformulated in *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 at para. 32.
- [18] In *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, the Court held that although formulated in the context of publication bans, the *Dagenais/Mentuck* framework should be applied to all discretionary judicial orders that limit the principle of openness. Hence, these principles guide the court's exercise of discretion in making anonymity orders and sealing orders as well as publication bans.
- [19] *A.B. v. C.D.*, 2010 BCSC 1530, is an example of a recent civil case in which the court ordered a publication ban. Although the case involved a sexual assault by a teacher and, therefore, the factors which informed the analysis were somewhat different than in this case, the court provides a helpful formulation of the *Dagenais/Mentuck* test at para. 63:
- [63] In my view, the *Dagenais* test, as modified by *Mentuck*, can be further modified to reflect the competing interests in the case at bar as follows:

A discretionary publication ban to protect identification of a person or entity should only be ordered when

- (a) such an order is necessary in order to prevent a serious invasion of privacy because reasonably alternative measures will not prevent the risk; and
 - (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
- [92] In this case, R.T.'s identity has already been published in the media articles that appeared after the summary trial decision was released. Justice Marzari addressed a similar circumstance in *Galloway v. A.B.*, 2019 BCSC 395, at paras. 41-43, relying on the decision of Mr. Justice Williams in *R. v. Pickton*, 2010 BCSC 1198. In such circumstances, the orders sought would not provide perfect anonymity, but would provide the applicant with a measure of protection in future. Previous publication is not a bar to an order being granted.

- [93] Anonymization orders and other limitations on publishing identifying information should only be granted in rare circumstances, as they constitute a derogation from the open court principle. Nonetheless, I am persuaded that the orders sought are necessary, in the circumstances of this case.
- [94] R.T. was sought out and attacked by a group of men, the "Arch-rivals", who made references to the Hells Angels, and accused him of wearing a Hells Angels vest. Some of the men involved in the attack on R.T. were never identified. Those men knew where R.T. lived and they knew he had a family. They took pictures of him.
- [95] R.T. is concerned about his safety. He testified that he had noticed suspicious vehicles near his house after the articles about the incident were published in 2021. While his counsel recognized that R.T. cannot prove whether these were real safety threats, or merely examples of his heightened alertness since the incident occurred, this evidence demonstrates that R.T.'s fear is real.
- [96] R.T. submits that there is a real risk of potential harm to him and his family. If the defendants, or their fellow assailants who have not been identified, were to obtain further personal information about him, it could be used to harm or intimidate him or his family.
- [97] I find that these fears, grounded in real risks of potential harm to R.T. and his family, are sufficient to warrant some limitations on the open court principle. The orders sought are proportionate in that the public will still have access to the Court's complete reasons for judgment, and the media may report on it, provided that in doing so they do not identify the plaintiff or link to earlier publications that identified him. In the absence of such orders persons such as the plaintiff who have been attacked and threatened by assailants, some of them unidentified, may be deterred from instituting or continuing legal proceedings to obtain justice for the wrongs done to them, a result which would be contrary to the interests of justice.

Summary

- [98] By way of summary, I have granted the following orders:

Damages

Non-pecuniary Damages

\$40,000.00

Loss of Past Earning Capacity

\$37,562.97

Special Damages

\$370.00

Punitive Damages

\$20,000.00

Health Care Recovery Costs

\$152.95

Total

\$98,085.92

Other orders

[99] In addition, I have made the following orders to protect the privacy of R.T.:

- 1) The style of cause in this proceeding shall be amended to refer to the plaintiff and his family by initials; and the plaintiff, his family and B.C. shall be referred to in this decision by their initials;
- 2) The whole of the court file shall be sealed on the following condition: third parties may apply to the court for an order for release of any of the documents from the sealing provisions upon notice to the plaintiff and the defendants. Absent court order, only the parties and their counsel will have access to the court file; and
- 3) No person shall publish in any document or broadcast or transmit in any way any information that could identify the applicant as a party to this proceeding, including any descriptions or links to print or internet publications containing any information that identify the applicant as a party to this proceeding which were published prior to the issuance of this order.

[100] Counsel for R.T. sought to make submissions on costs following receipt of this decision. He may do so by contacting Supreme Court Scheduling within 30 days of this decision being released to arrange a brief hearing to speak to costs.

"Lyster J."

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