

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Workers' Compensation Board v. Ramsay*,
2025 BCSC 734

Date: 20250417
Docket: S214479
Registry: Vancouver

Between:

Worker's Compensation Board

Plaintiff

And

Phillip Gilmore Ramsay

Defendant

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Plaintiff:

J.K. Kooner
K. Priddle

The Defendant, appearing in person:

P.G. Ramsay

Place and Dates of Trial:

Vancouver, B.C.
October 15-18, 2024
November 12, 2024

Place and Date of Judgment:

Vancouver, B.C.
April 17, 2025

Table of Contents

I. OVERVIEW 3

II. ISSUES 3

III. IS WCB AUTHORIZED TO BRING THIS SUBROGATED CLAIM?..... 4

IV. DID MR. RAMSAY COMMIT A BATTERY OF MR. KING?..... 6

 A. Credibility and Reliability 6

 B. Evidence Regarding Liability 12

 C. Conclusions on Disputes in the Evidence..... 19

 D. Analysis 21

V. CONCLUSION 28

VI. COSTS 28

I. OVERVIEW

[1] The Plaintiff, Workers' Compensation Board ("WCB"), advances a subrogated claim on behalf of James King. Mr. King was injured during an altercation with the Defendant, Philip Gilmore Ramsay, almost six years ago, in Whistler, British Columbia (the "Incident").

[2] Following the Incident, Mr. King made a claim for WCB benefits. The WCB approved the Claim, and paid Mr. King wage loss and other benefits. The WCB now seeks to recover those payments, as well as compensation for Mr. King for his non-pecuniary damages, damages for past and future loss of earning capacity, and out-of-pocket expenses.

[3] Mr. Ramsay has denied liability for Mr. King's injuries, and further denies that Mr. King has suffered the damages in the amounts claimed.

[4] For the reasons that follow, I find that the Plaintiff has failed to prove liability. Consequently, the claim is dismissed.

II. ISSUES

[5] The following issues are raised in this proceeding:

- a) Is the WCB authorized to bring the subrogated claim?
- b) Did the Defendant commit the tort of battery against Mr. King?
- c) Did the Defendant's actions cause injuries to Mr. King? If so, what amount, if any, is Mr. King entitled to receive for his:
 - i. non-pecuniary damages;
 - ii. past loss of earning capacity;
 - iii. future loss of earning capacity;
 - iv. future care costs; and
 - v. special damages.

- d) Is the WCB entitled to receive reimbursement of \$2,048.58, which it paid out for Mr. King's past wage loss, and \$4,604.38 which it paid for healthcare and Medical Services Plan payments?

[6] In the Notice of Civil Claim ("NOCC")¹, the Plaintiff sought a separate award for loss of house maintenance capacity. However, this claim was not advanced at trial. Similarly, the claim for punitive damages was not pursued at trial, despite being sought in the NOCC.² I have therefore treated both these claims as abandoned.

III. IS WCB AUTHORIZED TO BRING THIS SUBROGATED CLAIM?

[7] The first question relates to the WCB's authority to bring this subrogated claim.

[8] Mr. Ramsay does not dispute that s. 130 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 and amendments thereto (the "Act"), authorizes the WCB to commence a subrogated tort action to compensate Mr. King for personal injuries arising from the alleged tort committed by Mr. Ramsay. Nevertheless, given that Mr. Ramsay is self-represented, I have addressed this issue to ensure completeness.

[9] This action is brought by the WCB pursuant to s. 130 of the *Act*, which provides as follows:

Board has right of action if compensation is claimed

- 130 (1) If a worker or dependant applies to the Board claiming compensation under the compensation provisions, neither the making of the application nor the payment of compensation under those provisions restricts or impairs any right of action against the party liable.
- (2) In relation to every claim referred to in subsection (1), the Board is subrogated to the rights of the worker or dependant and may maintain an action in the name of the worker or dependant or in the name of the Board.
- (3) The Board has exclusive jurisdiction to determine whether to maintain an action under this section or compromise the right of action, and the Board's decision is final and conclusive.

¹ Notice of Civil Claim filed April 27, 2021, Part 2, at para. 6.

² *Ibid.* at para. 7.

(4) If, by an action under subsection (2), more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under the compensation provisions, the amount of the excess, less costs and administration charges, must be paid by the Board to the worker or dependant.

[10] Thus, s. 130 is triggered when a claim for compensation is made to the WCB by an injured worker. In this case, Mr. King testified that: (a) he made a claim to the WCB for compensation for injuries sustained as a result of the Incident; (b) the claim was approved; and (c) he received payments from WCB in relation to his claim.

[11] Section 131 of the *Act* limits the amount of recovery under a subrogated claim, to only those damages that are attributable to the actions of the named defendant. If there is some fault attributable to the employer or another worker, then the court must determine the portion of the damage or loss caused by the negligence of these third parties, even if they are not a party to the action. Mr. Ramsay does not rely on s. 131; nor is there evidence that some fault for the Incident is attributable to the employer or another worker.

[12] Section 133 of the *Act* sets out the amounts that must be awarded if the action is successful:

Amounts to be awarded in legal proceedings under this Division

- 133 (1) In an action brought under this Division, an award for damages must include
- (a) health care provided under Part 4 [*Compensation to Injured Workers and Their Dependants*], and
 - (b) wages and salary paid by an employer during the period of disability
 - (i) that were considered by the Board in setting the amount of a periodic payment of compensation, or
 - (ii) that would have been considered by the Board for that purpose if the worker had elected to claim compensation.
- (2) Costs may be awarded to and collected by the Board in an action taken by the Board under this Division even if a salaried employee of the Board acts as solicitor or counsel for the Board.

[13] I now turn to the question of liability.

IV. DID MR. RAMSAY COMMIT A BATTERY OF MR. KING?

[14] The Plaintiff alleges that Mr. Ramsay committed the tort of battery by physically attacking him during an altercation that occurred when the Plaintiff and a co-worker (William Parkinson) tried to remove the Defendant from their work premises because he was intoxicated.

[15] Mr. Ramsay denies committing a battery on Mr. King. He says that the physical contact was initiated by Mr. King, and that any injuries sustained by Mr. King occurred from an accidental fall.

[16] Mr. Parkinson, who also testified at the trial, provides a third version of events. This version largely supports the position of the Defendant.

[17] Each party asks me to find the other party's evidence unreliable, and in some respects, lacking in credibility. I will therefore begin with setting out the principles that apply to assessing the accuracy and veracity of a witness' testimony.

A. Credibility and Reliability

[18] Credibility and reliability are related but distinct concepts. Reliability concerns the accuracy of the testimony of a witness. It engages consideration of the ability of a witness to accurately observe, recall, and recount the events in issue. Credibility centers on the honesty of the witness. It involves an assessment of the trustworthiness of their evidence, based on their veracity and sincerity, as well as the accuracy of the evidence provided: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd [2012] S.C.C.A. No. 392.

[19] A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case – a credible witness may still give unreliable evidence. Sometimes an honest witness will be trying their best to tell the truth and will believe the truth of what they are recounting, but nevertheless be mistaken in their recollection: *R. v. H.C.*, 2009 ONCA 56 at para. 41.

[20] In *Gichuru v. Smith*, 2013 BCSC 895 at para. 129, aff'd 2014 BCCA 414, 2014 leave to appeal SCC ref'd 2014 Carswell BC 4023, the court noted that demeanour is a factor that a court can consider in assessing a witness' credibility. However, trial judges are cautioned against making credibility assessments based on demeanour alone: *R. v. N.S.*, 2012 SCC 72 at paras. 99–107. This is because the manner in which a witness testifies is a notoriously unreliable measure of credibility. A witness' physical health, personality, cultural and social upbringing, and comfort level with testifying in a courtroom setting, are but some of the things that may affect their demeanour, thereby making it difficult to interpret.

[21] The relevant principles to be applied when assessing the credibility of interested witnesses are discussed in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at p. 357 and *Bradshaw* at para. 186. These factors include whether the witness: modified their testimony; their testimony is in harmony with independent evidence; and whether the testimony seems unreasonable, impossible, or unlikely. I have applied those principles here.

[22] I did not find the Plaintiff to be a reliable or credible witness, both on the question of liability and with respect to damages.

[23] My concerns about Mr. King's credibility arise from a number of things, including: internal inconsistencies in his evidence; inconsistencies between his trial evidence and that provided by him at his examination for discovery ("Discovery"); his admission that he had lied during his Discovery regarding declaring his tips to the Canada Revenue Agency ("CRA"); contradictions between what he told the police when they attended immediately after the Incident and what he told this Court about his injuries; inconsistencies between the injuries he claims to have sustained at the hands of the Defendant, and his ability to continue working immediately afterwards; and his continued participation in high impact sports (such as snowboarding) which belies the seriousness of his injuries.

[24] During his direct evidence, Mr. King admitted that he did not declare all of his tips on his income tax returns and estimated that he only declared about 15-20% of

the total tips that he actually earned. He justified this by stating that it was a “group decision” made by himself and other employees at Buffalo Bills nightclub, where he worked. Mr. King’s Discovery evidence was put to him during his cross-examination, where Mr. King stated that the amount indicated on his tax return represented “all” of his tips. Mr. King admitted at trial that he had lied at his Discovery when he made that statement.

[25] Two concerns arise from this evidence. The first is Mr. King’s admission that he lied during his Discovery despite having affirmed to tell the truth. The second is Mr. King’s admission that he lied to the government when he repeatedly represented to them that the tips he declared were an accurate representation of his income. This evidence gives me little confidence that Mr. King understands (and is willing to comply with) his sworn obligation to be truthful in this Court proceeding. Further, it provides evidence that Mr. King is willing to lie for personal financial gain.

[26] In *Gagnier v. Canadian Forest Products Ltd.*, 1991 CanLII 143 (B.C.S.C.), Justice Finch (as he then was) noted that “false income tax returns raise a strong inference against the plaintiff who asserts a loss of income claim”: at p. 3, citing *Iannone v. Hoogenraad*, 1990 CanLII 1089 (B.C.S.C.), 50 B.C.L.R. (2nd) 390. The evidence adduced by the plaintiff does not assist him in overcoming this inference.

[27] The fact that Mr. King admitted his failure to declare his tips during his direct evidence, rather than his cross-examination, does not ameliorate the concerns that arise. His after-the-fact acknowledgment of wrongdoing does not negate the fact that he did not disclose the tips to the CRA. Nor does his assertion that it was a “group decision” and that “everyone does the same thing”. Rather, these reflect Mr. King’s failure to accept personal responsibility for his actions, and reinforce that Mr. King is willing to lie in order to gain a financial advantage.

[28] This trial is focussed on determining if Mr. King should be compensated for his injuries, and in what amount. I have not been provided any reason for why I should accept that Mr. King is telling the truth now, where the stakes are also

financial, when he was willing to lie in the past to avoid or diminish his financial liabilities or tax consequences.

[29] Justice Majawa came to a similar conclusion in *Turabi v. Nabi*, 2025 BCSC 48. The Court found that Mr. Nabi was neither credible nor reliable, in part because he gave different evidence regarding his taxable income at discovery, in affidavit form, and at trial: at para. 46.

[30] I have additional concerns regarding Mr. King's evidence. During his direct evidence, Mr. King stated that he felt a sudden headache after his altercation with the Defendant. He also testified that he does not recall completing his shift after the Incident, because the injury to his head affected his memory. It was put to him during cross-examination that he had told the police who arrived immediately after the Incident that "no-one was injured". Mr. King explained that when he said this he was thinking about the patrons, and not himself. He also explained that he was not aware of his own injuries. Mr. King later stated that he did not feel the headache until about 30 to 45 minutes after the Incident. These changing accounts and inconsistencies raise a number of concerns about the reliability of Mr. King's evidence regarding the onset of symptoms and their severity.

[31] Finally, I turn to the absence of corroborating evidence. The Defendant asks me to make an adverse inference regarding Mr. King's failure to produce certain photographic and video evidence. This flows from Mr. King's testimony that: he took photographs which depicted his injuries immediately following his altercation with the Defendant; and there were surveillance cameras at Buffalo Bills which were in operation at the time, and which captured some of the events from the night of the Incident. Neither the video footage nor photographs were put into evidence.

[32] The Court of Appeal for British Columbia recently summarized the adverse inference rule in *1104318 B.C. Ltd. v. Dr. Paul Wittenberg, Inc.*, 2025 BCCA 68 [*Wittenberg*]. As the court explained:

[76] An adverse inference may be drawn against a party who fails to adduce relevant evidence without sufficient justification. The nature of such

an inference is that the evidence is being withheld because it undermines the withholding party's position. The trial judge relied on (at para. 105)—and both parties cite on appeal—the following passage from *Wigmore on Evidence*, 3rd ed. (1940) vol. 2 at 162, for the meaning and effect of an adverse inference:

“The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.”

[33] Whether to draw an adverse inference is ultimately a matter of judicial discretion: *Wittenberg* at para. 78. The Defendant bears the burden of adducing at least some evidence to establish that, on the face of the matter, the inference should be drawn: *Wittenberg* at para. 11. Without any evidence, the inference will not be established.

[34] In relation to the photographs, Mr. King explained that he had changed cell phones and no longer has the photographs. Mr. King was not asked any questions during his cross-examination that impacted the veracity of this assertion. Nor was he asked to elaborate or explain when he changed cell phones or what his practice was for storing photographs in the cloud. In the face of a plausible explanation for failing to produce the photographs, there is no basis to make an adverse inference in relation to the missing photographic evidence.

[35] However, I come to a different conclusion regarding the missing video evidence. Mr. King admitted that that he reviewed the surveillance video after the Incident. When asked why it had not been put into evidence, he gave a vague answer about one of the outside cameras being under maintenance. When it was put to him that there were other cameras inside Buffalo Bills, Mr. King gave the following evasive response:

...the cameras that we use, they have a uhm...sort of memory of a certain amount of time – I don't know when it is exactly but obviously it wasn't included it wasn't included when it was needed to be looked at as it is five years old...

[36] Notably missing from this confusing answer was any denial that the video had recorded something material or probative to the events in question. I infer from this evidence that the video did capture some of the events in question and that had it been tendered into evidence, it would have shed light on matters at issue in this trial. It is possible that Mr. King was suggesting from the above testimony that the video was no longer available as it had been erased. However, the vague answer given by Mr. King does not lead naturally to that conclusion. Mr. King's evasive answer, as well as lack of any evidence about what efforts he took to retrieve the video before it was erased or when he discovered that it had been erased, suggests that the video did not support Mr. King's version of events. Had it done so, I conclude that Mr. King would have tendered it into evidence, or, at the very least, taken steps to retrieve the video and produce it to the Defendant. The Defendant has met the burden of establishing that an adverse inference should be drawn in relation to the missing video evidence.

[37] I turn now to the reliability and credibility of the Defendant's evidence. I do not have any concerns about Mr. Ramsay's credibility. He provided his evidence in a forthright manner, conceded facts that were against his self interest, and admitted to the limits of his memory. While there were some inconsistencies between his trial evidence and that given at his Discovery, they were minor and do not affect my view of his credibility. However, I did not find his evidence about the events of the night in questions, and of the Incident, to be reliable. It is clear from the evidence (including that of Mr. Ramsay) that Mr. Ramsay was heavily intoxicated at the time. Mr. Ramsay also admitted to having poor recollection of the events. It is also evident that at least some of his testimony was based on what he believed he would have done, rather than his actual recollection of events.

[38] Four additional lay witnesses testified in the trial: William Parkinson; Colin Hamilton; Chad Millet; and Yari Nieken. The first three witnesses all worked with

Mr. King. They provided evidence regarding his injuries and the impact the injuries had on Mr. King's work and recreational activities. Mr. Parkinson also testified about the Incident, which he observed firsthand. Mr. Nieken, who was called by the Defendant, was also present at Buffalo Bills on July 14, 2019. However, he did not witness the Incident, and his testimony centered around his observations regarding the Defendant's state of intoxication.

[39] I do not have any concerns about the credibility of any of these non-party lay witnesses. Despite their respective relationships with the parties, they each provided their evidence impartially and absent any display of favouritism for one side or the other. Any concerns about the reliability of their evidence are addressed as they arise in these Reasons.

[40] Dr. Heran is a neurosurgeon who was called as an expert witness on behalf of the Plaintiff. He assessed Mr. King on May 17, 2024, and prepared a medical legal report dated July 17, 2024 (the "Heran MLR"), addressing the issue of damages. For reasons outlined below, it is not necessary for me to address his evidence.

B. Evidence Regarding Liability

[41] There are four witnesses who testified about the events surrounding the Incident: Mr. King, Mr. Parkinson, Mr. Ramsay, and Mr. Nieken. Mr. King and Mr. Parkinson were both present as employees of Buffalo Bills at the time of the Incident. Mr. Ramsay and Mr. Nieken were both customers and came in together as part of a group. The following findings of fact are made from the evidence of these witnesses. Some of the facts are uncontroverted, while others are in dispute. I have only attributed the source of a particular fact where it is relevant or controverted, and have addressed disputes in the evidence as they arise. Where a key fact is in dispute, I have resolved the dispute under part C of this section.

[42] The Incident occurred at Buffalo Bills Bar & Grill ("Buffalo Bills") shortly after midnight on July 15, 2019 – sometime before 12:30 a.m. Buffalo Bills is a night club located in Whistler, with the typical night club atmosphere – a dark interior with

strobe lights, loud music, and a party-like setting. During the period in question, Buffalo Bills was open from 8:00 p.m. to 2:00 a.m. on Sundays. The night club is located underground and is accessed through two sets of doors. The main entrance is found at the top of a short set of steps (the "Village Steps") leading from Whistler Village (the "Village"). Through those doors is a set of stairs. At the bottom of the stairs is another doorway, which leads directly into the night club.

[43] On Sunday, July 14, 2019, Mr. King was working as a bar manager at Buffalo Bills. Sundays at Buffalo Bills tended to be slower than other days, so there was minimum staff working during this shift. One of the staff working with Mr. King that evening was William Parkinson. Mr. King was the only bartender working that night, and he served Mr. Ramsay and his party.

[44] I turn first to Mr. King's evidence. Mr. King testified that a group of people came into Buffalo Bills at around 9:00 or 9:30 p.m. and sat at the bar (the "Group"). Mr. Ramsay was part of the Group. Mr. King did not know Mr. Ramsay and had never met him prior to that evening. According to Mr. King, there was a clear leader in this Group. I infer from the evidence that this person was likely Mr. Nieken, who paid the bar tab for the Group. The Group ordered a round of drinks and some of its members made small talk with Mr. King.

[45] About 30 minutes to an hour later, a bachelorette party came into the night club. Some of the men in the Group started talking to some of the women in the bachelorette party, and ordered them a bottle of champagne. Members of the bachelorette party later moved to the dance floor. Mr. King saw Mr. Ramsay join the women on the dance floor.

[46] At some point, Mr. King was approached by Mr. Parkinson, who told him that the Defendant had exposed himself on the dance floor. Mr. King then looked over to the dance floor, and saw that Mr. Ramsay had his pants on the floor around his ankles, and was "swinging" his genitals around.

[47] Mr. King stated that he and Mr. Parkinson approached Mr. Ramsay. Mr. Ramsay pulled his pants up. Mr. King told Mr. Ramsay that he needed to leave. Mr. Ramsay did not give much of a response, but started moving towards the front door voluntarily. There is some dispute in the evidence about whether Mr. Ramsay was physically escorted off the dance floor, or whether he left voluntarily. I prefer the evidence of Mr. Parkinson on this point, that Mr. Ramsay left the dance floor voluntarily.

[48] Mr. King provided the following evidence about what occurred next.

[49] As Mr. Ramsay got near the base of the staircase leading out, he turned around and asked why he should leave. Mr. King and Mr. Parkinson repeated their request. Mr. Ramsay refused to leave, and both Mr. King and Mr. Parkinson physically restrained Mr. Ramsay and started moving him towards the staircase. They travelled up most of the stairs when Mr. Ramsay started becoming violent. Mr. Ramsay began "lashing out" and tried to loosen their grip on him. When they neared the top of the stairs, Mr. King's and Mr. Parkinson's grips on Mr. Ramsay began to loosen. Under cross-examination, Mr. King stated that Mr. Ramsay actually "got loose" at the top of the stairs.

[50] Mr. King stated that when they were outside the main entrance doors to Buffalo Bills (which were located at the top of the stairs), Mr. Ramsay grabbed the back of Mr. King's neck and threw him into the metal railing of the steps leading into the Village. Mr. King hit the left side of his head on the metal railing, and then fell backwards on to the concrete. Under cross-examination, Mr. King stated that the metal railing where he "was thrown" was about three to four steps from the front entrance of Buffalo Bills. He stated that he hit his head and then he fell backwards. According to Mr. Parkinson, Mr. King fell and was not thrown by Mr. Ramsay. I have addressed this dispute on a key issue later in these Reasons.

[51] Mr. Ramsay then turned around and faced the venue, and started yelling. Mr. King does not recall what he said. Mr. King sent Mr. Parkinson back inside Buffalo Bills and called the police. They arrived about five to seven minutes later.

When the police arrived Mr. Ramsay was sitting on the ledge opposite to the outside entrance to Buffalo Bills.

[52] Mr. King testified that he spoke to the police, but he did not “press charges” at the time. Under cross-examination, he agreed that he did not tell the police that he had been hurt when they asked if anyone was injured. He explained that he had to get back to work and did not think of his own injuries. When asked during cross-examination why he did not mention being assaulted by Mr. Ramsay, he stated that he had a conversation with the police but did not want to press charges that night “because I was not aware of my injuries”. As noted elsewhere, these varying accounts cause concerns about Mr. King’s credibility and reliability.

[53] The police detained Mr. Ramsay and took him away. Mr. King then returned to Buffalo Bills, and resumed his shift. At some point, one of the men in the Group came up to Mr. King and apologized for Mr. Ramsay’s behaviour.

[54] Mr. King stated that he was pretty shaken up. He had a headache, and did not have much of a memory of that evening. He knew he completed his shift, but did not have any memory of doing so. Under cross-examination, Mr. King could not recall what time Buffalo Bills closed that night, but believed that the last call was at 2:00 a.m. He agreed that he continued to work for some time after the bar was closed.

[55] After completing his shift, Mr. King went home. When he went to lay down, he found a lump on the side of his head where the impact had occurred. The next morning, he was feeling groggy and “a little bit” disoriented, he was sensitive to light, and had stiffness in his lower back.

[56] Under cross-examination, Mr. King was asked how Mr. Ramsay injured him. His evidence was vague and unclear, though he maintained that Mr. Ramsay grabbed him from the back of the neck. Mr. King explained as follows:³

³ This exchange is taken from the DARS recording as a transcript of Mr. King’s testimony was not obtained.

Q: Could you describe to the Court how I did that?

A: Well, getting – getting loose and being able to loosen your grip and grab the – towards the back of my head, on the neck and able to go for - as you were moving forward, is where I went into the side of the rail.

...

Q: It just strikes me as somewhat improbable that two people holding my arms behind my back, applying pressure would somehow let the— your tight group loose at the top of the stairs and—that is a long three to four feet, apparently, to struggling into – that's – that's your recollection of events?

A: It is.

Q: Okay. So – when you say – you also said that you went through the metal railing – what does that – what do you mean by “through the metal railing”?

A: So in—into the metal railing and having acquired a concussion, my hands going forward, so my hands go past the metal railing and then I fall backwards.

[57] I turn now to Mr. Parkinson's evidence. There was considerable accord between the evidence of Mr. Parkinson and Mr. King, up to the point when they reached the top of the stairs with Mr. Ramsay. Their evidence then diverged in one key respect – how Mr. King hit his head on the metal railing of the Village Steps.

[58] During his direct examination, Mr. Parkinson explained the Incident in the following way:⁴

Q: In your own words, can you describe what happened that night?

A: Yes. There was a bachelor party, bachelorette party, dancing on the dance floor, and there was a couple other guys in the room. One of the girls came up to me saying there was a naked guy on the dance floor. I went over to try and get him to put his clothes back on. And he finally did. And we were trying to get him out, and he refused. And so, we tried to push him out, and he was just refusing, refusing. And we finally pushed him out and we fell out the front door. And that's when James hit his head and we all fell.

THE COURT: I'm sorry, did I hear you say "we all fell"?

A: Sorry, yes. Me, James, and the other person. I don't know his name, sorry.

⁴ Proceedings at Trial, Excerpt – Testimony of William Parkinson (“Transcript Parkinson Testimony”), pp. 3-4.

CNSL J. KOONER:

Q: Okay. When -- when you're testifying to "we", when you're saying "we" pushed him out, who are you referring to?

A: Me and James.

Q: Can you please describe from the time that you asked the person to leave, can you describe physically what was -- what you -- if you used any physical force or anything -- anything that was happening, if you recall?

A: We were -- sorry, me and James were pushing him out -- out the door, and he was refusing.

Q: Can you describe the path out the door from the -- from the bar?

A: Yeah. There was one doorway to a set of stairs going up. I don't know how many steps. And then at the top of the stairs there's another doorway, and I think about three steps down into the village.

Q: And where did -- when you say "we -- we fell", where did you fall?

A: On the last set of steps going down into the village outside.

Q: Can you describe any physical actions of the person you were pushing out, if any? What was he doing?

A: He was trying to stay in the club.

Q: And can you describe how everyone fell? What happened?

A: He was trying to come back in and we put -- me and James used force to push him back out. And I don't remember how we all fell.

[59] Mr. Parkinson confirmed that Mr. King hit his head on the outside railing.

[60] During his cross-examination, Mr. Parkinson elaborated that Mr. Ramsay was physically removed from the night club by he and Mr. King. Both he and Mr. King had their hands on the Defendant as they were escorting him out. They first put their hands on Mr. Ramsay when he was on the dance floor, and he began to resist almost immediately and "was physically trying not to leave". They had Mr. Ramsay's arms behind his back and were applying pressure to his shoulder. When they got to the top of the stairs they were "still pushing him out the door". Mr. Ramsay was in front of Mr. King and Mr. Parkinson, and the two men were physically pushing him through the entrance doors that lead to the Village. When they were trying to push him out they "grabbed his back". Then:

...he had his hands on our clothes **from front** and when we all fell, he pulled us.⁵

[61] In answer to a further query from the Court to explain how they all fell, Mr. Parkinson stated:

Q: So we were pushing him and he had a hand on both of us. And when we pushed, he pulled in return, and we all **fell**.⁶

[62] I turn now to Mr. Ramsay's account, which differs from Mr. King's and Mr. Parkinson's in numerous ways. According to Mr. Ramsay, earlier on July 14, 2019, he and some friends had gone out for dinner after a round of golf. They drank some wine with their meal, and then headed over to Buffalo Bills. While at the night club, they ordered more alcohol. Mr. Ramsay stated that he had quite a few drinks, and became heavily inebriated. He admitted that he did not have a "perfect" memory of that night. He also asserted that he was over served by the establishment.

[63] Mr. Ramsay denied that he took his clothes or pants off or that he was acting in any lewd manner. He described wanting to bring some "life" into the night. He jumped up and grabbed a light hanging from the ceiling near the dance floor (which he referred to as the "chandelier"). According to Mr. Ramsay, when the light fell down, it drew the attention of the staff, who then escorted him out. Mr. Ramsay later clarified that he did not initially recall the events regarding the chandelier. It was only later, after he spoke to Mr. Nieken, that he recalled grabbing the chandelier.

[64] Mr. Ramsay recalled two men escorting him out and handling him physically. He also recalled feeling pressure and soreness in his shoulder. He got agitated and telling them to get off him. He admits that he was "mouthing" off to the two men as they pushed him up the stairs. Mr. Ramsay categorically denied assaulting anyone or laying a hand on them. However, he did concede being unruly. He stated that after the police arrived, they took him to the "drunk tank".

⁵ Transcript Parkinson Testimony, p. 9; words in bold appear as "indiscernible" on transcript, and are transcribed directly from DARS recording.

⁶ Transcript Parkinson Testimony, p. 10; word in bold appears as "indiscernible" on transcript, and is transcribed directly from DARS recording.

[65] Under cross-examination, Mr. Ramsay admitted that his memory was foggy from the night of the Incident, and that he only had a sketchy recollection of events. When an apparent inconsistency was put to him from his Discovery, regarding what he was drinking, Mr. Ramsay explained that he had forgotten the small details because he was heavily inebriated. However, over time, he was able to recall more things. Mr. Ramsay admitted that he may have been spilling his drinks, was probably slurring his words, and had diminished motor control. He denied starting a fight with Mr. King and Mr. Parkinson, and denied wanting to intimidate them. However, he admitted that he yelled at both of them, and probably swore at them and “made a fool of myself”.

[66] Mr. Nieken was the final witness who was present on the night in question. Mr. Nieken confirmed that he went to Buffalo Bills with Mr. Ramsay and two other friends. He could not recall what time they arrived at Buffalo Bills. He stated that while there, they played pool and drank alcohol. He paid the tab for the alcohol, which was around \$2,000. It included beers, shots, and a bottle of champagne for the bachelorette party. Mr. Nieken stated that he did not observe Mr. Ramsay exposing himself. He also could not recall Mr. Ramsay grabbing the chandelier.

[67] Under cross-examination, Mr. Niken could not recall seeing Mr. Ramsay fall off his chair, slur his words, or spill his drink. He did recall seeing Mr. Ramsay dancing, but did not see him remove his clothes, or being escorted out. He did not go outside to see what happened to Mr. Ramsay. He stayed at the night club for about another hour and stated that he probably ordered more drinks.

C. Conclusions on Disputes in the Evidence

[68] I found Mr. King’s evidence regarding how the Incident occurred to be largely self-serving and lacking in credibility. He was contradicted in key respects by his own witness, Mr. Parkinson, whose evidence I prefer. I have also not very little weight on Mr. Ramsay’s evidence regarding the Incident, unless it is uncontroverted. In my view, Mr. Ramsay’s evidence is unreliable due to his poor memory of events.

He was heavily intoxicated and could not provide crucial details regarding the Incident which resulted in Mr. King falling.

[69] Where there is a dispute in the evidence regarding how the Incident occurred, I have preferred the testimony of Mr. Parkinson. He was the only impartial witness in this trial who saw the entire Incident from start to its conclusion. He had a good recollection of events, and I found his evidence to be both credible and reliable. I have also placed some weight on Mr. Nieken's evidence, but to a lesser extent. While I have no concerns regarding Mr. Nieken's impartiality, he did not see the Incident and his recollection of some of the events was vague.

[70] I make the following findings of fact in the disputed evidence.

[71] Mr. Ramsay's account differs from that of Mr. King and Mr. Parkinson with respect to what happened on the dance floor, the reason he was removed from the establishment, whether he pushed Mr. King, and whether he had been over-served.

[72] As to the first question, I am satisfied that Mr. Ramsay did pull his pants down and display his genitalia when he was on the dance floor. Mr. Parkinson provided a convincing account which was consistent on that point with the evidence of Mr. King. Mr. Ramsay for his part, had no recollection of the event. His evidence that this was out of character for him, was contradicted in part by Mr. Nieken, who stated that he had seen Mr. Ramsay expose himself before, while at a fraternity party. In any event, doing something out of character is the hallmark of drunken behaviour, and therefore I put little stock in Mr. Ramsay's assertion that he did not expose himself because he would not have exposed himself. Given Mr. Ramsay's level of intoxication that night, which I find was very high, I am satisfied that whether it was out of character for him or not, he did indeed expose himself.

[73] This brings me to the second point of contention: the reason why Mr. Ramsay was removed from Buffalo Bills. On this too, I prefer the evidence of the Plaintiff's witnesses, that Mr. Ramsay was removed because he exposed himself. Mr. Ramsay's recollection that he was told to leave because he broke a light fixture

or chandelier while on the dance floor, is suspect, given his state of intoxication. His evidence on this point was not supported by any other witness. Mr. Nieken could not recall seeing Mr. Ramsay grab the chandelier, and neither Mr. King nor Mr. Parkinson were asked about it during their cross-examination. However, even if Mr. Ramsay did break the chandelier, I find that this was not the reason Mr. Ramsay was told to leave. Rather, it was because of his lewd behaviour on the dance floor.

[74] The third point of contention is whether Mr. Ramsay pushed Mr. King into the metal railing. On this issue, I prefer the evidence of Mr. Parkinson. I find that when the three men were going up the stairs, Mr. Parkinson and Mr. King were holding Mr. Ramsay's arms behind his back, and he was struggling to get loose. When they got to the top of the stairs, they changed their body positions such that Mr. King and Mr. Parkinson pushed Mr. Ramsay ahead of them and started pushing him from behind to get him out the door. They did so by putting pressure on Mr. Ramsay's back. I infer from the evidence that once they got Mr. Ramsay out of the front entrance doors, he turned around and was now facing them at the top of the landing to the Village Stairs. When Mr. King and Mr. Parkinson pushed Mr. Ramsay again, they did so forcefully. Mr. Ramsay grabbed the front of both their shirts to steady himself from falling. This caused all three men to fall such that Mr. Ramsay fell backwards and Mr. King and Mr. Parkinson fell forwards towards him. As Mr. King fell, he hit his head on the metal railing of the Village Stairs.

[75] Regarding Mr. King, I specifically find that Mr. King was not thrown into the metal railing by Mr. Ramsay. Rather, he fell after Mr. Ramsay grabbed his shirt to steady himself, thus pulling Mr. King forward and causing him to lose his balance.

[76] I will address the final point of contention, about whether Mr. Ramsay was over-served, under the "Intoxication" analysis.

D. Analysis

[77] Mr. Ramsay raises four alternative arguments in his defence. First, he denies that he applied force to Mr. King intentionally and says that Mr. King fell accidentally. Second, he submits that the altercation was akin to a mutual fight rather than an

assault, such that any force that he did apply was with Mr. King's consent. Third, he says that he was acting in self defence. Fourth, he submits that he was intoxicated at the time, and should not be held liable for his actions, particularly since the intoxication was due to being overserved by Mr. King.

[78] The Plaintiff has alleged assault and battery. These are related concepts but legally distinct from each other. As held by the Court in *N.E.T. v. British Columbia (Attorney General)*, 2018 BCCA 380, assault and battery in the civil litigation context are defined as follows:

[27] An assault "is the intentional creation of the apprehension of imminent harmful or offensive conduct", and battery "is the intentional infliction of unlawful force on another person": *Ward v. City of Vancouver*, 2007 BCSC 3 at para. 48. ...

[79] As all of the evidence and arguments in this case were made on the basis of a battery being committed against Mr. King, I have approached the analysis on that basis.

[80] The tort of battery in a non-sexual context, is established when the plaintiff proves that: (1) the defendant intentionally applied force to the plaintiff; (2) the physical contact was harmful or offensive to the plaintiff; and (3) the force was applied without the plaintiff's consent: *Non-Marine Underwriters v. Scalera*, 2000 SCC 24 ("*Scalera*") at paras. 18-19; *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208 at paras. 142-144; *Vassilaki v Vassilakakis*, 2023 BCSC 1487 at paras. 54-55.

[81] Liability for battery does not necessarily require physical contact. The defendant will be liable if the plaintiff can establish that the plaintiff's injuries occurred by the direct acts of the defendant: *Siegerist v. Tilton*, 2020 BCSC 549 at para. 6, citing *Scalera* at paras. 3-8.

[82] The plaintiff must show the defendant intended the offensive contact but need not show the defendant intended any resulting harm: *Scalera* at para. 98; see also

Siegerist at para. 7, citing *Bettel v. Yim*, 20 O.R. (2d) 617 at 5, 1978 CanLII 1580 (Ont. S.C.).

[83] Once the plaintiff has discharged their burden, the onus shifts to the defendant to advance a defence. The defences of consent and self-defence are particularly relevant in the context of a mutual fight. Self defence is only available as a defence if the defendant 's use of force was not excessive: *Habib v. Wilson*, 2023 BCSC 585. In the context of a mutual fight, a plaintiff's claim will only succeed if the defendant used force that was "excessive or unnecessary": *Ismail v. Hammad*, 2024 ABKB 482 at para. 47, citing *MacMillan v. Hincks*, 2002 ABQB 283 at para. 29.

[84] The first part of the *Scalera* test is met on the evidence. I am satisfied that Mr. Ramsay intentionally applied force to Mr. King when he reached out and grabbed his shirt to steady himself from falling. In coming to this conclusion, I note that it is not necessary to prove that Mr. Ramsay intended for Mr. King to fall as a result. Rather, it is only necessary that the plaintiff establish that Mr. Ramsay applied some force to him, and that he did so intentionally.

[85] The second part of the *Scalera* test requires that the contact be harmful or offensive to the plaintiff. In *Scalera*, the Court explained this requirement, as follows:

18 I do not dispute that a plaintiff generally must prove all elements of the tort she alleges. Nor do I dispute that contact must be "harmful or offensive" to constitute battery. However, I am not persuaded that plaintiffs in cases of sexual battery must prove that contact was "non-consensual" in order to prove that it was "harmful or offensive". If one accepts that the foundation of the tort of battery is a violation of personal autonomy, it follows that all contact outside the exceptional category of contact that is generally accepted or expected in the course of ordinary life, is *prima facie* offensive. Sexual contact does not fall into the category of contact generally accepted or expected in the course of ordinary activities. Hence the plaintiff may establish an action for sexual battery without negating actual or constructive consent.

19 The idea that battery is confined to conduct that is "harmful or offensive" finds root in the old cases involving trivial contacts. While the law of battery traditionally has held that the defendant, not the plaintiff, bears the onus of proving consent, it has also held that not every trivial contact suffices to establish battery. The classic example is being jostled in a crowd. A person who enters a crowd cannot sue for being jostled; such contact is not "offensive". Two theories have been put forward to explain this wrinkle on the general rule that all a plaintiff in a battery action must prove is direct contact.

The first is implied consent: *Salmond and Heuston on the Law of Torts* (21st ed. 1996), at p. 121. The second sees these cases as “a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of everyday life”: *In re F.*, [1990] 2 A.C. 1 (H.L.), at p. 73, *per* Lord Goff.

[86] Although *Scalera* was decided specifically within the context of a sexual battery case, the above articulation provides useful guidance in this case.

[87] It is important to note here that the harmful nature of the contact does not relate to the consequences of the contact – for example, a head injury or a bruise. Rather, it relates to the intrinsically harmful nature of the contact itself which flows from the failure to respect the inviolability of the person: *Scalera* at para. 22.

[88] Having regard to all of the evidence in this case, I find that the second part of the *Scalera* test is also met, such that the physical contact in this case was harmful or offensive to the plaintiff. In coming to this conclusion, I find that the contact in this case was not contact which is an “inevitable consequence of general human activity and interaction”: *Scalera* at para. 21.

[89] In *Scalera*, the court used examples such as being jostled in a crowd, exchanging a gift, or a gratuitous handshake, as the type of contact which would fall within the “exceptional” category of contact that would be considered non-offensive or not harmful. On the other end of the spectrum is sexual contact, which is *prima facie* offensive: *Scalera* at paras. 18, 21.

[90] In my view, the circumstances of the case at bar fall outside the “exceptional” category of contact “that is generally accepted or expected in the course of ordinary life”. That is because the circumstances that Mr. King and Mr. Ramsay found themselves in, were not so ordinary. They required a certain amount of active engagement and interaction from both men.

[91] I accept that the act of reaching out to grab something or someone to steady oneself from falling may constitute the type of physical contact that one might expect when they are standing near someone that is falling. For example, if a person is

riding on a busy bus, and the bus comes to a sudden stop, they may instinctively grab on to someone standing near them for balance. While such contact may not be casual or accidental, it can potentially be described as the type of contact that one would consider acceptable in everyday life.

[92] However, the above does not describe the contact that occurred between Mr. King and Mr. Ramsay. The physical contact that occurred here did not arise from ordinary events.

[93] I turn now to the third element of the *Scalera* test – whether the contact was consensual or otherwise defensible. To address this issue, the contact between Mr. Ramsay and Mr. King that lead to Mr. King falling must be considered within the context that it arose. The physical contact was initiated by Mr. King and Mr. Parkinson while they were still inside Buffalo Bills. Their purpose was to forcibly remove Mr. Ramsay from the night club. To achieve that goal, Mr. King acted in concert with Mr. Parkinson to push Mr. Ramsay up the stairs and out the doors of the night club. When they got Mr. Ramsay outside, Mr. King and Mr. Parkinson continued to push him even though they had already achieved their goal of removing him from the facility.

[94] Mr. Ramsay by then was fully outside the doors of the front entrance to Buffalo Bills, near the landing to the Village Steps. Mr. King and Mr. Parkinson then pushed Mr. Ramsay backwards in what I find was an act of excessive force and unprovoked aggression. When they did so, it was foreseeable that Mr. Ramsay may lose his balance and reach out to grab the closest thing or person he could find to steady himself – in this case, Mr. King's and Mr. Parkinson's clothing. To that end, I find that the circumstances in this case are akin to Mr. Ramsay acting out of self-defence. Consequently, consent to the physical contact can be implied.

[95] In my view, the force used by Mr. Ramsay to grab onto Mr. King's shirt was not excessive but in fact was proportionate to the circumstances in which he found himself. He had been pushed by Mr. King and Mr. Parkinson while he was standing on top of the landing of the Village Steps. At the risk of falling backwards down the

steps, he reached out to steady himself and grabbed on to their clothing. The force which he used to grab their shirts was reasonable. The fact that Mr. King and Mr. Parkinson fell after Mr. Ramsay grabbed their shirts does not indicate that the force used by Mr. Ramsay to hold on to them was excessive. Rather, it suggests that the force they used to push him backwards was excessive.

[96] Even if the altercation that resulted in Mr. King falling is characterized as a mutual fight, I find that Mr. King consented to participate in this fight when he and Mr. Parkinson pushed Mr. Ramsay once he was outside the doors of Buffalo Bills. Cast in that light, I still find that the force used by Mr. Ramsay to grab Mr. King's shirt was not excessive. In coming to this conclusion, I specifically reject the assertion that Mr. Ramsay struck Mr. King's head into the metal railing – rather, he reached out and grabbed Mr. King's shirt to steady himself, and Mr. King fell as a result. I do not see anything excessive or unnecessary in those actions.

[97] After considering all of the evidence in this case and the applicable legal principles, I conclude that the claim fails on the third part of the *Scalera* test. The Plaintiff consented to the application of force by Mr. Ramsay who was acting in self-defence, or alternatively, by being involved in a mutual fight with the Defendant.

[98] Given these findings, it is not necessary for me to address whether Mr. Ramsay can rely on intoxication as a defence. However, I will do so briefly for the sake of completion.

[99] Mr. Ramsay argues that he is not liable for battery because he was intoxicated at the time of the Incident and his actions were not voluntary. The evidence and the law does not support this contention.

[100] There is no dispute that a plaintiff will only be liable for battery if they acted voluntarily. To succeed on a battery claim, the defendant's act must have been "conscious", and the defendant must have known the nature of their act: *Canada (Attorney-General) v. Connolly*, 64 D.L.R. (4th) 84 at 92, 1989 CanLII 5206

(B.C.S.C.) [*Connolly*]. A person who is in a state of “complete automatism” will not be liable for their actions: *Connolly* at para. 26.

[101] The onus is on the defendant to show that they acted without volition: *Connolly* at 92; *D.W.P. v. Owner*, 2025 BCSC 612 at para. 49, citing *Hagg v. Bohnet*, 33 D.L.R. (2d) 378, 1962 CanLII 387 (B.C.C.A.) at 394.

[102] In criminal law, “automatism” is defined as “a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action”: *R. v. Brown*, 2022 SCC 18, citing *R. v. Stone*, 2 S.C.R. 290 at para. 156, 1999 CanLII 688. Intoxication short of automatism, that does not cause somebody to lose voluntary control of their actions, will not provide a defence: *Brown* at paras. 43 and 45. This definition of automatism is also helpful in determining whether somebody acted voluntarily in an alleged battery.

[103] There is no evidence that Mr. Ramsay’s level of intoxication rose to the level of automatism, or that he otherwise lacked voluntary control over his actions that night. Thus, the intoxication defence is not available to Mr. Ramsay.

[104] Further, even if being over-served by Mr. King could absolve Mr. Ramsay of any responsibility for his actions towards Mr. King, there is no evidence that he had in fact been over-served. On that point, it is notable that none of the witnesses, including Mr. Nieken, supported Mr. Ramsay’s argument that he had been over-served.

[105] For those reasons, I reject the defence of intoxication. Nonetheless, as I have indicated earlier, this claim fails on the third part of the *Scalera* test.

[106] I conclude that the Plaintiff has failed to establish that Mr. Ramsay committed an assault and battery of Mr. King on July 15, 2019.

V. CONCLUSION

[107] The Plaintiff has failed to establish that Mr. Ramsay is liable for the injuries he sustained as a result of the Incident which occurred on July 15, 2019.

[108] Given my finding regarding liability, there is no reason to undertake an analysis of the damages claimed, as there is no basis to award damages to the Plaintiff.

[109] The claim against Mr. Ramsay for damages for assault and battery is dismissed.

VI. COSTS

[110] The general rule is that costs follow the event. I am not aware of any reason that warrants a departure from this rule. The Defendant was successful and as such he is entitled to his costs at Scale B for a matter of ordinary difficulty.

[111] If there are settlement offers or other matters that I am not privy to which may affect the award of costs, a party may prepare written submissions up to a maximum of seven pages in length (excluding attachments), for my consideration. These should be submitted through Supreme Court Scheduling within 45 days of this Order. Responding submissions are to be provided seven days thereafter and are not to exceed seven pages. Any Reply submissions are to be provided within four days following receipt of Response submissions, and are limited to three pages.

[112] Absent further submissions, this costs order will stand.

“Shergill J.”