# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *D.W.P. v. Owner,*
2025 BCSC 612

Date: 20250402
Docket: M208745
Registry: Vancouver

Between:

**D.W.P.**

Plaintiff

And

**Owner and Driver**

Defendants

Restriction on publication: While this case and these reasons may be reported on and published, the presiding judge has issued a limited publication order: restricting the publication, broadcasting, or transmission in any way of the identity of the parties referred to as “D.W.P.”, “Owner” and “Driver”. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Mr Justice Crerar

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | R.J.M. Yalowsky |
| Counsel for the Defendants: | M.D. Mirosolin<br>J.C. Walker |
| Place and Dates of Trial: | Vancouver<br>February 10-14, 18-21, 24-27, 2025 |
| Place and Date of Judgment: | Vancouver<br>April 2, 2025 |

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## I. INTRODUCTION

[1] Around 7:30 pm on September 26, 2018, the plaintiff and his friend were returning to Vancouver over the Lions Gate Bridge after an enjoyable motorcycle ride on the North Shore: the friend was leading, with the plaintiff following. Suddenly, the blue Audi driven by the defendant "Driver" and owned by his then-girlfriend, the defendant "Owner", accelerated and struck the back of the plaintiff's motorcycle at roughly 60 km an hour.[1] The plaintiff was thrown from his motorcycle; he hit the pavement and skidded and tumbled; a metal lock attached to his belt threw sparks.

[2] The plaintiff was taken to St Paul's Hospital, and released five hours later. He was treated for a sprained left wrist and right ankle. Although he claims that his entire body ached after the collision, most of his injuries have since resolved. The one exception is his left shoulder, the torn rotator cuff of which was undiagnosed until many months later: its pain and limitations persist to this date, despite two operations. The ongoing pain and residual psychological distress deprives him of sleep, which in turn inflicts diminished focus, confidence, and drive, which in turn have significantly reduced his income as a leading local voice actor, in animated productions, commercials, and video games. He claims $1,397,313 in damages.

[3] Both sides and the Court accept that Driver was suffering from a psychotic episode at the time of the collision. The defendants argue that they should not bear liability, either in negligence or battery, for the collision, occasioned wholly by the unforeseeable and involuntary onset of the all-consuming paranoid delusion.

[4] The parties relied on the following expert reports:

| **Expertise** | **Plaintiff's expert and dates** | **Defendants' expert and dates** |
|---|---|---|
| Psychologist | Dr Spencer Wade (February 2, 2024, and October 29, 2024) | |
| Orthopedic surgeon | Dr Danny Goel (February 6, 2024, and November 7, 2024) | |
| Psychiatrist | | Dr Eugene Okorie (January 29, 2024, and November 1, 2024) |

| | | |
|---|---|---|
| Economist | Nicholas Coleman (February 5, 2024, April 11, 2024, and November 19, 2024) | Mark Gosling (March 1, 2024, November 13, 2024, and December 18, 2024) |

## II. LIABILITY

### A. Facts

[5] Driver had no history of any mental illness, or previous paranoid delusions: his episode was wholly unexpected and unprecedented. After the collision, he complied with a prescribed treatment of medication and psychiatric consultations, along with counselling designed to assuage his feelings of guilt and shame for the injuries inflicted in the collision. In the six and a half years since the collision, he has suffered no mental health issues -- delusional or paranoiac or otherwise -- apart from lingering feelings of guilt.

[6] At the time of the collision, Driver was working long hours in a stressful environment. He worked with heavy machinery in a pipeline construction project. Although he shared a residence with Owner in an interior city, and made regular visits home, he was renting a room in Port Coquitlam for his work. It was his first job away from home, and he was missing his girlfriend and family.

[7] The sequence of events starts three days before the collision (Driver first said “two or three days,” but the preponderance of his testimony indicates three days). His memory of those three days, and of the collision itself, is intermittent and foggy.

[8] The evidence did not establish any specific trigger for the incident. Driver reported to Dr Okorie stressors in the form of long hours on a dangerous job, witnessing a co-worker’s workplace injury, hearing of a neighbour’s death, and some tensions with his girlfriend. He also told Dr Okorie that in the days leading up to the incident, he had run out of cannabis, which he had used regularly to facilitate sleep: Dr Okorie opined that its absence must have contributed to Driver’s sleep deprivation.[2]

[9] On the morning of September 23, Driver went to work. He had a brief meeting with his foreman, who apologised to him for reasons that Driver does not recall.

Suddenly and inexplicably, Driver felt emotional to such a degree that he abruptly left work, only 15 minutes after arriving. He telephoned his direct supervisor, saying that he needed a few days off, as he felt “stressed out.” Driver drove back home. Later that day, he found himself in the parking lot of the Port Coquitlam IKEA, asking random shoppers whether they needed help: he was beset with the sense that he needed to help them. After about five minutes, Driver returned home again.

[10] Driver’s memory of the next three days is particularly vague: he estimated that he could only account for about two or three hours. He believed that he did not sleep, eat, or drink water during that entire period. He testified that he experienced constant paranoid fears that he was being watched by demonic entities. Throughout this period, he heard voices in his head, although he could not recall what those voices said. He confirmed that he had never before experienced such fears or worries.

[11] His testimony of constant paralysis and terror is undercut somewhat by the evidence of Owner, his ex-girlfriend. She testified that on the morning of the collision, they had their first of two telephone conversations. In contrast to the later telephone conversation, Driver sounded “normal”. She detected nothing unusual in his voice or words.

[12] Notwithstanding that earlier moment of apparent calm, Driver testified that in the hours before the collision, he felt “frightened for his life.” He got in the Audi. He started driving towards Stanley Park: he stated that he believed that if he could “touch the waters” around Stanley Park, he could make the demons go away.

[13] At some point, he parked the Audi on a side road. He called his girlfriend and “asked for help.” She confirmed that in this second call, Driver was “not making any sense”. Driver spoke of “bad guys” and “demons” watching and pursuing him. He reported hearing voices in his head. He told her that “I need to find the water” to be safe from the “demons”. She noted that he also sounded as if he was talking to someone else, until she realised that he was alone, and that “he was talking to the voices in his head.” She confirms that at no time in their relationship had she ever

witnessed any unusual or psychotic behaviour by Driver, and that the phone call was completely out of character.

[14] His girlfriend told him not to drive, and to stay in place. She called 911 to report her concerns. She also called Driver's brother, who also spoke with Driver, also telling him to stay in place and not to drive.

[15] Driver continued to be scared for his life, and felt that the demons were closing in on him. Notwithstanding the directions of his brother and girlfriend to stay in place, he recommenced his mission to touch the Stanley Park waters, and drove onto Highway 1. He remembers little of that journey, except for a swerving truck, as well as various streetlights and suspicious cars, all of which he believed were amongst the dark demonic entities chasing him. At some point, he stopped at a hotel: he asked the valets for help but they said that they could not. He continued westwards, taking the Capilano Road exit, towards the Lions Gate Bridge.

[16] On the bridge, he saw ahead the plaintiff and his friend, on their motorcycles. He believed that the two were also demonic entities: members of the dark cabal that was pursuing him. He testified that he had no concept that the riders were human beings rather than demons. He rammed the motorcycles in order "to save my own life." Just before he struck the plaintiff's motorcycle he ripped a gold crucifix off from around his neck.

[17] Driver then sped forward and struck the friend's motorcycle, pinning it and the Audi to the concrete bridge divider. Driver jumped out of the Audi, then back into the Audi, and then out again. He ran towards Stanley Park. He met a jogger on the Causeway, whom he asked for help. The jogger led him back to the collision scene. Paramedics had already arrived, and police soon followed. Driver moved towards the bridge railing, and looked down: he reported seeing "big stacks of flames under the bridge." Fearing a suicide attempt, an officer intervened, and placed Driver in the back of a police car. Driver repeatedly smashed his shoulder and head against the interior police door and window. To protect Driver and emergency workers, a paramedic administered midazolam, which sedated him within 10 minutes.

[18] Driver was then taken to Lions Gate Hospital, where he was certified by two successive physicians under the *Mental Health Act*, RSBC 1996, c 288. After two weeks of involuntary treatment, he was released from hospital. No charges were laid connected to the collision.

### B. Dr Okorie's reports

[19] The defendants tendered two expert reports authored by Dr Eugene Okorie, a psychiatrist, who remotely and briefly interviewed Driver on two occasions roughly six years after the collision: in January and November 2024. The plaintiff objected to the reports. My edited reasons for allowing those reports, attached as **Appendix A** to these reasons, presaged that I would place limited weight on the reports, as I have.

[20] Dr Okorie diagnosed Driver as suffering at the time of the collision, from a brief psychotic disorder, with marked stressors: specifically delusional beliefs that were not based in reality. Its manifestations included hallucinations, seeing and hearing demons, presentation of disorganised and nonsensical speech and behaviour, questing to Stanley Park to "touch the water", and driving his vehicle into the motorcycles driven by the plaintiff and his friend.

[21] Dr Okorie opined that Driver's irrational beliefs and actions were prompted by his condition, rather than conscious decisions. As such, "his behaviour was disorganised and not reality-based, such that his acts and omissions were not conscious and/or wilful acts under his control." From the onset of his psychosis, in the days before the collision, up to the point when he started receiving treatment at the hospital, he lacked control over his actions. He accordingly lacked capacity to understand or appreciate his duty to take care in his interactions with other individuals. Indeed, within his subjectively and internally rational perception, he was helping people by running "evil people" off the road.

[22] The hallmark of the diagnosis is the lack of insight, such that the patient's psychotic experiences seem realistic and reasonable to them. As Driver believed that he was acting rationally when he was acting in wholly irrationally, he would not

have realised that he was mentally ill or foreseen that he would experience a psychological break. Accordingly, Dr Okorie's view is that Driver could not have taken reasonable steps to help himself in advance of the episode, or at the early onset of the condition.



### C. Law: mental illness as a defence

[23] The effect of mental illness and mental illness episodes on tortious liability varies considerably amongst common law jurisdictions, throughout the Commonwealth, and even between Canadian provinces. To illustrate this diversity, I attach, as **Appendix B** to these reasons, the comprehensive Commonwealth jurisprudential review conducted by Lady Justice Rafferty in *Dunnage v. Randall*, [2015] EWCA Civ 673. As a further reflection of this diversity, different academic texts note and advocate for different approaches to the tort liability of persons with mental illness.[3]

[24] As stated in L.N. Klar et al., *Remedies in Tort* (Toronto: Thomson Reuters, 1987) (loose-leaf updated 2025, release 3) [Klar, *Remedies*], § 32:45–47:

> ***The few decisions dealing with whether, and under what circumstances, a mentally handicapped person is liable for his torts, are not unanimous.*** The reason for this may be in the longstanding wider problem whether the philosophical basis of liability in tort should be culpability or compensation. It would appear that at present different tests are applied, ***depending on whether the tort in question requires some particular intent or is framed in negligence.***
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> It is clear, however, that the defendant's mental disability is a question of fact, and that ***the onus of establishing the defence of insanity rests with the defendant.***
>
> While earlier cases have held that mental disability is no defence to a tort action, more recent decisions do not impose strict tort liability upon a mentally handicapped person ***if his mental disability was so extreme as to prevent the formation of the requisite intent.***
>
> ***The present position would appear to be that the rules for establishing the defence of criminal insanity do not apply to a civil tort; and that a mentally handicapped defendant will be held liable for an intentional tort if he was capable of forming, and did form, the intent to commit the tort, and if he knew the nature and quality of his act. This is true even where the defendant did not know and was not capable of knowing that his act was wrong. The onus is on the defendant to prove he is incapable of forming the requisite intent.***

> A mentally handicapped person is ***not liable in negligence if his mental disability is so extreme as to preclude any genuine intention to do the act complained of, because in that case there is no voluntary act at all***. The question is whether, at the time of the alleged negligence, the defendant understood and appreciated the duty upon him to take care, and whether, as a result of his mental incapacity, he was disabled from discharging that duty. Where a person is afflicted suddenly and without warning with a mental ***illness and can prove on a balance of probabilities that he had no capacity to understand or appreciate the duty of care or was unable to discharge the duty of care because he had no meaningful control over his actions at the time, the person will not be held liable in tort.***
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> [emphasis added]

[25] The Honourable A.M. Linden et al., *Canadian Tort Law*, 12th ed (Toronto: LexisNexis Canada, 2022), at § 5.04[2] also notes that the differing approaches reflect the philosophical debate about whether compensation or culpability drives tort liability:

> ***There are good reasons for rejecting the defence of mental illness under negligence law altogether, and some jurisdictions have done so***. Lord Justice Denning argued in *White v. White* that the civil courts should not excuse a mentally ill person, because they are "concerned not to punish him, but to give redress to the person he has injured". Two early Ontario decisions refused to accept the mental illness defence, and advanced three policy reasons to support this conclusion. First, "when one of two innocent persons must bear a loss, he must bear it whose act caused it". Second, if liability is imposed, "the relatives of the lunatic may be under inducement to restrain him". Third, the civil court, by refusing to apply the defence of mental illness, might avoid the vexing definitional problems it has injected into the criminal law and perhaps thereby curtail the simulation or pretense of mental illness by tortfeasors. Appealing as these arguments may be, most Canadian courts eventually reversed themselves and granted an exemption from tort liability to the truly mentally ill.
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> …
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> ***If mental illness suddenly renders defendants totally unaware of what they are doing, so that they are moving like sleepwalkers, automatons or someone who has suffered a stroke or seizure, they will be exempted from liability on the ground that there has been no "act" done by the defendant***. Mr. Justice Middleton observed in *Slattery v. Haley* that "to create liability for an act which is not wilful and intentional but merely negligent it must be shown to have been the conscious act of the defendant's volition. He must have done that which he ought not to have done or omitted that which he ought to have done, as a conscious being". This is a convenient way of avoiding the issue, ***but mental illness is rarely of such a nature that it makes a person's mind a total blank.***
>
> ***The puzzle of the liability of the mentally ill in negligence law has not yet been satisfactorily resolved***. ***Perhaps the best solution would be to***

> ***treat the mentally ill in the same way as everyone else. Although this might be somewhat hard on them, it is harder still on their victims to excuse them. At least in the automobile cases and other adult activities, they should not be allowed to escape liability, just as young people engaged in adult activities are held accountable.*** Moreover, since the highway traffic legislation denies the mentally disabled the privilege of having a licence, they might be precluded from using their own evasion of the law to get a licence as a defence on a theory akin to estoppel.
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> [emphasis added]

[26] As stated in C. Sappideen and P. Vines, eds, *Fleming's Law of Torts*, 10th ed (Pyrmont, NSW: Thomson Reuters, 2011) [*Fleming*] at p. 132:

> ***The position of the mentally ill remains controversial, but the weight of authority regards it as unfairly prejudicial to accident victims if any allowance were made for a defendant's mental abnormality.*** Although this conclusion may seem incompatible with any lingering practice to excuse loss of consciousness by "normal" defendants, it is recognition of the fact that considerations of moral fault are out of place in many contexts such as traffic accidents where personal liability has been displaced by insurance. Yet it is a burden which can fall harshly on those who would not be insured.

[27] The English text, *Clerk and Lindsell on Torts*, 24th ed, 2023 [*Clerk and Lindsell*] at pp. 302–3, reflects the predominant English approach: unless the mental illness (or, for that matter, physical incapacity) fully deprives the defendant of volition, as in automatism, it will not serve as a defence in tort:

> **Liability of persons of unsound mind** ***There is very little authority on the liability in tort of persons of unsound mind.*** It is suggested that they are liable to the same extent as persons of sound mind, provided that the torts are committed by them while in that condition of mind which is essential to liability for all defendants. In its absence, it would appear that there is no voluntary act at all. In cases where liability depends on some specific state of mind insanity may be strong evidence to show that the necessary element is lacking, and may therefore constitute a good defence. ***To actions for trespass, conversion, defamation and others in which the only intent necessary to establish liability is the intent to do the physical act complained of, insanity will presumably be no defence, unless it is of such an extreme character as to deprive its victim of all power of deliberate choice***. In *Morriss v Marsden*, the claimant was held entitled to damages for a violent assault and battery on the ground that the defendant's act was voluntary, and that he knew the nature and quality of his act though

> not that it was wrong. The rules in *McNaghten's* case do not necessarily provide the correct test for determining responsibility in tort.
>
> [emphasis added]

[28] The position set out in *Fleming* and *Clerk and Lindsell* is reflected in the most considered recent English appellate authority on the subject (an authority 14 years more recent than the most recent Canadian appellate authority on the subject): *Dunnage*, a claim framed in negligence. There, the claimant's uncle Vince, after several weeks' manifestation of an undiagnosed florid paranoid schizophrenia, accused the claimant of plotting against himself and his family. Vince doused himself with petrol. He then ignited it, killing himself and badly burning the claimant. The trial judge found that "[b]y reason of the extreme nature of the manifestation of his mental illness, Vince was not acting voluntarily and accordingly is not within the scope of the duty neither is he in breach of that duty. Furthermore, voluntary or voluntarily informed acts were not the cause of the events that led to the damage": para. 21 [as in original].

[29] The unanimous Court allowed the appeal. The three Justices confirmed that an objective standard of care should apply: absent full impairment of responsibility and conscious agency—that is, something akin to automatism—mental illness will not serve as a defence in tort. As stated by Lady Justice Rafferty:

> 106 I begin with "acts". Did Vince do an act, when he doused himself in petrol? Of course he did. ***He used his hands and at least one arm to raise direct and upend the opened can. He elected to take it from the table, to move it through an arc and to position it so that liquid would come from its neck. Those were choices he made.*** This was always a difficulty facing Mr Davie in his answer to his own chosen question. When Vince came in from the car he must have had mental capacity. He knew he had the petrol in its can. He made at that stage at least one decision, that is not to use it immediately. ***That evidence suggests that he had at that stage control which later he lost.***
>
> ….
>
> 114 A further area which concerns me is that the experts allowed a small margin at the end of "complete elimination". ***Once there is introduced any qualification of 100% impairment, as there is for example by use of the adverb "probably", difficulties flow. Where is any line to be drawn?*** At 99% impairment? At 95% or 90%? What is the lowest percentage to which the court could descend before its findings were affected? ***Unless a***

> ***defendant can establish that his condition entirely eliminates responsibility — I avoid use of "fault" so as to emphasise my point – he remains vulnerable to liability if he does not meet the objective standard of care***. It is the entirety of the elimination which drives this conclusion, and once that entirety is eroded or diminished, he is fixed with the standard. The evidence was that Vince's responsibility came very close to complete elimination, but the experts stopped short of finding that it was complete.
>
> 115 ***Vince was protected from liability if he did nothing. If, akin to the man holding a knife whose arm was gripped by another and directed, Vince had no part to play in his physical acts, he would escape liability***, as contemplated in *Corr*. Likewise, ***had he been in a state of automatism or were he a sleepwalker.***
>
> [emphasis added]



[30] In the recent decision of *Lewis-Ranwell v. G4S Health Services (UK) Ltd & Ors*, [2024] EWCA Civ 138, Lord Justice Underhill (Vice-President of the Court of Appeal (Civil Division)) briefly reviewed and confirmed *Dunnage*, noting that "[a]ll that was necessary was that the defendant's mind, however diseased or deluded, should direct their hand: in practice that means that the defendant will only escape liability in cases of automatism…": para. 27.

[31] Canadian courts have more readily departed from the traditional objective standard of care, in relieving from liability defendants whose tortious acts were impelled by sudden and significant mental illness that negates volition, foreseeability, or appreciation of the duty of care, or standard of care, or a combination of those deficiencies.

[32] The two leading Ontario appellate decisions indicate that defendants will not be liable where the sudden onset of mental illness renders them incapable of appreciating and performing their duty of care.

[33] In *Buckley and The Toronto Transportation Commission v. Smith Transport Limited*, [1946] OR 798, 1946 CanLII 77 (CA), a semi-trailer driver was suddenly struck with the delusion that he could not control or stop his vehicle, as it was under remote electrical control. The trailer struck a street car at high speed, injuring the operator. The driver died the month after the accident from late-stage syphilis that inflamed his brain and rendered him paralyzed. Roach JA relieved the defendant

driver of liability, as "at the time of the collision, [his] mind was so ravaged by disease that it should be held, as a matter of reasonable inference, that he did not understand the duty which rested upon him to take care, and further that if it could be said that he did understand and appreciate that duty, the particular delusion prevented him from discharging it": p. 807. The Court applied the earlier *obiter dicta* of Middleton J, endorsed by the Court of Appeal, in *Slattery v. Haley*, [1923] 3 DLR 156, 1922 CanLII 562 (ONCA) at p. 160:

> I think that it may now be regarded as settled law that to create liability for an act which is not wilful and intentional but merely negligent it must be shewn to have been the conscious act of the defendant's volition. He must have done that which he ought not to have done, or omitted that which he ought to have done, as a conscious being.
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> …
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> When a tort is committed by a lunatic, he is unquestionably liable in many circumstances, but under other circumstances the lunacy may shew that the essential *mens rea* is absent; but, when "the lunacy of the defendant is of so extreme a type as to preclude any intention to do the act complained of, there is no voluntary act at all, and therefore no liability:' Salmon, 5th ed., pp. 74 and 75.

[34] In *Lawson v. Wellesley Hospital* (1975), 61 DLR (3d) 445, 1975 CanLII 41 (ONCA), aff'd [1978] 1 SCR 893[4] [*Wellesley Hospital*], Dubin JA (as he then was), for the majority, endorsed *Buckley* on the appeal of a summary dismissal of a claim brought against the hospital after a psychiatric patient, confined for past random attacks, suddenly struck another patient. The plaintiff advanced a negligence claim against the hospital. In *obiter dicta*, the Court confirmed that the psychiatric patient would not be liable in battery, as "…it is now well established that if a mentally ill person is by reason of his illness incapable of the intent to assault a person, he is not liable in an action founded upon that assault"[5]: p. 450. At p. 451–2, Dubin JA cited *Morriss v. Marsden*, [1952] 1 All ER 925 (ABQB) at pp. 927–8:

> On the whole, I accept the view that ***an intention — i.e., a voluntary act, the mind prompting and directing the act which is relied on, as in this case, as the tortious act — must be averred and proved***. For example, I think that, ***if a person in a condition of complete automatism inflicted grievous injury, that would not be actionable. …***
>
> …

> ***The next matter to consider is whether, granted that the defendant knew the nature and quality of his act, it is a defence in this action that, owing to mental infirmity, he was incapable of knowing that his act was wrong.*** If the basis of liability be that it depends, not on the injury to the victim, but on the culpability of the wrongdoer, there is considerable force in the argument that it is, but I have come to the conclusion that ***knowledge of wrongdoing is an immaterial averment, and that, where there is the capacity to know the nature and quality of the act, that is sufficient although the mind directing the hand that did the wrong was diseased***.
>
> [emphasis added]

[35] While English authorities, such as *Dunnage*, above, cite this same *Morriss* passage to emphasise the high bar to relieve a defendant of liability due to mental illness, Dubin JA emphasised the phrase "voluntary act." At p. 452, Dubin JA confirmed that there will be no tort liability where the defendant discharges his evidentiary onus of establishing that mental illness rendered him incapable of appreciating the nature or quality of his acts, and thus lacking intention:

> I accept the principle that it is an ***essential element in the tort of assault that there be a voluntary act, the mind prompting and directing the act which is complained of.*** The authorities on that issue are fully canvassed in the judgment of McGregor, J., in *Beals v. Hayward*, [1960] N.Z.L.R. 131. However, in view of the observations in *Cook v. Lewis*, 1951 CanLII 26 (SCC), [1952] 1 D.L.R. 1, [1951] S.C.R. 830, ***the onus of showing that the act was involuntary appears to be on the person who makes that assertion.***
>
> In the instant case, if the plaintiff establishes the averments in the statement of claim, i.e., that the patient Rupert ***suffered from such a profound mental disorder that he was incapable of appreciating the nature or quality of his act, no action would lie against him at the suit of the plaintiff. It is sometimes said that mental illness excuses one from liability for the tort committed by him***. See 87 Hals., 3rd ed., p. 134, para. 236:
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> > Persons suffering from mental disorder are not liable for their tortious acts where, by reason of their mental infirmity, ***they are unable to understand the nature and consequences of their acts or, where intention is an element of the tort, they are unable to form the necessary intention.***
>
> However, with respect, I think it more accurate to state that ***where a person, by reason of mental illness, is incapable of appreciating the nature or quality of his acts, such person has committed no tort since the intention, which is an essential element of the cause of action, is missing***. ….
>
> [emphasis added]

[36] While *Buckley* and *Wellesley Hospital* govern Ontario law, they have been gently questioned by the Ontario trial courts.

[37] In the facts leading to *Hutchings v. Nevin* (1992), 9 OR (3d) 776 (GenDiv), 1992 CanLII 7564 (ONSC), the defendant crashed his car, seriously injuring the plaintiff passenger. The defendant "had seen the light" and was driving to see God, whom he believed to be his father. For the month before the accident, he exhibited bizarre behaviour. Haines J noted that he was obliged to apply *Buckley,* and held that the defendant's mental disorder rendered him unable either to understand and appreciate his duty of care, or to discharge that duty: p. 781. In reaching that conclusion, the Court asked at pp. 786–7 whether the approach "should be re-examined in light of legislative and social developments that have occurred since *Buckley* was decided in 1946", to avoid depriving victims of compensation:

> In tort the ultimate purpose is to address the consequences and provide compensation for the injury. Incidental to this is the imposition of financial responsibility for the misconduct. It appears that the weight of authority in Ontario supports the traditional philosophy that protects the mentally disabled at the expense of their victims. Other jurisdictions have taken a contrary approach and refused to accept mental incapacity as a defence, holding that it would be unfairly prejudicial to accident victims…

[38] *Moushi v. Stephen*, 2019 ONSC 3125 noted the *Hutchings* concern with *Buckley*, but similarly noted its binding precedent, such as to relieve from liability the defendant who stole his mother's car and crashed head-on into the plaintiff's vehicle. The plaintiff had just been released from an overnight involuntary psychiatric evaluation, and was scheduled to start a three-day cannabis and alcohol detoxification programme that day. As in the present case, the defendant thought that he was being pursued by dark forces; he believed that suicide was his only escape.

[39] The *Moushi* Court applied the test set out in *Fiala v. MacDonald*, 2001 ABCA 169, discussed below. The Court found that the defendant had discharged his onus of establishing, based on psychiatric evidence, that at the time of the collision, as a result of his delusional state, he neither understood nor appreciated his duty to take care: nor was he able to discharge that duty: para. 161. The Court also found that

the defendant had established that he was “afflicted suddenly and without warning” by the debilitating mental condition. While the defendant had a history of alcohol and cannabis abuse, and while he had become paranoid and confused in the months before the collision, he had never experienced a psychotic episode, and there was no indication that his substance abuse would lead to such an episode.

[40] *Fiala* is the most recent Canadian appellate authority, albeit one now almost a quarter-century old. There, the defendant, while out on a jog, experienced a sudden and unforeseeable severe manic episode prompting him to believe that he was God, with a plan to save the world. He asked several individuals for their telephone numbers. He then broke the sunroof of a nearby driver, whom he started choking. The driver involuntarily hit the gas pedal, striking another car and injuring the three plaintiffs. The Court of Appeal confirmed the dismissal of the claim at trial: at the time of the accident, the defendant was suffering from a mental illness that removed his capacity to reason and appreciate his duty of care to others.

[41] The Alberta Court of Appeal applied *Buckley* for the proposition that a defendant who, by reason of serious mental disorder, was either incapable of appreciating the duty to take care or incapable of discharging that duty, would not be liable in negligence: para. 43. The Court noted that such a recognition would not violate the objective reasonable person standard in negligence, but would, rather, serve as an exception to the general rule, in the same manner afforded to children and the physically disabled: para. 47.

[42] The Court noted policy grounds for relieving from liability a defendant whose mental condition deprived him of voluntary action or the capacity to understand his duty of care owed to others:

> [48] The case law and academic literature reveals that there has been judicial recognition in Canada of the need to relieve the mentally ill of tort liability in certain circumstances. While the compensation of victims is still a worthy goal, that should not compromise the basic tenets of tort law. To find negligence, the act causing damage must have been voluntary and the defendant must have possessed the capacity to commit the tort. The burden of showing the absence of either falls on the defendant. If the defendant

> understood the duty of care he owed and was able to discharge that duty, his actions would be voluntary and the requisite capacity would exist.
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> …
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> [53] If a strict liability regime is to apply to the acts of the mentally ill, the Legislature must give such direction. If the courts favour the compensatory goal of tort law by treating like any other person those suddenly afflicted with a serious and debilitating mental illness, the historical roots of tort law would be submerged and fault would become irrelevant. The result would be to taunt the tort.

[43] Accordingly, the Court set down the following test:

> [49] In order to be relieved of tort liability when a defendant is ***afflicted suddenly and without warning*** with a mental illness, ***that defendant must show either*** of the following on a balance of probabilities:
>
> > (1) As a result of his or her mental illness, ***the defendant had no capacity to understand or appreciate the duty of care*** owed at the relevant time; or
> >
> > (2) As a result of mental illness, ***the defendant was unable to discharge his duty of care as he had no meaningful control over his actions*** at the time the relevant conduct fell below the objective standard of care.
>
> [50] This test will not erode the objective reasonable person standard to such a degree that the courts will be imposing a standard "as variable as the length of the foot". It will preserve the notion that a defendant must have acted voluntarily and must have had the capacity to be liable. Fault will still be an essential element of tort law.
>
> [emphasis added]

[44] The Court found that the sudden onset of the defendant's mental illness deprived him of meaningful control of his behaviour, and appreciation of the duty of care he owed to others:

> [51] On the facts of this case, the expert evidence preferred by the trial judge clearly indicated that MacDonald was afflicted suddenly, and without prior warning, with a condition that left him with no meaningful control of his behaviour and an inability to appreciate the duty of care he owed to Cechmanek and others, including the Fialas. His mental illness was manifestly incapacitating.

[45] In contrast to some jurisprudential scenarios, where the defendant exposed others to the risk posed by his known prior mental condition, the defendant's mental illness was unprecedented and unforeseeable:

> [52] Unlike the defendant in *Wenden* (who at the time of the accident, was at Alberta Hospital being treated for his psychosis), MacDonald was unaware of his mental illness until after the accident. He was not driving a vehicle at the time and there was no way he could have foreseen the onset of his manic episode or taken preventative measures to avoid its result. His fault was no greater than Cechmanek's or the Fialas[']; there was no fault.

[46] The *Fiala* test provides clarity in a difficult and inconsistent area of tort law. As will be seen, I have applied it with respect to both the negligence and battery claims, as an icing-on-the-cake analysis. That said, both parties acknowledge that as a matter of *stare decisis*, the decision of this Court in *Canada (Attorney-General) v. Connolly* (1989), 64 DLR (4th) 84, 1989 CanLII 5206 (BCSC)[6] [*Connolly*] governs British Columbia claims in negligence and battery against a defendant whose ostensibly tortious acts are motivated in whole or in part by the onset of a severe mental health condition affecting the defendant's perception and judgement.

[47] In *Connolly*, the plaintiff police officer, whilst on duty, went to check on the defendant's oddly-parked vehicle. The officer asked for the defendant's licence and registration papers. The defendant, who was mumbling throughout the interaction, called the officer a "pig." The defendant then pinned down the officer's hand and drove away, dragging the officer some 100 feet.

[48] Justice Paris canvassed the English, Canadian, and British Columbia jurisprudence on the tortious liability of defendants whose mental and physical conditions severely impaired their judgement and voluntary actions: paras. 15–27.

[49] Paris J noted *Hagg v. Bohnet* (1962), 33 DLR (2d) 378, 1962 CanLII 387 (BCCA) as the highest related British Columbia authority on the subject. There, the Court upheld a finding of gross negligence against a driver whose impaired driving may have been caused by diabetic blackout, a condition from which the defendant had previously suffered. Ultimately, the Court found that the defendant had failed to acquit his onus of establishing that a medical condition had deprived him of volition, and thus negated negligence. As stated at p. 394:

> It may be that if there is impairment of judgment produced by disease (of which a driver is totally unaware and of which he cannot be said to have had any warning) of so extreme a character as to prevent the operation of the will,

> there would be no conscious act of volition and so no negligence. But in my opinion such a degree of impairment of judgment in the appellant has not been proven. The most that can be taken from Dr. Banks' evidence is that the appellant was suffering some degree of impairment of judgment which affected his ability to drive his car to some extent. This is not enough.

[50] As such, at pp. 390–91, the *Hagg* Court declined to determine whether a psychotic condition negating an understanding of his duty of care will serve as a defence in a negligence claim:

> I find it unnecessary to consider whether, as seems to be indicated in Roach, J.A.'s judgment in *Buckley & T.T.C. v. Smith Transport Ltd*., a driver whose mind is so ravaged by disease that he does not understand the duty which rests upon him to take care, as distinct from one who is prevented from discharging that duty, cannot be held liable for his acts and omissions in the course of his driving. I reserve this for some future occasion. I am unable to find evidence establishing, directly or by reasonable inference, that the appellant in the case at bar did not understand the duty to take care which rested upon him. Likewise, I reserve until the occasion arises the question whether insanity which does not result in impairment of faculties and judgment to the full extent I have mentioned will provide a defence to an action for negligence".

[51] Paris J recognised *Buckley* as the governing Canadian authority with respect to the effect of mental illness on a negligence claim:

> [21] The next case of interest is *Buckley v. Smith Transport Ltd.*, [1946] 4 D.L.R. 721, [1946] O.R. 798, [1946] O.W.N. 829 (C.A.), an action in negligence arising out of a motor vehicle accident. This case seems to have widened the test significantly, at least in so far as negligence is concerned. The head-note reads as follows:
>
> > Where an issue of negligence arises with respect to the conduct of a person suffering from a delusion, *the question is whether or not he appreciated his duty to take care* and whether he was disabled by reason of the delusion from discharging that duty. Liability based on negligence cannot be imposed upon a person who, at the material time, *was suffering from a delusion which prevented him from understanding his duty of care* and who, in any event, was prevented by the delusion from discharging that duty.
>
> [emphasis added by Paris J]

[52] Applying *Buckley*, Paris J dismissed the claim in negligence, based on expert evidence that the defendant's mental illness rendered him incapable of foreseeing that his actions could pose a significant risk to others:

> [32] However, perhaps if considered carefully, the test which results in liability in an assault case may produce a different result in a claim for negligence. Actionable negligence involves foreseeability of harm of the kind, at least in general, that in fact results from the negligent act. Persons with severe mental illnesses of the kind from which the defendant in this case suffers, have their capacity for such foresight severely impaired. If an act entraining liability in negligence must be accompanied by foresight of harm in the above sense, then it is necessary to consider whether because of mental illness the person might be incapable of such foresight. ***If he is not capable of foreseeing that his act involves a significant risk of harm to others then one can say that there was not sufficient awareness or consciousness of the nature of his act to make it a true voluntarily negligent act***.
>
> [emphasis added]

[53] Paris J noted that *Buckley* represented a departure from the objective reasonable person standard traditionally applied in negligence:

> [34] Admittedly, it is a departure from the objective test usually applied in a claim for negligence. The foreseeability of the reasonable person is normally the measure of liability in an action in negligence. But negligence, perhaps more than most other torts, is about fault and mental state. This approach, I believe, is more in line with the evolution of the law away from the early strict common law rule which afforded no relief in tort to a defendant who suffered from severe mental illness. It is also, incidentally, more in line with the position under civil law systems, including Quebec, which in general hold that if there is no fault (including an incapacity to discern right from wrong), there is no liability in tort…

[54] Paris J, however, found Mr Connolly liable in battery. In contrast to negligence, a plaintiff need not establish that the defendant knew that his act was wrong: para. 28. The plaintiff only needed to establish that "the defendant's act was conscious, that he knew the nature of his act, and that, to use Dubin JA's words in *Wellesley Hospital*,[7] there was "a voluntary act, the mind prompting and directing the act which is complained of": the *Morriss* passage, quoted above.

[55] Accordingly, while Mr Connolly's severe illness likely prevented him from knowing that his actions would cause harm, and profoundly impaired his judgment, the defendant was aware of and intended to effect his physical actions that constituted battery. He had some degree of control over his thoughts and actions: he was able to drive; he responded to the officer's directions; he showed that he understood his victim to be a police officer by calling him "a pig" just before grabbing

his arm and driving away. In short, the defendant committed a voluntary physical act, albeit one that was significantly impelled by his severe mental illness, which significantly impaired his judgment in the sense that his actions were wrong.

### D. Is the defendant Driver liable in negligence?

[56] Driver's mental health episode was considerably more profound and debilitating than that in *Connolly*. As set out above, Mr Connolly knew that his actions were directed towards a police officer. He understood that he was the subject of a police stop, and responded at least partially in an appropriate manner. In contrast, at the time of the collision, Driver was immersed in a psychotic delusion, hearing voices and perceiving that dark figures were chasing him. The plaintiff concedes that by the time Driver reached the Lions Gate Bridge, he lacked the capacity to understand the duty of care he owed to the plaintiff and others.

[57] Mr Yalowsky, for the plaintiff, ingeniously expands the relevant time period, to argue that Driver had sufficient consciousness and control in the three days before the accident to have recognised that he was significantly mentally and physically unwell, and to have foreseen that driving in that state would create a substantial risk that he would drive his vehicle into others, either deliberately or negligently. In the words of *Connolly*, he was "voluntarily negligent" in driving, and not taking preventative measures to ensure that he would not drive. Driver acknowledged in cross that he left work in part because it would be unsafe to operate heavy equipment in his agitated state. He retained some lucidity up the and including the day of the collision: he presented as "normal" in his conversation with his girlfriend, suggesting some retained mental control and ability to foresee reasonable harm. Later that day, Driver had the wherewithal to call his girlfriend for "help": both his girlfriend and brother expressly told him to stay put and not to drive. Further, he knew that he had not slept or consumed food or water for three days before he got in the car: even without the further debilitation of a paranoid delusion, it would have been reasonably foreseeable that driving in that impaired physical state would pose a harm to others.

[58] I agree that the negligence analysis should not be limited to the minute or hour before the collision, when Driver was wholly immersed in his delusional state, but should extend to the three days leading up to the collision, when Driver retained sufficient spells of lucidity interspersed with warning signs, such that he could and should have exercised care to ensure that he not enter a vehicle and drive. Put conversely, he has not acquitted his persuasive onus of establishing that, in the words of *Connolly,* he was "not capable of foreseeing that his act" (driving), and omission (ensuring that he would not drive if his state declined) would pose a "significant harm to others." While Driver had no role in bringing the psychotic episode onto himself, his liability is analogous to that imposed upon an intoxicated driver (e.g. *McKenzie v. Mills*, 2013 BCSC 1505 at para. 31) or an exhausted driver (e.g. *Muench v. Reiter* (1961), 38 WWR (ns) 65, 1961 CanLII 230 (SKKB), at para. 6; *R. v. Jiang*, 2007 BCCA 270 at para. 22) or a driver potentially suffering from a debilitating physical condition who gets behind the wheel despite indications that to do so would be unsafe.

[59] In his written reports, Dr Okorie initially opined that Driver lacked the capacity to understand or appreciate his duty of care to others, not only at the time of the collision, but stretching back to the outset of his psychotic signs:

> Given his lack of insight into his psychosis, he did not realize that his psychotic thoughts and behaviours were rational and not reality based.… In my opinion, he could not understand and appreciate his duty of care to other drivers ***from the onset of his psychosis until he started receiving appropriate treatment at the hospital.*** Not only could he not control his actions because of his psychosis, he did not understand and appreciate that his actions were a rational and dangerous. Therefore, he could not help himself and did not realize that he should not drive during his psychosis.
>
> …
>
> Due to his brief psychotic episode at the time, he could not meaningfully control his actions or effectively discharge his duty of care to other drivers. ***Right from the onset of his psychosis*** until he started receiving treatment at the hospital including during the subject incident, he did not have control of his actions. Hence, he would not have known that ***he should not drive from the outset of his psychosis.***
>
> [emphasis added]

[60] In his brief and conclusory opinion, Dr Okorie does not distinguish between Driver's fully immersive psychosis immediately before the collision, and Driver's condition three days before, when he left work in part out of caution, and the three-day period before the collision, when he remained safely in his apartment, and Driver's condition during his roughly 40-kilometre drive towards Stanley Park, where he passed other seemingly "demonic" figures that he nonetheless did not attack with his car. Given Dr Okorie's limited and belated contact with Driver, this lack of distinction is understandable. Dr Okorie also lacked the benefit of the trial evidence about Driver's telephone calls with his brother and girlfriend, including, specifically, Driver's seemingly lucid call the morning of the collision, as well as Driver's acknowledgement that he left work early as it would have been unsafe to continue in his psychologically agitated state.

[61] In cross, Dr Okorie retreated somewhat from his binary conclusion that Driver was unable to appreciate his duty of care for the entire three-day period:

> Mr Yalowsky: Now you also made reference to this concept that he's psychotic…he's irrational in some thoughts, but would be rational in others. And you gave the example of if you asked him his name that's not tied to his psychosis, he would be able to answer his name.
>
> Dr Okorie: Yes.
>
> …
>
> Mr Yalowsky: And does irrational behaviour build up in the sense that on Day 1: I'm irrational about a couple of thoughts; Day 2: I'm irrational about more thoughts; on Day 3: nothing's making sense.
>
> Dr Okorie: You are right: yes.[8]

[62] Thus, despite his broad pronouncements, the overall tenor of Dr Okorie's opinion is that Driver likely possessed some degree of rationality, to appreciate the risk that his driving would pose, and to control and take steps to prevent himself from driving. Further, Driver did not simply lose all control three days before the collision, at the advent of his delusional symptoms: instead, these symptoms worsened, or perhaps ebbed and flowed, over the three days leading to the collision. Indeed, the defendants' own argument describes "his decline" and "his mental condition deteriorat[ing] further."

[63] The British Columbia cases do not categorically consider whether warning signs before the defendant gets behind the wheel will provide sufficient foreseeability and appreciation of a duty of care such as to render a mentally ill defendant liable in negligence.

[64] In *Hagg*, the defendant had, in the past, occasionally fainted: only after the accident, these blackouts were attributed to diabetes: p. 385. On the day of the accident, he was feeling “off colour”, “restless” and “out of sorts”: pp. 384, 387. O’Halloran JA (concurring in the result) agreed with the trial judge that the defendant was negligent for driving despite these warning signs. Tysoe JA (with whom Davey JA concurred) noted that his accident-day symptoms differed from those preceding his prior blackouts, and that the medical evidence did not even establish that he had suffered a diabetic blackout just before the accident. Nonetheless, the defendant was liable as he failed to rebut his *prima facie* negligence of crossing the centre line, through proof that a sudden medical affliction had denied him volition.

[65] It appears that in *Connolly*, an argument akin to that advanced by the present plaintiff could have been advanced, but was not: *Connolly* focused solely on the moments before the defendant pinned the plaintiff’s arm and drove away. Mr Connolly had a long history of major mental illness, but had stopped taking his medication some time before the incident, leading to his mental deterioration: paras. 12–13. The reasons do not canvass whether Mr Connolly could and should have exercised better care in the hours and days and months before the accident to ensure that he did not get behind the wheel when his mental illness was not sufficiently under control.

[66] In *Wenden v. Trikha* (1991), 116 AR 81, 1991 CanLII 13111 (ABKB), aff’d 1993 ABCA 68, 135 AR 382, leave to appeal ref’d [1993] 3 SCR ix, the Court accepted this form of argument. There, the defendant struck the plaintiff’s vehicle after eloping (that is, escaping) from his psychiatric ward, severely injuring the plaintiff. At the time, the defendant was suffering from a delusional psychosis: he directed his car towards the plaintiff in order to try to “retrieve his spirit from a

spaceship in the sky." The Court found the defendant liable in negligence, notwithstanding the opinion of two psychiatrists that at the time of the accident, the defendant neither understood the nature and quality of his acts, nor appreciated his duty of care to others. The defendant had not discharged his onus of show that he was acting against his conscious will: paras. 116–117. The defendant knew of his mental condition, and knew that he should not drive when his illness was not under control through medication: paras. 119-120. Importantly, the defendant had failed his evidentiary burden of establishing that he was suffering from a wholly debilitating mental condition throughout the relevant time period:

> [123] I am ***not satisfied that Trikha was suffering from a delusion constantly*** throughout his third admission or during and following his first elopement ***such that his ability to reason and appreciate his duty of care to others was consumed by the delusion of his mission.*** The evidence as I have heard it has led me to conclude that ***there were periods of time following the first elopement when Trikha was dealing in the real world***. We know that he could recall what he had done while the delusion was submerged in reality since he related a number of delusional thoughts when he spoke to Drs. Yaltho, Pascoe and Tweddle at different times after the accident. Indeed, he testified with respect to these matters both on examination for discovery and at trial. ***Yet, when he was dealing in the real world he did nothing about having his car removed as he had done on his second admission.***
>
> [emphasis added]

[67] The Alberta Court of Appeal upheld the decision. It declined to pronounce categorically on the test for relieving a mentally ill defendant of tort liability, but noted that the defendant had not met his burden of proof, even on the laxest test: paras. 16–17. At para. 52, *Fiala* explains the *Wenden* result, contrasting its defendant MacDonald to the defendant Trikha: "[h]e was not driving a vehicle at the time and ***there was no way he could have foreseen the onset of his manic episode or taken preventative measures to avoid its result***…" (emphasis added).

[68] The present case can be partly distinguished from *Connolly* and *Wenden*, where the defendants had a known history of severe mental illness: here, Driver had no history or diagnosis of mental illness.

[69] At the same time, again, Driver had three days' warning, in the form of increasing paranoia and erratic behaviour, along with self-imposed deprivation of food, water, and sleep, that he would pose a substantial risk to others if he attempted to drive or did not take proactive steps to seek treatment or otherwise prevent himself from driving. As set out above, he retained some lucidity, self-awareness, and control over his actions, including consciousness about the risks he posed to others in his agitated state, during this period leading up to the collision.

[70] Courts have found drivers negligent where they elected to drive, despite signs of a pending stroke or other physical affliction that might render them a risk to others. For example, the defendant driver in *Turner's Transfer Ltd. v. Anderson* (1962), 37 DLR (2d) 399, 1962 CanLII 507 (NSSC), was found liable given the warning signs that he might suffer a heart attack behind the wheel. He skipped work on the day of the accident after suffering pain and indigestion the previous evening: pp. 402, 404. He mentioned to an acquaintance that he thought he was having heart trouble ("if the old ticker starts to go you can go any time": p. 402). He also told a neighbour "quite some time before" the accident that he was afraid of "taking [a] weak turn" while driving and killing someone: p. 403.

[71] In *Boomer v. Penn* (1966), 1 OR 119, 1965 CanLII 352 (ONSC), the defendant diabetic was found responsible for a car accident because he failed to take steps to avoid low blood sugar while driving. The defendant failed in his onus to establish that he had no reason to anticipate nor opportunity to remedy his condition.

[72] In *Telfer v. Wright* (1978), 23 OR (2d) 117, 1978 CanLII 1262 (CA), the defendant driver, with a history of dizzy spells, had suffered a dizzy and then fainting spell shortly before causing an accident. Although he stopped for about one minute at that time, he carried on and the accident ensued. The Court found the driver liable, noting at p. 119 that:

> A motorist who is aware he suffers from a disability is under a very heavy duty to take the necessary precautions to avoid the possibility of this disability implicating him as the cause of an accident.

[73] Similarly, in *Spillane (Litigation Guardian of) v. Wasserman* (1992), 13 CCLT (2d) 267, varied on other grounds (1998) 41 CCLT (2d) 292 (CA), the trial judge found that the defendant, whose sudden epileptic seizure caused the accident, should not have been driving given his medical history and his failure to take prescribed medicine for his condition.

[74] In the law school chestnut of *Roberts v. Ramsbottom*, [1980] 1 WLR 823 at p. 832, cited in *Connolly,* the defendant was found liable in negligence after losing control due to an unforeseeable cerebral haemorrhage. The stroke did not strike wholly and suddenly, but arrived gradually: the defendant continued to drive despite a series of increasing and recurring indications—nausea, dizziness, and generally "feeling queer" —as well as a minor earlier collision (see p. 827). Even in his diminished state, he ought to have appreciated that he was suffering from a medical condition that might make his continued driving a risk to others. In his alternative basis for liability, Lord Justice Neill stated:

> I also consider that the plaintiffs would be entitled to succeed, if necessary, on the alternative ground put forward, that is, that the defendant continued to drive when he was unfit to do so and when he should have was involved in an accident when unknowingly he was suffering from a stroke and was unaware of his unfitness. He was aware that he had been feeling queer and had hit the van. Owing to his mental state he was unable to appreciate that he should have stopped. As I have said, and I repeat, the defendant was in no way morally to blame, but that is irrelevant to the question of legal liability in this case. An impairment of judgment does not provide a defence. ***I consider that the defendant was in law guilty of negligence in continuing to drive because he was aware of his disabling symptoms and of his first collision even though he was not able to appreciate their proper significance.***
>
> [emphasis added]

[75] While in *Mansfield v. Weetabix Ltd*, [1998] 1 WLR 1263 at pp. 1266–1267, the English Court of Appeal rejected the primary *Roberts* conclusion (that a defendant may *only* escape tortious liability by establishing that he was in a state of automatism), it expressly endorsed this alternative *Roberts* conclusion, quoted above, as correct.

[76] In *Dunnage*, Lord Justice Vos (at para. 126) and Lady Justice Arden (at para. 147) note that no argument was advanced that Uncle Vince ought to have anticipated a debilitating attack posing a risk to others, notwithstanding his lack of diagnosis, in the weeks of florid paranoid psychosis preceding the incident, and hint that such an argument may have been germane: para. 126. The Justices cite *Waugh v. James K Allen Ltd.*, [1964] 2 Lloyd's Rep. 1, where the driver, in contrast to Mr Ramsbottom, was relieved of liability where he suffered a sudden and unforeseeable stroke: his feelings of ill health before the accident could reasonably have been attributed to inhaling noxious bone meal at a glue factory, rather than the onset of a medical condition reasonably foreseeable to pose a harm to others. In *Waugh,* in reaching that conclusion, Lord Evershed noted the serious duty imposed upon any would-be driver, not to drive when potentially impaired, from whatever source:

> As Lord Reid has observed, it is impossible to put out of one's mind a real sense of sympathy for the unhappy appellant who, through no fault whatever of his own, has suffered grievous bodily injury. Nor in the present day and age can it ever be right to forget the responsibility which rests upon the driver of a motor vehicle in a busy highway. It has many times been observed that a motor I car—and more particularly a heavy vehicle of the kind driven in this case by the respondents' late servant, Robert Gemmell —***is potentially a dangerous and, indeed, a lethal instrument; so that there rests upon every driver of such a vehicle a serious duty owed to his fellow human beings not to drive the vehicle in a public highway if he has or should have any reasonable ground for thinking that, from illness or otherwise, his skill or judgment as a driver may have been impaired.*** [p. 5]
>
> [emphasis added]

[77] The gradual yet clear warning signs in the present case, *Wenden, Telfer, Turner,* and *Roberts* stand in contrast to the sudden, absolute, and unforeseeable manic attack that struck the defendant, mid-jog, in *Fiala*. In contrast to Driver, he had no opportunity to seek care or help or restraint, or prevent himself from undertaking a hazardous activity such as driving, or otherwise ensure that he posed no harm to others. As stated at para. 52:

> Unlike the defendant in *Wenden* (who at the time of the accident, was at Alberta Hospital being treated for his psychosis), MacDonald was unaware of his mental illness until after the accident. He was not driving a vehicle at the time and there was no way he could have foreseen the onset of his manic

> episode or taken preventative measures to avoid its result. His fault was no greater than Cechmanek's or the Fialas[']; there was no fault.

[78] Ultimately, and in any case, the jurisprudence is united in placing the evidentiary burden on the defendant. Here, Driver has failed to acquit his onus of establishing that the burgeoning psychosis robbed him of any ability to take reasonable steps to protect others from the hazards posed by his compromised physical and mental state. The evidentiary vagueness of Driver's recall of the three days before the collision, and the objective indications of some degree of foreseeability and control during that period, undermine his own evidentiary burden of avoiding liability. In the words of *Fiala* at para. 49, Driver has not acquitted his evidentiary onus of establishing either that "[a]s a result of his or her mental illness, [he] had ***no capacity*** to understand or appreciate the duty of care owed at the relevant time;" or that "[a]s a result of mental illness, [he] was ***unable*** to discharge his duty of care as he had ***no meaningful control over his actions*** at the time the relevant conduct fell below the objective standard of care" [emphasis added]. Nor has he acquitted his evidentiary burden of establishing that he was "afflicted suddenly and without warning" by the psychotic episode that caused the collision: para. 49.

### E. Is the defendant Driver liable in battery?

[79] While the conclusion above makes it unnecessary to consider the claim in battery, I will do so for completeness. I find that Driver is also liable under the intentional tort of battery.

[80] As a preliminary matter, the defendants argue that I should apply the *Fiala* test, quoted above, to bar a claim in battery. The defendants argue that *Fiala* purports to provide serious mental illness as a defence in all tort cases, as indicated by the preamble to its test, quoted above: "In order to be relieved of tort liability when a defendant is afflicted suddenly and without warning with a mental illness…." While *Fiala* was framed as an action in negligence, the Court noted that the defendant MacDonald's choking of the driver was more akin to battery: para. 20.

[81] The plaintiff argues that notwithstanding multiple broad references to "tort law" generally, any pronouncements beyond the issue before it—negligence—must be considered *obiter dicta*. Although the defendant MacDonald committed battery against the driver in *Fiala*, the driver was not the plaintiff, but a co-defendant: the plaintiffs were those struck by the driver's car when he accidentally pushed the gas while being strangled. The issue before the Court was whether it ought to have been reasonably foreseeable to the defendant MacDonald that when he attacked the driver, it could cause serious harm to those plaintiffs: an issue of negligence. Accordingly, the *Fiala* reasons, and the test itself, is permeated with the register of negligence law: "duty of care", "objective reasonable person standard" and "foreseeable harm".

[82] In any case, as set out above, Driver would fail the *Fiala* test, even if that test were to be imported into British Columbia jurisprudence, and even if it were to apply to claims framed in battery. Further, while *Fiala* is persuasive, both in content and clarity, it does not bind this Court as a matter of *stare decisis* on the issue of whether sudden mental illness negates liability for battery: I am bound to follow *Connolly*, and will do so.

[83] The issue thus turns on whether Driver's act of driving his vehicle into the plaintiff was a conscious and voluntary act, with his "mind prompting and directing the act", and whether he knew the nature, quality, and consequences of that act, regardless of whether he knew that his act was wrong: *Connolly,* paras. 12, 23, and 28.

[84] The defendants argue, citing Dr Okorie's opinion, that Driver was so consumed by his psychotic state that he had no meaningful control over his actions at the time of the collision. Specifically, he had no intention to harm the plaintiff, and could not have appreciated the nature, quality, and consequences of his action. He did not believe that he was driving his vehicle into the plaintiff, but, rather, into a "demonic entity" that he sought to "take out" as a form of self defence.

[85] In *Gerigs v. Rose (Guardian ad litem of)*, [1979] OJ No 40, 9 CCLT 222 (HCJ), Justice Eberle, after reviewing many of the authorities cited above, including *Wellesley Hospital* and *Morriss*, confirmed that "nature" focuses on the physical aspects of the act, while "consequences" refers to physical rather than moral consequences: para. 68. Accordingly, the defendant suffering from persecutory delusions was nonetheless liable for shooting a policeman, as he appreciated that he was physically shooting a gun. *Perri v. Allstate Insurance Co. of Canada*, [1984] OJ 2359 (Co Ct), 8 CCLI 40 at para. 20 applied *Gerigs* to conclude that the suicidal driver defendant knew that removing his hands from the steering wheel would result in a collision with another car—the intended effect—such as to constitute an intentional act, albeit one impelled by the driver's mental illness.

[86] Driver is liable in battery, based on the defendants' own evidence. In his reports, Dr Okorie confirms that Driver's "actions were conscious, voluntary, and aimed at running innocent motorcyclists whom he perceived as evil of[f] the road" although "his actions were motivated by disorganized psychosis-related delusional beliefs and emotions." In cross, Dr Okorie confirmed that Driver's actions were "conscious and voluntary, in that his mind was telling his body what to do, but they were being governed by an irrational thought process." On Driver's own evidence, he consciously, voluntarily, and deliberately accelerated the Audi towards the plaintiff's motorcycle, and then consciously, voluntarily, and deliberately turned the steering wheel for the purpose of striking the plaintiff. His mind prompted and directed those physical actions. He knew the nature and quality of the act: to kill or neutralise the motorcycle rider, albeit perhaps a demon rather than human.

[87] In this, Driver's deluded but deliberate actions parallel those in *Butterfield v. Intact Insurance Company*, 2022 ONSC 4060, aff'd 2023 ONCA 246,[9] where Mr Butterfield, in a state of paranoid delusion, went to a gun shop and stabbed the owner, whom he believed, incorrectly, had raped and murdered his girlfriend. The trial judge concluded:

> [46] Mr. Butterfield understood the physical nature and consequences of his act. He clearly did not appreciate that what he was doing was morally wrong given the schizophrenia diagnosis, but that does not change the fact

> that his actions were intended to harm Mr. Carr. Mr. Butterfield's actions demonstrate a clear intention to injure or kill Mr. Carr with a large knife, even if it was based on a delusional belief wherein he did not know his actions were morally wrong.

[88] Driver's deluded but deliberate actions also parallel those of Uncle Vince in *Dunnage,* where Lady Justice Arden observed:

> 146. In my judgment, this case is indistinguishable in any material respect from that in *Morriss v Marsden* [1952] 1 All ER 925. In that case**, a schizophrenic, who like Vince was deluded, was held liable for assaulting the manager of a hotel where he was staying: like negligence, assault and battery do not require an intention to injure. The attack was unprovoked. His mind directed the attack. It was irrelevant that he did not know that what he was doing was wrong.** The court held that the defendant understood the nature and quality of his act even though he was deluded and even though he did not know that what he was doing was wrong.
>
> [emphasis added]

[89] Arden LJ cited *Morriss*, endorsed in *Wellesley Hospital,* both of which were endorsed in turn in *Connolly.* In *Morriss*, the defendant, who heard voices in his head, and was prone to random violent acts, suddenly attacked a hotel manager. As stated in *Morriss* at p. 928, quoted in *Connolly* at para. 17:

> The next matter to consider is whether, granted that the defendant knew the nature and quality of his act, it is a defence in this action that, owing to mental infirmity, he was incapable of knowing that his act was wrong. If the basis of liability be that it depends, not on the injury to the victim, but on the culpability of the wrongdoer, there is considerable force in the argument that it is, but ***I have come to the conclusion that knowledge of wrongdoing is an immaterial averment, and that, where there is the capacity to know the nature and quality of the act, that is sufficient although the mind directing the hand that did the wrong was diseased.***
>
> [emphasis added]

[90] This conclusion accords with the first principles of the intentional tort of battery. In battery, "intention" is a physical phenomenon in contradistinction to "motive", which reflects volition. As stated in *Morriss*, harmful or nefarious knowledge or intent is irrelevant. As stated by Iacobucci J, for the minority judgment in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 [*Scalera*]:

> 96 Sexual battery is a form of battery, the traditional test for which is relatively straightforward. In *M. (K.)*, *supra*, at p. 25, La Forest J. defined assault and battery as "causing another person to apprehend the infliction of immediate harmful or offensive force on her person coupled with the actual infliction of that harmful or offensive force". ***What is notably absent from this definition is any intent to injure***. Professor Klar, in his second edition of *Tort Law* (1996), makes this point at p. 42:
>
> > For the tort of intentional battery, the defendant must have intended an offensive, physical contact with the plaintiff. ***The defendant need not have intended to harm or injure the plaintiff,*** although in most battery cases there is an intention to injure.
>
> 97 A. M. Linden, in *Canadian Tort Law* (6th ed. 1997), emphasizes this point at p. 43: "***A battery can be committed even though no harm or insult is intended by the contact. If the contact is offensive to the recipient, even if a compliment was intended, it is tortious."*** ….
>
> 98 Intentional battery generally ***requires only the intent to cause the physical consequences, namely, an offensive touching.*** Klar, *supra*, makes this point at p. 30:
>
> > Technically, however, ***the concept of "intention" in the intentional torts does not require defendants to know that their acts will result in harm to the plaintiffs.*** Defendants must know only that their acts will result in certain consequences. ***It is not necessary for defendants to realize that these intended consequences are in fact an infringement of the legal rights of others. Intention, in other words, focusses on physical consequences.***
>
> To similar effect is Linden, *supra*, at p. 33: "Conduct is intentional if the actor desires to produce the consequences that follow from an act."
>
> [emphasis added]

[91] As Linden further states, at §2.02[3]:

> … There can be no intentional conduct without volition, ***although there can certainly be voluntary conduct which is not intentional…***
>
> ***Intention must also be differentiated from motive. Intent is the word used to describe the desire to bring about certain consequences; motive is the term utilized to describe the underlying objective which inspired the intentional conduct.*** A person may intend a given result, such as the death of another, for any number of motives including revenge, financial gain, or self-defence…

[92] This conclusion reflects that the tort of battery focuses on protection of the plaintiff's bodily autonomy rather than the defendant's fault. As stated by McLachlin J (as she then was) in her *Scalera* majority judgment:

> 15 These arguments persuade me that we should not lightly set aside the traditional rights-based approach to the law of battery that is now the law of Canada. ***The tort of battery is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems from violation of the right to autonomy, not fault***. When a person interferes with the body of another, a *prima facie* case of violation of the plaintiff's autonomy is made out. The law may then fairly call upon the person thus implicated to explain, if he can. If he can show that he acted with consent, the *prima facie* violation is negated and the plaintiff's claim will fail. But it is not up to the plaintiff to prove that, in addition to directly interfering with her body, the defendant was also at fault.
>
> [emphasis added]



[93] Finally, the defendants sought to distinguish these authorities on theo-zoological grounds. At trial, Driver testified that he believed that he was escaping, and then driving into "demonic entities": he stated that he was horrified to later discover that he had injured human beings. In short, the nature and quality of his act was not an intentional attack on a human being, but rather an attack on a non-human, and, indeed, on a supernatural entity.

[94] This clever argument can be dismissed on evidentiary, practical, and legal grounds.

[95] As an evidentiary matter, Driver's repeated use of the specific phrase "demonic entities" at trial came off as forced and deliberate. In any case, Driver's more reliable earlier descriptions indicate that he understood himself to be directing his vehicle towards human beings. The hospital records in the days following the collision note Driver's reports that he "hit two people on motorcycles as he felt they had demon spirits"; that he "believes motorcyclist were 'bad people' involved with the oil company" and were "using my dyslexia to make me commit suicide on the bridge." In January 2024, Driver told Dr Okorie that the motorcycle riders were "evil people", and that he believed that he was "helping himself and others by running those 'evil people' off the road." At trial, Driver did in fact refer once to his pursuers as "people," and Owner recounted him as describing them as "bad guys" in their telephone call. I am satisfied that whatever Driver's state of delusion, he understood

the nature of his actions: driving a swiftly-moving vehicle into two human beings, albeit ones with dark and demonic intentions.

[96] As a practical matter, I agree with the plaintiff that drawing a distinction between defendants whose delusional thoughts view their victims as persons and those who view their victims as mythical creatures is arbitrary. It should make no difference whether a defendant attacks a plaintiff based on the delusion that they are a spy, or an alien, or a devil, or a dragon. As set out above, battery is concerned with protection of personal autonomy and not the culpability of the defendant. To accede to the defendants' anticipated argument would incorporate culpability in the liability assessment. Further, drawing a distinction on liability based on the delusion experienced by Driver would only further muddle an already confusing area of the law.

[97] As a legal matter, a defendant may be liable in battery even if confused about the specific identity of the target of his battery. As stated by Linden at §2.02[2]:

> Another situation where courts impute intention is the fiction called "transferred intent". If A strikes at B who ducks, and A hits C instead, this result is treated as though it were intended by A. ***What is important to the court is not the identity of the plaintiff, but the fact that the defendant desired to strike another person unlawfully.*** Such a malefactor, even if someone is hit unintentionally, can be no better off than if the chosen target was hit successfully. In law the malefactor is equally blameworthy and either injured victim is entitled to compensation. This resembles the notion of "transferred malice" in criminal law, which also penalizes an accused who punches at one person, hits some glass which shatters and injures a second person.
>
> Not only can intention be transferred from one person to another, it can also be shifted from one direct interference to another. ***For example, if one person intends to batter another, but misses and merely frightens the victim, there is sufficient intention present to constitute an assault, even though a battery and not an assault was desired***. Similarly, if one person shot at another, intending only to frighten the other person, the shooter could be held liable for battery if the bullet struck the victim, or even if it hit a stranger. ***In these examples, the defendant is being held responsible for the unintended consequences of the intentional act.*** ….
>
> [emphasis added]

[98] The footnote to the passage from L.N. Klar, *Tort Law*, 2nd ed (Toronto: Carswell, 1996) at p. 42, cited by Iacobucci J above at para. 91, *infra* (and preserved

in the 2023 7th edition of that text at p. 54), is particularly relevant to the present case:

> 107. This raises a cloudy issue. **It seems to be agreed that it is unnecessary that the defendant intended to contact the specific plaintiff, as long as physical contact with *someone* was desired or substantially certain. In other words, the identity of the victim is irrelevant, as long as it was substantially certain that there would be a victim.** I know of no Canadian battery cases where this occurred…
>
> [bold emphasis added; italics in original]

### F. Is the defendant Owner vicariously liable?

[99] Pursuant to s. 86 of the *Motor Vehicle Act*, RSBC 1996, c 318, Owner is also liable:

> **86** (1) In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who
>
> (a) is living with, and as a member of the family of, the owner, ***or***
>
> (b) ***acquired possession of the motor vehicle with the consent, express or implied, of the owner***,
>
> is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner.

[100] Counsel provided no case authorities on this point, and the defendants did not resist the plaintiff's argument. That said, we observe the following.

[101] In her testimony, Owner acknowledged that she had given Driver general consent to possess and drive her Audi. In her second telephone call the day of the collision, however, she told him to stay put and not drive, given his strange behaviour. She also called the police.

[102] Owner's oral directions not to drive do not relieve her of liability for three reasons.

[103] First, the plain wording of s.86 focuses not on consent to drive, but, rather, consent to possess the motor vehicle, which consent was never revoked here.

[104] Second, and consistent with the wording, some authorities indicate that an individual who has consented to another person possessing their vehicle cannot avoid liability simply by orally revoking that consent without taking other steps to dispossess the driver of the vehicle or ensure that he does not drive: *Usher v. Goncalves*, [1970] 9 DLR (3d) 15, 1969 CanLII 826 (BCSC), at p. 20; *Green v. Pelley*, 2011 BCSC 841 at para. 45; *Ezzedine v. Dalgard*, 2006 ABQB 826 at para. 89; *Morrison v. Cormier Vegetation Control Ltd.*, [1997] 3 WWR 153, 1996 CanLII 2627 (BCCA) at para. 22.

[105] Third, in the context of universal provincial automobile insurance, section 86 is remedial and is intended to broaden the circumstances in which liability is imposed on a driver who has given possession of their vehicle to someone else: *Harris Victoria Chrysler Dodge Jeep Ram Ltd. v. Ward*, 2023 BCCA 478 at para. 85, per Newbury JA.

## III. CREDIBILITY

[106] I generally found the plaintiff to be credible. He had a wide opportunity to exaggerate or malinger about his injuries, but did not. Notwithstanding the dramatic dynamics of the collision, and the breadth of his initial pain complaints in the hospital, the plaintiff confirmed that all injuries but the left shoulder have healed, or at least returned to pre-accident states. He does not complain of or pursue damages for any ongoing limitations in his left arm or wrist, right foot, hip, knees, or lower back, for example. As a rare instance in personal injury law, he does not claim to suffer from headaches or soft tissue injuries. He stated that his nightmares and flashbacks of the accident have decreased. He exhibited general stoicism with respect to the pain and limitations of his conditions. Apart from restraint in testimony about his medical condition, he could also have exaggerated the state of the Vancouver market for voice actors, or his stature in that community, but, again, was restrained in his testimony.

[107] The defendants dedicated considerable space in their argument attacking the plaintiff's credibility. As expanded below, I partly agree with two of those arguments.

First, the plaintiff's failure to seek medical and other remedies for shoulder pain undermines his stated intensity and effects of that pain on his sleep, lifestyle, and vocation. Second, he downplayed to the Court and the medical experts his nocturia condition that has required him to wake up several times a night to urinate, regardless of the shoulder pain. These two difficulties prompt the Court to view his pain complaints and testimony generally with some caution.

[108] Apart from the nocturia issue, I put little weight on the defendants' criticisms of the plaintiff for claiming excellent health before the collision. The plaintiff acknowledged his previous surgery for his right shoulder rotator cuff tear, his hernia, and his hammer toe condition. The former two had resolved before the collision, while the last hardly constituted a serious health condition: only producing the occasional blister.

[109] I also place little weight on the defendants' credibility arguments related to medical records. Below, I dismiss the defendants' primary attack: that the medical records make little reference to the left shoulder pain for the first six months after the accident. The defendants also argue that the plaintiff should have produced x-rays, as well as the paperwork he says he filled out at his family physician's office to obtain an MRI. The x-rays would not reveal the shoulder injury, and would be of no use in these proceedings. As for the MRI forms, they were solicited by and submitted to the clinic: there is no reason that the plaintiff himself would retain copies.

[110] As a matter of credibility and causation, the defendants point to two post-collision internet videos featuring the plaintiff talking about his voice acting roles. They observe that the plaintiff appears animated and enthusiastic, contrary to his claims of fatigue and listlessness. They also claim that the videos exhibit functioning and mobility. With respect to the latter argument, the plaintiff is sitting in both videos: the occasional movement of his left arm does little to undermine his pain complaints, nor does the plaintiff's ability to present himself as jovial and animated during two videos designed to promote his voice acting œuvre. I agree with the comments in

*Juelfs v. McCue*, 2019 BCSC 1195 at paras. 38–41 and *Dakin v. Roth*, 2013 BCSC 8 at paras. 55–56 on the limited utility of staged social media in controlled environments in assessing a plaintiff's functional limitations.

[111] The defendants also spent considerable time cross-examining the plaintiff about his 2015 bankruptcy. During that cross-examination, he stated his belief that "he had paid his debt to the CRA": the defendants argue that if that were the case, he would not have needed to declare bankruptcy, and through declaring bankruptcy, he avoided that debt. They also criticised the plaintiff for not producing tax records predating the bankruptcy. The plaintiff's bankruptcy three years before the collision was very much a collateral issue. The plaintiff's testimony convincingly conveyed that he was genuinely not sophisticated about the bankruptcy process and his finances generally: hence perhaps his arrival in that state.

## IV. CAUSATION

### A. Law

[112] The law of causation is well established. The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. If the defendant's negligence is one cause of an injury, or if it exacerbates or aggravates an existing condition, then the defendant is liable for causing the resulting injury: *Athey v. Leonati,* [1996] 3 SCR 458, 1996 CanLII 183 at para. 47. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus.* Causation need not be determined by scientific precision: *Athey* at paras. 13–17.

[113] The primary test for causation asks: "but for the defendant's negligence, would the plaintiff have suffered the injury?" This test recognises that compensation for negligent conduct should only be made where there exists a substantial connection between the injury and the defendant's conduct: *Resurfice Corp. v. Hanke,* 2007 SCC 7 at paras. 21–23.

### B. The plaintiff's injuries

[114] Upon impact, the plaintiff was thrown from his motorcycle. He landed on the road way and skidded for some distance before his body started to roll. When he initially landed, he fell on his right shoulder and back and smashed his left arm on the ground. In the immediate aftermath on the roadway, the pain was most pronounced in his left forearm and wrist, and his right ankle. He also felt pain in his shoulders, knees, and hips.

[115] The plaintiff was taken to St. Paul's Hospital where he received a soft cast for his swollen and bruised left arm, and treatment for his sprained ankle.

[116] In the first month, he felt aches in his hips and shoulders, in addition to the pain in his right foot and left arm. His swollen right foot resulted in a limp, necessitating use of a cane for several months. He was prescribed a walking cast in early 2019.

[117] Following the accident, the plaintiff saw his family physician on September 27, 29, and October 3 and 31. The plaintiff described the pain as going through his left shoulder and pectoral, and going down the arm to his index finger. He testified that he reported those injuries to his doctor, but those reports are not reflected in the medical records. He also claims that he requested and filled out paperwork for an MRI in the following months, but those records have either not survived or been produced. It was not until his next visit, on March 26, 2019, that his physician's office requisitioned an x-ray for his left shoulder, and then, later, an ultrasound: the September 27, 2019 ultrasound revealed the left torn rotator cuff.

[118] On January 28, 2020, the plaintiff underwent his first of two surgeries to his left shoulder for the torn rotator cuff. Recovery was painful: the plaintiff described it as worse than the injury itself. He was required to wear an immobilising sling for several weeks.

[119] Despite physiotherapy, the shoulder repair did not take. On July 17, 2023, the plaintiff underwent a second shoulder surgery, this time performed by Dr Goel. The

plaintiff described the recovery process as even more painful than the first surgery. He was again required to wear a sling. He did his physiotherapy at home, as he could not afford clinic fees.

[120] The plaintiff testified that he continues to feel shoulder pain today, from the elbow through the shoulder and in the pectoral. Some days are better, and some days worse. The plaintiff testified that he can experience pain from as simple a task as removing a shirt.

[121] The plaintiff's arm, hips, and knees have largely recovered. His right shoulder has also recovered to its pre-accident state.

[122] As expanded below, the main effect of his ongoing shoulder pain is that it prevents him from sleeping through the night, resulting in diminished energy, sociability, patience, and focus. He naturally sleeps on his side: when he migrates to that position in bed, he wakes up from the pain.

[123] The collision has also inflicted psychological disorders upon the plaintiff: both directly, and indirectly, through long-term diminished restorative sleep. Following the collision, he suffered frequent nightmares that caused him to wake up, perspiring, with a rapid heart rate. He had occasional flashbacks to the collision. When Dr Wade first met with the plaintiff in November 2020, he diagnosed him with moderate post-traumatic stress disorder. This condition has since relatively stabilised, through therapy, self management techniques, and behavioural intervention, such that he no longer meets the definition.

[124] In his second report, Dr Wade diagnosed the plaintiff as still suffering the following psychological disorders:

a) Adjustment disorder, with depression in the severe range;

b) Other specified trauma and stressor related disorder; and

c) Somatic symptom disorder, with predominant pain: persistent and severe.

[125] In his second report, Dr Wade concludes:

> As outlined in my prior psychological report of February 1, 2024, given that I have no evidence to suggest any past history of significant persisting psychological difficulties, it is my opinion that if not for the motor vehicle accident of September 26, 2018, [the plaintiff] would not be experiencing symptoms of chronic pain, depression, anxiety and trauma. The physical and emotional injuries and their impact on his life, combined with the trauma from the motor vehicle accident would be sufficient to result in [the plaintiff] developing an Other Specified Trauma and Stressor Related Disorder, as well as an Adjustment Disorder, with depression, and a Somatic Symptom Disorder, with predominant pain, persistent and severe.

### C. Discussion and decision

[126] The defendants argue that plaintiff has failed his persuasive burden to establish that his ongoing left shoulder complaints are causally linked to the collision. Defence raises two primary challenges to causation.

[127] First, the defendants conjecture that the plaintiff could have injured his left shoulder in ways other than the collision. The defendants note that the plaintiff tore his right shoulder rotator cuff in 2016 while exercising in the gym; they note post-collision medical records indicating that the plaintiff was keen to return to the gym. The defendants also note that the plaintiff was in another motor vehicle accident in January 2019: two months before the first specific reference to left shoulder pain in the medical records. The only evidence before the Court about the January 2019 accident, however, is that it was a very light collision that injured neither party. The defendants would be in a good position to contradict the plaintiff's assertion through evidence of the second accident, but did not do so. Similarly, apart from hearsay references to the gym in the medical records, undeveloped through cross-examination, there is no affirmative evidence on which I could adopt the defendants' inference.

[128] Second, and with more vigour, defence argues that no medical record refers to complaints about left shoulder pain until March 2019: six months after the collision. The defendants emphasise a November 2018 physiotherapy questionnaire describing, in words as well as in a body chart, the plaintiff's various pain complaints. This recitation of various pain complaints specifically mentions pain in the plaintiff's

*right* shoulder (the subject of separate rotator cuff surgery in 2016, performed by Dr Goel), but is wholly silent on any pain in his left shoulder.

[129] Notwithstanding the lack of direct and specific references to left shoulder pain in the six months following the collision, I accept that the collision caused or contributed to the plaintiff's ongoing left shoulder condition that results in lingering discomfort, reduced sleep, reduced concentration, reduced confidence, reduced earnings capacity, lost roles, and reduced income. I do so for several reasons, many of which were highlighted in Mr Yalowsky's effective and resolute reply argument.

[130] First, it is not correct to say that there is no reference to left shoulder pain in the medical records following the accident. On September 27, 2018, the day after the collision, a record notes *bilateral* shoulder tenderness, with limited ability of the plaintiff's left arm (that is, a left shoulder movement) to touch the back. His March 26, 2019 family physician clinic medical record, pointed to by the defendants as the first reference to shoulder pain, expressly reports that "patient here for post-MVA l[eft] shoulder pain… *For several months* has had pain over the L[eft] shoulder, radiating down to elbow…". After this March consultation, the doctor immediately requisitions an x-ray, rather than exploring a sequence of less-expensive treatment strategies, suggesting that the left shoulder pain is not in fact a recent or frivolous complaint.

[131] Second, I am guided in this issue by Justice N. Smith's oft-cited and learned caution about medical records in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114:

> [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
>
> …
>
> [36] While the content of a clinical record may be evidence for some purposes, ***the absence of a record is not, in itself, evidence of anything***. For example, ***the absence of reference to a symptom in a doctor's notes***

> ***of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.***
>
> [emphasis added]

[132] Third, it makes sense that the post-collision medical records focus on the plaintiff's most pressing and apparent and immediately-treated injuries: his left forearm and wrist, in a sling, and his right ankle, in a protective boot. The November 2018 physiotherapy questionnaire emphasised by the defendants must be read in its context: it was a referral for the plaintiff's wrist and ankle; with an eye to *Edmondson,* the left shoulder was not the primary concern. Further, the plaintiff is right-handed: especially while his left arm remained in the sling, the plaintiff would not likely have exerted his left shoulder to such an extent that would have highlighted its ongoing pain and injury. His ankle injury would have also limited his movements and opportunities to sense whether his left shoulder was suffering more than the rest of his body in general recovery.

[133] Fourth, a shoulder injury is wholly consistent with the plaintiff's uncontroverted evidence of the mechanics of his injury: being struck from behind by a car driving around 60 kilometres an hour, flying off his motorcycle, and then skidding and rolling. The plaintiff described his body as "aching all over," and "moving hurt in all directions": descriptions reflected in several medical records between the collision and the March 2019 x-rays. The records note that the plaintiff's left hand hit the pavement: while the left wrist is the focus of immediate treatment, several medical records also note pain in the left arm generally.

[134] Fifth, as noted above, and expanded below, despite some concerns with the plaintiff's credibility, I generally accept his account of the dynamics of the collision and the history and current state of his symptoms.

[135] Sixth, Dr Goel opined that the plaintiff's left shoulder pain is a direct consequence of the collision. While Dr Goel responsibly acknowledges that he is not an expert with respect to mechanics of injury, he does have the advantage of a long clinical relationship with the plaintiff: he noted that when he performed the 2016

surgery on the plaintiff's right shoulder, there was no pre-accident condition that could explain his current left shoulder condition.

[136] I am also satisfied that the collision caused or contributed to plaintiff's ongoing psychological disorders: both anxiety and sleep loss directly caused by the collision, as well as the psychological effects of sleep disruption through recurring left shoulder pain. I will return to the other source of sleep disruption—the plaintiff's nocturia—in the next section of these reasons, comparing his post-collision conditions to the conditions that he would have likely experienced regardless of the collision.



## V. DAMAGES

### A. Introduction

[137] The parties differ on the appropriate damages:

| **Head of damages** | **Plaintiff** | **Defendants** |
|---|---:|---:|
| Non-pecuniary damages | $200,000 | $55,000 to $130,000 |
| Loss of past earning capacity | $227,349 | c. $60,000 |
| Loss of future earning capacity | $959,644 | $0 to $80,000 |
| Special damages | $1,500 | $1,500 |
| Cost of future care | $8,820 | $0 |
| **TOTAL** | **$1,397,313** | **c. $115,500 to $271,500** |

### B. Law

[138] While causation concerns the legal causes of the plaintiff's injuries, the assessment of damages measures the extent of their loss: that is, the difference between their life as it is, and their life as it would have been, but for the tortious conduct that caused those injuries.

[139] Damages awards seek to place the plaintiff in the position they would have been had the defendant not been negligent: no better or worse. The defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would likely have experienced regardless of the defendant's

negligence. The defendant is liable for the additional damage but not the pre-existing damage: *Athey* at paras. 32–35.

[140] As McLachlin CJC stated in *Blackwater v. Plint,* 2005 SCC 58 at para. 78:

> Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *[Athey v. Leonati].*

[141] As L. Warren J (as she then was) explains in *Abbott* v. *Gerges*, 2014 BCSC 1329:

> [55] The fundamental principle in assessing tort damages is that the quantum should be that which is required to place the plaintiff in her original position; that is, the position she would have been in absent the defendants' negligence: *Athey,* at para. 32. This requires a determination of the plaintiff's position after the negligence and an assessment of what the original position would have been. The difference between these positions represents the quantum of the defendants' liability: *Athey,* at para. 32.
>
> [56] The defendants need not put the plaintiff in a position better than her original one and should not compensate the plaintiff for any damages she would have suffered anyway: *Blackwater v. Plint*, 2005 SCC 58, at para. 78. In determining the plaintiff's original position, it may be necessary to reflect any debilitating effects of a pre-existing condition, or a measurable risk that such a condition would have detrimentally affected the plaintiff in the future regardless of the defendant's negligence. This is the crumbling skull rule and, where applicable, it results in the damages award being reduced to reflect risks inherent in the plaintiff's pre-accident condition: *Athey*, at para. 35.
>
> [57] As explained in *T.W.N.A.* v. *Canada (Ministry of Indian Affairs),* 2003 BCCA 670, at para. 48, a measurable risk need not be proved on a balance of probabilities:
>
> > Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

### C. The plaintiff's conditions

[142] The plaintiff testifies that his ongoing shoulder pain prevents him from sleeping through the night, resulting in diminished energy, sociability, patience, and

focus. He describes his life as “living in a fog”. This fatigue and pain make him less skilled and confident as a voice actor: he claims that he has received fewer roles since the accident. He has also declined from a socially active person to, in the words of a testifying friend, a recluse. He has also lost for the most part his former active lifestyle of hiking, snowboarding, mountain biking, and regular trips to the gym.

[143] In his November 7, 2024 report, Dr Goel notes that the plaintiff continues to have weakness and pain even after his revision rotator cuff operation. He notes that if the condition remains the same, the plaintiff will be limited from performing overhead lifting, pushing, and pulling. Dr Goel provides a guarded prognosis:

> Prognosis: [the plaintiff]’s prognosis is guarded. He is now nearly a year and a half following his revision rotator cuff repair and while he has regained his motion, he continues to have pain and weakness to his left shoulder which is impacting his overall activity and activities of daily living, including his recreational and social activities. This will also contribute to his potential for future employment regarding the above.

[144] Dr Wade also provides a pessimistic prognosis with respect to his psychological conditions:

> In regards to [the plaintiff]'s ability to regain his pre-accident psychological state, my opinion is unchanged since my February 1, 2024 psychological report. [the plaintiff]'s prognosis is poor, as there continues to be little further progress in his physical recovery. I would defer to the respective medical specialist to comment further.

[145] Unfortunately, the evidence diminishes the plaintiff’s damages claim in several ways.

[146] First, the plaintiff has not convinced the Court that he would not have suffered these effects to some extent, regardless of the collision, due to personal and industry factors. Damages seek to restore the plaintiff, as best as can be done, to the position he would be in but for the accident. The court must not overcompensate the plaintiff for conditions and impediments that he would have suffered regardless of the accident: *Athey* at paras. 32–35; *Murphy v. Snippa*, 2024 BCCA 30 at para. 53; *Repin v. Aam Ventures Ltd.*, 2020 BCSC 227 at para. 161.

[147] It is unsurprising that the plaintiff, progressing from the ages of 54 to 61 in the years since the collision, has experienced less sustained and more disrupted sleep, with reduced restorative effects: most people in this demographic share his frustration due to accumulated aches and pain, weight gain, hormonal changes, and increased need to urinate at night, among myriad other sources attendant to the natural degradations of aging. Further, the plaintiff has suffered from specific conditions that could well have caused or contributed to disrupted sleep: during the relevant period, he was diagnosed with an enlarged prostate, as well as nocturia, the condition of having to awake frequently at night to urinate. One medical record indicted that the condition necessitated four wake-ups a night.

[148] The plaintiff tried to diminish his nocturia diagnosis by testifying that it went away as soon as he started drinking less liquid before sleep, and arguing, unconvincingly, that he only urinated at night because he was already awake with his shoulder pain. The medical records are not clear or comprehensive, but they establish that his nocturia was considerably more prolonged and serious than the plaintiff indicated in his testimony. Medical records in 2018 (predating the collision) as well almost the entire span of 2022 and 2023 reveal that he had a history of incomplete flow, and the need to wake multiple times each night to urinate. A May 2023 record refers to “a history of severe lower urinary tract symptoms.” The plaintiff was sent to a specialist, and was prescribed at least two medications for the condition; the most recent medical record, in late 2023, indicated that he wished to explore a surgical operation to address his condition.

[149] I will return to the theme of losses suffered by the plaintiff regardless of the accident below, in the assessment of past and future income loss.

[150] Second, I agree with the defendants that the plaintiff’s silence about his nocturia in his direct testimony, and his downplaying of his nocturia in cross-examination, partly diminishes his credibility. The plaintiff’s nocturia omission also diminishes the utility of the Dr Wade expert reports tendered on his behalf. Much of those psychological reports focus on the effect of sleep interruption on the plaintiff’s

ability to concentrate and other aspects of life. In cross-examination, Dr Wade was visibly surprised when asked if the plaintiff had advised him that he suffered from nocturia: he had not.

[151] Third, the plaintiff's complaints about the effects of his injuries are undermined somewhat by the medical records and evidence. In December 2023, Dr Goel noted that the plaintiff was doing well and making progress, albeit with some pain on the terminal ranges and plane. He has also returned to the gym, albeit with modifications, and continues to ride his motorcycle. He is subject to no medical limitations on his activities.

[152] Fourth, the plaintiff's pain and sleep complaints are undermined by his failure to meaningfully explore simple and non-intrusive medical means of addressing his loss of sleep through pain beyond white and pink noise[10] machines and meditation apps. For example, he confirmed on cross-examination that he had abandoned attempts to decrease pain or facilitate sleep through over-the-counter pain medications and melatonin: he presently takes no medication to deal with his pain or sleep interruption. He has never attended a sleep clinic, and has engaged in only limited therapy to address his physical injury. There are indications that he is not pursued rehabilitation or physiotherapy as thoroughly as or to the extent recommended by his healthcare providers. The defendants do not advance an argument that the plaintiff has failed to mitigate his damages, and provide no medical report, as required, to establish both the potential treatment and its effect. But the plaintiff's lax pursuit of simple solutions for his pain undermine his claims of the intensity and persistence of that pain, and his credibility generally: see *Padgham v. Ram*, 2024 BCSC 72 at para. 19; aff'd 2025 BCCA 100 at para 33.

[153] Fifth, as a related point, Dr Goel has prescribed no particular therapies to counteract the shoulder condition, beyond exercise. The plaintiff and his medical advisors have not pursued various injections, active rehabilitation therapy, further MRIs, or other treatments and medical inquiries that might reasonably be explored if the plaintiff's pain and sleep conditions were as crippling as asserted.

### D. Non-pecuniary damages

[154] The oft-cited case of *Stapley v. Hejslet,* 2006 BCCA 34 at para. 46 sets out a non-exhaustive list of factors to be considered when assessing non-pecuniary damages:

- age of the plaintiff;
- nature of the injury;
- severity and duration of pain;
- disability;
- emotional suffering;
- loss or impairment of life;
- impairment of family, marital and social relationships;
- impairment of physical and mental abilities;
- loss of lifestyle; and
- the plaintiff's stoicism.

[155] The plaintiff is 61 years old: his conditions do not span a lifetime. His persistent shoulder injury inflicts some pain, disability, emotional suffering, and impairment of life and physical and mental abilities, but less profoundly than that suffered by many plaintiffs in the jurisprudence. His conditions have made him less sociable and have hindered his social relationships, but, again, in a manner that appears less inevitable than in other cases. He has exhibited general stoicism about his condition, in life and in testimony; he has avoided catastrophising his injuries. As a special feature of the present case, the plaintiff has in effect suffered his shoulder injury, with attendant pain and restrictions thrice: first after the accident, and then after his first surgery, and then again after his second surgery, which has improved but not fully corrected his condition.

[156] The assessment of non-pecuniary damages must also consider the past pain and inconvenience represented by his two shoulder operations, along with the pain and inconvenience inflicted by his arm, foot, back, and post-traumatic psychological injuries that have now resolved. On the other hand, they must also consider the fact that the plaintiff would likely have suffered sleep disruption regardless of the collision, as well as the doubts about the extent and persistence and inevitably of the pain conditions, expressed above.

[157] The plaintiff seeks $200,000 for non-pecuniary damages. The plaintiffs in his comparator cases, however, all suffered more extensive and disruptive injuries. In *Matwijec v. Goodridge*, 2024 BCSC 2030 ($235,000), the plaintiff was unable to work or socialise, and lived in constant pain. In *Riascos v. Raudales*, 2024 BCSC 26 ($170,000), the plaintiff suffered a brain injury along with ongoing pain and migraines. In *Lewis v. Gibeau*, 2023 BCSC 784 ($220,000), the plaintiff suffered a diminishment of her exceptionally active lifestyle through significant chronic pain requiring medial branch nerve block injections..

[158] The defendants' comparator cases, specifically dealing with persistent shoulder injuries, more resemble the extent and effects of the present injuries: In *Florence v. Westereng*, 2022 BCSC 1414 ($130,000), the plaintiff underwent two shoulder surgeries and suffered a diminished capacity to enjoy his active hobbies, but was able to continue maintaining his household. In *Arnbrecht v. Isaac*, 2024 BCSC 2352 ($100,000), the plaintiff suffered a painful shoulder injury which affected his personal life, but did not prevent him from working or completing household chores.

[159] The Court awards $100,000 in non-pecuniary damages

### E. Loss of past earning capacity

[160] In *Lamarque v. Rouse*, 2023 BCCA 392, Madam Justice Horsman summarises the principles governing the assessment of loss of past earning capacity:

> [29] An award of damages for loss of past earning capacity compensates the claimant for the loss of the value of the work they would have, not could have, performed, but were unable to perform due to the accident-related injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The standard of proof for past hypothetical events is: whether there is a "real and substantial possibility" that the events would occur: *Grewal v. Naumann*, 2017 BCCA 158, at para. 48; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. If the claimant establishes a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 48.
>
> [30] In many cases, a claimant's actual lost income will be the most reliable measure of a loss of earning capacity. However, there is no hard and fast rule that only loss of actual income is compensable. It must be remembered that it is not the actual lost income that is compensable, but the loss of capacity: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. An award of damages for past loss of earning capacity compensates a claimant for any pecuniary loss resulting in an inability to work, and evidence supporting such loss can take different forms. In *Ibbitson*, for example, the plaintiff, who worked in the forest industry, maintained his pre-accident level of income by working longer hours. Thus, he was found to have suffered a pecuniary disadvantage that was compensable through an award of damages for loss of earning capacity: *Ibbitson* at paras. 20–21.

[161] The plaintiff argues that his disrupted sleep diminishes his concentration, confidence, and enthusiasm, and ultimately his creative process. These facets are all critical in obtaining voice acting roles in an increasingly competitive job market. The plaintiff's agent testified that he has witnessed the plaintiff's diminished professional and personal presentation and abilities. Mr Yalowsky compares the skills of an actor to the skills of a professional athlete, where loss of the slightest edge may make the difference between a lucrative or mediocre or frustrated career: someone else will get the role in a competitive market requiring idiosyncratic skills.

[162] The plaintiff points to the decline in revenue from voice work starting in 2018 (the year of the collision): his annual gross (excluding his agent's commission, generally 10 or 15 percent, and his minimal professional expenses) revenue averaged roughly $100,000 in the four years before the collision, and $49,000 in the six years since the collision.

[163] The defendants accept that if liability is established, which it is, the plaintiff is entitled to an award for past loss of income. The defendants argue that it should be

confined to approximately one year following the accident. Alternatively, the defendants argue for a loss of approximately $10,000 per year, as the plaintiff's losses can be attributable to factors other than the collision, as set out above and below.

[164] The defendants also note that the voice acting industry in Vancouver is competitive, and argue that the plaintiff has not established a causal link between the accident and his reduced roles and income. While the evidence was not comprehensive on this point, the evidence provided by the plaintiff and his agent, which I accept, indicates that while there are more voice actors vying for roles, there are also more opportunities, particularly for experienced and versatile voice actors such as the plaintiff. I find that the plaintiff would have faced greater competition, but not to the extent asserted by the defendants.

[165] The defendants' strongest attack on this head of damage, as well as loss of future earning capacity, focuses on the plaintiff's loss of a specific central and recurring role in a popular animated series. As set out in the table below, from 2014 through 2021, the plaintiff earned $36,000 to $47,000 annually from this role alone (an average of $39,500), representing between 35 and 73 percent of his total earnings.

[166] In 2021, the show was reconfigured, and the plaintiff's recurring central character role reduced to flashbacks and other intermittent appearances. In 2022 through 2024, his earnings from that role dropped considerably: from an average $39,500 annually to $8,000 to $12,000 annually, representing an annual average gross revenue drop of roughly $30,000, or 30 percent of his total average annual pre-accident earnings: a drop wholly unconnected to the collision.

[167] Each side's position is illustrated by the table below, again using gross earnings as a measure, with the years of the accident and the reduction of the recurring role highlighted:

| | Gross revenue | Recurring role revenue | Recurring role % | Other engagement revenue |
|---|---|---|---|---|
| **2014** | $95,040 | $36,614 | 39% | $58,426 |
| **2015** | $107,057 | $37,591 | 35% | $69,466 |
| **2016** | $95,304 | $37,268 | 39% | $58,036 |
| **2017** | $103,245 | $40,944 | 40% | $62,300 |
| ***2018*** | ***$75,901*** | ***$47,353*** | ***62%*** | ***$28,548*** |
| **2019** | $65,272 | $43,491 | 67% | $21,780 |
| **2020** | $63,967 | $29,243 | 46% | $34,724 |
| **2021** | $60,404 | $43,844 | 73% | $16,560 |
| ***2022*** | ***$43,776*** | ***$11,915*** | ***27%*** | ***$31,861*** |
| **2023** | $29,066 | $8,613 | 30% | $20,453 |
| **2024** | $31,242 | $8,044 | 26% | $23,198 |

[168] The plaintiff seeks to downplay the impact of this loss of the recurring character, arguing that before the collision, he always had a steady stream of work, through a combination of repeat and one-off and brief roles: the end of one repeat role would soon be replaced with a new repeat role. The numbers above, however, clearly establish the importance, in the form of the steady stream of income represented by this recurring character, the loss of which has nothing to do with the plaintiff's injury.

[169] At the same time, even taking the loss of the recurring character out of the equation, the plaintiff's earnings from other voice acting roles has decreased since the accident, with no explanation established in the evidence other the plaintiff's ongoing post-collision conditions. Average revenue from non-recurring roles during the six post-collision years dropped by roughly $37,000 per year (roughly a 60 percent drop) compared to the four-year pre-collision average.

[170] The plaintiff relies upon reports and calculations prepared by Nicholas Coleman, a forensic economist. Mr Coleman calculates cumulative net business income losses between January 1, 2019 and February 9, 2025 at $263,230. This calculation is conservative, insofar as (1) it does not count lost income for the final

three months of 2018, immediately following the collision, when the plaintiff clearly and most tangibly did suffer lost earning capacity, and (2) it incorporates a 20 percent income reduction in 2023 attributable to the Writers Guild of America and Screen Actors Guild strikes, when the trial evidence established that those strikes had no effects on the voice acting industry.[11] I reverse these two conservative assumptions, adding losses of $5,856 to the 2018 calculation, and $12,866 to the 2023 calculation, increasing the cumulative net business income losses from the date of the collision from $263,230 to $281,952.

[171] I accept the basis of Mr Coleman's calculations. I also accept that there was a real and substantial possibility that the plaintiff lost roles and income, and suffered diminished economic capacity as a voice actor due to the collision.

[172] At the same time, the calculation must be discounted in two ways. First, the net business income losses from January 1, 2022 through February 9, 2025, will be reduced by 30 percent, to reflect the diminution of his recurring character role during those years in any case. Second, it will be further discounted by 30 percent, reflecting the fact that regardless of the collision, the plaintiff would likely have suffered disrupted sleep, through nocturia, as well as faced some degree of increased competition. It also reflects my comments above, questioning the extent and persistence and inevitability of the pain and injuries.

[173] The plaintiff is awarded $112,780 for loss of past earning capacity.

### F. Loss of future earning capacity

[174] In *Lamarque*, Horsman JA also summarises the principles governing the assessment of loss of future earning capacity:

> [37] The central task for the court in assessing a claim for loss of future earning capacity is to compare the claimant's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157. As with past hypothetical events, future hypothetical events need not be proven on a balance of probabilities. A hypothetical future possibility will be accounted for as long as it is a real and substantial possibility. If a claimant establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event: *Rab v.*

> *Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., dissenting on other grounds, in *Grewal* at para. 48.
>
> [38] A diminishment in earning capacity does not justify an award of damages for future loss of earning capacity in the absence of evidence that the impairment will result in a pecuniary loss. A claimant must always prove there is a real and substantial possibility of a future event leading to an income loss. If the claimant discharges that burden, then the loss must be quantified based on either an earnings approach or a capital asset approach. The earnings approach is more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at paras. 4 and 32.
>
> [39] In *Rab*, this Court set out a three-step process for considering claims for loss of future earning capacity: (1) does the evidence disclose a potential future event that could give rise to a loss of capacity?; (2) is there a real and substantial possibility that the future event will cause a loss of capacity; and (3) what is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?: *Rab* at para. 47.
>
> [40] The process of quantifying damages for loss of capacity at the third step of the *Rab* test is often challenging. Courts have adopted various approaches to assigning a dollar figure to the loss of capacity to earn income, including, where appropriate, awarding a claimant's entire income for one or more years: *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), 1995 CanLII 2871 at para. 43. Any approach that is adopted must be supported by the evidence: *Rab* at para. 75.

[175] The plaintiff again relies upon Mr Coleman's reports for the calculation of the loss of future earning capacity. Mr Coleman provides a sample calculation based on the assumption that the plaintiff would have earned $125,398 gross annually (his average 2016 and 2017 pre-collision earnings, adjusted for inflation), but will earn $48,580 annually (based on the 2025 dollar value of his 2022 income) due to his post-collision impediments, with consistent variable expenses (agent commissions and business expenses) at a rate of 16 percent of his gross business income. Those calculations result in a present value loss of $225,441 (if the plaintiff works to age 65), $708,021 (if the plaintiff works to age 75), and $1,011,802 (if the plaintiff works to age 85).

[176] The defendants do not challenge the rate of variable expenses: the plaintiff's agent's commissions range from 10 percent to 15 percent, and his travel and other professional expenses are negligible. I agree that 16 percent represents an appropriate figure for the variable expenses used in Mr Coleman's calculations.

[177] The plaintiff testified with convincing passion that he had no plans to retire: he loves voice acting in itself, beyond its financial rewards. Many actors of course continue working until their deaths, and a voice actor is in a better position to continue working despite any physical degeneration associated with aging. I agree that age 85 is not an unrealistic end date for his career, for the purposes of measuring damages. Mr Coleman's tables take into account the risk of disability and death, regardless of the retirement date, discounting each year's calculation for those possibilities.

[178] For the same reasons set out above with respect to past loss of earning capacity, I agree that there is a real and substantial risk of future loss of earning capacity. At the same time, I must adjust the figures in Mr Coleman's table in two ways.

[179] First, the calculation assumes that the plaintiff would earn on average $125,398 gross (his average pre-collision earnings adjusted for inflation). This number, however, presumes the continuation of his recurring character, or the replacement of that steady income source. As set out above, the diminution of earnings from this recurring character, wholly unconnected with the collision, in itself resulted in a 30 percent drop in the plaintiff's income. At the same time, I recognise the possibility that over time, in future, the plaintiff would have had a real possibility of replacing the lost income with another recurring role, or a combination of other engagements: instead of a 30 percent reduction on the baseline amount, I will apply a 10 percent reduction. Accordingly, the without-accident gross business income in 2025 dollars should be calculated based on the reduced amount of $112,858.

[180] Second, the with-accident gross business income in 2025 dollars should be adjusted to reflect the possibilities that in future, any reduced income would occur regardless, or may not transpire at all. That amount should be increased by 30 percent, represented by sleep disruption and pain that likely would have occurred in any event, as well as increased competition; and 50 percent, representing the possibility that medications, treatments, therapy, sleep clinics, avoiding side-

sleeping, or other minimal steps in future could address either or both of the plaintiff's shoulder pain and sleep disruption such as to counteract any residual effects of the collision: $97,160, for annual gross losses of $15,698. This results in $206,765 (pre-tax) as the cumulative present value of the plaintiff's net business income losses, reflecting possible disability to a retirement age of 85. This amount is slightly less than the $10,000 per year suggested by the defendants in their alternative argument, albeit projected to a retirement age of 85 rather than 70.

### G. Cost of future care

[181] A cost of future care award must be based on what is reasonably necessary as a result of the incident and on the medical evidence to preserve and promote the plaintiff's mental and physical health. The test for determining the appropriate award under the heading of cost of future care is an objective one, generally based on medical evidence: *Milina v. Bartsch* (1985), 49 BCLR (2d) 33, 1985 CanLII 179 (SC) at pp. 78 and 84, aff'd (1987) 49 BCLR (2d) 99 (CA).

[182] The plaintiff's claim for costs of future care is modest: 36 sessions of psychological counselling, at $245 a session, for a total of $8,820. This treatment is recommended by Dr Wade, from whom the plaintiff has received treatment for many years before and since the collision. Dr Wade opined that the plaintiff's mental health degraded in the period between writing his February and October 2024 reports. I accept his evidence in this regard.

[183] The defendants do not address this form of future care, rather, addressing anticipated future care costs for the left shoulder, which were not in fact sought by the plaintiff.

[184] The Court awards $8,820 for future psychological counselling.

### H. Special damages

[185] By agreement, the quantum of special damages was fixed at $1,500. The Court awards this amount.

## VI. CONCLUSION

[186] The plaintiff is awarded the following damages:

| | |
|---|---|
| Non-pecuniary damages | $100,000 |
| Loss of past earning capacity | $112,780 |
| Loss of future earning capacity | $206,765 |
| Cost of future care | $8,820 |
| Special damages | $1,500 |
| **TOTAL** | **$429,865** |

[187] The plaintiff is the successful party, although not to the extent sought. He is presumptively entitled to his costs, at Scale B. If any party wishes to dislodge this presumption, that party will advise the others within 15 days of these reasons, and schedule with the Registry a date as soon as reasonably practicable to argue the matter. Each party will provide a written argument to the other party and to the Court at least seven days before the hearing date. Each side is encouraged to strive for a negotiated settlement to the costs issue prior to the costs hearing, and issue formal offers to settle costs.

[188] The Court extends its gratitude to all three counsel for their zealous and thorough advocacy in this difficult and unusual case.

"Crerar J"

## VII. APPENDIX A: ORAL RULING DATED FEBRUARY 20, 2025 ON *VOIR DIRE* #2 RE ADMISSIBILITY OF REPORTS OF DR EUGENE OKORIE

[189] **THE COURT:** If a transcript is ordered for these reasons, I reserve the right to expand and edit these reasons. I especially reserve the right to expand the discussion and add specific authorities, either case law or in discussions of criminal law procedure, in texts or otherwise, with respect to the admission of psychiatric expert opinion in the criminal context in cases, for example, of automatism.

[190] These will be my brief oral reasons for judgment or oral reasons on this evidentiary objection raised by the plaintiff's counsel to two expert reports provided by the defence.

[191] The expert reports are dated January 29, 2024 and November 1, 2024. They have been provided by Dr Eugene Okorie, a registered psychiatrist.

[192] One of the central issues—if not the central issue in this motor vehicle case—is whether the defendant, Driver, was suffering some form of psychotic episode when he deliberately drove his car into the plaintiff’s motorcycle, and then into the motorcycle ridden by the plaintiff's friend. After striking the plaintiff's friend, Driver, at least according to his testimony this morning, jumped out of his car, jumped back into his car, and then jumped out of his car, went over the concrete median on the Lions Gate Bridge, and started proceeding down the sidewalk on the causeway. He was then led back to the accident scene by a jogger whom he had asked for assistance.

[193] Driver found himself on the Lions Gate Bridge after a three-day stint without sleep or food or water, according to his testimony. During this time, he was feeling constant dread and paranoia. He testified that he felt that “demonic entities” were closing on him. In the afternoon of the accident, he spoke with his girlfriend, who was in an interior city, by phone, and asked for help. He then jumped in the car, which, incidentally, was owned by the same girlfriend: hence her role as a co-defendant. He drove on the highway from Coquitlam towards Stanley Park. On that journey, he continued to see dark demonic entities. Items that he saw on his route

towards Stanley Park, including a semi-trailer and traffic signs, morphed in his mind into these dark demonic entities.

[194] He was heading to Stanley Park with the intention of "touching the water": his understanding at the time was that somehow by touching the waters around Stanley Park, he would receive relief from these pursuing demonic entities. He struck the two motorcycles because he believed their riders to be these demonic entities, rather than human beings. All through this period, he reported that he was hearing voices in his head, although he had no present recollection of what those voices were telling him.

[195] Mr Yalowsky for the plaintiff has two primary grounds of objection to the Okorie reports. The first ground is that the reports will provide no assistance to the Court: I will expand on this in a moment. He cites the *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 [*White Burgess*] and *R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 requirements for the reception of expert evidence. He also cites jurisprudence that rejects psychiatric expert reports where the doctor providing the opinion has never seen the person who is subject to the psychological or psychiatric opinion.

[196] The second ground for objection is pressed, responsibly, less heavily by Mr Yalowsky. Specifically, he argues that the phrasing of certain questions put to Dr Okorie prompted Dr Okorie to seek to usurp the role of the court in providing evidence in the manner of the exact legal questions that the Court will have to decide and that are exclusively in the ken of the trial judge.

[197] I turn to the primary ground of objection: that the report provides no assistance to the Court. Mr Yalowsky cites a line of authority that appears to start with the decision of Mr Justice Burnyeat in *Dhaliwal v. Bassi*, 2007 BCSC 549:

> [3] As well, the Court has commented a number of times on ***it being inadvisable to rely on the opinion of a medical advisor who has not seen a plaintiff***: see for instance *Parish v. Scott*, [1996] B.C.J. (Q.L.) No. 2839 (B.C.S.C.) at paras. 5 and 29. I am satisfied that ***an opinion from a professional in the field of psychiatry requires more than a review of medical and other records and that an opinion must be based at least in***

> ***part on the observations of the person that the psychiatrist has met and observed***. On that ground alone, the report of Dr. Smith should be inadmissible.
>
> [emphasis added]

[198] *Dhaliwal* in turn was applied more recently by Madam Justice Adair in *Turner v. Dionne,* 2017 BCSC 1924:

> [1] The defendant wishes to have Dr. Paul Steinberg, a psychiatrist, qualified as an expert in forensic psychiatry, to give opinion evidence regarding psychiatric issues as they pertain to injuries suffered by the plaintiff and any sequelae related to the motor vehicle accident on July 28, 2010.
>
> . . .
>
> [6] Mr Nieuwenburg, for the plaintiff, says that the reports are inadmissible, or, alternatively, they should be given no weight. He relies in particular on the decision of Mr Justice Burnyeat in *Dhaliwal v. Bassi*, 2007 BCSC 549, in particular at paras. 2 and 3. There, Mr Justice Burnyeat ruled the report of a psychiatrist who had simply reviewed records, and never seen the individual, to be inadmissible. Mr Justice Burnyeat said that he was not assisted by such an opinion, and that (among other things) any opinion from a psychiatrist must be based, at least in part, on the observation of the person by the psychiatrist.
>
> [7] I note that, in her oral evidence, Dr. Jeanette Smith, who was qualified in the same terms as the defendant is seeking to have Dr. Steinberg qualified, ***confirmed the importance of the forensic psychiatrist being able to personally observe and take a history directly from the patient.***
>
> . . .
>
> [10] In my opinion, ***although Dr. Steinberg has special expertise as a psychiatrist, the fact that he never had any contact with the plaintiff means that the opinions in his reports, based as they are on a document review, fail to meet the necessity requirement in Mohan. In those circumstances his reports are not helpful to the court.*** To satisfy the necessity criterion in *Mohan*, expert evidence must be more than merely helpful; it must be necessary.
>
> [emphasis added]

[199] In both of those cases, the defence sought to qualify psychiatric experts to provide opinion evidence regarding psychiatric issues relating to injuries that the plaintiffs claimed to have suffered in those cases. In both of those cases, those proffered defence psychiatric experts did not see the plaintiff, that is, the person subject to their psychiatric expert opinion, at all.

[200] This presents an initial distinction with the present case. Dr Okorie had two meetings, albeit neither face to face, with Driver. The first was by a video call on January 5, 2024, and the second was a follow-up telephone call on October 18, 2024. In both meetings Dr Okorie asked Driver questions that provided more information about Driver's state of mind on the day of and days surrounding the motor vehicle accident in September 2018.

[201] I would also observe that Justice Burnyeat in *Dhaliwal*, the fountainhead of this jurisprudence, does not state categorically that a medical advisor who has not seen a plaintiff may never provide an expert opinion with respect to that individual. Rather, Justice Burnyeat notes that commentary in the jurisprudence indicated that it is "inadvisable": para. 3. He states that a psychiatric opinion "…requires more than a review of medical and other records, and that an opinion must be based at least in part on the observations of the person that the psychiatrist has made and observed."

[202] I am satisfied that Dr Okorie's opinion is "based at least in part" upon his interviews with and personal assessments of Driver, consonant with the statement of Justice Burnyeat in *Dhaliwal*.

[203] One could note parenthetically that the *Dhaliwal* pronouncements would address a particular mischief that one occasionally sees in personal injury defence strategies, where an expert is provided just for the sake of providing an expert, with minimal background information and minimal direct consideration of the person on whom the doctor purportedly provides a medical opinion. A doctor who has such a minimal background base of information, as well as a complete lack of direct observation of the patient, would indeed have little of worth to provide to the court, and would represent a waste of the court's time.

[204] Justice Burnyeat's admonition that the psychiatrist must at least in part base his or her opinion on that medical expert's observations of the subject person would partly counteract this mischief, and will make the expert reports much more useful and indeed necessary to the court: not only assisting the trier of fact in reaching the

ultimate disposition of the dispute on its merits, but also in preserving the integrity of the trial process itself.

[205] Turning to the *Mohan/White Burgess* test, I am satisfied that the Okorie reports do satisfy the four factors.

[206] I have already referred to factor one: their relevance. The reports address what is likely the central issue in this trial: that is, whether or not Driver had agency and personal control when he drove his vehicle into the plaintiff's motorcycle.

[207] I do not understand factors three and four—the absence of an exclusionary rule, and a properly qualified expert—to be particularly controversial. Dr Okorie's evidence is frequently heard and received in these courts. I myself have heard his testimony and received his reports in two trials. I do not understand there to be a challenge to his qualifications.

[208] Mr Yalowsky's primary focus amongst the four *Mohan* factors is, of course, that of necessity. Mr Yalowsky argues that Dr Okorie's evidence is of no use to the Court. The accident, again, occurred in September 2018. Dr Okorie does not speak with Driver until some five-and-a-half years and then six years later. It is argued that where the subject individual has completely recovered from the episode, as Driver appears to have done, a psychiatrist in the shoes of Dr Okorie would have very little on which to base his report. In contrast to an orthopaedic surgeon or another medical doctor performing an assessment, for example, of soft tissue injuries years after the fact, at least that doctor can apply a series of medically accepted tests to ascertain whether the soft tissue injuries are indeed legitimate, whether they are manifesting themselves in the way and in the locations on the body that they should, and thus provides value to the court. Those lingering injuries allow the doctor to provide illumination to the court in his or her medical report about the plaintiff's lingering soft tissue conditions.

[209] Plaintiff's counsel argues that it is difficult to conceive of anyone who could provide a useful opinion with respect to the psychiatric state of Driver in the

moments leading up to his driving of his vehicle into the motorcycle. Alternatively, the doctors at Lions Gate Hospital who saw Driver immediately after and in the 24-hour period after he was taken to the hospital ought to be presenting this opinion, and only their opinions would conceivably be of utility and thus necessity to the court.

[210] I take a wider view of necessity as set out in the *Mohan* test. Although a judge, like any other non-medically trained individual, will be in a position to assess whether Driver was acting erratically and, colloquially, in a psychotic manner, the Court is not in a position to provide its own diagnosis in that regard. The Court is certainly not in a position to measure one step further whether the erratic or psychotic behaviour of Driver in the moments and hours and days before the accident rendered him bereft of free will and individual agency such that the Court cannot make a finding of negligence against Driver.

[211] The Court requires a psychiatric expert to provide a diagnosis based upon an assessment of multiple reports, medical and non-medical, of Driver's behaviour leading up to and in the immediate aftermath of the accident. The Court cannot do that on its own. Nor can the Court line up that testimony and that evidence against the DSM-5 Manual (*Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition), and assess whether or not this psychiatric condition can responsibly be found by the Court. That is in a medical and specifically a psychiatric realm of expertise and not something that the Court can do on its own.

[212] So, pausing there, I conclude that at least some form of psychiatric opinion is necessary for this trial.

[213] I am also satisfied that the gap in time between the motor vehicle incident in 2018 and Dr Okorie's two meetings with Driver should not be fatal. Again, it is not at all unusual for an expert offering a psychiatric opinion to examine the subject years after the incident or injury in question, and, based upon that interview and a review of the subject's medical records history, provide an opinion as to the history of that

condition, and whether there is a causal link between the original accident and the present complaints. Dr Okorie's present opinion is no different than that.

[214] I appreciate that the realm of psychiatry is less tangible in most aspects than would be a medical report on a physical injury. That said, there are likely aspects of Dr Okorie's interviews with Driver that will inform his ultimate opinion. I do not know whether this sort of inquiry has been undertaken, but Dr Okorie in his professional training would know methods of probing a subject to get a sense of the legitimacy of the reports of manifestations of psychiatric illness that are provided by the subject. Certainly, the doctor would be able to provide opinions about whether a subject, who in 2024 exhibits no psychiatric conditions or psychotic conditions, could nonetheless have been suffering from such conditions in 2018 on that fateful day. I am satisfied that Dr Okorie would be in a position to answer the questions that have been impugned in the argument presented by the defendants:

> …
>
> 2. On the day in question, were the defendant’s acts and omissions conscious acts of his will?
> 3. What is the medical explanation for defendant’s presentation?
>
> …
>
> 5. Before the defendant’s episode, would it have been reasonably foreseeable to an objective person that the defendant might experience a psychological break? If so, how and why?
> 6. Was the episode foreseen by the defendant on the facts of this case?
> 7. Could the defendant have taken reasonable steps or precautions given his symptoms to avoid this accident?
> 8. How quickly did the defendant’s episode come to pass?
> 9. Please indicate where appropriate if another specialist’s opinion is required or if you defer to another area of specialty on any issue.
> 10. As a result of his mental illness, did the defendant have capacity to understand or appreciate his duty of care to other drivers at the time of the accident and at the time he started to experience psychosis?
> 11. As a result of mental illness, was the defendant able to discharge his duty of care to other drivers, or had he no meaningful control over his actions at the time of the accident and at the time he first experienced psychosis?

[215] I am satisfied that notwithstanding the passage of time, this psychiatrist, through his review of the medical records, and through his questions posed to Driver, will be in a much better position to provide an opinion on what transpired in the days leading up to the motor vehicle incident and at the time of the motor vehicle incident than this Court could independently do.

[216] I agree with Mr Walker's compelling argument with respect to the passage of time that even the doctors identified by Mr Yalowsky as presenting the more appropriate providers of opinion evidence would not fully satisfy the exigencies of Mr Yalowsky's argument. Specifically, soon after police, paramedics, and firefighters attended at the accident scene, because of Driver's agitated state and because of the accident that he had just caused, he received a sedative. In his testimony this morning, Driver described that medication as providing an immediate calming effect. That effect was confirmed by the paramedic, Mr Parlongo, who administered that medicine. Driver immediately calmed down, both in terms of his internal turmoil, as well as in his external agitated presentation of that turmoil.

[217] Accordingly, I agree with Mr Walker that the emergency doctors would not have a direct means of diagnosing Driver's condition, and that, indeed, only a doctor who by happenstance was driving his car into Downtown Vancouver at the precise moment of the collision would satisfy the high bar set out by the plaintiff.

[218] Finally, I note that in the criminal law context, psychiatrists frequently provide psychiatric diagnoses long after the event in question, as in the case of a finding that an otherwise accused person is not criminally responsible by reason of a psychiatric illness. In almost all circumstances, those psychiatric opinions will be based upon assessments conducted some time after the psychotic incident in question, based upon an assessment directly of the subject accused, as well as a review of the medical records in a manner that is really no different than what we have here today.

[219] I am satisfied that Dr Okorie, an experienced and qualified psychiatrist, is well placed to provide an opinion to the Court based upon his review of the medical records, as well as his two interviews with Driver, in a manner that this Court

requires in order to reach an appropriate and just conclusion is this very unusual case.

[220] Insofar as Dr Okorie examined Driver years after the psychotic incident, and may have been limited in the number of tests and other assessment tools because of the passage of time, and the fact that Driver is apparently free of psychotic concerns, those issues will all go to weight. Similarly, the fact that Dr Okorie conducted his assessments remotely via videoconference and telephone call, will also go to weight.

[221] I will turn very briefly to the second ground of objection: the usurpation of the role of the court through questions that touch upon the ultimate issue. As Mr Yalowsky responsibly acknowledges, while this ground used to be of considerable potency, it has diminished in recent years. As stated in Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis, 2022):

> 12.178 Even before the ultimate issue rule was abolished, it was not strictly applied. In *R. v. Lupien*, [[1970] S.C.R. 263, [1969] S.C.J. No. 82 (S.C.C.)] for example, the Supreme Court of Canada held that a psychiatrist could testify on the very fact in issue which the fact-finder was required to decide. In light of that decision, other ***courts permitted experts to express their opinions in the context of the very words which comprise the legal definition which the court must apply***. Lord Parker G.J. in *Director of Public Prosecutions v. A. & B.C. Chewing Gum Ltd.* [[1968] 1 Q.B. 159, at 164, [1967] 2 All E.R. 504 (D.C.)] recognized this practice:
>
> > ***Those who practise in the criminal courts see every day cases of experts being called on the question of diminished responsibility, and although technically the final question "Do you think he was suffering from diminished responsibility?" is strictly inadmissible, it is allowed time and time again without any objection.***
>
> …
>
> 12.180 Historically, the so-called ultimate issue rule was ignored by many Canadian and English courts. This is apparent from the authorities canvassed by Aylesworth J.A. in R. v. Fisher:
>
> > In many instances opinion evidence is received upon the very issue the Court has to decide, as for example, where the issue is the materiality of a representation in an application for insurance: Yorke v. Yorks. Ins. Co., Sun Ins. Off. v. Roy, or where the issue in a marine case is proper seamanship: Fenwick v. Bell, or in malpractice actions against professional men: Davy v. Morrison. In R. v. Mason,

> ***the defence to a charge of murder was that the deceased had committed suicide and a doctor who had heard the evidence was asked whether it was his opinion that the fatal wound was inflicted by someone other than the deceased.*** The Court of Criminal Appeal held that his answer was admissible as an opinion based on an assumed state of facts. In R. v. Holmes, the same Court decided that ***a doctor called in support of the accused's plea of insanity might be asked in cross-examination whether the prisoner's conduct after the crime, indicated that he knew the nature of his act and that it was wrong***, although these are, of course, the very points which determine the applicability of the rules in McNaghten's case. The decision in the Holmes case was approved in the B.C. Court of Appeal in R. v. Matthews….
>
> …
>
> 12.189 The caselaw illustrates that there are certain subject matters which go to the very heart of judicial decision-making and courts remain wary of expert witnesses providing advice as to how they should decide issues such as whether a witness is telling the truth or the meaning of English words. ***Perhaps it is just a matter of sensitivity over the way in which the expert gives his or her evidence.*** For example, a court would be loath to receive explicit evidence from an expert that an accused is guilty or innocent or that a defendant was negligent or not, or that an individual was insane or not. ***However, it will readily receive evidence which is not so direct but which, if accepted, inescapably leads to that conclusion.*** …
>
> [emphasis added]

[222] As stated by McLachlin J (as she then was) in *R. v. Burns*, [1994] 1 SCR 656, 1994 CanLII 127:

> 26 The respondent does not argue that psychiatric evidence bearing on a witness' behaviour is for that reason inadmissible. His objection is that "the opinion of Dr. Maddess went to the very root of the issue before the learned trial judge" and that "allowing that opinion usurped the function of the trial judge": the so-called "ultimate issue rule". However, the jurisprudence does not support such a strict application of this rule. While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, ***it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court:*** *R. v. Graat*, [1982] 2 S.C.R. 819. See also *Khan v. College of Physicians & Surgeons (Ontario)* (1992), 9 O.R. (3d) 641(C.A.), at p. 666 (per Doherty J.A.).
>
> [emphasis added]

[223] The specific jurisprudence concerning the effect of mental illness on tort liability frequently features such questions posed to psychiatric experts framed in the

language of tort law. For example, in *Moushi v. Stephen*, 2019 ONSC 3125 at para. 141, psychiatrist opined on "[w]hether on the balance of probabilities, as a result of his mental illness, Mr. Stephen lacked capacity to understand or appreciate the duty of care owed at the relevant time?" and whether, "as a result of the mental illness, the defendant was unable to discharge his duty of care as he had 'no meaningful control' over his actions at the time of the relevant conduct fell below the objective standard?" In *Canada (Attorney General) v. Connolly*, 64 DLR (4th) 84, 1989 CanLII 5206 (BCSC), the psychiatrist opined on whether the defendant "had known the nature and consequences of his acts", and whether "because of his delusional thought, his failure to appreciate the consequences of his acts and his inability to know that what he was doing was against the law, 'he was unable to form an intent to commit either an intentional tort or a negligent act'": para. 12.

[224] Courts recognise the artifice of counsel tying themselves into knots composing questions that will somehow avoid the expert providing an opinion that may coincide with the similar legal pronouncement that the judge at the end of the day will have to make. As has been the subject of objections on both sides with respect to psychiatric terms that have both a specific medical diagnostic meaning, as well as a common everyday meaning, I am satisfied that the Court is well placed to limit the psychiatrist's opinion to a medical opinion and to safeguard against transferring directly that medical opinion into the legal analysis that ultimately will determine the issues before the Court.

[225] To consider as an example: question five posed to Dr Okorie:

> Before the defendant's episode, would it have been reasonably foreseeable to an objective person that the defendant might experience a psychological break? If so, how and why?

[226] I appreciate that this tracks to some extent the legal inquiry that I will have to pose to myself. The legal analysis may or may not be a partial, or negligible, or complete Venn diagram between the approaches to the phrase "reasonably foreseeable" undertaken by a psychiatric expert, and a judge, and an individual untrained in either the law or medicine. I will safeguard against conflating a medical

assessment with a legal assessment, unless it is clear that those assessments are in fact identical.

[227] Again, at the end of the day, I may or may not give any weight to Dr Okorie's opinions with respect to what transpired five-and-a-half or six years before he actually examined or conversed with Driver.

[228] I would also say that I will have before me the evidence of two doctors who did see Driver closer in time to the accident, specifically Dr Murray, who saw him at Lions Gate Hospital soon after he was brought in, as well as, presumably, Dr Burgmann, a psychiatric expert who saw him the next day. These medical experts may provide a greater context to the parties, as well as to the Court, to assess what weight should be given to Dr Okorie's expert opinions. In this sense, Dr Okorie's opinions are conceptually less prejudicial to the plaintiff than they may be in other circumstances.

[229] In turn, the opinion of Dr Okorie, based upon the totality of the medical records and his communications with Driver, may provide a more historical and holistic assessment of Driver's condition leading up to the incident than would the medical treating doctors who saw Driver on a one-off basis in the context of an operating hospital with all of the stresses of that practice. This factor speaks further to the necessity of Dr Okorie's reports.

[230] Anything arising from that, counsel? Mr Yalowsky?

[231] [DISCUSSION]

[232] The last thing I would say: although I have given the usual reservation to expand the reasons, I have not been provided with many cases in total, or any cases from the defence. So I would in particular reiterate that I reserve the right to expand the jurisprudential base for these reasons. I would also specifically reserve the right to reiterate—not revisit—this ruling in my final reasons for judgment. That reiteration will not change in terms of its substance or its result, but it may represent an expanded version of what I have just extemporaneously delivered in Court today.

## VIII. APPENDIX B: LADY JUSTICE RAFFERTY'S JURISPRUDENTIAL REVIEW IN *DUNNAGE V. RANDALL*, [2015] EWCA CIV 673

**The authorities.**

33 *The McNaghten Rules*, M'Naghten's Case 1843 10 C&F 200, applied in criminal trials, are that if the defendant did not know the nature and quality of his acts or if he did not know that what he was doing was wrong, he is not guilty by virtue of insanity.

34 *Donaghy v Brennan* (1900) 19 NZLR 289 (" *Donaghy*") a decision of the Court of Appeal of New Zealand was pleaded in trespass and thus strict liability. The court found insanity no defence to a claim for damages for assault. The defendant, a lunatic of unsound mind, was unconscious of and incapable of understanding the nature and consequences of his acts. Stout CJ delivering the judgement of the court said at p 299:

> "…the question …is whether a person…labouring under disease of the mind to such an extent as to render him incapable of understanding the nature and quality of the act and of knowing that such was wrong shoots another and injures him, is liable in damages to the person injured. …Insanity would not it has been said in many cases exempt from liability for a wrong if an essential ingredient of that wrong was not intention or malice. ….Stout CJ said in *Weaver v Ward* "if a lunatic kill a man or the like this is not felony because felony must be done animo felonico …and therefore if a lunatic hurt a man he shall be answerable in trespass". Hale's Pleas of the Crown [sets out that] those incapacities or defects that …. the laws of England take notice of …are of three kinds: i) natural ii) accidental iii) civil incapacities or defects. Natural includes infancy and accidental includes madness and Hale says ordinarily none of these do excuse …from civil actions …[for] trespasses batteries wounding etc. … There may be distinctions made according to Holmes [in his lectures on the common law] between the liabilities of the insane. …Once such a distinction is made it will be very difficult to draw the line. To a medical man a man subject to delusions or with a depraved or weakened will should not be expected to act as the normal man and his liability both criminal and civil should be less tha[n] that of the same man with a normal will. But our law…has not adopted this medical point of view. ….And Holmes's statement as to liability for torts states the law more broadly than has been accepted in English Courts. "

35 In *Slattery v Haley* [1923] 3 DLR Middleton J said:

> " ….an act ..merely negligent…must …have been the conscious act of the defendant's volition. He must have done that which he ought not to have done or omitted that which he ought to have done as a conscious being. …When a tort is committed by a lunatic he is unquestionably liable in many circumstances but under other circumstances the lunacy may shew that the essential mens rea is absent; but when the lunacy …is of so extreme a type

> as to preclude any genuine intention to do the act complained of there is no voluntary act at all and therefore no liability: Salmond 5th Ed……..Lord Esher MR in *Hanbury v Hanbury* (1802) 8 Times LR 559 [said] "whenever a person did…either a criminal or a culpable act which.. if done…with a perfect mind would make him civilly or criminally responsible… if the disease in the mind ..was not so great as to make him unable to understand the nature and consequences of the act…that was an act for which he would be civilly or criminally responsible…"

36 In *White v White* [1949] 2 All ER 339 (" *White*") the court allowed the husband's appeal against the dismissal of his petition for divorce based on the cruelty of his wife. In his dissenting judgment Denning LJ said:

> "… insanity is to be regarded differently in the civil courts from…the criminal courts……In the case of torts such as trespass and assault it is also settled that a person of unsound mind is responsible for wrongful conduct….even though …influenced by mental disease which was unrecognised at the time …even if….he did not know what he was doing or that what he was doing was wrong. The reason is that the civil courts are concerned not to punish him but to give redress to the person he has injured. It has ever since [Bacon and Hale] been accepted as the law not only in this country…but also in the United States…in Canada… and in New Zealand…..where all the English authorities are collected. …Recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability but on whom the risk should fall. …where a specific intent is a necessary ingredient of the wrong a man may not be responsible if he was suffering at the time from a disease which made him incapable of forming that intent…….but the cases I have cited show that assault and trespass, to which I would add negligence, do not fall within that exception."

37 In *White v Pile* 68 W.N. (N.S.W.) 176 (1950) the certified schizophrenic defendant went into the plaintiff's house, told her she was his wife, attacked her and left. The medical expert said he would not have had a full appreciation of what he was doing and that the normal Pile was not there. The integrated self was pro tem broken up. The court held that some element of intent was necessary to establish the tort of injury to the person. One whose act was involuntary, eg an epileptic or somnambulist, would escape liability. The general current of opinion favoured immunity where the mental disease brought the case within rules analogous to the McNaghten rules. It was more in accord with common sense to allow immunity from tortious liability in assault by an insane person where his insanity would provide a defence to a criminal charge.

38 In *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR 56 ("*Adamson*") the Supreme Court of Western Australia considered liability of an insane person for an act prima facie negligent and a tort. Clerk and Lindsell on Torts (10 Ed 1947) set out the then modern textbook writer's view:

> "lunatics are liable for torts to the same extent as sane persons provided [they are] in that condition of mind …essential to liability in sane persons. In its absence there is no voluntary act."

39 The court cited *Buckley and Toronto Transportation Commission v Smith Transport Ltd* (1946) 4 DLR 721 (" *Buckley*") in which disease of the brain leading to unexpected paralysis convinced the driver of a streetcar that his vehicle was controlled remotely and that he should not use the controls. The Court of Appeal found no tortious liability because his mind was entirely bereft of the mental power to control the car. This was described as a decision reached on a rational basis, that his mind was so diseased as to lead to and be the cause of his actions. That said, the court found much in support of the theory that a lunatic should be responsible for his tortious acts. The position left untouched cases in which the act was during a state of amnesia or mania. Logically even that defendant should be liable. The driver was liable in negligence. He understood what he was doing and that what he was doing was wrong.

40 In *Beals v Hayward* 1959 NZLR a sixteen year old trespasser was hit in the eye by a gun. The jury found the defendant's discharge of the gun was not an intentional assault. His disease of the mind did not leave him incapable of understanding the nature and quality of his act but did leave him incapable of knowing his act was wrong. The injury must flow from the voluntary act of the defendant. Were the act of firing involuntary or accidental there would be no liability.

41 In *Williams v Williams* [1964] AC 698 (" *Williams*") a husband, certified, returned to the status of voluntary patient and during home leave resumed cohabitation. His wife's petition pleaded cruelty by unjust accusations of misbehaviour with men. He suffered paranoid schizophrenia, knew what he was doing when making the accusations but not that they were wrong or untrue. By a majority the House of Lords held that in a charge of cruelty against an insane person the test is whether after allowance for his disabilities the character and gravity of the acts amounted to cruelty and that proof of insanity is not necessarily an answer.

42 Lord Reid said:

> "…the man who knows that he is injuring his wife's health and persists….is clearly blameworthy unless he has adequate justification. But what if he did not realise the damage he was doing? … the reasonable man and what he would have realised…… would throw no light on whether this man was blameworthy…..But then we come to the really difficult cases if blameworthiness is to be a test. There are many…husbands and wives not insane but either sick in mind or body or so stupid selfish or spoilt that they plainly do not appreciate or foresee the harm they are doing…. Certainly allowances have to be made particularly when their condition is due to misfortune……In my judgment decree should be pronounced against such an abnormal person not because his conduct was aimed at his wife or because a reasonable man would have realised the position….but simply because the facts are such that after making all allowances…..the character and gravity of his acts were such as to amount to cruelty…."

43 Lord Evershed said:…

> "the test …is to be applied wholly objectively and … insanity (.. ..unaware through mental disease or disorder of the nature and quality of his acts) is not necessarily an answer ….The mental derangement…cannot…. be wholly disregarded…..But the test will still be objective …. "

44 In *McHale v Watson* (1966) 115 CLR 199 the defendant twelve year old hit a nine year old in her eye when he threw a rod at a post off which it glanced. He had no intention of hurting her. The court referred to the American Restatement of the Law of Tort which divided infants into three categories: babies and children of very tender years, incapable of perceiving risk; those who as adults could foresee the probable consequences of their acts for whom the standard of care was as per an adult; and infinitely various capabilities of those between for whom the standard would be that of a reasonable child of like age intelligence and experience. The defendant was nearly thirteen but playing as a child. It was no answer for him any more than for an adult to claim the harm was due to his being abnormally slow-witted quick-tempered absent-minded or inexperienced. He could however rely upon a limitation personal to himself as characteristic of this stage of development, normal since this was an objective standard. The concept of normality was of rising levels until the achievement of years of discretion. The age at which liability would bite was case-specific. No individual English authority was of help and US and Canadian jurisprudence varied in result and reasoning.

45 In *Roberts* the defendant suffered a cerebral haemorrhage of which he was unaware and drove. After one collision he drove away, colliding with a second vehicle injuring its driver and passenger who sued him in negligence. He argued that he had driven in a state of automatism and was not responsible for his actions.

46 Neill J said:

> "…..automatism involves a complete loss of consciousness…. The driver will…escape liability if his actions ..were wholly beyond his control. The most obvious case is sudden unconsciousness. But if he retained some …albeit imperfect control and his driving judged objectively was below the required standard he remains liable. His position is the same as a driver who is old or infirm. … the driver cannot avoid liability on the basis that according to some malfunction of the brain his consciousness was impaired. [Counsel] put the matter accurately…when he said: "One cannot accept as exculpation anything less than total loss of consciousness"

47 In *AG of Canada v Connolly* 64 DLR (4th) 84 the bipolar defendant injured a police officer by driving away as the latter's arm was pinned in the car. The expert evidence was that he knew someone was standing beside the car, arm inside, but not that what he was doing was wrong or would cause harm. He was severely delusional. The court held those as ill as he had severe impairment of their capacity for the required foresight. If incapable of foreseeing that his act involved a significant risk of harm he had insufficient awareness of consciousness of the nature of his act to make it truly voluntarily negligent. Negligence perhaps more than most other torts is about fault and mental state,

an approach in line with the evolution of the law away from the common law rule affording no relief in tort to a defendant suffering severe mental illness.

48 In *Mansfield* a lorry driver unaware he suffered a condition leading to hypoglycaemia drove into the plaintiff's shop. The court held that there was no reason why the disabling event should absolve him from liability for damages where it was gradual, provided he was aware of it. The standard was that of the reasonably competent driver unaware of a potentially disabling condition. To apply an objective test otherwise would be to impose strict liability. *Roberts v Ramsbottom* was disapproved, Neill J having erred in treating civil and criminal cases indifferently and in assuming that to escape civil liability automatism had to be shown.

49 In *Carrier*, who had a long history of schizophrenia, left hospital and attempted suicide by throwing himself under a bus. The driver, citing *Wilkinson v Downton* (" *Wilkinson*") relying on acts calculated to cause harm or done with needless indifference to the harm likely, sued in negligence both the hospital (for letting him out) and Bonham. The Queensland Court of Appeal held that the standard of the ordinary and reasonable person applied and Bonham's mental condition did not diminish or reduce his liability in negligence. The evidence was that whilst unable to appreciate that what he was doing was wrong and to appreciate the possibility of injury to the plaintiff, his " *capacity to control his actions was seriously impaired but not lost*."

50 Macpherson JA described Bonham's reliance on "calculated" [per *Wilkinson*] as importing a need to show intention or at least foresight of causing harm and that his mental condition precluded it. The expert had said Bonham was not capable of awareness that his actions might injure those on the bus. He would have no concept of what his actions might do to another. Macpherson JA said that though *Wilkinson* was often relied on to show that in an intentional act reasonably foreseeable consequences were not foreseen in all their severity, that was commonly so; most everyday acts of actionable negligence are wholly or partly a product of intentional conduct.

51 He preferred the approach in *Donaghy*, *Adamson* and the American and Canadian authorities which were almost at one in holding a person liable in tort even though of unsound mind. Almost the sole exception was *Buckley* where the driver escaped liability because his delusions deprived him of the ability to understand his duty of care and his power to discharge it. Opinion to the contrary was in Clerk & Lindsell, (16 th Ed 1969) which equated the man of unsound mind with the young child. The court found it difficult to see why a person should be liable for battery or assault but not for negligence, the last requiring no particular state of mind, only a departure from the objective standard. One justification for the contrary view was that rare cases contemplated exemption from liability when enduring a fit or hypoglycaemic episode. Those decisions turned not on state of mind but on automatism when the act was not that of the individual at all. The special category into which childhood foresight falls was different from unsoundness of mind, neither a normal condition nor a stage of human development.

52 In *Fiala et al v MacDonald et al* (2001) 201 DLR (4th) 680 a defendant later diagnosed as bipolar jumped on a car sunroof, the driver involuntarily accelerated into another car and its injured occupants sued in negligence. The court found the driver incapable of appreciating the nature or quality of his

actions or his duty of care. One expert said assessment of rightness or wrongness, if it had little to do with emotion or affect, would probably be unimpaired but if to do with emotion could be almost totally impaired. Another said his brain was over-activated, misfiring, and sending him misinformation. Totally out of control the mind was driving the physical activity which the man could neither stop nor control.

53 The court quoted AM Linden, Canadian Tort Law 6 th Ed:

> *"Persons suffering mental illness may not have to comply with the reasonable person standard, the theory being that it is unfair to hold people liable for accidents they are incapable of avoiding."*

The court said the extract arguably emphasised the "fault" requirement underlying tortious liability. In contrast, several authors considered the compensatory nature of tort law paramount so that those suffering mental illness should not attract a lowered standard. When two innocent persons are involved in an accident he who caused it should be liable for the damage.

54 There was judicial recognition in Canada of the need to relieve the mentally ill of tortious liability in some circumstances. To find negligence the act must have been voluntary and the defendant have possessed the capacity to commit the tort. If he understood the duty of care and could discharge it his actions would be voluntary and the capacity would exist. To be relieved of tortious liability when affected suddenly and without warning he must show either that his mental illness led to his having no capacity to understand or appreciate the duty of care or that he was unable to discharge it as he lacked meaningful control. This test would not erode the objective standard but would preserve the notion that a defendant must have acted voluntarily and had the capacity to be liable. Fault would remain an essential element.

55 In *R v Sean Peter C* [2001] EWCA Crim 125 the appellant schizophrenic argued he should not have been convicted of harassment (abusive letters to an MP) since his compulsive behaviour drove him to write them. He was a long-term abuser and under the self-induced influence of strong cannabis. He wished to be measured against a reasonable schizoid individual. Before moving to the effect of his drug consumption the court first considered the effect if any of his mental condition. It rejected the suggestion that the standard of the reasonable man should be modified for the mentally ill to take account of illness. The standard objective test was apposite.

56 In *Corr* after head injuries from malfunctioning machinery and consequent post-traumatic stress disorder a suicide risk suffering severe anxiety and depression jumped to his death. His employer conceded negligence but contested liability for his suicide. The court found the employer owed a duty to take reasonable care to avoid causing him injury (including psychiatric injury) and that foreseeability of physical injury was sufficient to establish liability. His suicide had been a direct result of his depressive illness which impaired his capacity to make reasoned and informed judgments about his future. The suicide was not a novus actus.

57 Lord Bingham said Corr's suicide was not a voluntary informed decision by an adult of sound mind but by a man suffering a severely depressive illness impairing his capacity to make reasoned and informed decisions. Tort did not require so blunt an instrument as *The McNaghten Rules*. The cursoriness of

arguments in the court below on contributory negligence made it inappropriate to enquire into the factual basis for it. Were Lord Bingham making a finding he would assess the deceased's responsibility as 0%.

58 Lord Scott eliminated automatism, since the power of choice was retained. Had Corr jumped and in disregard of their safety injured people, fault would have been attributed. Lord Scott would have set his responsibility at 20%.

59 Lord Walker considered Corr still had the capacity to manage his affairs, was not deprived of his autonomy and made his own decision to end his life because of his feeling of worthlessness and hopelessness, the result of his depression, in turn the result of his accident. He would make no deduction for contributory negligence.

60 Lord Mance preferred to leave open contributory negligence. A conclusion that someone suffering depressive illness has no responsibility for his suicide and is an effective automaton might in law be questionable when the capacity to make a reasoned and informed judgment is impaired not eliminated. He agreed with Lord Scott that liability could not be escaped unless the suicide were an automaton.

61 Lord Neuberger found contributory negligence would not reduce damages where the suicide was not of sound mind. He quoted with approval Lord Hoffman in *Reeves v Commr of Police for the Metropolis* [2000] 1 AC 360 ("*Reeves*") where he said:

> *"The difference between being of sound and unsound mind whilst appealing to lawyers who like clear-cut rules seems to me inadequate to deal with the complexities of human psychology in the context of the stresses caused by imprisonment."*

62 Lord Neuberger thought there exists a spectrum of sanity normalcy or autonomy. At one end would be a man of sound mind whose suicide could be said to be a voluntary act, at the other a man whose will and understanding were so overborne that he had no real choice as he had lost his autonomy, did not appreciate what he was doing and had no real control over his action. In the middle, the man of not entirely sound mind had a degree of control over his emotions and actions and would appreciate what he was doing when he killed himself. He would have lost a degree of autonomy. Corr's capacity was impaired not removed, and the question was the extent to which his autonomy had been overborne.

63 In *Coley v R* [2013] EWCA Crim 223, the 17 year old defendant was convicted of attempted murder. Having gone to bed he later, in dark clothing, a balaclava, and carrying a knife entered the bedroom of his next-door neighbours' home and as both sleepers awoke stabbed the male repeatedly. He said he had blacked out and awoken pushing open their bedroom door. He claimed that having heard the female scream he blacked out again and had no further memory until finding himself in the garden. The issue was whether the Crown could prove his intention to kill. He had that day taken a good deal of strong cannabis. Three psychiatrists excluded mental illness or disorder or personality disorder. There was a real possibility of an unusually brief psychotic episode induced or triggered by the cannabis. Automatism was not left to the jury. Had the jury found it made out the defendant must have been acquitted since the

act would not have been his but wholly involuntary, better expressed as his voluntary control being completely destroyed.

64 Hughes LJ giving the judgment of the court said:

> "Automatism, if it occurs, results in a complete acquittal on the grounds that the act was not that of the defendant at all. It has been variously described. The essence of it is that the movements or actions of the defendant at the material time were wholly involuntary. The better expression is complete destruction of voluntary control: *Watmore v Jenkins* [1962] 2 QB 572 and Attorney-General's Reference (No 2 of 1992) [1994] QB 91. Examples which have been given in the past include the driver attacked by a swarm of bees or the man under hypnosis. "Involuntary" is not the same as "irrational"; indeed it needs sharply to be distinguished from it."

The court said that on its facts "consciously" was an adverb importing some risk of difficulty. Coley was not unconscious in the sense of comatose. Automatism does not require such a state. On the other hand his detachment from reality some might describe as an absence of conscious action, but that fell short of involuntary, as distinct from irrational, action. A psychotic episode, as the doctors hypothesised had occurred, would not preclude complex organised behaviour. He made the decision to dress as described, arm himself, find the keys and let himself in. Those actions were not involuntary, whether or not driven by delusion. One expert said that if in a psychotic state the defendant was conscious and in control of his body, another that he would be in voluntary control of his limbs and aware of what he did physically. The third thought that even if he had assumed the role of a video game character and it was the character acting, nevertheless he was conscious in the belief that he was that character. He lacked an awareness of what he was doing. The court described this last opinion as a description of irrational behaviour, the mind deluded or disordered, not of wholly involuntary action.

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[1] These reasons out of necessity discuss sensitive personal medical information about both the plaintiff (urological conditions) and the defendant Driver (psychiatric conditions), the dissemination of which, in conjunction with their actual names, would likely result in an affront to their dignity and strike at the core of their privacy. Apart from the interests of those individuals, the public has an interest in the value of protecting this sensitive and potentially stigmatising personal information. At the same time, there is no particular public interest in hearing that information in conjunction with the names of the litigants. Accordingly, as per *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 34-38, the Court finds it proportionate to anonymise the parties and style of proceedings and to issue a publication ban on identifying the parties.

[2] Notwithstanding this, tests at Lions Gate Hospital indicated that driver had a cannabinoid reading greater than 49 mg/ml. Dr Okorie opined that driver was not under the influence of cannabis of the time of the collision, despite his positive test at the hospital.

[3] The texts and judgments cited in these reasons adopt differing language around mental illness according to authorial and editorial preferences and the linguistic norms of the times and places of publication. I retain the original language in quotations for the sake of accuracy, while acknowledging that such language may dated, and offensive and inappropriate.

[4] The Supreme Court of Canada affirmed the result, but left the issue of liability and incapacity for another day: "… [i]t is preferable to await a case in which it calls for decision, one in which there is an action against a mentally ill person": [1978] 1 SCR 893 at p. 899.

[5] The torts of assault and battery are both descendants of the writ of trespass from early English law. The writ of trespass provided a remedy for directly inflicted injury, in contrast to the writ of trespass on the case, which evolved later as a remedy for consequential injury: Klar, *Remedies* §2.1. Over time, assault and battery evolved as distinct torts. In Canada, battery involves intentional, offensive contact with another person's body, whereas assault involves intentionally creating an apprehension of imminent offensive contact: Linden §2.03–04. In lay terms, assault involves the threat of harm, whereas battery involves the infliction of harm. As Linden explains at §2.04: "[S]winging at someone and missing is an assault but not a battery; striking someone from behind, without his or her knowledge, is a battery but not an assault." The incorporation of the same terms into the criminal context has only increased confusion: some jurisdictions maintain the distinction between assault and battery, whereas others, including Canada, have integrated both concepts under the umbrella of assault: *Criminal Code*, RSC 1985, C-46 s. 265.

[6] *Connolly* contains a footnote that a motion to appeal was filed. In related proceedings, ICBC brought an application to determine coverage issues. In *Canada (Attorney General) v. Connolly*, 64 DLR (4th) 84, 1990 CanLII 443 (BCSC), ICBC was found liable to pay. ICBC's appeal of that decision was dismissed in *Canada (Attorney General of) v. Connolly*, 1992 CanLII 583 (BCCA). The Court of Appeal wrote:

> 19 Hill and his co-plaintiffs appealed against the judgment of Mr. Justice Paris seeking an order making Connolly liable in negligence was well as in battery. That appeal would only be of moment if the Court had found that Regulation 64 did not extend to the intentional act found by Mr. Justice Paris. In the light of the result of the first appeal, the second appeal has become academic unless the Insurance Corporation obtains leave to appeal to the Supreme Court of Canada from our judgment in the first appeal. If it does not then, in my view, the second appeal should be dismissed on the grounds that it is academic. If leave should be obtained the matter should stand until further proceedings are disposed of.

[7] Dubin JA became Chief Justice of Ontario the year after *Connolly*, in 1990.

[8] Apart from that limitation on the Dr Okorie evidence as a whole, the reports' broad pronouncements and conflation of the concepts of irrational thoughts and involuntary acts evoke the concerns of Lady Justice Rafferty in *Dunnage* about similar conceptual blurring in the expert reports before her:

> 110 I am as I earlier indicated uneasy about the proliferation of terms, all seeking to pin down in words not what Vince was enduring, florid paranoid schizophrenia, but its effect in the context of tortious liability. I am particularly anxious about use of "involuntary" and "irrational" almost as synonyms. Even if not quite synonymic they are certainly attached to nouns seeking to describe the same condition.
>
> 111 I select but two examples of how troubling I find the vocabulary. The Judge concluded that so long as incapacity altogether removes rational motivation there is no liability. He found that when Vince returned with his can he was not acting rationally. "Rational" might suggest synonymity with "voluntary".

[9] An insurance coverage case that concluded that the gun shop owner's claim against Mr Butterfield, although pleaded in negligence, nonetheless constituted a battery and a deliberate attack, such that the exclusionary clauses in Mr Butterfield's insurance policy applied, such that the defendant insurer had no duty to defend.

[10] White noise contains all audible frequencies with equal energy, with more of a hissing sound. Pink noise has more energy at lower frequencies and less at higher frequencies, sounding softer and more balanced: it is often likened to the sound of a waterfall. Brown noise is even more bass-heavy: like a gentle surf sound.

[11] The evidence established that neither of the 2023 strikes (the Writers Guild of America and Screen Actors Guild) affected voice actor work in Vancouver. The COVID-19 pandemic had a passing negligible effect, given the definitional ability to provide voices remotely.