

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fong v. British Columbia (Minister of Justice)*,  
2019 BCSC 263

Date: 20190301  
Docket: S111826  
Registry: New Westminster

Between:

**Michael Kwok Shuen Fong**

Plaintiff

And

**Her Majesty the Queen in Right of British Columbia as represented by  
The Minister of Justice for British Columbia**

Defendant

Corrected Judgment: This judgment was corrected on the cover page on March 22, 2019.

Before: The Honourable Mr. Justice Blok

## Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.  
October 16-20, 23-27, 30-31,  
November 1-3, 2017 and  
January 16-18, 2018

Supplemental submissions received:

January 26 and 31, 2018

Place and Date of Judgment:

New Westminster, B.C.  
March 1, 2019

**I. Introduction**

[1] In March 2006, Michael Fong was the manager of the Oasis Hotel (formerly the Dell Hotel), located in the Whalley area of Surrey, B.C. The primary feature of the Oasis Hotel was its large bar. The police viewed the Oasis Hotel/Dell Hotel as a problem establishment. It attracted a rough crowd and the police attended there frequently.

[2] In the early hours of March 11, 2006 there was a physical interaction between Mr. Fong and police officers who attended at the premises. Mr. Fong was injured in that interaction. He alleges that these injuries were caused by the wrongful acts of the police, and he says these injuries have developed into chronic pain and post-traumatic stress disorder (“PTSD”).

[3] Mr. Fong brings claims for assault and battery, false arrest and false imprisonment as a result of the incident. He claims, in the alternative, *Charter* damages pursuant to ss. 7, 8 and 9 of the *Charter of Rights and Freedoms*, on various grounds, including the alleged use of excessive force by the police officers.

[4] The liability issue in this case turns primarily on the question of whether the police had grounds to arrest Mr. Fong, as he was injured during the course of an arrest.

**II. Plaintiff’s Case – Liability**

**A. Mr. Fong**

*Background*

[5] Mr. Fong, who is in his 60s, briefly described his employment history and how he came to be involved in two hotels in the Whalley area. He said that, prior to his hotel work, he worked in real estate. This was from 1986 to 1999. From 1999 to 2002 he was employed as the manager of Byrd pub at the Flamingo Hotel in Surrey.

[6] In July 2005, the Dell Hotel was sold to a numbered company, whose shareholders consisted of a Mr. Chu (51%) and members of Mr. Fong's extended

family (49%). Although Mr. Fong was not one of the shareholders, he has powers of attorney from his parents authorizing him to act on their behalf. Mr. Fong was installed as the hotel's general manager, which was renamed as the Oasis Hotel.

[7] The police witnesses referred to the Oasis Hotel as the Dell Hotel, and so I will use those names interchangeably.

[8] Mr. Fong was generally familiar with the type of clientele who frequented the Oasis Hotel, and of the Whalley area in which the Oasis Hotel was located, from his experience as manager of the nearby Byrd pub. He described the clientele of the Oasis Hotel as "working class". As will be seen, the police described the clientele somewhat differently.

[9] During his time as manager of the hotel, Mr. Fong resided in one of the rooms on site on a full-time basis.

[10] As part of the liquor licence transfer process, both Mr. Fong and the majority shareholder took training at the offices of the Liquor Control and Licensing Branch (LCLB) in Surrey. This occurred in February 2006. Through that training Mr. Fong learned that the hotel's liquor licence had to be posted in the licensed area during the hours that it was open.

[11] The licence for the Oasis Hotel pub was usually posted on the wall in the bar area. Occasionally, a bartender might take it off the wall to show to a police officer, at the officer's request, but otherwise it was on the wall and not removed from that location. Mr. Fong kept another copy of the licence in a safe in the hotel office.

*The Incident*

[12] Mr. Fong described the events leading up to the incident in question, which began in the evening of March 10, 2006. Mr. Fong was in a small office near the bar (not the hotel office) when the head doorman (Tim Carrod) told him that an RCMP officer wanted to talk to him outside. Mr. Carrod did not say what the reason was for the request, but Mr. Fong said it is quite common for police to want to talk to the

manager. Mr. Fong exited via the bar doors and stood on the sidewalk, where he saw several police officers. He asked which officer wanted to talk to him, and Constable Dosange identified himself.

[13] Mr. Fong said he was carrying cash in an envelope and he believed he also had a small cash box with him, as he was counting cash at the time he was asked to speak to the police officers.

[14] Mr. Fong said he could not recall the exact words used by Cst. Dosange, but the officer wanted to see the liquor licence and his words were to the effect of “bring me the liquor licence”. Mr. Fong responded that the licence was posted behind the bar, but he told the officer he also had one in the safe, he was going to his office anyway and the officer was welcome to follow him to his office. Mr. Fong then started walking to the hotel office.

[15] Constable Dosange then asked “why do you keep a copy in the safe?”. Mr. Fong replied that sometimes liquor inspectors remove it from the bar and then police officers come along and ask why it is not in place, so that is why he had a licence in both places. Mr. Fong testified that when he was managing the Byrd pub, some police officers asked to see the liquor licence, took it outside and left with it in their possession, which left him unable to open the pub until he obtained a replacement copy from the LCLB. Mr. Fong knew that the licence had to be posted during opening hours, so that is why he did not take the copy from the bar and instead he said he would go to the office to get the copy version.

[16] In answer to Mr. Fong’s suggestion to Cst. Dosange that the officer follow him, the officer said “bring it out to me”.

[17] Mr. Fong said he was almost at the entrance doors leading to the lobby (which was the route to the office) when he heard someone say “Chinese faggot” three or four times. Mr. Fong then heard Cst. Dosange say “you are a small Chinese faggot”.

[18] Mr. Fong said he became very upset that such comments have been made about him in front of his coworkers and customers, and he did not appreciate being treated that way. He felt he had to stand up to that treatment and used course language “that I do not usually use”. He said to the officer, “Fuck you. If you want to see my licence you do not need my permission, go to Victoria and get your own copy”. He then walked to the lobby doors.

[19] He opened the door with one hand and then “someone bumped me from behind” and grabbed his left hand, the hand that was carrying the cash and cash box. He said he got “a big push from behind and I ended up a couple of steps inside the lobby”. He said he regained a standing position, and having done so, “someone hit me from behind with a solid item of some sort, a tap on top of my head, not a big force”. He then started bleeding badly, with blood all over his hair, face and shirt.

[20] Mr. Fong said he was very scared because he was being attacked inside his hotel. He testified that he tried to protect himself and cover up, in case he was struck again. His assailant then continued to use items to beat his shoulders, upper arm and body, and tried to pull his arms down. Someone bear-hugged him from behind, and he was punched in the right temple area, which knocked his glasses off. Mr. Fong thought he might have lost consciousness for a time.

[21] The next thing he remembered was waking up on the floor, with his head on the door frame of the entranceway and the rest of his body inside the lobby. There were people kicking him in rib cage on both sides. He tried to get up, but someone was holding his neck very tightly to the ground and kneeling on his back. Mr. Fong said his face was being pushed into the ground and he was being kneed in his lower back, and it was all very painful. He was kicking back as a reaction to the pain. They then pulled out his hands and handcuffed him very tightly. Up to this point he thought he was being robbed. It was only when he was assisted back to a standing position that he realized that the persons involved were both police officers.

[22] As he was taken back past the pub doors he saw one of the employees (Amanda) coming out, who started picking up the cash. She said to the officers that they did not need six RCMP officers to arrest Mr. Fong, and Cst. Dosange replied “just do your work, otherwise I will think of something to charge you with”.

[23] Mr. Fong then saw another employee, Peter Svedruzic, who was sitting in one of the police cars. Mr. Svedruzic was the bar manager at the hotel.

[24] Mr. Fong was led to a police car and put in the back seat. The officer did not drive away, but instead came back a minute later, looked at Mr. Fong’s head and brought two ambulance attendants to look at him. The attendants said they could not see the injury well enough, so the officer (Constable Ward) told them that they should do it in their ambulance. The officer then opened the door, helped Mr. Fong out, and they walked to the ambulance, which was parked perhaps 250 feet away.

[25] At the ambulance, Mr. Fong walked up the steps to get in, but near the top he slipped on the steps and fell to the ground. He hurt his elbow “very bad”, his lower back “stung a bit” and he hurt his left shoulder. When asked what he landed on, he said he landed on his elbow and rear end at the same time. He did not hit his head.

[26] The ambulance attendants cleaned him up, but then said to the officer that they needed to take him to the hospital. At that point, the officer brought a paper to him and asked him to sign it. Mr. Fong said that at that point he did not have his glasses and so he could not read, and he still felt dizzy in the head. Mr. Fong asked to speak to a lawyer. The ambulance attendants said that if he did not sign the document that they could not take him to the hospital, so he signed it. The document he signed was a “Promise to Appear”. Mr. Fong wrote on the Promise to Appear “I am hurt and I request [unintelligible] the RCMP beat me up”.

[27] Mr. Fong said that no one explained the document to him and he was not comfortable signing it, so he wrote that phrase on the document.

[28] Mr. Fong said that one of the attendants cleaned blood off Cst. Ward.

[29] When asked if there was any discussion about his being charged with an offence, Mr. Fong said Cst. Ward told him he was being charged with obstruction. Constable Ward did not explain in what way Mr. Fong was said to have been obstructing any of the officers.

[30] Mr. Fong was driven to Surrey Memorial Hospital in the ambulance. He telephoned 9-1-1 to report that he had been beaten by the officers. He wanted someone to attend at the scene and take photographs. Their response was that they were too busy.

[31] Mr. Fong eventually grew tired of waiting for treatment at the hospital, and so he took a taxi and returned to the hotel. He signed a hospital discharge document, showing a discharge time of 0225 hours.

[32] On his return to the hotel, he was told by Mr. Svedruzic that the pub had closed earlier because there had been a big fight. The pub entry doors were closed and locked. Mr. Svedruzic handed Mr. Fong two licensed premises check documents (“LPCs”). The first cited the establishment for “employee refus[ing] to produce licence” and the second said “failing to check ID, allowing drunken patrons to stay, employee consumed alcohol and pub has lost control”.

[33] Mr. Fong was given a contravention notice sometime after March 11, 2006. The contravention notice was dated April 5, 2006. It lists three separate contraventions, all relating to the events of March 11, 2006 (“drunkenness, quarrelsome disorderly conduct”; “permit intoxicated person to remain” and “employee consume liquor”). The contravention notice does not list as one of its alleged contraventions any issue about not displaying the liquor licence.

[34] As to that contravention notice, Mr. Fong said the liquor inspector was content with the responses he provided to her, and so she took no enforcement measures.

*Surveillance Video*

[35] A surveillance camera located outside the pub doors captured some of the events in question. Essentially, according to the time stamp on the video, RCMP officers arrived at about 12:59 a.m. on March 11, 2006. The pub manager, Mr. Svedruzic, exited the pub at 1:06:11 (all time references are a.m.) and he and the head doorman (Mr. Carrod) headed towards the area where the officers or some of the offices were located. Mr. Fong emerged at 1:09:07, followed by Mr. Carrod. Mr. Fong is seen holding an envelope in his hand. Mr. Fong said between 1:09:07 and 1:09:37 he is speaking to the officers. He said time stamp 1:09:44 is the point when he heard the “Chinese faggot” comments and the he gave a cursing reply. At time stamp 1:09:57, police officers and the head doorman are heading towards the lobby doors with some urgency. At 1:11:06 Mr. Carrod is handcuffed by Cst. Dosange. At 1:12:32 Mr. Fong is seen coming into the frame escorted by two officers, while handcuffed, heading to the police car.

[36] Mr. Fong testified about his various medical, psychological and social issues that postdated the event. I will refer to this evidence later when I discuss damages.

*Cross-Examination*

[37] In cross-examination Mr. Fong said:

- a) the “Chinese faggot” comment was repeated four times. It was the same voice saying this each time. After the fourth time, he turned around and saw Cst. Dosange say to him “you small Chinese faggot”;
- b) there were two sets of doors going into the lobby of the hotel. His arm was grabbed from behind just as he opened one of the doors in the first set. He almost fell down but regained his balance and was by that point inside the lobby itself;



- c) the lobby is carpeted. He said there was blood on the carpet as a result of the altercation but there are no photos of that because the janitor cleaned it up despite his instructions to the contrary;
- d) the photos of blood at the entranceway (where blood is shown at the sill of the first set of doors) is not the area where his head was when he woke up;
- e) he later identified the object used to strike his head as a police baton, although he said he never actually saw it;
- f) when he was down, his head was “in the door frame” but the rest of his body was in the lobby;
- g) the second set of doors was usually locked, but he denied these doors were locked that night;
- h) the licence posted at the bar was a copy of the original. The original was in the office safe. After the event in question he told the liquor inspector he had both an original and a copy, with the copy displayed, and the inspector never said there was anything wrong about doing that;
- i) he was going to fetch the licence from the office safe rather than the bar because his past experience had been that the police had walked away with licences, leaving him unable to keep the bar open;
- j) on his way to the lobby he turned and asked Cst. Dosange why he needed eight officers;
- k) his entire conversation with Cst. Dosange took 20 seconds;
- l) not all the interaction was captured on the video;

- m) he thought the assault might have been premeditated because the ambulance was already on scene before it happened. Specifically, he felt Cst. Ward already formulated a plan to beat him up;
- n) Mr. Svedruzic told him that he later used the bar licence to show to the police. The licensee named in the LPCs issued by the police that night show “AMPM Holdings” as the licensee. This was not the current owner but was the former owner of the hotel. He did not receive any approval to use that licence, but they had submitted the transfer documents to the LCLB and the inspector knew they were using the prior licence;
- o) he had not had any prior negative interactions with Cst. Dosange, Cst. Ward or Cst. Sabo;
- p) he acknowledged he had exchanged unpleasant words with an officer in February 2006, during Chinese New Year. He did not know which officer that was, but it turned out to be an officer named De Jager. The incident occurred after the bar had closed, and staff were drinking in the bar after closing hours. He said they had stopped drinking by the time the officers attended. There were 20 people there, employees and spouses. Four officers arrived and asked to speak to “Michael Fong”. Mr. Fong had wanted Mr. Svedruzic to deal with it because he (Mr. Fong) had been drinking tequila shooters, seven or eight of them. The officer wanted to know why there were so many people still drinking in the bar, and he wanted to see a list of the employees. Mr. Fong told him he would get the list to him the following Monday. The officer said he needed it now. He told the officer “either you give me a ticket or you fuck off out of here. Happy Chinese New Year”;
- q) he was aware that both Peter Svedruzic and Tim Carrod had criminal records. He had never seen any negative interactions between Mr. Carrod and the police, although he admitted he never saw what

Mr. Carrod did outside the bar doors. Mr. Carrod told him the police did not like him very much;

- r) he made a complaint to the RCMP a few years earlier about an incident that occurred when he was managing the Byrd pub. The owner of the Byrd pub/Flamingo Hotel wrongfully took \$90,000 of his money from his locker, as well as quantities of liquor (for which he was financially responsible). For three years the police told him they were “investigating” the matter. He said he was not angry with the police about that, but he was disappointed about the way he was being treated. He lodged a complaint with the police as a result;
- s) in a statement given to police, he said that when they bought the Dell Hotel the police told him they wanted to meet with him. They told him they wanted to shut down the hotel because the hotel was selling beer too cheaply and renting rooms too cheaply;
- t) a community relations officer came by at one point and said the police wanted the bar shut down permanently;
- u) he contacted a local television station after the police assault, and they sent a news crew out to interview him. This would have been on March 14 or 15, 2006. In the video he pointed out the blood in the doorway and said that was where he fell. The camera did a close-up of the liquor licence he said the police demanded to see. The licence shown was for the “Oasis Hotel” and was issued to 0724193 B.C. Ltd. In cross-examination, Mr. Fong said the licence shown in the video was the licence from the safe, and this was the same licence that was in the safe on March 11, 2006; and
- v) in that news footage he said “someone sucker punched me in the back of the head and I fell down immediately”. He said that was how he remembered it at the time. He said sometimes he gets too emotionally

excited and he gets things in the wrong order. For the same reason, he did not mention the “tap” on the top of his head during that news interview.

**B. Edwina Nazarek**

[38] Ms. Nazarek was employed as a provincial liquor inspector from 2001 to 2008. She is now employed elsewhere in government.

[39] In her capacity as inspector, she dealt with licensees in several ways, including through compliance meetings. A “compliance meeting” is set up when a licensee is not in compliance and the LCLB wants to convey what is wrong and to get the licensee to change. She said these are “informational” in nature.

[40] If there is a contravention observed during an inspection of the premises, then a notice is issued. The LCLB will then consider whether the matter is to go to enforcement. This may depend on the history of the file or the location. If it goes to enforcement, a Notice of Enforcement Action is issued, and the matter goes to a hearing.

[41] Where there is a contravention noted by an inspector, the inspector will issue a Contravention Notice. A notice issued by the police is called a Licensed Premises Check, or LPC. LPCs are forwarded to the LCLB and then forwarded to the inspector responsible for the area. The inspector then makes the decision whether to merely discuss the issue with the licensee or take enforcement action.

[42] Here, Ms. Nazarek received an LPC from the police for the event in question. She then issued a Contravention Notice, which was dated April 5, 2006. She agreed that the LPC issued by the police listed “refuse to produce documents for inspection” as one of the alleged contraventions, but the Contravention Notice she issued did not. She did not have an explanation for that.

[43] Ms. Nazarek said there is no policy reason why a licence cannot be taken off the wall to show to a police officer.

**III. Defendant's Case – Liability**

**A. Constable James Ward**

[44] At the time of these events, Cst. Ward was a general duty officer assigned to an area that included the Oasis Hotel, which he referred to as the Dell Hotel.

[45] At about 1:00 am on March 11, 2006 he received word that other RCMP members required assistance at the Dell Hotel. The initial call was a report of assaults occurring inside the bar. He was a few blocks away at the time of the call and it took him perhaps five minutes to get there. He pulled into the parking lot of the Dell Hotel and saw Csts. Dosange and Sabo dealing with some individuals at the front door of the bar. Both of their cars were pulled up to the area. He parked his car somewhat away from them.

[46] There were a lot of drunk people standing around outside, perhaps 20 to 40 people. They were boisterous, aggressive and hostile. They were extremely intoxicated and were yelling obscenities. He saw Cst. Dosange putting a male into his car, or attempting to do so. This male was Peter Svedruzic, who he understood was the bar manager. Constable Dosange appeared to be having some problems dealing with Mr. Svedruzic, as Mr. Svedruzic was yelling and screaming, and resisting being put into a police car. There were a couple of other males in the area with Cst. Dosange.

[47] Constable Sabo was dealing with another male, Mr. Carrod, somewhat farther away. Both Mr. Svedruzic and Mr. Carrod were known to Cst. Ward for criminal activity, mostly involving beating up people for drug debts. Both were known to have been violent to police in the past.

[48] A person came out from the bar area, yelling profanities and saying "leave him alone". He later learned this was Mr. Fong.

[49] Constable Ward asked Cst. Dosange what was going on. Constable Dosange informed him that they were called out for an assault complaint and one

thing led to another. They identified one individual who was under 25 and had identification issues. Constable Dosange had then asked an employee for the liquor licence and the employee said “don’t have it”. Constable Dosange also said the licence was not displayed. Constable Dosange then took the employee outside. This, it would appear, was Mr. Svedruzic.

[50] Constable Dosange asked Cst. Ward to write up a liquor violation. Constable Ward then asked Mr. Fong if he could produce the licence for the establishment. Mr. Fong declined, saying “fuck off and get out of here”. Constable Ward asked again, and Mr. Fong again told him “where to go”. Constable Ward said he needed the licence number in order to write up the violation.

[51] Constable Ward then asked Mr. Fong for his name. Again, Mr. Fong replied with profanities. He asked again for his name, and Mr. Fong replied with more profanities and started to walk away. Through this interaction Mr. Fong was extremely hostile and aggressive.

[52] Constable Ward had witnessed Mr. Fong interacting with RCMP officers the month before. He had been called to the Dell Hotel to assist another officer, Corporal De Jager. He saw Cpl. De Jager talking to a group of individuals, one of whom (Mr. Fong) was “up in [Cpl. De Jager’s] face, irate, screaming profanities and glowing with rage”. Evidently, Cpl. De Jager had found after-hours drinking at the establishment. Mr. Fong approached Cpl. De Jager and started poking him in the chest, and poking another officer in the chest, at which time two staff members “literally tackled Mr. Fong to the floor” and told the officers that they would take Mr. Fong back to his office. Cst. Ward later learned that the aggressive person was Michael Fong and that Mr. Fong was the operator of the hotel.

[53] Returning to the events in question, after Mr. Fong responded to Cst. Ward’s requests with profanities and started to walk away, Cst. Ward told Mr. Fong he was under arrest. Constable Ward said Mr. Fong was facing him when he said this, and he had no doubt Mr. Fong heard him. At that point, Mr. Fong quickened his pace

towards the lobby doors, despite Cst. Ward's commands to stop. Mr. Fong entered the first set of doors and then pulled the doors shut, holding them closed. Constable Ward could not open the door at first, so he then grabbed it with both hands and put his weight into his pulling in order to force the door open. Constable Ward again told Mr. Fong he was under arrest for obstruction. Constable Ward said he heard something metallic drop, which caused him to look down, at which time he saw Mr. Fong's right fist coming up to his face. Constable Ward blocked the blow and then "dived into him" essentially tackling him into the second set of doors, and managed to get hold of his head while Mr. Fong continued to resist. Constable Ward brought Mr. Fong to the ground. Once on the ground, Mr. Fong rolled onto his back and began to kick and punch at Cst. Ward, striking Cst. Ward in the face and kicking him in the lower body. Constable Ward then struck him on the side of the head with a closed fist. This caused Mr. Fong to stop fighting. Constable Ward flipped him onto his back and got Mr. Fong's right arm behind him to get one handcuff on, but Mr. Fong tucked his left arm in so that he could not access it. At that point, Cst. Sabo came to assist and they managed to get the other handcuff on despite Mr. Fong's continuing resistance.

[54] Constable Sabo told Cst. Ward that Mr. Fong was bleeding, so they stood him up, and Cst. Ward radioed for an ambulance. On their way out, Cst. Ward noted the crowd had now doubled in size, they were aggressive and the majority of them were drunk. Constable Ward did not feel safe there, so he decided to drive to the other end of the parking lot to meet the ambulance there, so that Mr. Fong would be treated away from the crowd. He drove Mr. Fong to the southern end of the parking lot. Mr. Fong continued yelling and screaming. Constable Ward said he smelled liquor on Mr. Fong's breath. Later, he added that Mr. Fong appeared to be intoxicated, and although his speech was not slurred, "he was yelling so loud".

[55] The ambulance had already arrived. Constable Ward surmised that someone else had called it. He told the attendants that Mr. Fong had a head injury and he was bleeding. They walked over to Cst. Ward's police vehicle and opened the rear door, and started to examine Mr. Fong. They decided they should look at

him in the ambulance. The two attendants walked Mr. Fong around both the police car and the ambulance in order to get to the back door of the ambulance. As they rounded the ambulance Mr. Fong slipped on a patch of ice, fell backwards, and struck the back of his head on the doorstep of the ambulance passenger door. The paramedics got him back up and took him into the back of the ambulance.

[56] The paramedics started to treat his wound, which was a small laceration on the back of his head about one inch long, then they told Cst. Ward that Mr. Fong was going to need further medical treatment in hospital because he was most likely going to need stitches.

[57] At this point, Mr. Fong had substantially calmed down. Constable Ward got his “tombstone” information from him. Knowing that Mr. Fong was going to be transferred to hospital, Cst. Ward was satisfied that Mr. Fong was no longer going to be interfering with any investigation. He decided to release Mr. Fong on a promise to appear, but Mr. Fong refused to sign it. Instead he wrote a message on the form.

[58] At about that point, Cst. Ward realized that a number of other police cars had arrived on the scene and so he returned to the bar, where a number of fights had broken out in a “near-riot” situation. There were approximately 15 officers on scene at that point.

[59] Constable Ward said the struggle between himself and Mr. Fong took place *between* the two sets of lobby doors. He said he never went into the lobby area itself as Mr. Fong was fumbling with keys to open it when he caught up with him.

[60] Constable Ward said he did not use a weapon at any time. He believes the injury to Mr. Fong occurred on the initial takedown, and that Mr. Fong struck his head on the aluminum sill at the first set of doors. He could not have used his ASP police baton anyway, as the struggle was “extraordinarily quick and dynamic” and the area in between the doors was too confined to deploy or swing it. He said he finds the ASP baton ineffective as a “use of force” device in any event, and he has



only used his baton to break windows. No other officer used a baton either, but in any event, only he and Cst. Sabo had any physical interaction with Mr. Fong.

[61] Constable Ward said he never heard anyone utter the words “Chinese faggot”. He himself did not utter those words, and Cst. Dosange did not either.

[62] Constable Ward did not suspect Mr. Fong lost consciousness at any time. He saw no indication of any significant head injury. Mr. Fong was bleeding from the cut, but blood was not gushing out. Mr. Fong did not appear drowsy, listless or unfocused. He noticed no change in Mr. Fong after he slipped and fell at the ambulance.

[63] When asked if Mr. Fong dropped anything, Cst. Ward said “some change and keys”, which he believed Mr. Fong had been carrying in his right hand.

[64] Constable Ward said he had no intent to injure Mr. Fong but instead his intent was to stop Mr. Fong from injuring him. He said the manner in which he engaged Mr. Fong physically was in accord with his training. The actions he took were standard techniques.

[65] Constable Ward said he would not have entered the hotel bar on his own that night, or generally. The hotel was located in a “very seedy part of town”, many patrons were anti-police, and drunks would often try to pull out officers’ guns from their holsters or assault the officers. He said he had attended at the Dell perhaps 100 times, dealing with assaults, sexual assaults, stabbings and shootings. Some of those incidents involved Mr. Carrod and Mr. Svedruzic. Since most calls to the hotel involved violence, any attendance by police always involved a minimum of two officers.

[66] Constable Ward said he did not take any steps to ascertain whether the liquor licence was posted on the wall. When asked what motivated him to demand Mr. Fong produce the licence, he said he needed it to write up the ticket because

Cst. Dosange had told him an underage person had been served. As it turned out, Cst. Ward did not write up the ticket. He believed Cst. Dosange did so.

[67] In cross-examination, Cst. Ward said:

- a) he had never come across an establishment that had not displayed its liquor licence;
- b) he asked Mr. Fong for identification because at that point he did not know who he was, although it was clear he was the boss or manager;
- c) he did not make any handwritten notes of his interaction with Mr. Fong, although he made typed notes that night in an incident report, which he augmented in a report to Crown counsel;
- d) in his notes he recorded that “I was informed by Cst. Dosange that Mr. Fong refused to produce the licence”;
- e) Mr. Fong walked away “more or less” right away after Cst. Ward told him he was under arrest. He told Mr. Fong he was under arrest after Mr. Fong refused to produce identification;
- f) upon opening the first set of lobby doors and grabbing Mr. Fong, Cst. Ward told Mr. Fong he was under arrest for obstruction. It was only at the lobby doors that Cst. Ward told Mr. Fong that he was under arrest for obstruction;
- g) he was the subject of a “code of conduct” complaint, and as part of those proceedings, he gave a formal, recorded statement to Corporal Tom Norton on June 27, 2006;
- h) he did not go to see for himself if there was a licence posted in the bar;

- i) Crown counsel sent him a memo dated June 7, 2006 explaining why she had declined to approve charges against Mr. Fong. Constable Ward felt that her advice was incorrect and that she had misinterpreted the events;
- j) the only offence listed in the promise to appear was “obstruction”. There was no mention of “assault”. That came later;
- k) the infractions at issue were admitting or serving persons under 25 without ID and failure to display the liquor licence;
- l) as noted in his statement to Cpl. Norton, he said to Mr. Fong that the licence was not displayed so Cst. Ward asked him to get it, at which time Mr. Fong said “fuck off and fuck you”;
- m) at the lobby doors he grabbed Mr. Fong and told him he was under arrest. Mr. Fong had something in his right hand. Constable Ward heard a “clink” and Mr. Fong turned around in way that made Cst. Ward positive Mr. Fong was going to strike him, given that he had witnessed Mr. Fong’s confrontation with Cpl. De Jager some time earlier;
- n) in his statement to Cpl. Norton he did not say Mr. Fong came at him with a fist, although he did say that in his report to Crown counsel;
- o) he is 5’11” tall and he weighed 250 pounds at the time. His equipment would add at least a further 15-20 pounds to that;
- p) his goal in grabbing Mr. Fong by the head was to get him to the ground and under control;
- q) when he told Cpl. Norton “I feared he was doing something based on what I was told by the members” he meant he believed Mr. Fong was in violation of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267 [LCLA]. During his interactions with Mr. Fong, in trying to satisfy the

requirement of issuing the ticket, “he then committed the offence of obstruction by not complying with my lawful orders”;

- r) in his statement to Cpl. Norton he said he had never had occasion to check for the licence at the Dell so he had never actually gone to see it. At his examination for discovery, Cst. Ward said he had been at the Dell numerous times before this incident and the licence was generally posted and visible behind the bar. In cross-examination he said he did not recall seeing it before the incident;
- s) when he thought Mr. Fong was going to hit him, he rushed him and slammed Mr. Fong into the second set of doors;
- t) during the altercation, Mr. Fong was screaming extraordinarily loudly. In re-examination, Cst. Ward said he felt Mr. Fong was trying to rile the crowd;
- u) by the end of the altercation, Cst. Ward was covered in Mr. Fong’s blood.

**B. Staff Sergeant Harmeet Dosange**

[68] Staff Sergeant Dosange was a constable at the time of these events. I will refer to him by the rank he held at the time.

[69] Constable Dosange said he received a call around 12:50 am that night of a fight at the Dell Hotel on King George Highway. He had a newer officer, Constable Wesolowski, with him. On arrival at the hotel, Cst. Dosange parked near the front doors of the bar. He believes other RCMP members were already on scene, including Cst. Sabo.

[70] Constable Dosange said he had been called out to the Dell Hotel numerous times in the four years he had been posted in the area. It was an extremely violent bar, with drug use prevalent, and there were calls for service there on a daily basis. The Dell Hotel was in an area known as “The Strip”, which was plagued with

violence and drug-dealing. The rooms were frequent locations of illicit drug activity, stabbings and prostitution.

[71] When asked if there were any “rules” followed by the police for this location, Cst. Dosange said his supervisor told him he was not to attend there alone, and there was “zero tolerance” for offences.

[72] Constable Dosange had been to the Dell Hotel for “bar walks”. He noted that two of the bar employees, Peter Svedruzic and Tim Carrod, were anti-police and were known to be very violent. There were frequent problems at the Dell Hotel bar with over-serving of patrons and of intoxicated patrons.

[73] The Dell Hotel was by far the most dangerous bar in Whalley, and “nothing else compared”.

[74] Constable Dosange said he arrived at the Dell Hotel at approximately 1:00 am. He saw Tim Carrod at the door, and he told him why the police were there. Inside, the bar was three quarters full. It was extremely loud and dark inside. There were intoxicated people present.

[75] One particularly intoxicated male said something to Cst. Sabo. The male looked underage and he was unable to produce any identification, so he was escorted outside. Constable Dosange asked Mr. Carrod if the male had been allowed in without identification and Mr. Carrod replied “I know him”. Constable Dosange said that he knew Mr. Carrod to not be credible and so he told him that identification had to be produced.

[76] I digress for a moment to note that there is evidence in this case that for some regular patrons there was a practice of keeping copies of identification or other proof of age at the bar.

[77] Mr. Carrod maintained that it was sufficient that he knew the male in question, but Cst. Dosange said this was not good enough. Mr. Carrod refused to produce any identification for the male.

[78] Constable Dosange then looked for the bar licence. He did not recall seeing it. Mr. Carrod told him several times that he would not produce it. At that point another employee, Mr. Svedruzic, “got into my face” and was very agitated and belligerent. They had an exchange. He, too, would not produce the licence. Constable Dosange then detained Mr. Svedruzic because he was obstructing the police and so he was placed in a police vehicle.

[79] Constable Dosange said he was explaining to Mr. Carrod that they needed the licence and both Mr. Carrod and Mr. Svedruzic said “you are not getting the licence”. At trial, Cst. Dosange explained that he needed the licence because he needed the licensing number for the ticket, as well as the stated opening hours and occupancy limits. In short, he needed it to complete the ticket. Constable Dosange added that he was also concerned about what appeared to be gross over serving of patrons.

[80] Outside the bar, another male, Mr. Fong, came out. He was yelling and swearing and he said something about Cpl. De Jager. Constable Ward started talking to Mr. Fong, who then walked away towards the lobby doors of the hotel. Constable Dosange said he could not hear the exchange, but then there was a commotion. Meanwhile, Cst. Dosange detained Mr. Carrod as he was concerned he was going to join the commotion, given his violent nature. Constable Dosange then walked towards the lobby doors. There, he saw Cst. Ward and Mr. Fong on the ground. He assisted Cst. Ward in getting Mr. Fong to his feet and walking to a police vehicle. Mr. Fong had a cut to his head. He was still agitated, although he was coherent and talking.

[81] When he saw Cst. Ward and Mr. Fong on the ground, parts of them were outside the first set of doors and some parts of them were inside. He did not see any blood on the ground or floor, but did see blood on Mr. Fong’s head. He did not recall if Mr. Fong was drunk or intoxicated.

[82] Constable Dosange said there were a lot of people outside who were grossly intoxicated. It was a very chaotic parking lot. There were several officers trying to intervene in the crowd. In that crowd were individuals who had bloody cuts on them.

[83] Constable Dosange returned to his vehicle in order to speak to Mr. Svedruzic. He told him “all this could have been avoided if [he] had given [him] the bar licence”. At that point Mr. Svedruzic’s attitude “changed 100%” and he apologized. He told Cst. Dosange that his boss would not let him remove the licence, and in saying that he mentioned Cpl. De Jager’s name. He took this to mean that Cpl. De Jager had taken the bar licence on a prior occasion.

[84] Eventually the staff produced a copy of the licence and Cst. Dosange completed a licensed premises check form, giving it to Mr. Svedruzic.

[85] Constable Dosange said that when he first saw Mr. Fong that night he (Cst. Dosange) was speaking to Mr. Carrod and Mr. Svedruzic. He was not sure where Mr. Fong came from, but possibly he had exited via the bar doors. He did not recall exactly what Mr. Fong was saying, other than he was yelling and swearing and flailing his arms. He was on a rant and saying something about Cpl. De Jager. He came towards him and was clearly upset with the police.

[86] Constable Dosange said he had had previous dealings with Mr. Fong. He could not recall any specific incidents but he knew who Mr. Fong was.

[87] Constable Dosange said he did not call Mr. Fong a “Chinese faggot”. Constable Ward did not call Mr. Fong that name either.

[88] Mr. Fong did not say anything to indicate that he would cooperate and produce the bar licence.

[89] Constable Dosange said he did not strike Mr. Fong and he did not “sucker punch” him.

[90] When the “dust settled”, Cst. Dosange returned to his vehicle to fill out the ticket. At that point, Mr. Carrod came over and told Cst. Dosange that “there’s fights in the bar, it is out of control”. Constable Dosange then called for additional assistance. He told Mr. Carrod to have all the lights turned on and to stop the music.

[91] In cross-examination, Cst. Dosange said:

- (a) the “bar walk” was done in order to locate the victim of the reported bar fight, and to see if any fights were still going on;
- (b) on past visits he had seen the bar licence on the wall;
- (c) he did not keep handwritten notes but prepared typed notes at about 2:10 am, not long after the events;
- (d) any discussion he had with Mr. Carrod took place outside the bar;
- (e) Mr. Carrod said the youthful patron was known to him and that he had ID’ed him the week prior and satisfied himself then that he was of age;
- (f) as they were standing outside trying to sort things out with Mr. Carrod and Mr. Svedruzic, Mr. Fong came running out;
- (g) Mr. Svedruzic was similarly swearing and flailing his arms, just like Mr. Fong;
- (h) when Mr. Fong walked away he did so in an agitated manner and at a quick pace;
- (i) he was not focusing on that event because he was dealing with Mr. Carrod;
- (j) Mr. Carrod started walking over as a result of the commotion of the lobby doors and Cst. Dosange stopped him;
- (k) he and Cst. Ward both helped Mr. Fong to his feet;



- (l) when he spoke of Mr. Svedruzic's statement about Mr. Fong not wanting to produce a licence, he was referring to the fact that the staff were not to take it outside;
- (m) the LPC was issued for failure to produce the licence;
- (n) Mr. Svedruzic eventually produced the licence. Constable Dosange agreed the licence appeared to be in order;
- (o) LPC infractions are alleged contraventions. The ticket gets forwarded to the LCLB and it is up to them what to do with it;
- (p) The "zero tolerance" policy was a directive from their supervisors that any observed offence would be written up because the bar had been given numerous warnings.

**C. Superintendent Theodore De Jager**

[92] At the time of the events in question Superintendent De Jager was a corporal and he was the road supervisor in District 1, which is in the northwest corner of Surrey. I will refer to him by the rank he held then.

[93] As a supervisor, he issued some directives to his officers concerning dealings at the Dell/Oasis Hotel. He told members of his team to always have a minimum two-member response. Also, any investigation at the Dell Hotel carried with it a 10 minute timer, so the dispatcher would call every 10 minutes to check on the member who was attending there. If no answer, there would be a call for an immediate response on the part of any other non-occupied RCMP members. The Dell Hotel was the only bar that had this sort of directive for the RCMP members.

[94] These measures were put in place for the safety of the officers because the Dell Hotel was a violent establishment with belligerent staff.

[95] Corporal De Jager testified about an attendance at the Dell Hotel in September 2005. RCMP officers had been called there by the health inspector in order to serve a closure notice. Corporal De Jager attended with other officers.

[96] On arrival, he spoke to a person behind the bar, who as it turned out was Michael Fong. Initially Mr. Fong ignored him. He then asked for the duty manager and Mr. Fong replied that there was no duty manager. Later, Mr. Fong said he was the manager. Corporal De Jager said that on that attendance there were several *LCLA* offences, including no display of the bar licence.

[97] Mr. Fong did not cooperate with the health inspection. Corporal De Jager warned him that if he did not cooperate he could be charged with obstruction. He then cooperated and produced the documents that the inspectors had requested.

[98] On that occasion Cpl. De Jager noted that the licence that was posted at the bar was for the wrong operation. The posted licence was for the Dell Beer and Wine Store, which was some distance away, across the parking lot. The licensee name on that licence was a AMPM Holdings.

[99] Corporal De Jager had other dealings with Mr. Fong. As road supervisor, he went regularly to check on the proper closing of the bar and so he had regular contact with Mr. Fong and his staff. One of those other occasions took place on January 29, 2006 at about 2:30 am. Mr. Fong and other staff were there and were consuming alcohol. Mr. Fong was belligerent and was specifically belligerent towards Cpl. De Jager and the other officers. He did not issue an LPC on that occasion, although another officer did.

[100] In the years 2005 and 2006 he encountered acts of violence that were directed to police officers and it was for that reason that he issued the directives that he did. He said the bar was a dangerous place for his officers. There were a number of violent incidents. There was one occasion where there was a violent interaction with the patrons and bar staff, and he and the other officers had to take a defensive position with their batons out. On another occasion, Cpl. De Jager

declared the bar to be a “crime scene”, because of the several assaults that had occurred inside, and he had the bar locked.

[101] Both Mr. Carrod and Mr. Svedruzic were persons of interest to the police. Mr. Carrod was known to be a violent individual who was establishing a drug network on the Strip. The same with Mr. Svedruzic. Mr. Fong was not a person of interest to the police other than the fact that he was known to be the manager of the Dell/Oasis Hotel. Mr. Fong was not a target for enforcement.

[102] The police did not have any plan to shut down the Dell Hotel. Their intention was to prevent criminality and to enforce the *Liquor Control and Licensing Act*.

**D. Sergeant Ivan Sabo**

[103] In 2006, Cst. Sabo was a constable in Surrey District 1. He had been with the RCMP just over four years by that point. I will refer to him by his rank at the time.

[104] Just before 1:00 am on March 11, 2006, Cst. Sabo responded to a report of fights at the Dell Hotel.

[105] Constable Sabo did not have a partner on that shift, so he waited for Cst. Dosange to arrive and after that they went inside the bar to look for the fights. It was standard practice that there would be no bar walks or other responses by a single officer. The bar was violent and the patrons and staff were anti-police. It was the worst bar in the district.

[106] Inside the bar, Cst. Sabo did not notice any fights so they proceeded to do a bar walk. He has a standard method for doing bar walks, using the perimeter. He said there were at least 200 patrons inside the bar. The bar was dark and lit predominantly by just nightclub lights. Loud music was playing.

[107] As they walked past the main bar one male gave them a “middle finger”. They took him outside to speak to him and, specifically, to see if he had been over-served, if he had identification and to ascertain why he had exhibited that behaviour.

[108] The male said he had no identification, although he appeared to be under 25. Constable Sabo asked the doorman, Mr. Carrod, how he got in without showing identification and Mr. Carrod said he was a regular and Mr. Carrod had seen his identification before.

[109] Constable Dosange then took over speaking to Mr. Carrod and was in the process of asking for the liquor licence. Mr. Svedruzic, another bar employee, came out and told Cst. Dosange that they would not produce the licence. Constable Sabo then heard Cst. Dosange say to Mr. Svedruzic that he was under arrest, and Mr. Svedruzic resisted. Constable Sabo then asked another officer to take care of the young male, and he then spoke to Mr. Svedruzic, with whom he had dealt before, telling him to cooperate and calm down. Mr. Svedruzic did calm down and Cst. Dosange arrested him at that point. He then returned to deal with the young male. Constable Sabo then heard a “huge commotion with yelling and screaming”. By this point he was located around the corner from the front door of the bar. He told the young male to stay where he was and he went to the bar entrance. At the lobby doors he saw Cst. Ward and Cst. Dosange with Mr. Fong. Mr. Carrod was in the area and Mr. Carrod started moving towards the lobby doors at a “slow jog”, so Cst. Sabo ran up to intercept him.

[110] Constable Sabo saw Cst. Ward, Cst. Dosange and Mr. Fong at the lobby entranceway, with the officers trying to arrest Mr. Fong. His attention then focused on Mr. Carrod to make sure he did not get involved. Constable Sabo had his baton out at this point. Constable Dosange then took over dealing with Mr. Carrod and he went to assist Cst. Ward.

[111] Constable Sabo said that through his past dealings at the hotel and police briefings he knew Mr. Fong to be difficult to deal with and that he had an anti-police attitude. His own dealings with Mr. Fong had been minimal, and none were criminal in nature. He said it was apparent Mr. Fong did not like dealing with the police.

[112] When he saw Cst. Ward and Mr. Fong in the entrance area, Mr. Fong was only in the area of the first set of doors and not in the lobby itself. Mr. Fong was resisting arrest, thrashing and screaming, with the sound echoing in the small area, and this was attracting the attention of the onlookers outside.

[113] Constable Sabo went to assist Cst. Ward. Although he could not recall if he still had his baton out, he said he did not strike Mr. Fong with it. He assisted Cst. Ward by putting his foot on Mr. Fong's upper back to hold him down so that Cst. Ward could put handcuffs on. At that point, Mr. Fong was face down, with pooling blood near his head.

[114] Constable Sabo said Mr. Fong was yelling and screaming, but he did not recall Mr. Fong exhibiting any signs of intoxication.

[115] As soon as Mr. Fong was handcuffed, Cst. Sabo returned to deal with the young male.

[116] Constable Sabo said he did not call Mr. Fong a "Chinese faggot" and no one else did either. He did not strike Mr. Fong and he did not see Cst. Ward strike Mr. Fong. He also did not see anyone strike Mr. Fong with a baton, or sucker punch him.

[117] When he returned to deal with the young male, he released the male and then went to his police vehicle to prepare notes. He then got word that there was a "huge fight" inside the Dell Hotel, and so they called for more assistance. Patrons were streaming out of the doors. There was a mass of people leaving. Constable Sabo told the disc jockey to turn on all the lights and shut the music off, so that everyone would go home.

[118] Constable Sabo saw Mr. Fong later, as he was finishing his paperwork, when Mr. Fong returned to the hotel. He had a bandage on his head.

[119] In cross-examination, Cst. Sabo said:

- (a) he had seen the bar licence before. It was usually in a “cubby” by the main bar. He did not check for the licence that night;
- (b) he did not know why Mr. Svedruzic was being arrested;
- (c) he had pulled out his baton because he believed Mr. Carrod was going to physically intervene in the altercation between Cst. Ward and Mr. Fong and he thought he might get into a fight with Mr. Carrod;
- (d) Constable Sabo is 6’2” tall and weighs 260 pounds;
- (e) when he went back to speak with the young male, the male was apologetic. He satisfied himself about the male’s sobriety and so he was released;
- (f) he helped Cst. Ward complete an LPC as Cst. Ward was a relatively new officer. He had some prior LPCs for reference.

**E. Constable Wojciech Wesolowski**

[120] Constable Wesolowski is another RCMP officer who attended at the Dell/Oasis Hotel that night. He was a relatively new officer at the time.

[121] Constable Wesolowski said they received a dispatch to the Dell Hotel for a reported assault, where a female patron had been ejected. He was “solo” in his police vehicle. He was the first officer on the scene. At some point, Cst. Sabo and Cst. Dosange also arrived.

[122] Constable Wesolowski spoke to two females who had called and were waiting outside. They said another female punched one of them and then the bouncer threw them out. He then spoke to the bouncer, Mr. Carrod, who said the two women had “jumped” another female, who punched back, and so he threw everyone out.

[123] Constable Wesolowski said he did not see any evidence of anyone injured or assaulted. He noted that the female complainants were “fairly intoxicated”. An acquaintance of the complainants eventually “herded them into a taxi”.

[124] Constable Wesolowski was not surprised that other officers attended. The Dell Hotel had a “tough reputation” and was “not friendly to cops”. A lot of people there were “on police radar” and it was the “number one toughest place in Whalley”. He was unaware of any particular policy related to additional officer “cover” for attendances at the Dell Hotel, but said it would not have surprised him to learn there was such a policy. He said he would not have gone into the Dell Hotel alone.

[125] At one point, when Cst. Wesolowski was outside the front doors of the bar and talking to other officers, an Asian male came out. He was visibly upset, animated and yelling. He now knows that male to be Mr. Fong. Constable Ward engaged with this male back and forth in a shouted exchange. He could not remember what was said. At some point Mr. Fong turned around and walked away, and Cst. Ward followed him. Constable Wesolowski believed Cst. Ward told him to stop, but he was not able to recall that clearly. Later, when asked how fast Mr. Fong was walking away, Cst. Wesolowski said “it was not the speed so much as an attitude of ‘I’m finished, I’m done with this conversation’”.

[126] Constable Wesolowski did not hear the words “Chinese faggot” used.

[127] Mr. Fong walked toward the lobby doors. Constable Ward went after him, still shouting. He could not remember if Mr. Fong was also still shouting, but Cst. Ward was. Mr. Fong got to the door and slammed it. He had a cash tray or something, because Cst. Wesolowski remembered change spilling on the pavement. In cross-examination, he said he never actually saw a money tray, and all he heard was “coins skittering away”.

[128] At that point, Cst. Wesolowski realized Mr. Carrod was running up towards that area, so he got in his way to stop Mr. Carrod from going any farther. Mr. Carrod said he just wanted to pick up the money, but Cst. Wesolowski said he had to keep back. Cst. Wesolowski was facing away from the lobby doors at this point. Constable Wesolowski then heard screaming. He turned back, and saw Mr. Fong lying on the ground in front of the second set of lobby doors. Constable Ward was

either crouched or kneeling down, and it looked like he was trying to handcuff Mr. Fong. Mr. Fong's legs were flailing from side to side. His head was cut and there was blood on his face and on the pavement.

[129] Constable Wesolowski continued to deal with Mr. Carrod, although another officer was with him by this point. At some point, "things began spinning out of control". Patrons began streaming out of the bar. Constable Sabo, who was standing at the bar doors, tossed him a Taser. One male exited with "his head split open". Constable Wesolowski put him in his police car. An ambulance arrived at some point, but the male in his police car refused treatment. The bar emptied.

[130] Constable Sabo tossed a ticket book to Cst. Wesolowski and said "here, serve this".

[131] Constable Wesolowski did not see Mr. Fong being led away.

[132] In cross-examination, Cst. Wesolowski agreed that he was having a hard time recalling the events. He said, however, that it was not possible that Mr. Fong was talking to Cst. Dosange instead of Cst. Ward. He did not recall if Mr. Fong had been speaking to Cst. Dosange before engaging with Cst. Ward.

[133] As to the ticket book, Cst. Wesolowski said it was not filled out already when it was tossed to him by Cst. Sabo. The actual LPC is in his handwriting. He did not serve it. Instead, he gave it to Cst. Dosange.

#### **F. John McKay**

[134] Mr. McKay is a use of force expert. He has a long history in policing and related consulting. He has been qualified as a use of force expert on numerous occasions. Mr. McKay provided an opinion in a report dated July 17, 2015. Although Mr. McKay gave evidence in direct, he was not cross-examined.

[135] Mr. McKay's opinion was based on a number of assumptions. The principal assumptions were that: (1) Mr. Fong was arrested for obstruction; (2) he resisted



arrest; and (3) force was used in effecting the arrest. Generally, the other assumptions relied upon tracked Cst. Ward's version of events.

[136] Mr. McKay said the fundamental question for his consideration was whether the actions of the two officers (Csts. Ward and Dosange) reasonably conformed to the policies, procedures and training that the officers received and which governed correct RCMP procedure at the relevant time.

[137] Mr. McKay said:

- a) the standard procedure for the arrest of a resistive subject is to take him to the ground into a prone position and handcuff him behind his back;
- b) grabbing a subject's arm to control him is standard procedure. It prevents the subject from using that arm violently against the officer and it also begins the process of handcuffing a resistive subject;
- c) tackling Mr. Fong in response to what appeared to be his imminent attempt to strike the officer was in keeping with RCMP training, policy and procedure, and represented a minimal use of force in the circumstances;
- d) RCMP procedure is to arrest a resistive or assaultive subject on his stomach with handcuffs placed behind his back. This minimizes the risk of harm to both the officer and the subject;
- e) Mr. Fong's continued resistance while on his back, with arms and legs flailing, and screaming in circumstances where potentially violent patrons and staff were present, made it imperative to complete the arrest as quickly as possible; and
- f) the steps taken by the officers, including striking the sides of Mr. Fong's head to disrupt his train of thought, rolling him onto his stomach and pinning him as handcuffs were applied, were well within the acceptable

spectrum of force that could have been used to effect the arrest, and nothing was done outside of RCMP policy, practice or training.

**G. Lonnie Barkhouse**

[138] Mr. Barkhouse was one of the ambulance paramedics who attended on the night in question. He was on duty with another paramedic, Wes Bihlmayr.

[139] Mr. Barkhouse recalled that they were called to the hotel, but did not recall the reason. He parked some distance away from the front of the pub, pulling up near a police car. The officer asked them to look at the person in the back seat of the police car.

[140] Mr. Barkhouse said his partner attended to the person in the car. That person was very upset and very difficult to deal with. He was very upset by the circumstances and was taking it out on the paramedics, and he demanded that photographs be taken before being cleaned up. They explained to him that they were not connected with the police and were just doing what they had to do. This extended discussion took about 20 minutes.

[141] After finally taking him out of the police car they walked him to the ambulance. On the way there the person slipped on some ice, but he did not suffer any obvious or visible injuries. He was placed in the “jump seat” of the ambulance and Mr. Bihlmayr attended to him. Mr. Barkhouse cleaned up some blood on the officer.

[142] There was a conversation about a promise to appear, and a lot of explaining, but Mr. Barkhouse believed the person eventually signed it.

[143] He made no observations that gave him any concerns about the person having suffered a concussion.

**H. Wes Bihlmayr**

[144] Mr. Bihlmayr was the other paramedic on duty that night. He was the primary care paramedic. He remembered being called out to a parking lot in North Delta

around 1 am. There was a man in the back of a police vehicle who had a head injury as a result of an assault. The man was not very cooperative. He would not let them do anything to clean or bandage the wound. Mr. Bihlmayr did not recall the man saying why, other than he wanted pictures taken. A lot of time was spent talking to him about this. He would not let Mr. Bihlmayr do much with the wound, and Mr. Bihlmayr could not recall what treatment he managed to provide.

[145] The man got out of the police car and then slipped and hit his head on the back of the ambulance.

[146] Mr. Bihlmayr acknowledged his handwriting on the crew report, which noted a two-inch laceration on the top of the subject's head that had stopped bleeding. He also noted the subject "refused any other treatment". Mr. Bihlmayr recorded that there was "no LOC", or loss of consciousness.

[147] The man was driven to hospital, and Mr. Bihlmayr handed him over to a triage nurse at the emergency department.

#### **IV. Plaintiff's Case – Damages**

##### **A. Mr. Fong**

[148] Mr. Fong testified that on the morning after the assault he still felt a bit dizzy and he had a headache. Mr. Fong went to Royal Columbian Hospital ("RCH") that same day. He filled out a diagram showing which parts of his body were problems for him, and he indicated his head, both shoulders and upper arm, but he told the nurse that his whole body was painful. He was examined in various ways, including x-rays and lab work, and he received six or seven stitches in his head.

[149] Mr. Fong attended on his family doctor, Dr. Ting, in mid-April 2006. He told Dr. Ting he was having problems with his neck and shoulders and upper and lower arm, he had headaches, his lower back was hurting, as was his left ankle and his kneecaps. He said his neck was very tight and was hard to turn. It was painful. His

shoulders were painful and any repetitive motion of reaching up made his arms hurt. He said he had headaches almost every day for the first month.

[150] Mr. Fong started to use crack cocaine to deal with the pain. He said that later he also used crack cocaine to keep him awake and relaxed. He was having some anxiety issues in that he was afraid to talk to the RCMP. His crack cocaine use lasted until September 2006.

[151] Mr. Fong told Dr. Ting that he was using crack cocaine to deal with the pain. He used crack cocaine up until mid-September 2006. He has not used it since. He said for the first couple of months he used it for pain relief only, and later he found that it also relaxed him. He had never used crack cocaine prior. Starting in July 2006, Dr. Ting prescribed medication for him as he was having sleep problems and some “strange thoughts of people in my room”. Mr. Fong said the prescribed medication did not help much.

[152] Mr. Fong was suspended from his work in September 2006. This followed a suspension of the hotel that had been issued by the fire department on September 12, 2006. At that point, Mr. Chu (the majority owner) gave Mr. Fong a letter suspending his employment. He was called back to the hotel to help on a few further occasions in September and October, but on October 26, 2006 his employment was terminated. The Oasis Hotel was sold in late 2006 or early 2007.

[153] In the spring of 2007 he secured work as a doorman at a Chilliwack hotel, watching people going to the rooms. This job lasted until late August 2007.

[154] At this time he was still having muscle pain and symptoms in his low back and shoulders, which affected him when standing for long periods, or doing work requiring him to reach up. This meant he could not work in a bar.

[155] In July 2007 he was experiencing paranoia and anxiety. He had thoughts of people trying to inject him with needles. He was also unhappy and depressed.

Although a referral to a psychiatrist was recommended at that time, he did not accept the recommendation until early the next year. He then saw Dr. Mallavarapu.

[156] Mr. Fong was referred for physiotherapy in 2008 as a result of continuing pain in his shoulders and lower back. He also had acupuncture treatments.

[157] Mr. Fong said his injuries affected his concentration because he developed ringing in his ears. The ringing starts a few hours after waking, and gets progressively worse. He deals with it by turning on a radio or television, but at a certain point finds he cannot concentrate.

[158] His complaint to Dr. Mallavarapu was that he was very unhappy and his mood was very down. He also said he had strong headaches in the morning, sore muscles, and he was having difficulties sleeping. Dr. Mallavarapu prescribed some medications. They helped his pain but made him listless and tired. After August 2008 Dr. Mallavarapu changed both his Lyrica dosage and his sleeping medication. His mood stayed the same, however.

[159] Presently, he prefers to be left alone at home, and he does not like to go out. He cannot drive in any event due to the medications he takes. Prior to the event in question he had no problems that way and he was outgoing in nature.

[160] Mr. Fong said he has gained weight, an increase of 40 to 50 lbs. He now weighs around 230 lbs.

[161] Mr. Fong said he applied for WorkSafeBC benefits and his application was granted (following an appeal) in August 2009. His claim was accepted for a left shoulder injury and depression. He was later accepted for a CPP disability pension.

[162] WorkSafeBC sent him for retraining at Sprott Shaw College. He studied office administration, accounting and computers. He had a very difficult time with the course work, the computer course in particular. He failed it badly. He took the course again, this time with one-on-one help, and he barely passed. He said

learning new things is difficult because his memory is so poor. He had no problems with memory prior to the police assault.

[163] He has had little work since the subject event. He worked part-time as a land assembler in 2017. He prepared a resume and sent copies out, but the lack of response made him depressed again. He has thought about going back to the hospitality industry, but he feels the RCMP would not leave him alone if he did. He could perhaps run a budget hotel but worries that since they would be associated with criminals, prostitutes and the like, the police would be around and this would cause him anxiety. So he will not do hotel work.

[164] He is open to perhaps running a café if his energy levels improve. His energy is not as good as it was and he gets tired very easily.

*Pre and Post-Event Social Life*

[165] Mr. Fong said before the assault he was always hardworking and always working overtime. He worked seven days a week as a realtor and accountant, and he worked seven days a week at the hotels as well. Any breaks he took were to go travelling or to buy clothes for himself. As to family life, he said he was not a traditional Chinese father in that he was easygoing and did not assert much discipline. His activities with his sons consisted of dim sum on Sunday mornings, some dinners at home and watching movies.

[166] After the assault he had no energy at all. He has no interest in going to dinner and prefers to be left alone. His sons do not talk to him much, and they instead talk to his wife.

[167] Mr. Fong said he missed a lot of events because he did not want to go out. In social settings people ask him if he has “retired early” or “why are you so fat?” He was embarrassed by these sorts of questions and this leaves him in no mood to go out. He now has no interest at all in new clothes.

[168] Mr. Fong said he cannot play badminton, tennis or basketball, as he did when he was a teenager. He cannot play mahjong because it requires that he hold his arms out at times, and mahjong games can last for eight hours.

*Present Physical Issues*

[169] Currently, he has low back pain, his left shoulder “is a problem” and his kneecap gets sore. His left arm and shoulder are improving, but the problems are still there and they are aggravated by physical work.

*Current Medications*

[170] Currently, Mr. Fong takes medication for high blood pressure and cholesterol, antibiotics (for eczema), Tylenol or other pain medication (including Tylenol 3s), an anti-inflammatory, a medication for gout, medication for mood change (Lyrica, typically), medications prescribed by Dr. Mallavarapu and, as well, he uses a cream for shoulder, arm and low back pain. Excluding the medications for blood pressure, gout or eczema, the total cost of his medications is about \$3,200 per year.

*Work History*

[171] At the Byrd pub he was on a management contract. He lost money for the first three months. For the next three months he broke even. By the second or third year he was making a profit of approximately \$40,000 per year, based on the cash he had saved. He said he has not done his bookkeeping for that period so he has not “declared [his] wages”. I took this to mean that he did not declare this income in any income tax returns.

[172] At the Oasis Hotel, he was working 14 hours per day, seven days per week.

[173] After the assault he cut his work hours after a couple of weeks, to eight hours per day. Starting in July 2006 he cut his hours to four hours a day and had his sons help out in the bar. His starting wage at the Oasis Hotel was \$12 per hour. This increased to \$14 per hour in February 2006. In April 2006 (after the assault) it was

increased to \$16 per hour due to his reduced hours. This rate continued until the end of his employment.

[174] He worked as a night manager at a Chilliwack hotel in 2007. His pay rate was \$10 per hour. This was paid in cash.

[175] He was made an offer of employment by the owner of the Thunderbird Hotel in Port Hardy. The salary offered was \$40,000 per year, but it only involved four days of work a week. He did not take the job because he was told he would have to help in the store, and that role involved some physical work.

[176] But for the assault, his plan was to work in the hotel business until retirement or until he was not physically able to work. He thought this would take him to age 70 on a full-time basis, and then he would work part-time to age 75.

*Past Income*

[177] Mr. Fong produced his income tax returns for the years 2001 to 2016. There is income from a rental property, which I have excluded from the table below. The income tax returns show employment earnings, net “professional income”, CPP benefits or EI benefits as follows:

2001	\$15,000
2002	0
2003	15,000
2004	37,022
2005	0
2006	38,352
2007	20,237
2008	18,017
2009	10,642
2010	10,685
2011	10,866
2012	11,171



2013	11,372
2014	11,474
2015	12,807
2016	11,681

*Special Damages*

[178] In addition to the medication expense referred to earlier, Mr. Fong has incurred expenses for physiotherapy, eyeglasses (damaged in the assault), mileage and lawn care (for his rental property). There is also a substantial subrogated claim from WorkSafeBC.

[179] On damages issues, Mr. Fong said in cross-examination:

- a) he did not tell the ambulance attendants he had lost consciousness and he did not tell the physician at RCH that he had lost consciousness;
- b) he was not prescribed any medication at RCH and he did not ask for any;
- c) he had access to Tylenol 3 medication prescribed for his father, which prior to the incident he took for headaches. He started doing this in 2003 or 2004;
- d) one of the reasons he did not want to look for work as a hotel manager was that he was afraid he would lose his temper;
- e) when he was managing the Byrd pub (1999 to 2002) he lived at the Flamingo Hotel in Surrey. His family lived in Vancouver. He did not visit them much during those years, although he was in contact by telephone. He did not invite them to visit because he was too busy for visits;
- f) he had a “good family relationship” from 2002 to 2005, the time between working at the Byrd pub and working at the Oasis Hotel;

- g) he first took crack cocaine a few days after the assault, at the suggestion of one of the hotel tenants. Crack cocaine helped with the pain and made him more relaxed. He started taking more of it in July 2006 because of the pain and because he was getting more pressure at the hotel. He acknowledged that, later on, his use of crack cocaine was primarily to relax due to stress;
- h) his initial purchases of cocaine were quarter-gram amounts for \$25, which would last a couple of days. These increased to a peak in July and August 2006 of \$80 each day, and on some days \$200 each day;
- i) he was involved in a lawsuit against his former lawyers (*Fong v. Lew*, 2015 BCSC 436) which involved the loss of family money;
- j) he has seen Dr. Mallavarapu since 2008. After 2010 he told Mr. Mallavarapu about the family money he had lost, and the stress this caused. He did not tell him that he had been sexually assaulted in his room at the hotel. Instead, he reported to him that it was *like* he had been sexually assaulted. It was the same with his thoughts that he was being injected with needles by someone. These were delusions;
- k) these delusions occurred at the same time he was taking crack cocaine. They stopped when he stopped using cocaine in 2007;
- l) he was not sure if he also reported to Dr. Mallavarapu that he was taking increasing amounts of cocaine in order to stay awake, due to the fear of people entering his room. He also did not report he was paranoid to such an extent that he was sleeping in different rooms each night, or that he feared strangers were entering his room and injecting him with needles;
- m) a decision in the lawsuit against his former lawyers was issued in March 2015. He told Dr. Mallavarapu he was feeling better around that time. Twenty days after that decision (which he lost) he took an overdose of pills

(“a lot of pills”). He denied it was a suicide attempt. He said it was merely an impulsive act;

- n) following the incident involving excessive pill-taking he was admitted to Vancouver General Hospital (“VGH”). He was discharged to the Suicide Attempt Follow-up, Education & Research (“SAFER”) program;
- o) he is not sure if he told Dr. Mallavarapu that he had problems controlling his temper. He did tell him that he yelled at the judge (in the *Fong v. Lew* matter). He did not have any problems with his temper before the police assault, only after. He did not get any anger management treatment from Dr. Mallavarapu;
- p) since 2006 he has had three family doctors, Drs. Ting, Yang and Leung. All of them prescribed medications for him. He did not tell the doctors what the other doctors had prescribed. As for medications prescribed by Dr. Mallavarapu, he thinks Dr. Ting and Dr. Yang knew about them, but Dr. Leung did not;
- q) he did not tell Dr. Mallavarapu that prior to 2006 he was using his father’s Tylenol 3s;
- r) after the “excess pills” incident in 2015 he was cut off all painkillers. Lab results at VGH “showed I had too many chemicals”. He started up with painkillers again after that;
- s) officials with the City of Surrey, the Fire Marshall, the RCMP, as well as liquor and health inspectors attended at the Oasis Hotel in September 2006 in order to conduct an inspection. Photos were taken during the inspection and reports were prepared afterward. Mr. Fong agreed the photos accurately depicted various areas of the hotel. Among other things, these showed padlock fittings on a fire exit (Mr. Fong said the door was padlocked after midnight), a chain and padlock on another fire door, a

sofa placed in front of another fire exit; hotel rooms with lumber or bolts securing the inside of the doors, and areas with loose wiring present. As to these matters, Mr. Fong generally said that he either did not notice them, he did not check with any inspectors to see if the modification was allowed, or he relied on either his cleaning staff to report an issue or his maintenance person to fix it;

- t) at the conclusion of the inspection, he was handed an evacuation notice and given 20 minutes to clear the premises;
- u) although he testified that he enjoyed being a hotel manager, on his discovery he said he only enjoyed working in the pub; and
- v) the hotel did not re-open and it was sold sometime after. Mr. Fong did not take any steps to secure employment with the new owners.

**B. Dr. Kwang Yang**

[180] Dr. Yang is a physician who has a family practice (together with Dr. Ting) in Surrey. He first saw Mr. Fong on August 23, 2006. Mr. Fong's complaints then were problems with sleeping and he was anxious and depressed and felt "everyone was against him".

[181] In later appointments (one in October 2006 and the other in November 2007), Mr. Fong reported physical complaints: pain in his left shoulder and back, and ringing in his ears. His backache was his biggest concern. Dr. Yang examined him and Mr. Fong reported a lot of discomfort and pain at extreme points of bending forward or rotation. Mr. Fong complained that all of his joints were painful and stiff.

[182] Dr. Yang continued to see Mr. Fong for those complaints through 2008. He saw Mr. Fong until February 2011, although there were a few additional visits in 2013 and 2017. There was some improvement in his levels of pain, range of motion and stiffness, but up to his last visit in October 2017, Mr. Fong still complained of back pain, as well as shoulder pain and pain in his forearms.

[183] In cross-examination, Dr. Yang said:

- a) he prescribed Zopiclone for Mr. Fong in August 2002. It was done by a type of phone order. Zopiclone is a sleep medication;
- b) he was not aware that Mr. Fong was taking his father's Tylenol 3s;
- c) Mr. Fong made an appointment for March 13, 2006, but he was a "no show";
- d) for his anxiety and sense that "everyone was against him", Dr. Yang prescribed Risperdal in order to "sedate" him. He needed to be calmed down from his emotional stress and upset. Risperdal at higher doses is also used to treat schizophrenia and bipolar conditions, but Dr. Yang said he gave Mr. Fong a much smaller dose. Later, Dr. Yang acknowledged that Risperdal can cause joint stiffness and that this can have the effect of restricting range of motion;
- e) he was aware that Mr. Fong had been taking illegal drugs. His colleague, Dr. Ting, noted that in a July 2006 entry. Risperdal may interact (negatively, I took him to mean) with crack cocaine, but he prescribed a very small dose;
- f) he did not refer Mr. Fong to a psychiatrist until some time later;
- g) he saw Mr. Fong on July 24, 2008. The visit concerned his situation he had with the RCMP so that Dr. Yang could prepare a report. Among other things, Mr. Fong told him he had been "raped in his anus" in his hotel room. Dr. Yang did not mention this in his subsequent report; and
- h) he did not recall if he was the physician who referred Mr. Fong to Dr. Mallavarapu, but likely he was. He said Mr. Fong exhibited severe depression, anxiety and "a painful feeling with himself". Dr. Yang felt it was quite severe so he needed a specialist.

**C. Dr. Henry Leung**

[184] Dr. Leung authored a report dated June 22, 2015 and issued a corrected version of that report on October 3, 2017. In his report, Dr. Leung said he had known Mr. Fong and his family for over 30 years, although his first medical appointment with Mr. Fong was in October 2002. He had full physical checkups on both that date and in June 2004. On the first visit, Mr. Fong was found to have high cholesterol. His second checkup revealed hypertension and gout attacks, and his blood tested positive for ANA, which may indicate the presence of autoimmune disease. It was asymptomatic to that point. He was treated with medication for hypertension, with a plan to introduce medications for cholesterol at a later time.

[185] In December 2006, Mr. Fong attended upon him to report injuries from a police assault. He said his left shoulder had been hurting since the incident, his “nerves were shot” and he was unable to sleep “despite the use of a powerful sedative Imovane”. Dr. Leung diagnosed left shoulder capsulitis, a chronic inflammatory condition that needed a course of anti-inflammatory medication. A blood test came back positive for opiates. Mr. Fong said this was attributable to Tylenol 3s he was taking for the shoulder pain. At a later appointment that same month, Mr. Fong reported his left shoulder was feeling better.

[186] At an August 2007 appointment, Mr. Fong confessed to Dr. Leung that he had been taking “crack by mouth and not by smoking”, and it was costing him up to \$200 per day. He was “turning depressed and afraid to the point of paranoia that he could suddenly be physically attacked”. He said he had now “gone off the addiction” and was not using illicit drugs. He was given a prescription for an anti-inflammatory medication as well as Tylenol 3s. In an appointment the following month, Mr. Fong reported improvement of his aches and pains. In a further appointment in November 2007 Mr. Fong reported continued improvement of his shoulder symptoms.

[187] On January 8, 2008, Mr. Fong reported that acupuncture had “fixed” his left shoulder. However, Dr. Leung’s own examination showed the shoulder to be in the

same state as on his last visit, that is, full abduction was missing the last five degrees and produced pain.

[188] On April 23, 2008, Mr. Fong reported his impression that he was 80% recovered in his left shoulder. On July 14, 2008, Dr. Leung noted “almost full abduction” in Mr. Fong’s left shoulder with no significant tenderness, but Mr. Fong now reported “some deep pains in both shoulders”.

[189] Further visits to Dr. Leung took place in 2009 (nine visits), 2010 (one visit), 2011 (four visits), 2012 (two visits) and 2013, (two visits). Mr. Fong did not attend upon Dr. Leung at all in 2014. The earlier visits primarily concerned his left shoulder and the later appointments primarily concerned back pain.

[190] Dr. Leung saw Mr. Fong on two occasions in 2015. Both of these appointments concerned his left shoulder.

[191] At several points in his report, Dr. Leung noted that Mr. Fong also saw other physicians and was prescribed medications by those physicians.

[192] Dr. Leung made the following observations and conclusions:

- a) Mr. Fong’s left shoulder was injured in the incident. He had no symptoms prior. It is still present now and will never heal completely. The strength of the shoulder and the entire arm is and will stay decreased. He will have to take anti-inflammatory medication from time to time;
- b) his condition is very likely worsened by the inherited sublimating autoimmune disease he carries;
- c) Mr. Fong suffered post-traumatic stress disorder as a result of the incident;
- d) he might have suffered other injuries in the incident, but Dr. Leung was involved “only in a limited scope”.

[193] In cross-examination, Dr. Leung said Mr. Fong's rheumatologist did not think Mr. Fong's autoimmune condition was causative of his problems. There are some objective measures of his shoulder problem in that his range of motion goes down if Mr. Fong stops his medications, and ultrasound has disclosed some calcification of the joint, which Dr. Leung earlier said was due to chronic inflammation.

[194] In cross-examination, Dr. Leung also said:

- a) Mr. Fong did not tell him he had been assaulted at the Byrd pub in February 2002, and he did not tell him he had been sexually assaulted in 2006. He only learned of Mr. Fong's crack cocaine use after the fact;
- b) he was aware that Mr. Fong's father died in 2008;
- c) he did not know of Mr. Fong's unprescribed Tylenol 3 use;
- d) he did not deal with any of Mr. Fong's emotional or psychological issues and so he did not make inquiries related to these. At some point he knew Mr. Fong was being treated by a psychiatrist. Dr. Leung's involvement was for specific purposes only;
- e) he learned that Mr. Fong attempted suicide in April 2015. He spoke to the treating psychiatrist following Mr. Fong's discharge, as he (Dr. Leung) was named as Mr. Fong's family doctor in the discharge report;
- f) he did not investigate or treat Mr. Fong's PTSD. Nonetheless, he felt able to diagnose PTSD without a full history because he knew Mr. Fong both before and after the incident, and he knew Mr. Fong's stressors. He said the police incident was Mr. Fong's major stressor;
- g) Dr. Leung agreed that Mr. Fong was "shaping" the information he was giving to him;
- h) Mr. Fong first reported low back pain to him in June 2009. Dr. Leung said this was definitely caused by the incident;



- i) in 2009, Mr. Fong was not working, although he spoke of getting work; and
- j) throughout, it was not Dr. Leung's opinion that Mr. Fong could not work, just that he could not do strenuous work or manual labour. In fact, he said work would be good for Mr. Fong.

[195] In re-examination, Dr. Leung said he was speaking in terms of Mr. Fong's *physical* capabilities, and could not say anything about the effect of his psychological issues.

**D. Dr. John Ting**

[196] Dr. Ting is a physician who practices in a family practice setting. He works with Dr. Yang. Sometimes Dr. Yang would see Mr. Fong, and sometimes Dr. Ting would. Dr. Ting first saw Mr. Fong on April 21, 2006.

[197] Dr. Ting prepared a report dated May 3, 2015. He said that when he saw Mr. Fong on April 21, 2006, Mr. Fong complained of pain in his neck, both shoulders, both upper arms, both elbows, both wrists, right upper back and left upper chest. He had headaches, dizziness, pain in his scalp and insomnia due to pain. He diagnosed various muscular strains, contusions on both elbows, a scalp laceration and anxiety/stress disorder. He was treated with acupuncture, physiotherapy, massage therapy and medications, which included anti-inflammatories, Tylenol 3s, a "hypnotic" for insomnia and an antidepressant for his anxiety and depression.

[198] Dr. Ting said that over time Mr. Fong's injuries progressed into chronic pain syndrome, and he also developed major depressive disorder and anxiety disorder. Dr. Ting concluded these conditions were caused by the incident of March 11, 2006.

[199] Dr. Ting felt that Mr. Fong was not fit for work as a bartender after the incident because he could not lift his arms above shoulder level without pain, and he was not able to lift or carry more than a ten pound load without pain.

[200] Dr. Ting recommended that Mr. Fong continue with physiotherapy, acupuncture and medications, and that he continue seeing his psychiatrist.

[201] Dr. Ting concluded that his prognosis is guarded and that a complete recovery “is unlikely at this time”.

[202] In cross-examination, Dr. Ting said Mr. Fong told him he was taking an “illegal drug” for pain relief, but Dr. Ting believed he was not told it was crack cocaine until much later (October 2007). He would not have prescribed the drugs he did if he had been told because it would have meant Mr. Fong was taking “too many medications”, including some medications for the same purpose. As for medications prescribed by doctors in other offices, he relied on Mr. Fong to tell him about these.

[203] In a note he made on July 6, 2006, he recorded that Mr. Fong complained of feeling as if “someone was poking him with needles”, as well as insomnia. Dr. Ting felt this was due to anxiety. He noted no complaints relating to his shoulders.

[204] On July 26, 2006, Dr. Ting recorded Mr. Fong’s report of “bizarre symptoms” of being “itchy all over”. He thought that a bit strange. He prescribed an antihistamine for the itching, and Risperdal, an antidepressant and anti-psychotic, for his anxiety. He agreed that joint stiffness was a side effect of Risperdal.

[205] In notes he made on September 14, 2006, Dr. Ting recorded Mr. Fong as having “psychotic thoughts”, which he defined as “unusual thoughts compared to the average person”. He again prescribed Risperdal.

[206] Dr. Ting said he based his diagnosis of chronic pain syndrome entirely on the notes made in his chart. These notes, in turn, relied on Mr. Fong’s reports of pain, as well as his own objective findings. He also relied on reports from a rheumatologist, Dr. Yorke, and a psychologist, Dr. Cheung.

[207] Dr. Cheung noted in a report dated January 2, 2008 that Mr. Fong had problems with persons in authority which pre-dated the incident, including WorkSafeBC, health inspectors, and the RCMP for having failed to do anything

about his seized cash. Dr. Ting did not include these matters in his own report. He also did not refer to Mr. Fong's drug use in his report.

[208] Dr. Ting said Mr. Fong never mentioned to him being raped in his hotel, or losing \$800,000 in family money, or at least he did not recall being told those things.

[209] Dr. Ting said he never told Mr. Fong to stop work. He said Mr. Fong could do work that did not involve manual labour. He recommended to Mr. Fong that he exercise.

[210] Dr. Ting said he never discussed with Dr. Yang or Dr. Leung possible drug interactions involving Mr. Fong.

**E. Dr. Hendre Viljoen**

[211] Dr. Viljoen is a psychologist. He was qualified to give evidence in the field of clinical psychology, including the diagnosis and treatment of psychological illness in a vocational rehabilitation and assessment context.

[212] Dr. Viljoen prepared a report dated July 23, 2015. His report was based on his interview of Mr. Fong, psychometric tests administered to Mr. Fong, and the review of relevant documents.

[213] Dr. Viljoen noted that psychometric testing of Mr. Fong showed indications of: (1) "likely overreporting or exaggeration of his current symptoms", which likely reflects his current distress, which included a history of a recent suicide attempt; (2) a number of problematic personality traits including being emotionally labile and reactive, with angry acting-out behaviour, feelings of mistrust and hypervigilance as to the motives of people around him; and (3) a negative self-perception, dwelling on previous failures and prone to harsh self-criticism and a pessimistic outlook.

[214] Dr. Viljoen concluded that Mr. Fong met the diagnostic criteria for major depressive disorder and somatic symptom disorder. As to the latter, Dr. Viljoen said:

Under earlier diagnostic terminology, this would be considered a chronic pain disorder, and reflects a condition characterised by significant preoccupation

with and focus on symptoms of pain as well as experiencing his life as being significantly disrupted as a consequence of his physical symptoms that include pain.

[215] Dr. Viljoen noted that there is no evidence that Mr. Fong exhibited any of these symptoms prior to the police incident in 2006. He added that the March 2006 incident:

... altered his perception of his work identity and has led him to become focused on and preoccupied with attempting to minimize and manage his symptoms of pain and physical dysfunction.

[216] Dr. Viljoen said the steps Mr. Fong has taken with the guidance of Dr. Mallavarapu have been appropriate, but he would also benefit from being provided with consistent and targeted psychological treatment, which I took to mean cognitive behavioural therapy. He recommended 20 to 25 sessions.

[217] Dr. Viljoen said that even with this, the prognosis for a full resolution and return to full functional capability is relatively guarded.

[218] Dr. Viljoen also said Mr. Fong would benefit from a structured and monitored active rehabilitation program.

[219] In cross-examination, Dr. Viljoen said:

- a) the personality traits identified in his testing were pre-existing traits;
- b) as to whether Mr. Fong's issues would have manifested themselves in any event in reaction to other life events, his personality traits place him at a higher level of risk of reacting less resiliently and functionally to unusual stress or trauma. In short, any perceived injustice could create a greater chance of triggering his condition;
- c) Mr. Fong has had some psychological treatment, but not a focused course of treatment;

- d) Mr. Fong told him that he resumed cocaine use after working at the hotel in Chilliwack;
- e) Mr. Fong did not relate the details of his court case (*Fong v. Lew*), so he did not know what was at issue, but Dr. Viljoen was aware the result had been frustrating for Mr. Fong;
- f) he does not believe Mr. Fong told him that prior to the police incident he was taking his father's Tylenol 3s. This, however, accords with his personality trait that he would seek an immediate solution;
- g) he would not rule out a return to work by Mr. Fong once he completed the steps recommended, though he still has a guarded opinion about that;
- h) he would benefit from getting back to work, but only if it was sustainable. If it was not sustainable, it would have the opposite effect.

**F. Dr. Harinath Mallavarapu**

[220] Dr. Mallavarapu is a psychiatrist. He first saw Mr. Fong in January 2008, at the request of Dr. Yang. He saw Mr. Fong at fairly regular intervals between 2008 and 2015. He prepared an expert report dated July 13, 2015 and two responsive reports in reply to the reports of a defence psychiatrist, Dr. Fitzpatrick.

[221] In his report, Dr. Mallavarapu recounted Mr. Fong's report of the police incident in March 2006, Mr. Fong's subsequent medical attention, his two periods of cocaine use, his loss of over \$800,000 in investment money, his suicide attempt in 2015, and his ongoing symptoms.

[222] Dr. Mallavarapu said Mr. Fong's symptoms of depression are directly related to his pain symptoms, associated functional limitations and cognitive difficulties, as well as the emotional trauma he experienced as a result of the police incident.

[223] Dr. Mallavarapu said Mr. Fong complied with his treatment plans and showed gradual improvement in his mood state to October 2009. Thereafter, Mr. Fong

maintained improvement in his mood until April 2010, when he encountered financial difficulties associated with his investment loss, as well the denial of his WorkSafeBC claim. Mr. Fong's mood and outlook were lifted in 2012, when WorkSafeBC agreed to fund retraining as a business assistant. His subsequent difficulties completing that program again left him anxious and depressed.

[224] Dr. Mallavarapu said Mr. Fong again showed some improvement in mood in 2013, and later that year he was "functioning reasonably well and he was able to maintain the improvement in his mood." However, he remained anxious and continued to have physical symptoms in his shoulder, back and leg. By April 2014 he found Mr. Fong to be "fairly happy" and his energy level was "fairly good". By July 2014 Mr. Fong was "feeling well" and "he was happy".

[225] In March 2015, Mr. Fong reported to Dr. Mallavarapu that he was feeling very depressed, sad, unhappy, anxious and worried. He had just lost his court case "due to mistakes made by his lawyer". He told Dr. Mallavarapu "he had lost everything". He was feeling hopeless and helpless, and he was not sleeping well.

[226] Mr. Fong was admitted to VGH on April 20, 2015 as a result of his taking an overdose of antidepressant medications. He was discharged from hospital on May 1, 2015 and Dr. Mallavarapu saw him a few days later for a follow-up.

[227] Dr. Mallavarapu saw Mr. Fong for a medical-legal assessment on June 3, 2015. Dr. Mallavarapu diagnosed: (1) major depressive disorder, moderately severe; (2) post-traumatic stress disorder, moderately severe; (3) mild cognitive impairment; and (4) chronic pain disorder.

[228] Dr. Mallavarapu commented on the interrelationship between Mr. Fong's physical injuries, associated functional limitations and his emotional difficulties. He said that following the police incident Mr. Fong developed symptoms of anxiety and depression. He thought it likely that Mr. Fong developed a chronic pain disorder associated with both psychological factors (anxiety and depression) and a general medical condition. His cocaine use likely made his symptoms of depression and

anxiety worse, although these symptoms continued after he discontinued cocaine use. His chronic pain symptoms have likely contributed to his symptoms of fatigue, insomnia and irritability.

[229] Dr. Mallavarapu concluded:

Mr. Fong's difficulties listed above are likely due to the physical and emotional trauma he suffered at the time of the altercation with the RCMP officers on March 11, 2006.

Mr. Fong would not have developed his present constellation of physical, cognitive and emotional difficulties if he had not been injured on [the] March 11, 2006 altercation with the RCMP.

As a result of the injuries he sustained on March 11, 2006, Mr. Michael Fong has had a marked decrease in the overall quality of his life and he could not return to a gainful employment.

Mr. Michael Fong is [at] higher risk to suffer from an exacerbation of his symptoms of major depression, posttraumatic stress disorder and pain disorder in the event he is subjected to severe stress in the future.

Mr. Michael Fong's long-term prognosis from a psychiatric point of view for functional recovery to pre-accident level of functioning is guarded ... .

[230] Dr. Mallavarapu recommended treatment with medications, cognitive behavioural therapy and an exercise program.

[231] In his rebuttal report of August 30, 2016, Dr. Mallavarapu rejected the suggestion by Dr. Fitzpatrick that the fact Dr. Mallavarapu was a treating psychiatrist for Mr. Fong would not make him capable of providing an independent or unbiased assessment. He also rejected the suggestion that his "clock drawing" test was a mere screening tool, and he provided reasons why that was not so.

[232] In his rebuttal report of September 19, 2017, Dr. Mallavarapu said Dr. Fitzpatrick's conclusions about a personality disorder were based on the SAFER program records, were "vague and not specific of any particular personality disorder" and did not meet the diagnostic criteria for such a disorder. He also noted that although Dr. Fitzpatrick took into account his treatment of Mr. Fong for mood and pain disorders, Dr. Fitzpatrick did not "specify" the diagnosis and treatment Dr. Mallavarapu had done over a long period of time for major depressive disorder.

[233] Dr. Mallavarapu said that the information and comments contained in Dr. Fitzpatrick's rebuttal report did not change any of his opinions.

[234] In cross-examination, Dr. Mallavarapu said anything he knew about the police incident was derived from Mr. Fong. He emphasized he was not treating the incident, but the symptoms. He said his primary approach was to assess Mr. Fong's symptoms, make a diagnosis and formulate treatment. When asked if that meant he did not focus on the *source* of the symptoms, Dr. Mallavarapu said "we do have the history and causation", although he agreed that causation was based on what Mr. Fong told him together with Dr. Mallavarapu's own observations.

[235] He did not explore any emotional impact of the hotel shutting down because he was looking at the *overall* impact of events on Mr. Fong and his first contact with Mr. Fong was over a year later.

[236] Dr. Mallavarapu was not aware of (1) a prior assault of Mr. Fong in the Byrd pub; (2) the amount of money the family put into the hotel; (3) Mr. Fong's illicit use of his father's Tylenol 3s prior to the police incident; (4) Mr. Fong's engaging in high-risk lending from 2006 to 2010, with the subsequent loss of over \$800,000 of his wife's money and his mother's money; (5) Mr. Fong's delusions of being anally raped in the hotel; or (6) his delusions of people sticking him with needles.

[237] As to the latter point, Dr. Mallavarapu said he was aware that Mr. Fong used cocaine in 2006 and 2007 and had cocaine-related paranoia.

[238] Dr. Mallavarapu said the question was whether any unknown matters would materially change his presentation, and he felt the answer was "probably not".

[239] Dr. Mallavarapu said he has seen evidence in the clinical records that Mr. Fong has mild arthritis. He said, however, that it is not his role to evaluate the source of pain, just to evaluate whether pain contributes to Mr. Fong's presentation.



[240] He saw Mr. Fong after he lost a court case in March 2015. Mr. Fong was despondent, he felt hopeless and that nobody believed him, and his memory was patchy.

[241] The SAFER program recommended Mr. Fong take an anger management program. Dr. Mallavarapu felt this was part of Mr. Fong's depression, and he agreed with that treatment. Dr. Mallavarapu acknowledged that Mr. Fong told a professional at the SAFER program that his primary stressors were lack of finances, lack of work and lack of routine. Dr. Mallavarapu agreed Mr. Fong would benefit from structured, non-physical work; "structured" because Mr. Fong has difficulty concentrating. Dr. Mallavarapu agreed that Mr. Fong's medications could have an impact on his concentration and memory, but not his mood.

**G. Kam Yan**

[242] Mr. Yan is a physiotherapist. He provided therapy to Mr. Fong starting in December 2007. He complained of pain in multiple areas (arms, shoulders, knee and back) but Mr. Yan's focus was on Mr. Fong's left shoulder as this was the main area of complaint.

[243] Mr. Fong returned for therapy in April 2009. He said the areas of complaint were the same, those being the shoulder and lower back. He treated Mr. Fong on nine occasions between April and November 2009.

[244] Mr. Fong returned again in October 2015, complaining of chronic neck and back pain, both upper and lower back. In December 2015 Mr. Yan also treated Mr. Fong's shoulder.

[245] In cross-examination, Mr. Yan said he gave Mr. Fong strengthening exercises to do with his shoulder, and similar exercises for his abdomen, the latter being part of treatment for his low back complaints. In 2009, Mr. Yan gave Mr. Fong exercises to do in order to lose weight.

[246] There was a gap in visits from 2009 to 2015. It is not Mr. Yan’s practice to follow up. He expects patients to continue exercises on their own. In November 2015, Mr. Yan treated Mr. Fong for “chronic stiffness from computer hobby”.

**H. Reynold Lobo**

[247] Mr. Lobo is an employee of WorkSafeBC. He verified the list of payments WorkSafeBC has made in Mr. Fong’s case. He confirmed both the accuracy of the amounts and the fact that they have been paid. He said the payments total is now higher than the stated total of about \$92,700 because \$3,000 – \$4,000 in further expenses have been paid by WorkSafeBC since the printout was created.

[248] The amounts expended (or reserved) by WorkSafeBC in Mr. Fong’s case are: (1) \$67,777.84 for pension reserve; (2) \$55,514.94 for health care payments; and (3) \$47,223.14 for vocational rehabilitation payments.

**I. Victor Fong**

[249] Victor Fong is one of the plaintiff’s adult sons. He was 30 years old at the time of trial. He testified about observations of his father both prior to and after the police incident of March 2006.

[250] Prior to the incident, they lived in a home together with Victor Fong’s paternal grandmother and grandfather. The whole family would dine out once a month. It was usually his father who suggested the get-togethers. At family events he was very receptive and playful, particularly with children of the extended family. His father’s siblings looked to his father for advice.

[251] Generally, his father was very happy, cheerful, sociable and approachable. He was a very confident person.

[252] Before the incident his father weighed 180 to 190 pounds. Since the accident he has gained 50 or 60 pounds.

[253] After the incident, Victor Fong noticed changes in his father. His father became reserved and quiet, and he was temperamental at times. On many occasions he would get frustrated during conversations. He was not very engaging.

[254] When asked how his father was around the house, Victor Fong said he was away at university during this time (2005 to 2009), although he came back in summertime, and so he was not there to observe all the time. However, he said his father now had a reversed sleep pattern of staying up at night and sleeping during the day. The kitchen was kept dark. Most of the time his father slept on a couch in the living room and tended to fall asleep in a chair. He never did that before.

[255] His father's ability to focus is not as clear as before. At times he would simply ignore others. His mood is depressed. He does not smile and he would rather be alone. He does not suggest going out to dine and he would rather eat at home. He spends his time either in the living room or in the den.

[256] Gatherings of extended family are now less frequent. His father has very limited communication with some of these family members, and there are fewer telephone calls with family generally.

[257] His father now gets frustrated quickly, especially when discussing certain topics such as finances or family members. He was not like that before the incident.

[258] His father used to help around the house, but now his mother does all the chores. His father does not even put his own dishes away.

[259] Victor Fong said he assisted his father with some of his retraining. His father took a vocational program in administration, which involved computer and software training. His father needed a lot of help from him, as he had never used computers before. He struggled with assignments. Victor Fong tried to help but his father could not follow the instructions. He would ask the same question over and over.

[260] Victor Fong said it is at times difficult to communicate with his father. He is very private and is not open to talking about his issues. He does not seek help within the family. His father is a different person than he was before the incident.

[261] In cross-examination, Victor Fong agreed that his father was not home much when he was managing the Byrd pub. He used to come home on weekends for dim sum. He said that their family was never particularly open and communicative. They were more conservative, particularly with spending and money generally.

[262] He was not sure if his father lived at home from 2002 to 2005, but thought he did “on and off”. He was not sure what his father was doing for work during these years. His father tended to travel with his (Victor Fong’s) grandmother for a month or two each year. His father never took him on any of these trips. He was, however, very supportive and made sure he went to university. His father did not help him with his homework or go to his sports events.

[263] Victor Fong did not talk to his father regularly from 2005 to 2009, except for one summer when he helped his father out at the hotel’s beer and wine store. He was unaware whether his father lived at the Chilliwack hotel when he worked there, or whether his father stayed at truck stop accommodation for a time.

[264] Victor Fong agreed that his father’s sister Judy was an investor who lost money in investments handled by his father. His father no longer speaks to her. Also, he now will not attend any family banquets.

[265] Victor Fong was not aware the Oasis Hotel had shut down until some years later. His father has never opened up about his cocaine use or his arrest in March 2006. He only found out about his father’s arrest when his grandmother showed him a newspaper article about it, and that was how she had found out about it.

[266] Victor Fong was not aware his father had lost \$800,000 of family money. He knew there was a court case, however, and had read the decision. His father mentioned the case to him, noting that it concerned a mortgage that had not been

registered properly, and he said his father was observant and sharp when explaining the case, which involved a complex transaction.

[267] Victor Fong was present when his father attempted suicide. It was a month after the court decision. Obviously his father was not happy with the result. The case put a lot of stress on the family.

[268] His father spends his time watching television and in the den. Victor Fong is at work during the day, so he has limited ability to observe his father during that time.

[269] His father looked for work after he finished his retraining program, but Victor Fong has not seen him looking for work recently. His father has been helping out his brother (a realtor) a bit, but this is more of a mentoring role.

## **V. Defendant's Case – Damages**

### **A. Dr. Stephen Fitzpatrick**

[270] Dr. Fitzpatrick is a psychiatrist. He prepared three reports in this case. In a report dated July 13, 2015, Dr. Fitzpatrick said he was of the opinion Mr. Fong did not suffer from a mood disorder (depression) prior to the incident. He was sceptical of Mr. Fong's claim that he had no substance abuse issues prior to the incident, noting that "it is highly unusual for an individual with no prior substance use history to start using crack cocaine de novo as their first choice of analgesic agent." He also noted that Mr. Fong had given him differing answers about his use of alcohol prior to the incident. Dr. Fitzpatrick concluded that Mr. Fong's crack cocaine abuse was not a result of the incident.

[271] Dr. Fitzpatrick concluded that Mr. Fong did not suffer from PTSD after this incident, noting that Mr. Fong did not describe any symptoms of PTSD following the incident as outlined in the DSM-V and also noting the lack of other findings to substantiate the diagnosis.

[272] Dr. Fitzpatrick concluded Mr. Fong has, at minimum, “personality traits of the Cluster B type with narcissistic and antisocial traits”, though there was not enough evidence to determine if Mr. Fong fell within a diagnosis of Cluster B Personality Disorder. These are strong personality traits that are enduring and inflexible that cause marked functional impairment and/or subjective distress in relationships, employment and day-to-day social functioning. Dr. Fitzpatrick noted earlier testing had indicated some of these traits, as did his “reactive self-harm behaviour” of his suicide attempt. Dr. Fitzpatrick felt these traits would predispose him to misusing substances as a maladaptive way of coping with stress.

[273] Dr. Fitzpatrick also concluded:

- a) Mr. Fong has had episodes of depression and low mood in the years since the incident, but these have responded well under Dr. Mallavarapu’s care;
- b) since 2006, Mr. Fong has become completely focused on or preoccupied with his litigation, in which he sees himself as the victim and accepts no responsibility for any part he may have played in the events; and
- c) it is highly unlikely Mr. Fong will return to gainful employment. While Mr. Fong has put a lot of time and energy into the litigation process, he has not made a concerted effort to return to work.

[274] Dr. Fitzpatrick prepared a further report dated September 4, 2015. This was a report written in response to Dr. Mallavarapu’s report of July 13, 2015.

[275] Dr. Fitzpatrick said the following in his rebuttal report:

- a) although Dr. Mallavarapu mentioned Mr. Fong’s reports of decreased concentration and memory, asserting that these are due to his depression and pain symptoms, the reported deficits were self-reports from Mr. Fong only and were not verified in any way, or at least any meaningful way; and

- b) the simple tests used by Dr. Mallavarapu are merely screening tools and are not meant to be diagnostic tools.

[276] Dr. Fitzpatrick provided a report dated July 20, 2017 in order to comment on some further materials supplied. These included various clinical records, including records from Dr. Mallavarapu and the SAFER program.

[277] Dr. Fitzpatrick said Mr. Fong's poor attendance and lack of punctuality with the SAFER program were notable but, more importantly, the numerous references to Mr. Fong's expressions of well-being, on the one hand, and his intentions to self-harm, on the other, highlighted features of his personality and coping style observed by Dr. Fitzpatrick and other clinicians (that is, Cluster B personality traits with erratic histrionic, antisocial and narcissistic features). These personality characteristics remained entrenched, persistent, not amenable to treatment and maladaptive.

[278] In short, when Mr. Fong perceives things to be going well he can present himself relatively well, but when faced with difficult circumstances, his response is extreme and reactive ("I'm going to kill myself"). This is not a normal response to day-to-day setbacks.

[279] In cross-examination, Dr. Fitzpatrick said:

- a) he was not aware of certain things, including: (1) Mr. Fong's son noticing personality changes; (2) his pre and post-incident social interactions with his family; and (3) Mr. Fong having had money taken from him in 2002;
- b) in the event that the hotel Mr. Fong managed had been targeted for enforcement, it would not surprise him that Mr. Fong would feel singled out and somewhat persecuted;
- c) he was aware WorkSafeBC had provided some retraining to Mr. Fong but he did not know if Mr. Fong completed it. He was not aware that Mr. Fong had struggled with computer courses;

- d) assuming that Mr. Fong had certain personality traits but was functioning well prior to the event, it is reasonable to conclude he would be predisposed to or might react to events in a way that others would not, including that the events might be more traumatic for him;
- e) he emphasized that he did not diagnose a Cluster B personality disorder. He determined only that Mr. Fong had certain Cluster B traits;
- f) he agreed that he missed a note in Dr. Mallavarapu's chart that Mr. Fong was afraid to drive by the hotel, and he agreed the note was important because an avoidance mechanism is one of the criteria for PTSD; and
- g) assuming Mr. Fong experienced the various items set out in the PTSD criteria in the DSM-V then he would meet the criteria for PTSD.

[280] In re-examination, Dr. Fitzpatrick said the following factors, if present, would support his opinion: (1) Mr. Fong had disassociated from his family prior to the incident; (2) he had not told his son he was living at the Oasis, that he lost \$90,000 at the Byrd pub or that he had been assaulted by police; (3) Mr. Fong's response to the loss of \$90,000 was to complain to police rather than sue civilly; and (4) he had refused to produce the hotel's liquor licence and tried to run away when arrested.

[281] Dr. Fitzpatrick noted that certain medications could create side-effects with memory recall, memory loss and lethargy, and it was possible those symptoms could be attributable to drug interactions. In this regard, it would be of concern to him if there were different doctors prescribing medications for the same patient.

**B. Dr. Paul Bishop**

[282] Dr. Bishop is a specialist in spine pathology. He is a qualified medical doctor and chiropractor, and he has a doctorate degree in spine pathology. He provided two reports, a main report dated June 16, 2015 and an updated report dated July 5, 2017.



[283] Dr. Bishop said his diagnosis of Mr. Fong was chronic pain in his neck, thoracolumbar area, both shoulders, both elbows and both wrists, all without any objective basis. He noted the diagnoses by other professionals of major depressive disorder and chronic pain syndrome. Specifically, he said:

- a) Mr. Fong denied and the clinical records do not indicate a strong pre-March 2006 history of musculoskeletal symptoms or psychiatric problems;
- b) given that the degenerative changes in his spine likely predated the incident, the probability is greater than fifty percent that he would have eventually developed symptoms in his lower thoracic spine even absent the incident;
- c) the reported chronic pain does not have an objective basis;
- d) it is not unreasonable to conclude that Mr. Fong suffered soft tissue injuries in the reported areas, but these ought to have healed within 12 to 16 weeks, which is the expected period of disability;
- e) there is no anatomical basis on which to conclude Mr. Fong could not return to his pre-injury activities. An increase in activity may be accompanied by increased pain but this is part of a normal recovery pattern; and
- f) if he chooses to accept advice to return to activities, the prognosis for his full recovery is good.

[284] In his report of July 5, 2017, Dr. Bishop said he reviewed a number of further clinical records and those records did not cause him to change his earlier opinion.

[285] In cross-examination, Dr. Bishop agreed that not only was there no “strong” history of no prior musculoskeletal or psychiatric issues, there was no recorded history of those issues at all.

[286] Dr. Bishop acknowledged that he puts the same time frame for soft tissue healing of “12 to 16 weeks” into each of his medical reports, but he said this is, in fact, the healing range, although a small percentage of people continue to experience pain past this point and may also move into chronic pain. He said he had no doubt Mr. Fong continues to experience pain, but Dr. Bishop said there is no anatomical basis for it, and so physicians facing that situation have to move on to other treatment measures.

[287] Dr. Bishop agreed that chronic pain develops in five to 15 percent of cases. If still persisting after three years, the prognosis is guarded. Mr. Fong had also developed psychological issues, and this is not Dr. Bishop’s area of expertise.

## **VI. Positions of the Parties**

### **A. Plaintiff**

#### *Liability*

[288] The plaintiff submits that there was no obligation on Mr. Fong to produce the bar’s liquor licence for inspection by the police. The only obligation imposed on a licensee by the *LCLA* and *LCLA Regulations* is to display the licence in a conspicuous place. The licence was, in fact, posted in a conspicuous place in the bar area. None of the police officers actually bothered to ascertain whether the liquor licence was posted as required.

[289] Accordingly, there was no basis for the police to demand that Mr. Fong produce the licence, no basis for them to allege his refusal to produce it constituted an obstruction of the police, and no basis for the police to arrest him.

[290] Grounds for arrest must satisfy both a subjective and objective component. So even if Cst. Dosange or Cst. Ward subjectively believed that Mr. Fong was obliged to produce the licence to them outside the bar, the defendant has failed to meet the objective component because there is no provision that required Mr. Fong to do so.

[291] The plaintiff made extensive submissions calling into question the credibility of the police officers who testified, particularly Cst. Ward.

[292] The plaintiff said the evidence clearly shows the police knew who Mr. Fong was, given their past interactions with him, and so they had all of the information they needed to complete an LPC document. There was no legal obligation for Mr. Fong to identify himself (which he had done anyway) or to provide identification.

[293] Since there were no grounds for arresting Mr. Fong, his arrest was unlawful. The force used by Csts. Ward and Sabo thereby constituted assault and battery. The use of force evidence given by Mr. McKay is irrelevant because no amount of force was lawful here.

*Damages*

[294] The plaintiff noted the various physical injuries he suffered as a result of the assault, and emphasized that these persist to the present day. He now has chronic pain, major depressive disorder and post-traumatic stress disorder. His physical limitations and inability to concentrate affect his employability. Mr. Fong’s son testified that his father is a changed person.

[295] Mr. Fong seeks damages as follows:

Non-pecuniary damages	\$200,000.00
Past income loss	475,010.00
Future income loss	323,877.00
Loss of employer CPP contributions	36,748.80
Cost of future care	50,900.56
Special damages	178,822.92
Punitive and aggravated damages	30,000.00
Charter damages	20,000.00
Total	\$1,315,359.28

**B. Defendant**

*Liability*

[296] The defendant says Mr. Fong's refusal to produce the liquor licence thwarted Cst. Ward's efforts to perform his duties and enforce the law. When Mr. Fong hurried away from the officers without providing the information necessary to complete a ticket, Cst. Ward believed Mr. Fong had committed the offence of obstruction pursuant to s. 129 of the *Criminal Code*. Constable Ward therefore had proper grounds to arrest Mr. Fong, and the force he used in carrying out the arrest was the force necessary in the circumstances, given that Mr. Fong actively resisted arrest.

*Damages*

[297] Should the Court determine liability in the plaintiff's favour, damages should be limited to general damages for the laceration injury and four to six weeks of soreness from bruising and soft tissue injuries. General damages should be reduced by reason of the plaintiff's contributory negligence, his failure to follow the advice of his medical practitioners, and his use of illegal drugs.

[298] There should be no award for past wage loss or loss of earning capacity because the plaintiff returned to work immediately after the event. He was fired as the manager of the hotel by his own family after the hotel was shut down by the City of Surrey. His loss of employment was due to his incompetence as manager rather than to the incident in question. He was, in any event, able to pursue a type of vocation after the incident because he engaged in high-risk lending for profit until February 2010, as was demonstrated in reported court judgments.

**VII. Discussion**

**A. The Pleadings Issue**

[299] Before proceeding further, I will address a pleadings issue raised by the defendant at the very end of submissions.

[300] The defendant submits the plaintiff's notice of civil claim filed on August 20, 2015 amounted, in substance, to a withdrawal of admissions made in his earlier pleading. The defendant also says the plaintiff made additional claims in his later pleading, which are barred by the *Limitation Act*, S.B.C. 2012, c. 13.

[301] Some further background is necessary. The original statement of claim was filed on May 15, 2008. New rules of court, the *Supreme Court Civil Rules*, came into force in 2010. Transitional provisions provided for the filing, in existing actions, of pleadings in the new format, a format that required additional information and a different organisation of the pleading. The transitional provisions also provided steps by which one party could demand that an opposing party file amended pleadings that conformed to the new format.

[302] The defendant made such a demand of the plaintiff on June 11, 2015, some five years after the rules changed. The plaintiff took the position that an amendment was unnecessary and undesirable at such an advanced stage of the action. The dispute ended up in chambers, where Mr. Justice Armstrong held that the requirement to file an amended pleading was mandatory, but he was not satisfied that the failure to comply with the demand justified making an order striking the pleadings, as sought by the defendant. He granted leave to the plaintiff to file a notice of civil claim. As already noted, that notice of civil claim was filed on August 20, 2015.

[303] Defence counsel informed me that the question of admissions allegedly withdrawn and additional claims allegedly made came before the court at some other point, and the judge hearing the matter said the issue ought to be resolved by the trial judge. For his part, plaintiff's counsel said the admissions issue was *never* the subject of any court application. Neither counsel elaborated upon any of these matters by reference to any court documents or transcripts, which leaves me substantially in the dark about what was actually before the court, and what the court did or said.

[304] In any event, the differences in the pleadings, as summarized by the plaintiff in his submissions, are very subtle. They are:

- a) in the 2008 pleading, the plaintiff says "... the plaintiff failed to produce the liquor licence ...". In the 2015 pleading, the plaintiff says "The plaintiff offered to produce the liquor licence ..." (emphasis added).

As will be seen, in light of my findings in this case, this is a non-issue.

- b) in the 2015 pleading, the plaintiff says "The RCMP officers falsely arrested and imprisoned the Plaintiff". In the 2008 pleading, he merely says he was "arrested and released".

In making this submission, the defendant ignores other parts of the 2008 pleading, which includes the following:

9. The actions of the Defendants, and each of them for which they are individually and jointly liable and for which her Majesty the Queen is also jointly liable, constituted torts and breaches of section 7 Charter rights of the plaintiff including:

- a) Assault;
- b) Battery;
- c) False arrest;
- d) False imprisonment;
- e) Abuse of authority; and
- f) Negligence.

From this it is clear that false arrest and false imprisonment were, in fact pleaded.

- c) in the 2008 pleading, the plaintiff says he "suffered personal injuries including", and then three items are set out. In the 2015 pleading, the plaintiff expands on the list to include other areas of his body and other complaints.

I do not consider that the latter pleading raises any substantive new claim. The 2008 pleading alleged "personal injuries including..." (my emphasis). It did not purport to be an exhaustive list.

[305] For those reasons, I conclude that the pleadings issues raised by the defendant do not affect the substance of the claims in any way.

**B. Findings**

*Background Facts*

[306] There is no real issue with some of the basic facts. The Oasis Hotel/Dell Hotel was a tough bar. The police had been called out to the hotel on many occasions to deal with incidents there. The bar patrons were generally hostile to the police, as were members of the hotel staff. The evidence also shows Mr. Fong, in his capacity as manager of the hotel, had an interaction with the police the month before, and in that incident he too had exhibited such hostility to the police that he had to be restrained by co-workers. Because of the dangerous nature of the bar, the local RCMP had a policy or practice that no officer should enter the premises alone.

[307] That night, officers who attended at the hotel concluded that a Licensed Premises Check should be written up for the establishment. There was information from the bar's liquor licence that was needed in order to fill out the LPC. Constable Dosange had not seen the licence in the bar area, so he asked the doorman (Mr. Carrod) and the bar manager (Mr. Svedruzic) to produce it, and both refused.

[308] Mr. Carrod went inside the bar to fetch Mr. Fong and Mr. Fong came outside to deal with the police.

*Credibility*

[309] This is a convenient point to discuss Mr. Fong's credibility. In brief, Mr. Fong was not a very good witness. It is difficult to catalogue all of the issues with his testimony, but the following are some examples.

[310] Mr. Fong's testimony frequently wandered off-track and he often had difficulty coming to the point. His description of the altercation with Cst. Ward was highly elaborate and detailed, improbably so, to the point that it lost most of its believability. He insisted that he ended up within the lobby itself (that is, *inside* both sets of lobby

doors), despite the pool of blood that seems to clearly show he did not, and which version of events contradicted the version he gave to the television news crew just days after the event.

[311] Mr. Fong’s answer to the absence of any blood on the lobby carpet was that a staff cleaner went in and cleaned up the blood on the carpet, an act of remarkable janitorial efficiency and thoroughness that would have been quite out of keeping with the general standards of upkeep at that hotel, as depicted in the various photographs put to Mr. Fong in cross-examination. Not only that, but according to Mr. Fong, this cleaning was done despite his express instructions to the contrary. I do not believe any of that testimony.

[312] Also, Mr. Fong said that during the struggle a police officer “tapped” him on the head with a solid object he concluded was a police baton (although he never saw it), though “not with a big force”, yet he made no mention of that in the television news story. In his testimony, he seemed to attribute the cut on his head, the injury that caused all the blood, to this “tap” contact, and so one might expect that this would feature in his recounting of the event to the news crew. In any event, I note that the ASP baton carried by police officers is quite a formidable weapon in its way, and it makes no sense that an officer would deploy it during a struggle only to use it with gentle force. I am also satisfied that the limited space available in the area between the two sets of lobby doors would have made it very difficult to deploy a baton. Constable Ward said he never used his baton. Constable Sabo said he had his baton out at some point earlier when he was away from the lobby doors, but he did not use it when he came to assist Cst. Ward. I accept the evidence of these officers in preference to the evidence of Mr. Fong. I am satisfied that no police baton was used on Mr. Fong at any time.

[313] Finally, Mr. Fong testified that it was only when he was lifted to his feet – after his lengthy struggle with Cst. Ward, later joined by Cst. Sabo – that he realized that his assailants were RCMP officers. Even allowing for the fact that Mr. Fong’s glasses were knocked off early on in the incident, I find that impossible to believe.



[314] These are only a few examples of matters which raised concerns about Mr. Fong’s credibility. There were a good many more, particularly on damages issues, and on the latter subject I would simply make the general observation that Mr. Fong was highly selective in the information he provided to his physicians, a matter that also adversely affected his credibility considerably.

[315] In short, I conclude that I must be very cautious before I accept any of Mr. Fong’s testimony that is not supported by other evidence.

[316] Mr. Fong placed considerable emphasis on the security video taken at the bar’s front door. In his submissions he described the video as being the “silent witness” that supports his version of events. This footage, while useful to a point, has limited value. First of all, it is “stop action” footage – a series of still images – not continuous footage. Although the images appear at approximately one-second intervals, the stop-action characteristic makes it very difficult to assess subtleties or speed of movement. Secondly, the visual field of the camera is quite limited. The camera faces north, depicting a relatively narrow area running from the bar doors towards the lobby doors (although not the lobby doors themselves), and it does not show an area much more than about ten feet out (west) along the wall that runs north of the doors, a distance outward that becomes even less the closer it is to the camera. There is no view directly west from the doors or to the south of the doors, where some important interactions took place.

[317] In the security video, Mr. Fong emerges from the bar doors at 1:09:07 am, but he immediately proceeds to the left (approximately southwest), out of the frame. It seems that he is just off-camera, as he appears and disappears to the left side of the frame as the video proceeds. This is when the discussion occurs between Mr. Fong and the police officers. Mr. Fong argues that this video footage establishes he was not agitated, swearing, shouting or waving his arms and, instead, he was speaking to the officers in a “controlled, explanatory” manner. Given that this interaction with the police officers is largely off-camera, it proves nothing of the sort.

[318] Mr. Fong says the video shows “nothing in his demeanour or walk that indicates that he is trying to get away or elude anyone”. However, due to the stop-action nature of the video, I am unable to gauge either his walking speed or anything other than very general aspects of his demeanour. It *appears* to take Mr. Fong roughly the same amount of time to move through the field of view as it takes the pursuing Cst. Ward. The evidence suggests Cst. Ward would have been walking very briskly. If Mr. Fong took about the same amount of time to traverse the same distance, then he would have to have been walking briskly too.

[319] I wish to emphasize that I did not purport to do any sort of formal timing or study of these images, and my comments are simply general observations.

[320] With one notable exception, I did not find any particular credibility concerns with the testimony of the police officers. There were inconsistencies in their versions of the events, but these were the sorts of inconsistencies I would expect in the circumstances, particularly given that the event occurred over a decade prior. I do not consider them to be material.

[321] I have paid particular attention to the plaintiff’s criticisms of Cst. Ward’s credibility, and I have carefully reviewed the testimony of the witnesses and the surveillance video with these in mind. I find no validity in most of these criticisms. In particular, I do not accept that: (1) Cst. Ward’s testimony fails to align with that of the other officers in any material respect; (2) the video refutes Cst. Ward’s evidence that Mr. Fong was aggressive and yelling right from the start; or (3) the video establishes that Cst. Ward could not have engaged in a discussion with Mr. Fong because Cst. Ward appears on screen coming from “a completely different angle” than Mr. Fong. As to the latter two points, Mr. Fong is seen in the video coming in and out of the camera frame in a fashion which could be consistent with an argumentative exchange, in the sense that he walks or turns away from his interlocutor or interlocutors twice before returning for more, as one might do in an argument. I note, as an aside, that the exchange is sufficiently interesting that it seems to hold the attention of a patron watching from the inside of the bar door (a

glass door), something that also seems inconsistent with the measured exchange described by Mr. Fong in his testimony. I agree that, ultimately, Cst. Ward enters the frame from a *somewhat* different angle than the angle of Mr. Fong's apparent attention *when he is visible*, but again, Mr. Fong is not always in the camera frame. Accordingly, I conclude the video is not inconsistent with the officers' evidence that the dialogue took place initially between Cst. Dosange and Mr. Fong and then took place between Cst. Ward and Mr. Fong.

[322] There was one aspect of Cst. Ward's evidence that suffered from credibility problems; specifically, his evidence about whether he had seen the liquor licence posted in the bar on previous occasions. At his examination for discovery, Cst. Ward said he had been at the Dell numerous times before this incident and the licence was generally posted and visible behind the bar. He agreed in cross-examination that those answers were true. However, he testified at trial that he did not recall seeing the licence prior to this incident. His attempts to explain or reconcile these irreconcilable statements did not reflect well on him.

*Other Factual Issues*

[323] I do not accept that Cst. Dosange, or any other police officer present, called Mr. Fong a "Chinese faggot", as he testified. Mr. Fong said that Cst. Dosange uttered this epithet four times, including once when Mr. Fong was looking directly at him. The evidence establishes that there were multiple people present in the area, including two of Mr. Fong's employees. The slur, if made, would have been an outrageous thing for a police officer to say, let alone say repeatedly, but of all the witnesses who were present and who testified, only Mr. Fong said this happened. In this, I do not believe him.

[324] I accept the evidence of the police witnesses that after Mr. Fong exited the bar he was yelling and swearing or was otherwise in an agitated state. Once outside, he engaged in a verbal exchange with Cst. Dosange, then an exchange with Cst. Ward, which ended when Mr. Fong told Cst. Ward to "fuck off" and Mr. Fong walked away, heading to the lobby doors. I accept Cst. Ward's evidence

that he then told Mr. Fong he was under arrest and Mr. Fong quickened his pace in response.

*The Bar Licence*

[325] I am satisfied that the police officers asked that the liquor licence be produced to them and one or both of Mr. Carrod and Mr. Svedruzic refused to produce it. The officers then asked Mr. Fong to produce it and he refused.

[326] I find that none of the police officers actually checked the bar area for the licence even though some of them knew it was usually posted there. Constable Dosange's evidence on the subject was vague in that he merely said he did not recall seeing the licence, although he knew it was usually posted in the bar area. In the notes he made that night he made no mention of looking for the liquor licence or of noting it was not posted. I conclude that Cst. Ward had also seen the licence in that area before. The circumstantial evidence satisfies me that the licence was in fact posted in its usual area of the bar that night, although it was probably a copy of the licence issued to the prior licensee, AMPM Holdings.

[327] I do not accept Mr. Fong's evidence that he identified himself to the police officers as soon as he approached the officers. I accept Cst. Ward's evidence that he asked Mr. Fong for his name and Mr. Fong refused to identify himself. Constable Ward had witnessed an interaction between Mr. Fong and Cpl. De Jager the month before but it is not clear on the evidence whether Cst. Ward knew Mr. Fong's name as a result of that incident. I conclude that although Cst. Ward knew Mr. Fong had some managerial role with the hotel, he did not know Mr. Fong's name.

*Reasonableness of Force Used*

[328] This issue was not contested by the plaintiff. Mr. McKay, the defendant's use of force expert, gave the opinion that the steps taken and level of force used by Cst. Ward and Cst. Sabo were appropriate in the circumstances. He was not cross-examined, so his opinion was unchallenged. I accept Mr. McKay's opinion.

**VIII. Liability**

**A. *Liquor Control and Licensing Act (LCLA) and Regulations***

[329] The statutory provisions relevant to liability are set out in the relevant version of the *LCLA* and *LCLA Regulations*. I emphasize that it is the *LCLA* and *LCLA Regulations* that were in force at the time of these events. These have changed since.

[330] Section 73 of the relevant version of the *LCLA* grants to the general manager or “person designated by the general manager” the right to require a licensee to produce any “prescribed document”. Section 73(2) makes it an offence for a person to refuse or neglect to produce a document required to be produced or to produce a record for inspection. The *LCLA Regulations* prescribe the documents that must be produced.

[331] Of note, the LPC that was issued on the night in question alleged that the licensee “failed to produce documents for inspection” contrary to s. 73 of the *LCLA*.

[332] I set out these statutory provisions, beginning with the provisions of the *LCLA*:

73 (1) To obtain information respecting the administration or enforcement of this Act or the regulations, the general manager or a person designated by the general manager may

(a) require the licensee to produce any prescribed document relating to the operation of the business licensed under this Act, and

(b) inspect any of the following:

(i) records in the possession of any person that may contain information relating to goods shipped, carried or consigned or received for shipment or carriage in British Columbia,

(ii) premises of any person set apart or used as a warehouse for the storage of liquor, and

(iii) establishments licensed under this Act and records, liquor and other things associated with the operation of the establishment.

...

(2) A person commits an offence if the person neglects or refuses to do any of the following under this section:

- (a) produce a document required to be produced;
- (b) produce and submit a record or thing for inspection or a sample of liquor;
- (c) allow premises to be inspected.

...

77 If an offence under this Act or the regulations is committed by a corporation, the officer or agent of the corporation in charge of the establishment in which the offence is committed is deemed to be a party to the offence and is personally liable to the penalties prescribed for the offence as a principal offender but nothing in this section relieves the corporation or the person actually committing the offence from liability for it.

[333] The following are the relevant *LCLA Regulations*:

34 For the purposes of section 73 (1) of the Act, the following documents are prescribed in relation to a licensee:

- (a) liquor purchase records;
- (b) liquor sales records;
- (c) liquor disposal records;
- (d) food sales records;
- (e) sales records respecting other merchandise or services provided by the licensee that are incidental to the business of the licensed establishment;
- (f) agreements and contracts between the licensee and a liquor manufacturer or its agent or representative;
- (g) invoices and purchase receipts for all equipment and other inventory used in the operation of the licensed establishment;
- (h) lease and management contracts related to the licensed establishment;
- (i) employee records including names, addresses, salaries, primary job responsibilities, shift schedules and dates of employment;
- (j) records of any incidents or events that occurred in or adjacent to the licensed establishment;
- (k) records of court orders and judgments against a licensee respecting the sale, service or manufacture of liquor;
- (l) records of the quantity and price of liquor servings.

...

37 A licensee must

- (a) post his or her licence in a conspicuous place in the licensed establishment, and
- (b) provide access to the approved floor plan of the licensed establishment on request of the general manager.

## B. Unlawful Arrest – Principles

[334] The *Criminal Code* authorizes a police officer to arrest a person without warrant where the officer believes on reasonable grounds that the person has committed or is about to commit an indictable offence. Obstruction of a peace officer (s. 129 of the *Code*) is a hybrid offence and therefore qualifies as an indictable offence for this purpose.

[335] The Supreme Court of Canada in *R. v. Storrey*, [1990] 1 S.C.R. 241, said that an arresting officer must have “reasonable and probable grounds” for the arrest. The Court described the standard to be met as follows at 250-251:

In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

[336] Earlier in the judgment, the Court explained the objective component to the grounds for arrest (at 250):

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.

[Citations omitted.]

[337] Section 25(1) of the *Criminal Code* protects police officers, (among others) from civil liability for actions committed during the course of enforcing or

administering the law: *R. v. Asante-Mensah* (2001), 204 D.L.R. (4th) 51 (Ont. C.A.) at para. 51, aff'd [2003] 2 S.C.R. 3 (S.C.C.).

[338] Section 25(1) reads as follows:

25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[Emphasis added.]

[339] The burden is on the defendant to show that the police officers in this case fall within the protections of s. 25(1) of the *Code*: *Crompton v. Walton*, 2005 ABCA 81.

As the court noted in that case:

[6] Section 25(1) contains three branches. In order to access the protection of the section, a police officer must prove that he or she:

- (i) was required or authorized by law to perform an action in the administration or enforcement of the law;
- (ii) acted on reasonable grounds in performing that action; and
- (iii) did not use unnecessary force.

...

[7] As is the case with other defences to assault, those seeking exemption from liability under s. 25(1) bear the burden of demonstrating the section applies: [citation omitted]. Therefore, to succeed in defending a civil suit for assault, the police must prove each of these three elements on a balance of probabilities.

### **C. Obstruction of Peace Officer – Principles**

[340] The law related to obstruction of a peace officer was well-summarized by Madam Justice Devlin in *R. v. Brodie*, 2017 BCSC 1787:

[72] Obstructing a peace officer under s. 129(a) of the *Code* requires proof of either a positive act, or a failure to act where there is a legal duty to act, on the part of the accused. Furthermore, the action or failure to act must have some actual obstructive effect on the execution of the officer's duty. The



accused's conduct must impede, hinder or frustrate an officer's ability to carry out some act or service: *R. v. Porter*, 2004 BCSC 1520 at paras. 93-94. It is not enough to show that the accused lied to police, the Crown must also show that the lie, in fact, obstructed the officer(s) in the execution of their duty.

**D. Liability – Discussion**

[341] From the foregoing principles, it will be seen that for Cst. Ward to have effected a lawful arrest of Mr. Fong, he must have had reasonable and probable grounds to believe Mr. Fong was obstructing him in his duties. This, in turn, required that there be a positive duty on Mr. Fong to produce the liquor licence to the police and to identify himself to them.

[342] The defendant argues that a combination of statutory provisions in the *LCLA* and *Offence Act*, R.S.B.C. 1996, c. 338 [*Offence Act*] provides peace officers with the authority to arrest persons contravening the *LCLA*. The defendant points to: (1) s. 73 of the *LCLA*, which the defendant says requires a licensee to produce *any* document, not just prescribed documents; (2) s. 73(2) of the *LCLA*, which makes it an offence to neglect or refuse to produce a document; and (3) s. 77 of the *LCLA*, which makes “an officer or agent of the corporation” personally liable for the offence “as a principal offender”. The defendant submits that, together, these provisions required Mr. Fong to produce the liquor licence to the police, and provided a basis to arrest Mr. Fong for failing to do so or in obstructing them in the process.

[343] The defendant emphasizes that Cst. Ward did not have to be right in his view of Mr. Fong's obligations as it was only necessary that Cst. Ward had reasonable and probable grounds for the arrest.

[344] The flaw in the defendant's argument lies in the assertion that the liquor licence was a document that was required to be produced on demand by reason of s. 73(2) of the *LCLA*. Section 73(1) says the general manager or designate may require a *prescribed* document to be produced, not *any* documents. Section 73(2) makes it an offence to refuse to produce a document “required to be produced”

(emphasis added), not *any* documents. A liquor licence is not one of the documents prescribed in the *LCLA Regulations*.

[345] The defendant argues that s. 73(2) is independent of s. 73(1) and so it is an offence to fail to produce *any* document demanded. The defendant bolsters this submission by noting the licensee’s obligation to post its licence in a conspicuous place, equating this to a requirement of a “constant state of production”, the breach of which constitutes an offence under s. 73(2). I do not accept this argument. It strains the language of the provisions well beyond any reasonable interpretation. In my view, the two provisions within s. 73 must be read together. Section 73(1) creates the requirement to produce “prescribed” documents (which are then prescribed in the *LCLA Regulations*) and s. 73(2) creates an offence for refusing to produce those documents (that is, “a document required to be produced”). When read together, it is clear the latter provision refers to the former.

[346] The defendant also noted that the licence displayed was only a copy of the original, and it was a licence issued to the former licensee, both of which were failures to comply with the *LCLA*. That may be so, but those matters were unknown to Cst. Ward and are therefore irrelevant to the grounds for arrest.

[347] I conclude that Cst. Ward did not have an objective basis for believing Mr. Fong had a duty to produce the liquor licence to the police. I accept that he may have had a subjective belief that Mr. Fong was obliged to produce the licence to the police, but he provided no basis for having that belief. He did not say, for example, that he had read the *LCLA* and had come to that understanding, mistaken though it might have been, or that his belief stemmed from any other source. Moreover, there were no proper steps taken to ascertain whether the licence was in fact displayed, which was the impetus behind the request to produce the licence in the first place. Constable Ward did not check it for himself even though he knew the licence was usually displayed. I accept that he testified Cst. Dosange told him it was not displayed (which, as it turned out, was based on what appears to have been, at most, a casual glance on Cst. Dosange’s part), but given that Cst. Ward’s stated

purpose in asking for the licence was to complete an LPC document for a different alleged violation altogether (serving a person without identification), I consider that Cst. Ward was obliged to do more.

[348] Ultimately, however, this issue turns on a lack of objective grounds for believing Mr. Fong was duty-bound to produce the licence to the police, and thus there were no objective grounds for believing Mr. Fong was obstructing the police in their lawful duties.

[349] This leads me to the second aspect, Mr. Fong's refusal to identify himself. The defendant argues that this was obstruction because Mr. Fong was deliberately avoiding the issuance or service of a violation ticket. However, there was never any suggestion that the police were writing up a *violation* ticket, which is a defined document under the *Offence Act* and *Offence Act Regulations*. Instead, they were writing a Licensed Premises Check or LPC, a document that was being directed to the licensee, not to Mr. Fong. The police did not need Mr. Fong's identification in order to complete an LPC directed to the licensee. There was no duty on Mr. Fong to identify himself. Mr. Fong's failure to identify himself did not impede or obstruct the police in issuing the LPC, and there were no grounds for believing that it did.

[350] The defendant also argues that the arrest of Mr. Fong was necessary to maintain public order in the midst of a volatile situation. The short answer to this is that Cst. Ward did not say anything to this effect. Constable Ward's stated basis for his arrest of Mr. Fong was obstruction, not maintaining public order.

[351] For these reasons, I conclude that Mr. Fong's arrest that night was unlawful. It follows that the defendant cannot invoke the protection of s. 25(1) of the *Criminal Code*. The defendant is liable for the assault and battery of the plaintiff, and for his brief unlawful imprisonment.

[352] The plaintiff also pleaded his case in negligence, but he made no submissions on it. In these circumstances I see no need to address it.

**IX. Damages**

**A. Overview**

[353] The plaintiff's credibility problems also affect the assessment of damages.

[354] I am satisfied that as a result of the hard takedown by the police, Mr. Fong suffered injuries to his shoulders (particularly his left shoulder), neck, back and arms, and there were other injuries of a more superficial nature, including the scalp laceration and some contusions. I am satisfied, as well, that the violent nature of the incident, together with the physical injuries suffered by Mr. Fong, caused him some degree of anxiety and stress.

[355] The most difficult aspect is assessing Mr. Fong's claim that the incident, and the injuries he suffered in the incident, have led to chronic pain, depression and complete or near-complete disability. This assessment is difficult because Mr. Fong's claims rest, ultimately, on his own reports, including – most importantly – his reports to his physicians, with whom he has been less than forthright, to put it mildly.

[356] For example, although in July 2006 he reported to Dr. Ting complaints of being "itchy all over", of feeling someone was "poking him with needles", and of other bizarre and psychotic thoughts, he failed to tell Dr. Ting he was using crack cocaine. Instead, Dr. Ting prescribed medications to deal with the various reported symptoms, something Dr. Ting said he would not have done had he known that Mr. Fong was using crack cocaine.

[357] Mr. Fong also attended upon more than one physician to address the same complaints, which appears to have led to excessive medication prescriptions.

[358] Mr. Fong also misled his other family doctor, Dr. Leung, about his cocaine use. When a blood test ordered by Dr. Leung came back with a positive indication for opiates, Mr. Fong said this was attributable to the Tylenol 3s he was taking, without revealing to Dr. Leung the fact that he was using crack cocaine. He finally

confessed his cocaine use to Dr. Leung in August 2007, but by then Mr. Fong was becoming depressed and “afraid to the point of paranoia that he could suddenly be physically attacked”.

[359] Dr. Leung agreed that Mr. Fong was not open with him and that Mr. Fong was “shaping” the information he was giving to him. Consistent with that, Dr. Viljoen’s psychological testing of Mr. Fong yielded results showing “likely over-reporting or exaggeration of symptoms”, though Dr. Viljoen thought this might be attributable to Mr. Fong’s recent distress associated with his then-recent suicide attempt.

[360] I conclude that in both his testimony at trial and in his interactions with the physicians and other experts in this case, Mr. Fong over-reported or exaggerated matters helpful to his claim against the police and he minimized, or omitted entirely, those matters that did not support his claim or otherwise put him in a bad light.

*Other Life Stressors*

[361] Mr. Fong had a number of significant stressors in his life in addition to the incident in question. These included:

- a) in or around 2002, while working at the Byrd pub, he lost \$90,000 in cash, together with a quantity of liquor, when these were appropriated by the hotel owner, an act that Mr. Fong viewed as a theft or some other criminal act. His response to that alleged misappropriation was to report it to the police, and then to file formal complaints about their failure to act;
- b) his crack cocaine binge, which lasted well over a year. He said he began crack cocaine use to deal with the pain he was experiencing (though he also said he used crack cocaine “to relax”), but he had legitimate, prescribed medications for that purpose;
- c) the hotel being ordered shut down in September 2006 for health and safety reasons;

- d) being terminated from his job as hotel manager;
- e) having his WCB claim rejected (though he was later successful);
- f) in or around 2010, losing \$800,000 in family money that he had been responsible for investing;
- g) in 2013 and 2014, going through a lengthy solicitor's negligence trial over the loss of the family money, and losing that case when judgment was rendered in March 2015;
- h) attempting suicide shortly after the loss of that court case;
- i) losing the subsequent appeal in February 2016;
- j) being estranged from members of his extended family as a consequence of the loss of the \$800,000 and the unsuccessful court case.

[362] Several of those matters require further elaboration. First, Mr. Fong's crack cocaine use. During the time that Mr. Fong was using crack cocaine he experienced physical ailments no doubt related to his cocaine use (itchiness, and the feeling of needles), but more importantly, he had persistent paranoid thoughts that pervaded his life to such an extent that he slept in a different hotel room each night, fearful that strangers were entering his room and injecting him with needles, or even raping him.

[363] Second, the loss of his job as hotel manager. It is clear that Mr. Fong threw himself into his work to the exclusion of almost everything else, including his immediate family, with whom he had very little direct contact while he worked at the Oasis Hotel. It was the same situation with the previous pub he managed (1999 to 2002), the Byrd pub where, again, he lived at the hotel and saw very little of his family. The Oasis Hotel was ordered shut down for various health and safety infractions which, from the photographs taken at the time the hotel was ordered closed, show manifest incompetence in the running of the hotel. The fact that the hotel was shut down for these reasons must have brought home to Mr. Fong the

obvious shortcomings in his management, and his firing would have confirmed it. Furthermore, his next job was as a hotel “doorman”, or front desk clerk, which would have represented quite a drop in his employment level.

[364] Finally, there is the loss of the court case, which had gone on for years. This, too, brought Mr. Fong’s abilities under scrutiny, this time his ability to manage his parents’ and sister’s money. The loss of the case was so devastating to him that he attempted suicide, and it resulted in Mr. Fong being estranged from members of his extended family.

[365] I have listed the difficult events in Mr. Fong’s life, and elaborated on certain events in particular, because these put the incident in question into its proper context. Mr. Fong attributes his major depressive disorder and chronic pain syndrome to the police assault alone, but the assault was only one of a substantial number of negative events and setbacks in his life.

*The Slip and Fall at the Ambulance*

[366] Before moving on to discuss damages issues, I will address an issue that arises out of Mr. Fong’s fall at the ambulance. At the Court’s invitation, counsel filed brief written submissions on the issue. Both counsel cited *Ray v. Bates*, 2015 BCCA 216, in support of their submissions on causation, despite the fact that *Ray v. Bates* was a negligence case, not a case involving the intentional torts of assault and battery. Since both relied on the case as stating the underlying principles applicable to this case, I will do so too.

[367] In *Ray v. Bates* the court said:

[12] Often, in a negligence case, the chain of causation will be broken where an independent voluntary human action intervenes between the negligent act and the injury. The principle, often expressed in Latin as “*novus actus interveniens*” can be difficult to apply, and admits of certain exceptions.

[368] The plaintiff argues that the principle articulated in that passage does not apply here because Mr. Fong was still in custody and was being walked by, or at the direction of, Cst. Ward when the slip and fall occurred. This, the plaintiff says,

means there was no “independent voluntary human action” that intervened between the arrest and the slip and fall and thus the chain of causation was not broken.

[369] The defendant acknowledges that the arrest of a person may *curtail* a person’s ability to carry out independent voluntary human action, but it does not extinguish it. Here, the plaintiff was walking unaided and alone, which meets the test of independent voluntary action, and so the chain of causation was broken.

[370] I conclude that Mr. Fong was walking independently at the time he slipped and fell. However, I also conclude that any injuries he suffered as a result were minimal. Mr. Barkhouse, one of the ambulance attendants, said Mr. Fong did not suffer any obvious or visible injuries. Mr. Fong said he landed on his elbow and rear end, which hurt his elbow “very bad”. He added that his lower back “stung a bit” and he hurt his left shoulder. He denied hitting his head. Constable Ward and Mr. Bihlmayr, the other ambulance attendant, said Mr. Fong hit his head. I conclude Mr. Fong did hit his head as he fell, but I also note that no one made anything of this event or of any possible injuries to Mr. Fong at the time, including Mr. Fong himself, which leads me to conclude that the only non-transient injury was the impact to his left elbow which, on the evidence, was a minor injury with no longer-term consequences.

[371] For these reasons, to the extent I am able on the limited evidence available, I have not factored into my assessment of damages any aches and pains associated with a likely bruising of Mr. Fong’s left elbow.

**B. Opinion Evidence**

[372] Under the following headings, I will comment on the evidence of the medical and other professionals.

*Dr. Kwang Yang*

[373] Dr. Yang testified as a fact witness, not as an expert. In August 2008 Dr. Yang wrote a letter to WCAT in support of Mr. Fong’s WorkSafeBC claim. To the



extent that this letter provides an opinion, I give it no weight. First, Dr. Yang was not qualified to give expert evidence. Second, in this letter Dr. Yang quite obviously adopts the role of advocate for his patient. This may be a laudable role for a family physician to play on behalf of a patient, but it does not assist the Court. Third, to the extent that Dr. Yang's comments address Mr. Fong's non-physical injuries (which he notes as being anxiety and depression), he relied only on Mr. Fong's self-reporting and did not mention or address any of the other stressors in Mr. Fong's life.

*Dr. Henry Leung*

[374] Dr. Leung's opinion that Mr. Fong suffered post-traumatic stress disorder as a result of the incident did not reconcile with Dr. Leung's admission in cross-examination that he did not deal with any of Mr. Fong's emotional or psychological issues and so he did not make any inquiries related to these. As noted earlier, he said he felt able to diagnose PTSD without a full history because he knew Mr. Fong both before and after the incident, he knew Mr. Fong's stressors, and he could say that the police incident was Mr. Fong's major stressor. However, I am satisfied that Dr. Leung did not know all of Mr. Fong's stressors because Mr. Fong did not reveal all of his stressors to Dr. Leung.

[375] For those reasons, I place no weight on Dr. Leung's opinion concerning Mr. Fong's non-physical injuries.

*Dr. John Ting*

[376] Dr. Ting concluded that Mr. Fong's physical injuries developed into chronic pain syndrome, anxiety disorder and major depressive disorder. As to chronic pain syndrome, Dr. Ting said he based his diagnosis in large measure on the information given to him by Mr. Fong. Given Mr. Fong's significant credibility issues, I am unable to place much, if any, confidence in Dr. Ting's opinion on that subject.

[377] In his report Dr. Ting did not mention other stressors in Mr. Fong's life, including Mr. Fong's illicit drug use and pre-incident difficulties with the RCMP and others (both of which Dr. Ting knew about), or Mr. Fong's report (or delusion) that he

had been raped in his hotel, the health and safety shutdown of the hotel, Mr. Fong's termination from his hotel manager job, the failed court proceedings, or the fact that Mr. Fong lost \$800,000 in family money (none of which Dr. Ting knew about). There was also no mention in Dr. Ting's report of Mr. Fong's April 2015 suicide attempt, although in fairness to Dr. Ting, this suicide attempt occurred on April 20, 2015 and Dr. Ting's report was dated May 3, 2015, so it may have been too recent for him to have been aware of it.

[378] For these reasons, I am unable to place any weight on Dr. Ting's opinion with respect to matters other than Mr. Fong's physical injuries.

*Dr. Hendre Viljoen*

[379] Dr. Viljoen concluded that Mr. Fong met the diagnostic criteria for major depressive disorder and somatic symptom disorder, which he said equated to chronic pain disorder, a now-outdated term.

[380] As noted earlier, Dr. Viljoen's psychometric testing of Mr. Fong showed indications of: (1) "likely overreporting or exaggeration of his current symptoms", although he added that this was likely reflective of his current distress, which included a history of a recent suicide attempt; (2) a number of problematic personality traits including being emotionally labile and reactive, with angry acting-out behaviour, feelings of mistrust and hypervigilance as to the motives of people around him; and (3) a negative self-perception, dwelling on previous failures and prone to harsh self-criticism and a pessimistic outlook.

[381] Dr. Viljoen was a much more thorough witness than were Mr. Fong's family doctors. Nonetheless, Dr. Viljoen's opinion necessarily relies in large measure on the veracity of Mr. Fong's account of the various events in his life, meaning that, to a substantial degree, Dr. Viljoen's opinion is only as reliable as the information upon which it is based. Accordingly, Mr. Fong's loss of employment at the Oasis Hotel is somewhat blandly described by Dr. Viljoen as being associated with the closure of the hotel, without any mention of the reasons why it closed, Mr. Fong's role in, or

responsibility for, that closure, or the fact that he was terminated from his employment by owners who included family members.

[382] The importance of that factual background is underscored in other passages in Dr. Viljoen’s report, where he comments on certain observations made by a psychologist, Dr. Weideman, who was involved in Mr. Fong’s WorkSafeBC claims process in 2009:

In this regard, Dr. Weideman’s description is particularly apt when he describes the events of March 2006 as having created “*an existential problem*” for Mr. Fong that had altered his perception of his work identity, and has led him to become focused on and preoccupied with attempting to minimize and manage his symptoms of pain and physical dysfunction.

[383] Because Dr. Viljoen did not have the full picture relating to the hotel closure he did not address the possibility that Mr. Fong’s loss of employment, which was manifestly caused by Mr. Fong’s poor management, may have been the cause of Mr. Fong’s “existential problem” that “altered his perception of his work identity”.

[384] In addition, Dr. Viljoen does not seem to have appreciated the magnitude of the setback that the loss of the court case represented. In cross-examination, Dr. Viljoen said Mr. Fong spoke of a court case that was lost, “resulting in frustration”, but otherwise Dr. Viljoen did not explore that subject with him. Using the term “frustration” to describe Mr. Fong’s reaction to an event that prompted a suicide attempt is more than a mere understatement. If that was the impression that Mr. Fong left with Dr. Viljoen, then Mr. Fong was not being at all forthright with him. But even in light of that misleading understatement, Dr. Viljoen said that the court case was a “significant stressor” and it had prompted “a significant increase in symptoms”.

[385] In summary, I am unable to accept the opinions of Dr. Viljoen that rely materially on information supplied by Mr. Fong.

*Dr. Harinath Mallavarapu*

[386] As noted earlier, Dr. Mallavarapu said Mr. Fong’s depression is directly related to his pain symptoms and his associated functional limitations and cognitive difficulties, together with the emotional trauma he experienced as a result of the police incident. Dr. Mallavarapu thought it likely Mr. Fong developed a chronic pain disorder associated with both psychological factors (anxiety and depression) and his general medical condition.

[387] I found it odd that Dr. Mallavarapu did not explore any emotional impact on Mr. Fong that was caused by the hotel shutdown and loss of employment. Dr. Mallavarapu said he did not explore that issue because he was looking at the *overall* impact of events on Mr. Fong and his first contact with Mr. Fong was over a year later.

[388] I can understand why, from a treating perspective, a psychiatrist might find that to be the best approach (because isolating a cause may not matter for treatment), but it seems to me that other potential causes have an important bearing where the expert offers the view that a patient’s psychological difficulties all stem from a single traumatic event to the exclusion of other events. I conclude that Dr. Mallavarapu’s failure to explore the reasons for, and impact of, Mr. Fong’s loss of employment is a significant omission.

[389] Dr. Mallavarapu also said that, in any event, “we *do* have the history and the causation”, but he acknowledged these were based in large measure on Mr. Fong’s self-report. Mr. Fong’s self-report was that the police incident was the cause of his problems. In uncritically accepting Mr. Fong’s self-report I find that Dr. Mallavarapu did not do enough to assess the accuracy of Mr. Fong’s assertions.

[390] Like the other experts, Dr. Mallavarapu was not made aware of all of the stressors in Mr. Fong’s life. These include the amount of money the family put into the hotel, the subsequent high-risk lending by Mr. Fong of that money and the ultimate loss of \$800,000 of his sister’s money and his mother’s money.

Dr. Mallavarapu was aware that Mr. Fong used cocaine in 2006 and 2007 and had cocaine-related paranoia, but he was not aware of some of the specifics, including Mr. Fong's delusion of being anally raped in the hotel and his delusions of people sticking him with needles. Dr. Mallavarapu did say, however, that he did not think any of these would have changed his opinion.

[391] As detailed earlier, Mr. Fong's paranoia during the time of his cocaine use caused him significant stress over a fairly long period of time, as demonstrated by his behaviour in moving to different rooms every night, installing hardware on the doors to keep people from coming in, and taking increasing amounts of cocaine in order to stay awake so that he could deal with any intruders. By the time Mr. Fong confessed his crack cocaine use to Dr. Leung in August 2007, which was nearly a year after the hotel closed, Dr. Leung noted Mr. Fong was "turning depressed and afraid to the point of paranoia that he could suddenly be physically attacked". However, Dr. Mallavarapu resisted the suggestion that these paranoid thoughts were, in themselves, stressors that were part of the causation picture, merely noting that Mr. Fong's paranoid thoughts ceased when he ceased using cocaine.

[392] Because of my concerns with Mr. Fong's credibility, I conclude that Dr. Mallavarapu's reliance on Mr. Fong's self-report as the basis, or much of the basis, for his causation opinion, together with Dr. Mallavarapu's failure to delve into other relevant events, renders his causation opinion unreliable.

*Dr. Stephen Fitzpatrick*

[393] Dr. Fitzpatrick concluded that: (1) Mr. Fong did not suffer from PTSD after this incident; (2) Mr. Fong's crack cocaine abuse was not a result of the incident; (3) Mr. Fong has "personality traits of the Cluster B type with narcissistic and antisocial traits", which are strong, enduring and inflexible personality traits that cause marked functional impairment and/or subjective distress in relationships, employment and day-to-day social functioning; (4) Mr. Fong has had episodes of depression and low mood in the years since the incident, but these have responded well under Dr. Mallavarapu's care; (5) since the incident Mr. Fong has become

completely focused on or preoccupied with his litigation, in which he sees himself as the victim and accepts no responsibility for any part he may have played in the events; and (6) it is highly unlikely Mr. Fong will return to gainful employment.

[394] As with all of the other experts, there were some matters that had not been brought to Dr. Fitzpatrick's attention, although unlike the other experts, some of the previously-unknown matters undermined his opinion somewhat, but others tended to support it.

[395] Dr. Fitzpatrick's opinion largely survived cross-examination intact.

*Dr. Paul Bishop*

[396] Dr. Bishop said: (1) Mr. Fong's complaints of pain in various areas of his body have no objective basis, although he did not doubt Mr. Fong continues to experience pain; (2) degenerative changes in Mr. Fong's spine likely predated the incident and would likely have manifested themselves in any event; (3) any soft tissue injuries ought to have healed with 12 to 16 weeks; and (4) Mr. Fong had developed psychological issues, and these did not fall within his area of expertise.

[397] Since it is apparent that Mr. Fong's ongoing issues are primarily psychological in nature, Dr. Bishop's opinion was not all that helpful in deciding the main issue in the case.

**C. Conclusion on Medical Issues**

[398] In addition to the soft tissue injuries described earlier, I am satisfied that Mr. Fong suffers from a major depressive disorder and chronic pain syndrome. He does not have post-traumatic stress disorder. On the latter point, I accept the opinion of Dr. Fitzpatrick over that of Dr. Leung. On the psychological disorders, the real issue is causation.

[399] I am not satisfied that the police takedown of March 2006 was the event that, in whole or in part, caused him to develop major depressive disorder and chronic pain syndrome.

[400] In *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 473, the Supreme Court of Canada said:

The so-called “crumbling skull” rule simply recognizes that the pre-existing condition was inherent in the plaintiff’s “original position”. The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage ...

[401] As noted by both Dr. Viljoen and Dr. Fitzpatrick, Mr. Fong had, and has, a number of personality traits that place him at a higher level of risk of reacting less resiliently and functionally to unusual stress or trauma (according to Dr. Viljoen) or that cause marked functional impairment and/or subjective distress in relationships, employment and day-to-day social functioning (as per Dr. Fitzpatrick). These problematic personality traits were pre-existing and were not caused by the police incident. Of course, tortfeasors must take plaintiffs as they find them, but here the plaintiff has not shown that the assault played any part in the psychological conditions that materialized much later.

[402] As I have noted in some detail, there were various negative, stressful events in Mr. Fong’s life that occurred after the police incident, any one of which was capable of causing Mr. Fong to react excessively and dysfunctionally. Notably, Mr. Fong continued to work at the hotel after the police incident, albeit at somewhat reduced hours for a time. It was only later, after other major setbacks, that his psychological problems came to the fore.

[403] I appreciate that there are some reports by Mr. Fong of psychological issues in the months after the police incident – stress, anxiety and feelings of being poked with needles, to name a few – but it seems equally likely, if not more likely, that these were attributable to Mr. Fong’s crack cocaine use. To take an example, Mr. Fong reported to Dr. Ting on July 6, 2006 that he was suffering from insomnia and he had the feeling that “someone was poking him with needles”. At the time, Dr. Ting concluded this was due to anxiety. It was only later that Dr. Ting learned

that Mr. Fong was using crack cocaine during this time. Accordingly, I cannot conclude that Mr. Fong had “anxiety” caused by the police assault. Another example is provided by Dr. Yang. In August 2006 Mr. Fong complained of sleep problems, he was anxious and depressed, and felt “everyone was against him”. However, this report was also made at a time when Mr. Fong was using crack cocaine, and likely during a time he was using it heavily. Accordingly, it is not possible to conclude that any reports of that sort, made in the few months after the police assault, stemmed from that assault or its effects.

[404] In brief, there is no reliable evidence on which I can conclude that his present psychological problems stem, in whole or in part, from the police incident. Instead, I consider that it is more likely that Mr. Fong’s psychological problems arose due to his accumulation of setbacks in his life, and in particular his several employment-related failures which, to adapt Dr. Viljoen’s comments, created an “existential problem” that “altered his perception of his work identity”. These problems would have occurred even if the police incident had not taken place.

[405] Accordingly, I conclude that Mr. Fong’s compensatory damages are limited to those physical injuries and reasonably-associated symptoms that he suffered by reason of the police assault.

## **X. Assessment of Damages**

### **A. Non-Pecuniary Damages**

[406] Probably the most accurate summary of Mr. Fong’s physical injuries comes from Dr. Ting, who first saw Mr. Fong, post-assault, on April 21, 2006. Mr. Fong complained of pain in his neck, both shoulders, both upper arms, both elbows, both wrists, right upper back and left upper chest. He had headaches, dizziness, pain in his scalp and insomnia due to pain. As I noted earlier, I am satisfied Mr. Fong suffered injuries to his shoulders, neck, arms and upper back, as well as injuries of a more superficial nature, including the scalp laceration and some contusions. He also suffered from headaches, though this had also been a problem for him prior to the assault. As noted earlier, I am also satisfied Mr. Fong probably had some



degree of anxiety and stress as a result of the assault, although it is very hard to assess this accurately in light of his crack cocaine use.

[407] Mr. Fong reported back pain to Dr. Yang in October 2006 and November 2007 but, oddly, he did not report any low back pain to Dr. Leung until June 2009, over three years post-assault. Dr. Yang said he continued to see Mr. Fong for left shoulder and back pain through 2008, when the visits stopped.

[408] Mr. Yan, the physiotherapist, treated Mr. Fong in three different time periods, the first starting in December 2007, the next in April 2009, and the last in October 2015. For the first two treatment periods the focus of treatment was on Mr. Fong's left shoulder, although he treated his lower back as well.

[409] Based on the evidence of Dr. Yang and Mr. Yan, in particular, I am satisfied that Mr. Fong suffered a back injury in the assault that gave him at least some problems up to and including 2009. I conclude that later back complaints are unrelated to the assault.

[410] Mr. Fong's most persistent physical problem has been his left shoulder. He reported ongoing left shoulder problems to Dr. Leung in 2006, 2007 and 2008. It had improved greatly by 2008. In April 2008, Mr. Fong reported that his left shoulder was 80% better. By July 2008, Dr. Leung was able to get "almost full abduction" without significant tenderness, compared to the five degrees of restricted range of motion, with pain, early in that same year. Nonetheless, Mr. Fong was treated by Mr. Yan for left shoulder problems in April 2009, and so I am satisfied that his left shoulder complaints continued to that point.

[411] I am satisfied that by April 2009 Mr. Fong's left shoulder had resolved substantially, or would have resolved substantially but for his psychological issues, although I also accept that his left shoulder would likely have troubled him from time to time on an indefinite basis.

[412] The defendant has raised the issue of mitigation of damages, arguing that Mr. Fong did not follow the advice of his medical practitioners. Specific reference was made to the recommendations of Dr. Viljoen, who in his 2015 report recommended cognitive behavioural therapy and a structured and monitored active rehabilitation program. These recommendations, however, addressed the whole of Mr. Fong's problems as they existed in 2015, not just the injuries and related issues that I have found were caused by the police assault. The cognitive behavioural therapy, for example, is irrelevant in light of my findings. Other evidence on this point was very thin, and the defendant did not point to any other rehabilitation recommendations made or any evidence that Mr. Fong failed to abide by those recommendations. Finally, the defendant did not lead any evidence to the effect that any recommendations made (and not followed) would have brought about a different result. In short, the defendant has failed to discharge its burden of proof on mitigation.

[413] Counsel cited cases on non-pecuniary damages that reflected their respective views of the case, and so these cases represented either total disability (as advanced by the plaintiff) or minor aches and pains of very short duration (as argued by the defendant). Both missed the mark by a substantial margin and so their authorities on non-pecuniary damages were not helpful.

[414] Having considered the various factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, I assess non-pecuniary damages at \$35,000.

**B. Past Income Loss/Loss of Capacity**

[415] The evidence is that Mr. Fong reduced his hours at the Oasis Hotel somewhat after the assault. I conclude that there is a loss associated with this. I will deal with this below. For the remainder of the pre-trial period, the issue is one of loss of capacity to earn income.

[416] Dr. Ting testified that he never told Mr. Fong to stop work. Instead, his opinion was that Mr. Fong could work, but he should not do manual labour.

Dr. Leung said essentially the same thing, adding that he thought work would be good for Mr. Fong.

[417] Mr. Fong was terminated from his employment on October 26, 2006. The termination of his employment had nothing to do with the assault. There is little evidence of efforts on Mr. Fong's part to secure other work. He secured a job as a night clerk at a Chilliwack hotel in the spring of 2007, which lasted a few months. He did not follow up with an employment lead at a Port Hardy hotel because it involved some physical work.

[418] Aside from those matters, there is a considerable gap in the evidence on this item of damages. There is no other evidence of efforts to obtain work, nor is there any evidence of what Mr. Fong was doing in subsequent years; all we know is that he had income of \$20,000 in 2007 and \$18,000 in 2008. After that, his income fell to \$10,000 or \$11,000, a level that likely reflects income from WorkSafeBC benefits.

[419] I accept that Mr. Fong was, by reason of the injuries I have found he suffered in the assault, somewhat less capable as an employee up to 2009, and indeed beyond that year but to a lesser extent, due to occasional problems and minor limitations associated with his left shoulder. Accordingly, I conclude it is appropriate to make an award for past loss of earning capacity: see *Falati v. Smith*, 2010 BCSC 465.

[420] In assessing damages for that loss, I bear in mind that Mr. Fong's pre-assault earnings (from 2001 to 2005) were very modest, and in two of those years (2002 and 2005) he reported no income at all. In two other years (2001 and 2003) he reported \$15,000 in earnings. His high-water mark for reported earnings, pre-assault, occurred in 2004, when he had earnings of \$37,000. I should add that I do not believe Mr. Fong's evidence that he earned \$40,000 per year while working at the Byrd pub. He explained that this was not shown in his income tax returns because he had not "declared his wages". Given the problems with Mr. Fong's

credibility I cannot accept his testimony on that subject without other, confirmatory evidence, which is absent here.

[421] I also do not accept the plaintiff's claim that he was been deprived of the opportunity to continue a rewarding career in hotel management. Mr. Fong had no formal education or training in hotel management, and he secured the Oasis Hotel job only because it was acquired by people with close connections to him. He had no computer skills. His son said that his father "had never used computers before". The many health and safety violations that prompted the order to close the Oasis Hotel demonstrate incompetence on his part.

[422] The evidence that I accept shows that Mr. Fong's income in the five years prior to the assault averaged \$13,400 per year and that in some years he had zero income. For the period of time after the initial period after the assault, where Mr. Fong reduced his hours, he would have been rendered *somewhat* less capable as an employee and have somewhat fewer employment options available. Bearing in mind the low level of his re-assault average earnings, I hazard the view that this might equate to a loss of perhaps 10% of his pre-assault earnings. This equates to \$15,000 over the 11-year period to the date of trial. Accordingly, I assess damages for past loss of earning capacity at \$15,000.

[423] I return to the assessment of the income loss associated with Mr. Fong's post-assault reduced hours. He testified that, pre-assault, he worked 14 hours a day, seven days a week, and he was paid \$14 per hour. A few weeks after the assault, he reduced his hours to eight hours per day, although his hourly pay rate increased to \$16 per hour, and by this point he was using crack cocaine. He reduced his hours still further in July 2006, from eight hours per day to four hours per day, although this coincided with the approximate time Mr. Fong was using crack cocaine heavily.

[424] The added complexity of Mr. Fong's cocaine use, and its likely effect on his capacity to work, means that an arithmetic calculation of income loss is not possible.

[425] I conclude that the sum of \$5,000 represents a proper assessment of Mr. Fong's income loss from the time of the assault to the time of his suspension from work in September 2006. This is based on the arithmetic loss calculated in two periods, the first being April to June 2006 (where Mr. Fong was working eight hours per day), and the second being July to mid-September 2006 (where he was working four hours a day), and attributing half of his reduced hours in the first time period to cocaine use, and in the second period attributing three-quarters of his reduced hours to cocaine use.

**C. Loss of Future Income-Earning Capacity**

[426] Mr. Fong testified that, but for the assault, he would have worked full-time to age 70, and then part-time to age 75. As with other assertions by Mr. Fong, it is hard to put much weight on this statement. To his credit, the evidence shows that he worked hard, with long hours, when he worked at the Byrd pub and the Oasis Hotel, although there is a noticeable absence of any other evidence for the many years outside those times. Just how effectual or competent his work was at the hotels is another matter, and this might well have limited him more than any issues related to his health, stamina or interest in continuing to work, although the medical evidence also indicates Mr. Fong was not the healthiest of individuals prior to the assault.

[427] Again doing the best I can in the circumstances, I conclude it is most likely Mr. Fong would have worked full-time to age 68, and then part-time until age 70. The time frame is therefore five more years of full-time work (as Mr. Fong turned 63 in February 2018) and two years of part-time work after that.

[428] For the future period, as it is with some of the pre-trial period, the issue is Mr. Fong's somewhat reduced income-earning capacity associated with occasional problems with his left shoulder. The most likely scenario would be Mr. Fong's avoidance of jobs that might aggravate his shoulder.

[429] Adopting the same approach that I used for loss of past earning capacity, I assess damages for loss of future income-earning capacity at \$8,000.

**D. Cost of Future Care**

[430] All of the amounts claimed by Mr. Fong relate to his psychological issues. Mr. Fong failed to establish that his ongoing psychological issues were caused, in whole or in part, to the police assault. Accordingly, I make no award under the head of damages.

**E. Special Damages**

[431] As for special damages, I allow the amounts claimed for eyeglasses and the physiotherapy expenses incurred in 2007, 2008 and 2009 (but not 2015). The mileage claim is enormous, and relates mostly to treatments for matters I have concluded were not caused by the assault. I allow mileage at \$250. The claim for “lawn care” costs incurred in 2017 is rejected.

[432] All other amounts claimed are WorkSafeBC payments. Given my findings in this case, these amounts do not appear to be recoverable, except for the eyeglasses expense, which I assume is related to the eyeglasses that were damaged in the assault, some of which was paid by WorkSafeBC and some of which was paid by Mr. Fong.

[433] If my impression is incorrect, or if there are any other issues relating to these WorkSafeBC expenses, the parties may re-attend to speak to those.

**F. Punitive and Aggravated Damages**

[434] In *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 at 299 (C.A.), the court observed that aggravated damages are awarded “for aggravation of the injury by the defendant’s high-handed conduct”. Punitive damages, on the other hand, are awarded to punish a defendant. As the Supreme Court of Canada said in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1208:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[435] I am not satisfied that the plaintiff has established grounds for any awards of aggravated or punitive damages. I have rejected Mr. Fong's claims of racial insult, use of a police baton and use of excessive force, and I have concluded Cst. Ward subjectively believed he had grounds to arrest Mr. Fong. I do not consider that the police acted in a malicious, oppressive or high-handed manner; it was merely mistaken. Furthermore, I have concluded that Mr. Fong told Cst. Ward to "fuck off" and he then scurried away, which I conclude was provocative behaviour that, in these circumstances, diminishes the need or basis for either aggravated or punitive damages: *Landry v. Patterson* (1978), 93 D.L.R. (3d) 345 (Ont. C.A.).

**G. Charter Damages**

[436] I am satisfied that the police actions breached Mr. Fong's ss. 8 and 9 *Charter* rights. The wrongful arrest and detention was a breach of Mr. Fong's s. 9 *Charter* right not to be arbitrarily detained or imprisoned, and the brief search carried out incidental to arrest breached his s. 8 *Charter* right to be secure against unreasonable search or seizure.

[437] In *Vancouver (City) v. Ward*, 2010 SCC 27 [*Ward*], the Supreme Court of Canada provided the following framework for analyzing damages claims for *Charter* breaches:

[4] I conclude that damages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication

of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[438] I have dealt with step one already. As to the second step, I conclude that damages are an appropriate remedy, not for compensation (because compensatory damages are being awarded), but as vindication of Mr. Fong's rights. The defendants did not demonstrate any countervailing factors. This leaves just the assessment of the quantum of damages.

[439] On this issue the Court in *Ward* said:

[52] A principal guide to the determination of quantum is the seriousness of the breach, having regard to the objects of s. 24(1) damages. The seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct: see, in the context of s. 24(2), *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. Generally speaking, the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be.

[440] In *Ward*, the Supreme Court of Canada affirmed an award of \$5,000 for *Charter* damages for an unlawful strip search. This award provides some basis for comparison.

[441] In assessing *Charter* damages I take into account: (1) Cst. Ward's honest, but mistaken, belief about grounds for arrest; (2) Mr. Fong's own role in the events, which provides important context for the assessment of the seriousness of the state conduct; (3) the search of Mr. Fong's person resulted in the retrieval of just his wallet, which was returned to him once his identity had been established; (4) Mr. Fong was detained for a relatively brief period of time, and he was released at the scene; and (5) Mr. Fong is receiving compensatory damages for the assault.

[442] Having regard to all those considerations, I assess *Charter* damages in the amount of \$2,000.



**XI. Summary**

[443] I award damages to Mr. Fong as follows:

Non-pecuniary Damages:	\$35,000
Past Loss of Income:	\$5,000
Past Loss of Capacity:	\$15,000
Future Loss of Capacity:	\$8,000
Charter Damages:	\$2,000
Total:	\$65,000

[444] In addition, the plaintiff shall recover special damages as described earlier.

[445] The plaintiff will have his costs on the ordinary scale unless there are matters which the parties wish to draw to my attention.

“Blok J.”