

SUPREME COURT OF YUKON

Citation: *Miller v Mendelsohn*
2022 YKSC 39

Date: 20220909
S.C. No. 19-A0173
Registry: Whitehorse

BETWEEN:

JERRY MILLER

PLAINTIFF

AND

MARK MENDELSON

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff

Daniel S. Shier and
Natasha Weninger, Articled Student

Appearing on his own behalf

Mark Mendelsohn

REASONS FOR DECISION

OVERVIEW

[1] The plaintiff, Jerry Miller, and the defendant, Mark Mendelsohn, were, at one time, next door neighbours. They were not on friendly terms. There was, in fact, animosity between Mr. Mendelsohn and Mr. Miller's entire family.

[2] One evening, Mr. Miller and Mr. Mendelsohn were both shovelling snow near their homes. Mr. Miller alleges that Mr. Mendelsohn came up to him, and, using his shovel, pushed into him, causing him to fall.

[3] Mr. Mendelsohn claims that he did not touch Mr. Miller. Rather, Mr. Miller fell on purpose when Mr. Mendelsohn was some distance away.

[4] Mr. Miller called the police after Mr. Mendelsohn allegedly knocked him over: Mr. Mendelsohn was charged with assault. Ultimately the charges were stayed and Mr. Mendelsohn entered into a peace bond.

[5] Mr. Miller also alleged that, on a later occasion, Mr. Mendelsohn tried to run him down when Mr. Mendelsohn was in his truck and Mr. Miller was on foot. He furthermore alleged that, on a third occasion, Mr. Mendelsohn made a rude gesture by showing him his middle finger. Mr. Mendelsohn was charged as a result of these further allegations; however, the charges were resolved without convictions against Mr. Mendelsohn.

[6] Mr. Miller has now brought a civil action of assault and battery against Mr. Mendelsohn arising out of the allegation that Mr. Mendelsohn pushed him over. Along with general damages, he seeks aggravated and punitive damages, damages for past loss of income and future loss of earning capacity, and special damages.

[7] Mr. Mendelsohn, in turn, has brought a counterclaim against Mr. Miller. He says, in essence, that Mr. Miller defamed him when he told the police that Mr. Mendelsohn pushed him, when he alleged that Mr. Mendelsohn ran at him with his truck and when he alleged that Mr. Mendelsohn showed him the middle finger.

[8] Mr. Mendelsohn forcefully argued his case. Despite this, for the reasons set out below, I have concluded that Mr. Mendelsohn committed a battery against Mr. Miller.

[9] In the counter-suit, I conclude that Mr. Miller defamed Mr. Mendelsohn when he made the three allegations. I find that qualified privilege applies to the allegation that Mr. Mendelsohn knocked Mr. Miller over, but not to the allegations that Mr. Mendelsohn drove at Mr. Miller in his truck nor that he showed him the finger. Consequently, Mr. Mendelsohn is successful in his counter-suit on those two allegations.

ISSUES

[10] The action and counter-action went to trial. The issues before me are as follows:

A. Assault and Battery

1. Did Mr. Mendelsohn push Mr. Miller over?
2. If so, was Mr. Miller injured because of the fall?
3. If so, is Mr. Mendelsohn liable for the entirety of Mr. Miller's injury?
4. Does Mr. Mendelsohn owe damages to Mr. Miller?
 - (a) General damages
 - (b) Aggravated and Punitive Damages
 - (c) Past Loss of Income and Future Loss of Earning Capacity
 - (d) Special Damages

B. Defamation

1. Did Mr. Miller defame Mr. Mendelsohn?
2. If so, does the defence of qualified privilege apply?
3. Does Mr. Miller owe damages to Mr. Mendelsohn?

ANALYSIS

A. Assault and Battery

1. Did Mr. Mendelsohn push Mr. Miller over?

[11] Mr. Miller alleges that Mr. Mendelsohn pushed into him, causing Mr. Miller to fall.

Mr. Mendelsohn denies having touched Mr. Miller at all.

[12] I find that Mr. Mendelsohn pushed Mr. Miller over.

[13] The law of assault and battery applies in this case. "Assault and battery" is often discussed as one concept, but it is really two ideas. Assault, broadly speaking, is the threat to apply physical contact to another person. Battery is the application of intentional physical contact to another person.¹

[14] Where the plaintiff alleges battery, they must prove that the defendant made direct physical contact with them. If they do, the defendant may raise a defence.

¹ *Minet v Kossler*, 2007 YKSC 30 at para. 35.

[15] In this case, Mr. Miller is alleging that Mr. Mendelsohn committed a battery against him. There are no allegations of assault. Further, Mr. Mendelsohn has not asserted any defence. If I believe Mr. Miller, then battery is made out. If I do not believe him, or if I believe Mr. Mendelsohn, Mr. Miller loses his case. Thus, my decision about whether there was a battery turns entirely on the issue of credibility.

[16] The parties provided two different versions of the incident. Because the parties' stories are different, I will lay out their versions and then assess credibility.

Mr. Miller's Version of Events

[17] At trial, Mr. Miller, Gordon Miller, and Bobby Bloor testified on Mr. Miller's behalf. Mr. Gordon Miller is Mr. Miller's father and lives next door to him. Mr. Bloor also lives on the same street. At the time of the incident, he lived next door to Mr. Mendelsohn. Mr. Gordon Miller and Mr. Bloor both testified that they watched the incident between Mr. Miller and Mr. Mendelsohn unfold.

[18] Mr. Miller testified that, on the day of the incident, February 26, 2018, he spent most of the day removing the snow from his driveway. After he completed his driveway, he went to clear out the snow that had accumulated at the back of his truck. His truck was parked across the street, next to a ditch.

[19] Gordon Miller and Mr. Bloor also testified that they saw Mr. Miller shovelling snow. They all testified that Mr. Mendelsohn was shoveling as well.

[20] The three testified that when Mr. Mendelsohn shoveled snow, he would shovel not only his driveway, but also the street in front of his house.

[21] This night was no different. Mr. Gordon Miller testified that Mr. Mendelsohn shoveled his driveway and then began shoveling the street. Mr. Bloor testified only to seeing Mr. Mendelsohn shoveling the street.

[22] Mr. Gordon Miller and Mr. Miller testified that when Mr. Mendelsohn got to the other side of the road, where Mr. Miller's truck was parked, they saw Mr. Mendelsohn shovel snow onto the hood of Mr. Miller's truck and under his tires. At that point, Mr. Miller was still clearing out the back of his truck.

[23] Mr. Miller testified that he went to the front of his truck and began clearing off the snow that Mr. Mendelsohn had shoveled onto the hood of his truck. Mr. Gordon Miller and Mr. Bloor also testified they saw Mr. Miller cleaning the hood of his truck.

[24] Mr. Miller said that he heard Mr. Mendelsohn scraping snow near him. Mr. Mendelsohn then said, "Excuse me!" and "shoveled me off my feet". Mr. Mendelsohn scooped the shovel under Mr. Miller's right foot and then pushed into the left, causing Mr. Miller to fall.

[25] Gordon Miller and Mr. Bloor also testified that they saw Mr. Mendelsohn knock Mr. Miller over with his shovel. Gordon Miller said that Mr. Mendelsohn shoveled Mr. Miller off his feet, while Mr. Bloor said that Mr. Mendelsohn took Mr. Miller's legs out from underneath him from the side.

[26] Mr. Miller testified that his left knee immediately started throbbing and aching. He then phoned 911 and requested assistance.

Mr. Mendelsohn's Version of Events

[27] Mr. Mendelsohn agreed that he and Mr. Miller were out shoveling snow and that Mr. Miller was tending to his truck while he was shoveling the street.

[28] Mr. Mendelsohn confirmed that when he reached Mr. Miller's truck he shoveled snow onto the hood, but stated it was not intentional: he wanted to shovel snow over Mr. Miller's hood, to the other side, but it landed on Mr. Miller's truck instead. He also says he put snow under the truck to give Mr. Miller clearance.

[29] Mr. Mendelsohn said that he got a “bad feeling” when Mr. Miller came towards the front of his truck. To avoid meeting Mr. Miller, Mr. Mendelsohn went back to the bottom of his driveway, at the borderline between Mr. Miller’s property and his property, and began shoveling back towards the other side of the road.

[30] At this point, his testimony differs from that of the other witnesses. He says he heard a loud bang and saw Mr. Miller take two or three steps away from his truck toward the middle of the road. Mr. Miller then “flopped down on the ground” and started to yell, “Mark hit me!”

[31] Mr. Mendelsohn went back to his property, but stayed outside. He turned his camera on to film what occurred and watched the event unfold. He testified that he did not think Mr. Miller was really injured.

[32] Everyone testified that Mr. Bloor and Mr. Gordon Miller went over to Mr. Miller to assist him. The police and ambulance attended. Mr. Miller went to the hospital, and Mr. Mendelsohn was charged with assault.

Assessment of Credibility

[33] There are two components to the concept of credibility: credibility and reliability. Credibility is about whether the witness is trying to tell the truth. Reliability is whether the witness is giving accurate testimony.²

[34] I find Mr. Miller’s, Mr. Gordon Miller’s and Mr. Bloor’s evidence credible. I also find that Mr. Mendelsohn is not reliable.

[35] In assessing credibility and reliability, the court may take a number of factors into account, including:

² *R v HC*, 2009 ONCA 56 at para. 41.

- inconsistencies and weaknesses in a witness' evidence, including internal inconsistencies, inconsistencies with other oral or documentary evidence, and prior inconsistent statements;
- independent evidence that corroborates the witness' testimony; and
- it may be important to consider the motive that witnesses who are parties may have for fabricating evidence.³

Assessment of Mr. Miller's, Mr. Gordon Miller's, and Mr. Bloor's Credibility

[36] The testimony of Mr. Miller, Mr. Gordon Miller, and Mr. Bloor is consistent with regard to the major facts about the incident. They provided similar testimony about the minutes leading up to the incident, including where Mr. Miller and Mr. Mendelsohn were, and what they were doing. They also provided similar testimony about how Mr. Miller fell.

[37] There are some issues of inconsistency with the witnesses' testimony that need to be addressed. Moreover, Mr. Mendelsohn raised concerns about the witnesses' credibility and reliability.

[38] One inconsistency is that Mr. Miller said that when he fell, his head was pointing toward the front of the truck, while Mr. Gordon Miller said the reverse.

[39] A second inconsistency is that Mr. Miller and Mr. Gordon Miller testified that Mr. Miller parked his truck across the street from Mr. Miller's property while Mr. Bloor and the police report identify that the truck was parked across the street from Mr. Mendelsohn's property. Neither of these inconsistencies is major, however, and do not affect my assessment of credibility.

³ *Gill Tech Framing Ltd v Gill*, 2012 BCSC 1913 at para. 28, citing *Re: Novac Estate*, 2008 NSSC 283 at paras. 36-37.

[40] Mr. Mendelsohn also pointed to inconsistencies between Mr. Miller's evidence and statements he was recorded to have made to third parties. The Ambulatory Care Form, created when Mr. Miller went to the hospital immediately after he fell, was filed as an exhibit. It states that Mr. Miller reported "being tripped by a friend".

[41] In addition, Mr. Miller filed an expert report from Amanda McClung, a physiotherapist. In the report Ms. McClung states about the incident: "Mr. Miller reports after some verbal abuse, his neighbour ran at him, knocked him over with his shovel and stomped on his left knee".

[42] The wording in the Ambulatory Care Form is not problematic. While one part of the form says that Mr. Miller was tripped, in another part it states that he was "hit". These two ideas are sufficiently similar that no inconsistency arises.

[43] The statement in Ms. McClung's report is different. The comment that Mr. Miller's knee was stomped on is a significant difference from his testimony. Mr. Miller testified that he did not tell Ms. McClung that his knee was stomped on and does not know why that is in the report. It would, however, be odd that Ms. McClung would get such a specific detail wrong. This inconsistency could affect Mr. Miller's reliability.

[44] In addition, Mr. Mendelsohn questioned both Mr. Gordon Miller's reliability and his credibility. He submits that Mr. Gordon Miller could not properly see the events unfold, as a birch tree on his property blocked his view. As well, Mr. Mendelsohn suggests that Mr. Gordon Miller and Mr. Miller made up their version of the story because of their grudge against Mr. Mendelsohn.

[45] There is no love lost between the Miller family and Mr. Mendelsohn. The Millers' and Mr. Mendelsohn's evidence demonstrated to me that the Miller family and Mr. Mendelsohn dislike each other.

[46] Mr. Gordon Miller agrees there was a tree on his property, although he says that he could see what happened because the tree was bare.

[47] The issues raised by Mr. Mendelsohn cannot be dismissed out-of-hand, and I will assess whether Mr. Gordon Miller is not reliable or if he colluded with Mr. Miller.

[48] I find that Mr. Gordon Miller was able to observe the incident. I also find that Mr. Miller and Mr. Gordon Miller did not collude.

[49] Mr. Miller testified that once he began clearing the snow off his hood he did not pay that much attention to Mr. Mendelsohn. He was aware that Mr. Mendelsohn was clearing snow, but not much else, until Mr. Mendelsohn was very close to him. At that point he heard Mr. Mendelsohn, first, scraping snow, and then saying “excuse me” before using the shovel to push Mr. Miller over.

[50] Mr. Gordon Miller provided testimony from a different point of view. He said that after Mr. Mendelsohn stopped shoveling snow onto Mr. Miller’s hood, he went back across the street to his trailer, looked towards Mr. Gordon Miller, walked quickly back to Mr. Miller, and at that point shoveled him off his feet.

[51] The two witnesses’ evidence is complementary: each presents the story from a different viewpoint, and, when put together, provide a fuller picture. Mr. Miller and Mr. Gordon Miller did not simply parrot each other, which points to the conclusion that they did not collude.

[52] Moreover, their testimony is very similar to Mr. Bloor’s testimony. Mr. Bloor described himself as Mr. Gordon Miller’s friend, but that in itself does not give him motive to lie.

[53] Mr. Mendelsohn also suggests that Mr. Bloor was intoxicated at the time of the incident, but Mr. Bloor denied drinking excessively on February 26. Mr. Bloor’s

testimony was brief, but he provided good detail about what he did see. He also did not guess: he admitted when he did not know or remember an aspect of the incident. I have no evidence to suggest that Mr. Bloor would not give accurate evidence, nor that he exaggerated or falsified his evidence.

[54] That Mr. Miller, Mr. Gordon Miller, and Mr. Bloor provided similar testimony reinforces the conclusion that all three were credible and reliable.

[55] The only problem arising from the three witnesses' testimony is the inconsistency Mr. Mendelsohn pointed to in Amanda McClung's report. Given the strength of the evidence otherwise provided, I find that the inconsistency in Amanda McClung's report is not significant. Overall, the three witnesses' testimony is credible and reliable.

Assessment of Mr. Mendelsohn's Credibility

[56] On the other hand, I have difficulties with Mr. Mendelsohn's evidence about the incident. In particular, his direct evidence about where he was when Mr. Miller fell is not easy to reconcile with his evidence in cross-examination, nor what he told the police when they attended at the time of the incident.

[57] In providing direct evidence, Mr. Mendelsohn said that when Mr. Miller went to the front of his truck, he returned to the bottom of his driveway, on the borderline between his place and Mr. Miller's property, and then began shoveling across the road. He was standing approximately 30 feet away when Mr. Miller "flopped down" to the ground.

[58] On cross-examination counsel questioned Mr. Mendelsohn about a report prepared by the police officer who attended the scene when Mr. Miller phoned 911 on February 26, called the General Report.

[59] Counsel suggested to Mr. Mendelsohn that his evidence on direct was different than what he told the police officer. He noted that Mr. Miller told the police officer that when Mr. Miller went to the front of the truck, he went to the back of the truck, and while he was there, he heard Mr. Miller yell that he had been hit.

[60] Mr. Mendelsohn explained he had started shoveling back across the road and that he was about 5-10 feet from the back of the truck when Mr. Miller fell. He said that he told the police officer he was shoveling toward the back of the truck when Mr. Miller fell.

[61] It is possible that the police officer did not provide a full description of what Mr. Mendelsohn said to him. Even taking this into consideration, Mr. Mendelsohn's testimony does not add up. On direct, Mr. Mendelsohn said that he was 30 feet away from Mr. Miller. On cross-examination, Mr. Mendelsohn said he was 10-15 feet away from the truck, at the back, when Mr. Miller fell. Perhaps these two statements can be reconciled, but Mr. Mendelsohn did not do so. His evidence leads only to confusion.

[62] In addition, the impression from the police report is that Mr. Mendelsohn heard, but did not see Mr. Miller fall, while the testimony he gave was that he saw Mr. Miller fall. Again, while it is possible that Mr. Mendelsohn could have explained the difference, he did not.

[63] What occurred in the moments before Mr. Miller fell is central to this case. Because Mr. Mendelsohn could not provide a comprehensible picture of what occurred, I find Mr. Mendelsohn unreliable on this issue.

[64] I believe Mr. Miller's version of events and do not believe Mr. Mendelsohn's. I therefore find that Mr. Mendelsohn did commit a battery on Mr. Miller by pushing him over using a shovel.

2. Was Mr. Miller injured because of the fall?

[65] I find that Mr. Miller was injured because of the fall.

[66] Mr. Miller's left knee was injured before the incident on February 26, 2018. He had an operation on his knee on November 30, 2017. By February 26, 2018, he had not completely healed and was still off work.

[67] As Mr. Miller was already injured when Mr. Mendelsohn pushed him over, the issue is whether Mr. Mendelsohn caused the injury Mr. Miller had after February 26, or if the problems Mr. Miller had after that date were simply due to his pre-existing injury.

[68] Mr. Miller presented subjective evidence that the fall on February 26 caused him to re-injure his knee. By February 26, 2018, Mr. Miller was almost three months post-operative. He testified that, at that point, he still had a few minor limitations, but was feeling much better. After the operation he took pain medication and used crutches, but by February 26, 2018, he was no longer on crutches nor did he take any pain medication. He spent most of February 26 removing snow with a snowblower, and then shovelled out the back of his truck. Despite performing this labour, he rated his pain as 0.

[69] Immediately after falling, Mr. Miller was in intense pain. He went to the hospital. He returned home, but spent most of the night in pain, despite taking pain medication. This injury did not get better over time, and, eventually, he required additional surgery.

[70] Mr. Miller's testimony is supported by the medical evidence filed at trial.

Dr. Curtis Myden, an orthopaedic surgeon, treated Mr. Miller for both his initial injury and his problems after February 26, 2018. He provided an expert report, which was filed in court. In the report, he diagnosed Mr. Miller with a partial tearing/stretching of his anterior cruciate ligament ("ACL") graft and medial and lateral meniscal tears. He stated

that Mr. Miller's fall on February 26 re-injured his ACL reconstruction and meniscus, and contributed to his meniscus not healing properly.

[71] Mr. Mendelsohn raised questions about whether the fall truly caused the injury, positing, for instance, that Mr. Miller worked too much on February 26 and that could have exacerbated his already injured knee. This is an interesting question, but Mr. Mendelsohn provided no expert evidence to contradict that of Dr. Myden. The only evidence before the Court is, therefore, that the incident of February 26, 2018, caused Mr. Miller to re-injure his knee. I conclude that Mr. Mendelsohn caused Mr. Miller's injury when he committed a battery against him.

3. Is Mr. Mendelsohn liable for the entirety of Mr. Miller's injury?

[72] I find that Mr. Mendelsohn is liable for all of Mr. Miller's injuries.

[73] Where there is a pre-existing condition, the defendant is responsible for the entirety of the plaintiff's injury even if it is unusually severe because of the pre-existing condition.⁴

[74] However, the defendant is not responsible for injuries arising from the pre-existing condition that the plaintiff would have developed even if they had not been injured by the defendant.⁵

[75] Mr. Miller's injury was, and continues to be, significant. It stands to reason that a fall like Mr. Miller's would not usually cause such extensive injuries. If, because of his pre-existing knee injury, Mr. Miller would have had some or all of these health problems even if he had not fallen, then Mr. Mendelsohn is not liable for those injuries.

⁴ *Athey v Leonati*, [1996] 3 SCR 458 at para. 34.

⁵ *Athey* at para 35.

[76] However, if Mr. Miller's injuries are worse because of his pre-existing injury, then Mr. Mendelsohn is liable for the entire extent of Mr. Miller's injuries.

[77] As noted above, Mr. Miller testified that his knee was doing well on February 26, 2018. Dr. Myden's report also indicated that he was healing well from his operation.

[78] Furthermore, Dr. Myden's opinion is that Mr. Miller's injuries after February 26 were caused by his fall. He does not suggest that some of them would have occurred even if Mr. Miller had not fallen.

[79] While Mr. Miller was doing well by February 26, however, he had not completely healed. Mr. Miller had not returned to work and a letter from Dr. Myden to Mr. Miller's family doctor from January 19, 2018, states: "He is going to wait another month or longer before he looks at any return to work." I conclude that he would likely have been fit to return to work by about April 2018.

[80] Mr. Mendelsohn provided no medical evidence to contradict that of Mr. Miller.

[81] I therefore conclude that on February 26, 2018, Mr. Miller was no longer feeling the effects of the pre-existing injury, and, but for Mr. Mendelsohn's battery, Mr. Miller would have experienced a full recovery. Mr. Mendelsohn is fully responsible for Mr. Miller's injury, except for loss of income for part of 2018.

4. What damages does Mr. Mendelsohn owe to Mr. Miller?

(a) General Damages

[82] Mr. Miller submits that the range of general damages awarded for the type of injury he sustained is between \$78,000 and \$115,000. I agree and award Mr. Miller \$85,000 in general damages.

[83] After the incident, Mr. Miller's injury did not get better. He had three surgeries on his left knee. Dr. Myden wrote letters to Mr. Miller's family physician throughout his

treatment. After each surgery, Mr. Miller would initially report that his knee was getting better, but as time wore on his symptoms would remain or increase. Dr. Myden also suggests that Mr. Miller may require more surgery.

[84] Dr. Myden states that, currently, Mr. Miller has “significant impairment and disability” in his left knee. He agrees with Mr. Miller’s self-assessment that he has 40% capacity in his knee.

[85] Dr. Myden also states that he agrees with the Functional Capacity Evaluation produced by Amanda McClung. Ms. McClung found that Mr. Miller had difficulty performing different ordinary, physical tasks that involved his knee.

[86] Mr. Miller testified about the limitations he now has in his daily activities.

Mr. Miller used to enjoy skateboarding, hunting, fishing and camping. He no longer skateboards, camps less often, and does not hunt. He said he needs assistance in many household activities.

[87] Gordon Miller and Mr. Miller’s mother, Yvonne Rafter, who also testified, echoed Mr. Miller’s evidence. Ms. Rafter also stated that Mr. Miller needs help with almost everything he does. He needs help with yard work, lighting fires in the stove, bringing firewood over, and really, anything that involves labour. She noted that Mr. Miller “asks for help now, and he never used to ask for help”.

[88] Mr. Mendelsohn questions whether Mr. Miller’s limitations are as significant as he says. However, Mr. Mendelsohn did not file any evidence in response to Mr. Miller’s expert evidence, and I therefore have only Mr. Miller’s evidence.

[89] Mr. Miller filed a number of cases in which the plaintiffs had been active, but, due to significant knee injuries, the plaintiffs could not function as they had before their

injuries. The range of awards granted is between \$60,000 and \$95,000, or, as adjusted for by inflation, between \$78,000 and \$115,000.⁶

[90] Given the extent of the injury, the limitations Mr. Miller's injury causes to his daily life, his reliance on others to assist in tasks he previously completed on his own, and the chronic discomfort he experiences, I conclude that an award of \$85,000 in general damages is appropriate.

(b) Is Mr. Miller entitled to aggravated and punitive damages?

[91] Mr. Miller is seeking \$5,000 in aggravated and punitive damages.

[92] I find that Mr. Miller is not entitled to aggravated damages, but that he is entitled to punitive damages.

[93] Aggravated damages augment compensatory damages. They provide compensation for intangible injuries, for instance distress and humiliation, that were caused by the defendant.⁷

[94] Mr. Miller testified to some of the emotional after effects of the battery, however, in this case I decline to award aggravated damages. The award of general damages is sufficient to compensate for the intangible elements experienced by Mr. Miller.

[95] Punitive damages are awarded to denounce and condemn a defendant for conduct that is "harsh, vindictive, reprehensible and malicious". Punitive damages provide denunciation and deterrence.⁸

[96] Mr. Miller's counsel has filed case law in which the award of punitive damages ranges from \$2,500-\$25,000.

⁶ *Cabrera v Sandhu*, 2009 BCSC 1321; *Rycroft v Rego*, 2017 BCSC 373; *Rutkowski v Nadarajah*, 2020 BCSC 583; *Majchrzak v Avery*, 2013 BCSC 1626.

⁷ *Vorvis v Insurance Corp. of British Columbia*, [1989] 1 SCR 1085 at 1099, citing Waddams, *The Law of Damages* (2nd ed 1983), at 562 at para. 979.

⁸ *Vorvis* at 1108.

[97] The range demonstrates the variety of factors that come into play when awarding punitive damages in actions of assault and battery. Higher awards are granted when the defendant has repeatedly or seriously beat the plaintiff. Other factors may also be relevant. Thus, in *Liedtke-Thompson v Gignac*,⁹ \$5,000 was awarded where the defendant had engaged in a campaign of harassment against the plaintiff.

[98] I conclude that punitive damages are appropriate in this case. Mr. Mendelsohn's aggression was entirely unprovoked. After the assault he laughed at Mr. Miller's distress. However, the battery is not at the level of severity of other cases. Moreover, while Mr. Mendelsohn's behaviour was problematic, it was not as serious as the harassment in *Liedtke-Thompson*.

[99] I therefore award Mr. Miller \$2,500 in punitive damages.

(c) Past Loss of Income and Future Loss of Earning Capacity

[100] Mr. Miller seeks global damages for past loss of income and future loss of earning capacity in the amount of \$100,000.

[101] I conclude that Mr. Miller is entitled to \$27,500 for past loss of income and \$60,000 for future loss of earning capacity.

Past Loss of Income

[102] I find that Mr. Miller lost income because of his injury and is entitled to damages.

[103] An award for past loss of income is not simply determined through a strict calculation of lost income. Rather, it is granted for the "loss of the value of the work" the plaintiff would have performed had they not been injured.¹⁰

⁹ 2015 YKSC 5.

¹⁰ *Rowe v Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[104] While the award for past loss of income is based on the value of the work the plaintiff would have performed, an assessment of what the plaintiff would have earned can be useful in determining the amount of damages to award. Because there must be a rational basis upon which damages are determined, the calculation of what the plaintiff would have earned, but for the injury, can serve as a benchmark in determining the appropriate amount to award the plaintiff.¹¹

[105] I will therefore consider whether Mr. Miller lost income because of his injury. If so, I will then consider the appropriate award to give Mr. Miller.

[106] Before his injury, Mr. Miller worked as a labourer at Builders Supplyland. He testified that, when he returned to work after Mr. Mendelsohn's battery, he returned to his job at Builders Supplyland. However, he was unable to perform the tasks required of his job because of his knee and therefore quit.

[107] The Functional Capacity Evaluation notes that Mr. Miller also worked as a lube technician, but this job required heavy lifting and he left that job as well.

[108] He then got a job as a roofer and presently continues to work in that job.

[109] Mr. Miller's yearly earned income, between 2016 and 2020 was, in round numbers:

2016:	\$27,000
2017:	\$26,000
2018:	\$ 8,000
2019:	\$19,000 (based on Records of Employment)
2020:	No information provided
2021:	\$23,500
2022:	No information provided

¹¹ Rowe at para. 31.

[110] The evidence of his earnings show that before his injury, Mr. Miller earned about \$27,000 per year (Mr. Miller went off work for the operation for his pre-existing condition at the end of November 2017. His income in 2017 would likely otherwise have been about \$27,000).

[111] I conclude that, but for his injury, Mr. Miller would have been able to earn at least \$27,000 per year.

[112] His actual earnings after 2017 show a marked difference from \$27,000 per year. Given this and the evidence about his work history since the injury, I conclude that Mr. Miller has established lost income between 2018 and the date of the trial.

[113] Having determined that Mr. Miller lost income due to his injury, the next question is how much Mr. Miller is entitled to for lost income. I conclude that, in total, Mr. Miller is entitled to \$27,500 for past lost income.

[114] An appropriate award here is the difference between what Mr. Miller would have earned (\$27,000 as of 2017) and what he did earn. I will also take into account that Mr. Miller's earning capacity would have increased as he gained experience.

[115] In 2018, I estimate that Mr. Miller's income would increase by about \$1,000. Had he not been injured, and had he worked the full year, Mr. Miller would therefore have earned about \$28,000. In actuality, he earned about \$8,000.¹² However, he was off work until April of that year because of his pre-existing injury. Mr. Mendelsohn is therefore not liable for loss of income between January-April 2018. But for Mr. Mendelsohn's battery, Mr. Miller would have been able to work nine months, from the beginning of April-December. Thus, Mr. Miller would have been capable of earning

¹² In 2018, and other years, Mr. Miller received Employment Insurance payments. I have not included those payments as income (*Leddicote v Nova Scotia (Attorney General)*, [2000] NSJ No 187 at para. 37).

approximately \$21,000 if he worked from April to December. Subtracting \$8,000 from \$21,000, I award Mr. Miller \$13,000 for lost income in 2018.

[116] In 2019, Mr. Miller earned \$19,000. It is unlikely that Mr. Miller's income would increase by \$1,000 every year. For 2019, therefore, I estimate that he could have earned \$28,000. I award \$9,000 for lost income for the year.

[117] Mr. Miller provided no information about his income in 2020. I therefore decline to award compensation for 2020.

[118] In 2021, Mr. Miller earned \$23,500. Estimating that Mr. Miller's income would otherwise have increase to about \$29,000, an appropriate amount for loss of income for 2021 would be \$5,500.

[119] Mr. Miller also provided no information about his income in the first months of 2022. I therefore do not award compensation for the months leading up to trial.

[120] Taken together, then, I award Mr. Miller \$27,500 for past loss of income.

Future Loss of Earning Capacity

[121] I conclude that Mr. Miller is entitled to two years salary, which is \$60,000, for future loss of earning capacity.

[122] In examining the issue of future loss of earning capacity, the court must answer two questions: whether the plaintiff has demonstrated that there is a real and substantial possibility that the plaintiff will lose income because of their injury; and what amount they should be awarded for that loss.¹³

[123] Compensation for future loss of earning capacity is awarded, not for loss of earnings, but for the loss of the ability to earn money.¹⁴

¹³ *Perren v Lalari*, 2010 BCCA 140 at para. 32.

¹⁴ *Perren* at para. 30, citing *Andrews v Grand & Toy Alberta Ltd*, 1978 2 SCR 229 at 251.

[124] Thus, a plaintiff who continues to work may still be entitled to damages for loss of earning capacity. Their entitlement arises from the fact that, “for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability”.¹⁵

[125] I find that Mr. Miller’s future earning capacity is impaired by his injuries. Currently, Mr. Miller works as a roofer. Mr. Miller testified about his ability to work as a roofer, as did a co-worker. Mr. Miller stated that he is unable to perform all the necessary tasks of a roofer, especially carrying shingles, which come in 70-lb packages.

[126] Scott Baker, Mr. Miller’s co-worker, also testified that Mr. Miller has difficulty doing his job and that he looks like he is in pain when he works.

[127] In addition, the Functional Capacity Evaluation states that Mr. Miller is not capable of performing jobs involving heavy labour, and categorizes the job of roofer as requiring a medium and occasionally heavy demand level. The report concludes that he is not capable of working as a roofer. By implication, he also cannot work in other jobs as a labourer.

[128] Mr. Miller is able to maintain his current job because his employer has agreed to some modifications and because of his own grit and determination. However, Mr. Miller suffers considerable pain from doing his job and he is unlikely to continue in his job for much longer.

[129] I have no difficulty concluding that Mr. Miller’s knee injury has impaired his future earning capacity, and is therefore entitled to some form of compensation.

[130] I next must determine how much Mr. Miller should be awarded.

¹⁵ *Palmer v Goodall* (1991), 53 BCLR (2d) 44 (CA) at 59.

[131] There are two approaches to calculating future loss of earning capacity: the “earnings approach” and the “capital asset approach”.

[132] The earnings approach is used where the loss can be calculated. The capital asset approach is used where there is a proven loss, but it is not possible to accurately measure the loss.¹⁶

[133] Mr. Miller’s counsel suggests that the capital asset approach is preferable. Given Mr. Miller’s youth and lack of established career path, I agree.

[134] In determining an award for loss of future earning capacity, the court should be guided, as much as possible, by factual and mathematical anchors. The court can take into consideration such factors as the plaintiff’s pre-accident employment history, training and capabilities, their personality, work ethic and attitude.¹⁷

[135] Four questions assist the court’s assessment of damages. These are:

- whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
- whether the plaintiff is less marketable or attractive as an employee to potential employers;
- whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
- whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.¹⁸

¹⁶ *Perren*.

¹⁷ *Knapp v O’Neill*, 2017 YKCA 10 at paras. 17 and 19.

¹⁸ *Firman v Asadi*, 2019 BCSC 270 at para. 155.

[136] Mr. Miller has presented compelling evidence that he cannot continue to work as a labourer. The evidence also demonstrates that he is restricted in other occupations. The Functional Capacity Evaluation states that Mr. Miller is capable of working at a light to medium physical demand level. However, even at the light to medium physical demand level, Mr. Miller would likely require modifications.

[137] Looking at other factors, no evidence was led with regard to Mr. Miller's educational level, aside from Mr. Miller testifying that he was only capable of working as a labourer. I could see during his testimony that Mr. Miller is capable and resourceful. That he continues to successfully work as a roofer despite his knee injury shows his strong work ethic.

[138] Despite these admirable qualities, Mr. Miller will face challenges in obtaining appropriate employment, even in more sedentary jobs than he has now. In the capital assets approach, damages are often calculated as a multiple of the plaintiff's income. I therefore conclude that Mr. Miller is entitled to two years' income. I put that currently at \$30,000 and award Mr. Miller \$60,000 in damages for future loss of earning capacity.

(d) Special Damages

[139] Mr. Miller is seeking \$6,060 for a work conditioning program that is recommended by Ms. McClung. I awarded him that amount for the program.

[140] He is also seeking an award for a knee brace, which would cost between \$1,700-2,500, and would need to be replaced every 3-5 years. Mr. Miller seeks \$20,000, or the ability to purchase 10 replacements. As Mr. Miller is almost 24 years old, and each brace lasts approximately 4 years, 10 replacements would take him to the age of 65. I make that award.

B. Defamation

1. Did Mr. Miller defame Mr. Mendelsohn?

[141] I conclude that Mr. Miller defamed Mr. Mendelsohn.

[142] To establish defamation, the plaintiff (who here is Mr. Mendelsohn, because he counter-sued) must establish that: the words are defamatory; they refer to the plaintiff; and they were published or spoken to a third person. The plaintiff does not have the burden of proving that the defendant was lying.

[143] Here, Mr. Mendelsohn alleges that Mr. Miller defamed¹⁹ him on three occasions. First, Mr. Miller reported to the police that Mr. Mendelsohn knocked him over on February 26, 2018. Second, on another occasion, Mr. Miller reported that Mr. Mendelsohn drove his truck at Mr. Miller. On a third occasion, Mr. Miller reported that Mr. Mendelsohn showed him the finger.

[144] The elements of defamation are easily met. The allegation of assault on February 26 and the allegation that Mr. Mendelsohn drove his truck at Mr. Miller are of criminal behaviour. When Mr. Mendelsohn allegedly gave Mr. Miller the finger Mr. Mendelsohn was subject to a peace bond in which one of the conditions was that he not have contact with Mr. Miller. Mr. Miller's third allegation is, therefore, also that Mr. Mendelsohn committed a crime. Allegations of criminal behaviour are, by their nature, defamatory.²⁰ Thus, Mr. Miller's allegations are defamatory.

¹⁹ The Statement of Defence does not refer to defamation, but rather states that Mr. Miller "falsely accused" him. However, Mr. Miller's counsel, quite properly in my view, treated the matter as one of defamation and replied to Mr. Mendelsohn's case on that basis.

²⁰ *Galloway v AB*, 2021 BCSC 2344 at para. 326.

[145] Mr. Miller admits that the statements were about Mr. Mendelsohn and that he communicated the statements to others: the police, with regard to the assault, and victim services, with regard to the two other allegations.

[146] Thus, Mr. Miller made defamatory statements about Mr. Mendelsohn in all three instances.

2. Does the defence of qualified privilege apply?

[147] Mr. Miller's counsel did not rely on the defence of justification. Instead, he asserts that qualified privilege applies because Mr. Miller was speaking to the police and to a public authority in matters over which they have jurisdiction.

[148] I find that qualified privilege applies to Mr. Miller's complaint to police that Mr. Mendelsohn knocked him down on February 26, 2018. I find that qualified privilege does not apply to the allegation that Mr. Mendelsohn tried to run Mr. Miller down with his truck, or that Mr. Mendelsohn showed him the finger.

[149] Qualified privilege applies when a person who makes a communication "has an interest or a duty, legal, social, or moral to make it to the person made"; and the person to whom the communication is given "has a corresponding interest or duty to receive it."²¹

[150] It applies "to the occasion upon which the communication is made, and not to the communication itself".²² Because the occasion of the communication is central to the analysis, it is essential to precisely characterize the occasion itself.²³

²¹ *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para. 143, quoting *Adam v Ward*, [1917] AC 309 (HL) at 334.

²² *Hill* at para. 143.

²³ *Bent v Platnick*, 2020 SCC 23 at para. 122.

[151] The occasion, or context, can be determined by examining such factors as the nature of the statement, the circumstances in which it is made, who made the statement, and to whom it is made.²⁴

[152] Proof of malice or an ulterior purpose, or that the defendant knew the statement was false or was reckless as to its truth, will defeat privilege.²⁵

[153] I will first assess how qualified privilege applies to Mr. Miller's complaint to police on February 26, 2018. The other two allegations have the same elements: on both occasions Mr. Miller spoke to victim services about criminal behaviour. I will therefore analyze those allegations together.

Report to the police on February 26, 2018

[154] I conclude that qualified privilege applies because Mr. Miller had a personal and social interest in reporting that Mr. Mendelsohn knocked him over and because the police had a duty to receive the report.

[155] Reports to police are well-recognized examples of qualified privilege.²⁶

[156] In this case, Mr. Miller called 911 immediately after having been knocked over by Mr. Mendelsohn. He was in great pain. Mr. Miller provided a report to police that was focused on what happened between Mr. Mendelsohn and him. I therefore find that Mr. Miller had a personal interest in reporting the incident to the police, as well as a moral interest in reporting crime.

[157] The duty of police officers to receive reports of criminal behaviour is firmly established.²⁷

²⁴ *RTC Engineering Consultants Ltd v Her Majesty the Queen in Right of Ontario* (2002), 58 OR (3d) 726 at para. 16.

²⁵ *Hill* at para. 145.

²⁶ *Cusson v Quan et al.* (2007), 87 OR (3d) 241 at para. 39.

²⁷ *Grant v Torstar Corp.*, 2009 SCC 61 at para. 93.

[158] There is no evidence that Mr. Miller acted with malice and I have found as a fact that Mr. Mendelsohn knocked Mr. Miller over.

[159] I therefore find that qualified privilege applies to Mr. Miller's report to the police that Mr. Mendelsohn knocked him over.

Mr. Miller's allegations that Mr. Mendelsohn went after him in his truck; and Mr. Mendelsohn showed Mr. Miller the finger

[160] I conclude that qualified privilege does not apply because I do not have enough evidence to conclude that Mr. Miller had an interest in making the statements to victim services, or that victim services had a duty to receive them.

[161] Although Mr. Miller's allegations were reported to the police and Mr. Mendelsohn was charged as a result of the allegations, Mr. Miller testified that he did not contact the police. Rather, he spoke to "victim services" about the allegations. He also testified that he spoke to them because they told him that he should contact them with any issues.

[162] I have concerns about Mr. Miller's reliability when testifying on these matters. While he did have some clear memories, there was also a lot he could not remember. For instance, Mr. Miller could not recall much about the circumstances surrounding Mr. Mendelsohn's charges. I therefore place little weight on Mr. Miller's statement that he approached victim services specifically because they told him to contact them with any issues.

[163] Moreover, even if I were to find Mr. Miller's testimony reliable, this statement provides only partial information. I am still left with the question of what Mr. Miller wanted to get from speaking to victim services about the allegations.

[164] It is tempting to infer that Mr. Miller was acting out of concern for his safety, or to report potential criminal behaviour. After all, one of the allegations involved, at best,

threatening behaviour, and the other showed blatant disregard for Mr. Mendelsohn's no-contact conditions.

[165] I am not prepared, however, to draw these inferences. While Mr. Miller could have had these interests, there are other interests that could have guided him, as well. Furthermore, the determination about his interest is an essential component in deciding whether qualified privilege applies. The type and extent of the indirect evidence here is an insufficient basis upon which to determine what Mr. Miller's interests were when speaking to victim services. I cannot conclude that Mr. Miller had a legal, social, or moral interest in making his allegations.

[166] I also cannot find that victim services had a duty to receive Mr. Miller's allegations.

[167] Mr. Miller did not provide evidence about the circumstances of the communication, including what he expected when he spoke to victim services, what else he said, how the victim services worker responded, or what happened after.

[168] In addition, no evidence was provided about what victim services is and does, what Mr. Miller's relationship was to victim services, or how victim services assisted Mr. Miller.

[169] It may have been expected that I would take judicial notice about victim services. It is well recognized in the community that victim services provides assistance to complainants in the justice system. I am therefore prepared to take judicial notice of that fact. I can also infer that victim services was assisting Mr. Miller during the course of some or all the criminal proceedings against Mr. Mendelsohn.

[170] I can go no further than that, however. Judicial notice was not discussed at trial. Moreover, the test for taking judicial notice is strict where, as here, the facts in question

are central to the legal issue.²⁸ I therefore cannot take judicial notice on issues such as victim services' mandate, the details of services it provides, or the limits of its services.

[171] Again, this leaves me with insufficient evidence upon which to conclude that victim services had a duty to receive Mr. Miller's communication.

[172] My decision turns entirely on the facts of this case and on the lack of the evidence presented. I am not finding that, as a general principle, qualified privilege does not apply to complainants receiving assistance from victim services.

[173] I therefore find that qualified privilege does not apply to Mr. Miller's allegations that Mr. Mendelsohn ran at him with his truck; and that he showed him the finger. Mr. Mendelsohn is, therefore, successful in his claims of defamation regarding these two allegations.

3. Does Mr. Miller owe damages to Mr. Mendelsohn?

[174] I conclude that Mr. Mendelsohn is entitled to \$10,000 in damages.

[175] In the Yukon, both libel (written defamation) and slander (spoken defamation) is actionable per se.²⁹ "Actionable per se" means that once the plaintiff has proven defamation, they do not have to prove that they suffered damages: damages are presumed.

[176] However, there is no presumption that a damages award for defamation should be high.³⁰ Each case is unique and the damages are to be determined based on a number of factors, such as:

- the plaintiff's conduct;

²⁸ *R v Spence*, 2005 SCC 71 at para. 59.

²⁹ *Defamation Act*, RSY 2002, c. 53, s. 2.

³⁰ *Gichuru v Purewal*, 2019 BCSC 731 at para. 64.

- their position and standing;
- the type and extent of publication of the defamation;
- whether there was a retraction or apology; and
- the whole conduct of the defendant, from the date of publication to the date of the trial verdict.³¹

[177] An important part of the context here is Mr. Mendelsohn's conduct.

Mr. Mendelsohn committed a battery on Mr. Miller: he is not a wholly innocent victim. Moreover, his battery was the spark that led to the defamation. He bears some responsibility for the defamation.

[178] His conduct also informs my assessment of his position and standing. Mr. Miller made his allegations to a victim services worker, who presumably already knew about Mr. Mendelsohn's initial charge of assault. If there was an impact on Mr. Mendelsohn's position and standing, then it had already suffered a blow when he was charged with assault. Subsequent charges may have entrenched beliefs about Mr. Mendelsohn's character, but likely did not greatly affect his position and standing.

[179] The effect of the defamation is also minimized because Mr. Miller made his allegations to a victim services worker. The victim services worker is a professional. I would expect the victim services worker to understand that issues of confidentiality may arise in relation to the allegations and to deal with anything pertaining to Mr. Mendelsohn in a professional manner.

[180] As well, the evidence before the Court is that Mr. Miller spoke of his allegations once. How the allegations got to the police was never clarified. Mr. Miller was asked

³¹ *Hill* at para. 182.

very little about this, resulting in gaps in the evidence. It was presumed that it was the victim services worker that contacted the police, but I am not prepared to draw that inference. Thus, the evidence is that Mr. Miller spoke of the issue once to a victim services worker. The impact on Mr. Mendelsohn was, therefore, limited.

[181] There was no retraction or apology, but, in this case, I consider this a neutral factor. Mr. Miller's conduct throughout the case does not warrant a higher assessment of damages. On this issue, the burden is on Mr. Mendelsohn to show that Mr. Miller acted poorly or maliciously. There is no evidence that Mr. Miller's conduct was problematic.

[182] Mr. Mendelsohn submitted that his business suffered, he was forced to move from his home and that his family broke up because of the defamation, amongst other losses. Mr. Mendelsohn did not provide documentary proof of loss of business. In his testimony, he said that he could not use certain suppliers for his business because of the allegations. However, he gave no evidence that he lost business because of the allegations. Additionally, on cross-examination he admitted that he could use other suppliers. Similarly, he failed to prove his other losses, such as the loss of his home.

[183] More importantly, Mr. Mendelsohn's losses really arise out of his charges and the conditions he was put under because of his charges. They do not arise because Mr. Miller spoke to a victim services worker about his allegations.

[184] The allegation, particularly that Mr. Mendelsohn drove at Mr. Miller with his truck, was serious. On the other hand, there was a minimal impact on Mr. Mendelsohn. I therefore conclude that a damages award of \$10,000 is appropriate.

CONCLUSION

A. Assault and Battery

[185] I find that Mr. Mendelsohn committed a battery on Mr. Miller by pushing him over. I also find that Mr. Mendelsohn is liable for the entirety of Mr. Miller's injury, aside from some loss of income. The damages assessed against Mr. Mendelsohn are as follows:

General damages	\$85,000
Punitive damages	\$2,500
Damages for past loss of income	\$27,500
Damages for loss of future earning capacity	\$60,000
Special damages:	
Work conditioning program	\$6,060
Knee brace and replacements	<u>\$20,000</u>
Total:	<u>\$201,060</u>

B. Defamation

[186] In the counter-suit, I find that Mr. Miller defamed Mr. Mendelsohn and qualified privilege does not apply to the allegations that Mr. Mendelsohn drove at Mr. Miller with his truck, or that Mr. Mendelsohn showed him the finger. The damages assessed against Mr. Miller are \$10,000.

[187] Costs may be spoken to in case management if the parties are unable to agree.

WENCKEBACH J.