IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Logeman v. Rossa et al,***
2006 BCSC 692

Date: 20060501
Docket: S032956
Registry: Vancouver

Between:

Christy Joyce Logeman

Plaintiff

And

Walter J. Rossa, Ken Dorby,
Greater Vancouver Transportation Authority
(Translink) and Attorney General of
British Columbia

Defendants

Before: The Honourable Madam Justice Sinclair Prowse

Reasons for Judgment

Counsel for the Plaintiff:	L. Spencer
Counsel for the Defendants:	T. Delaney J. Gopaulsingh
Date and Place of Trial:	April 21, 2006 Vancouver, B.C.

(I) NATURE OF THE HEARING

[1] In this action, the Plaintiff brought claims of assault, false arrest and false imprisonment against the Defendants. The trial was heard by a Jury and focused on the Defendants, Ken Dorby and Walter Rossa. The Defendant, the Greater Vancouver Transportation Authority (Translink), conceded that if the Plaintiff proved her claims against either or both Mr. Dorby or Mr. Rossa, those claims would be proven against it. With respect to the claims against the Attorney General of British Columbia, the parties resolved those claims.

[2] In their verdict, the Jury dismissed the claim of assault against the Defendant Ken Dorby and the claims of

false arrest and false imprisonment against both Mr. Rossa and Mr. Dorby. They found that the Plaintiff had proven her claim of assault against Mr. Rossa. However, the Jury also found that she had acted wrongfully (that is, in a tortious manner) and that her tortious conduct (to the extent of 35%) lead to a chain of events that ultimately resulted in Mr. Rossa's assault against her. The Jury apportioned Mr. Rossa's liability to 65%.

[3] As far as damages are concerned, the Jury awarded the Plaintiff $20,000 for her non-pecuniary loss, $2,000 for her past income loss and $30,000 in punitive damages.

[4] This hearing pertains to three issues arising from the Jury's verdict – namely, whether the award of punitive damages should be apportioned in accordance with the liability findings, the rate of interest to be applied to the punitive damages award and whether the award of costs should be apportioned in accordance with the liability findings.

(II) THE APPORTIONMENT OF PUNITIVE DAMAGES

[5] For reasons which follow, I am satisfied that a portion of the punitive damages award made in this case is subject to apportionment.

[6] The apportionment of damages arising from tortious conduct (intentional or negligent) is governed by s.2 of the ***Negligence Act,*** R.S.B.C. 1996, c.333: ***Brown v. Cole***, [1996] 2 W.W.R. 567 (B.C.C.A.). It is this section of this statute that permits the defence of contributory negligence and the consequence apportionment of damages in negligent tort claims and the defence of contributory fault and the consequent apportionment of damages in intentional tort claims.

[7] Section 2 of the ***Negligence Act*** provides that:

> Awarding of damages
>
> 2. The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:
>
> (a) the damage or loss, if any, sustained by each person must be ascertained and expressed in dollars;
>
> (b) the degree to which each person was at fault must be ascertained and expressed as a percentage of the total fault;
>
> (c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;
>
> (d) as between 2 persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled must be set off one against the other, and if either person is entitled to a greater amount than the other, the person is entitled to judgment against that other for the excess.

[8] Though the Court as yet does not appear to have specifically addressed the issue of apportionment of punitive damages in intentional tort cases, the issue of apportionment of punitive damages in negligent tort cases has been addressed.

[9] Specifically, it is by operation of s.2 of ***Negligence Act*** as that provision does not exclude punitive damages from apportionment (the statute just refers to damages). In ***Robitaille v. Vancouver Hockey Club Ltd.***, [1981] 3 W.W.R. 481 (B.C.C.A.), the British Columbia Court of Appeal held that these awards are subject to apportionment provided that the evidence proves that the wrongful conduct of the plaintiff contributed to the conduct of the defendant which led to the award of punitive damages.

[10] Consequently, as it is the same provision of the ***Negligence Act*** that permits the defence of contributory negligence and the consequence apportionment of damages in negligent tort claims and the defence of contributory fault and the consequent apportionment of damages in intentional tort claims, and as those provisions have been

interpreted to include punitive damage awards in negligent tort claims as being subject to apportionment, I am satisfied that punitive damage awards in intentional tort claims are also subject to apportionment, provided that the evidence proves that the wrongful conduct of the plaintiff contributed to the conduct of the defendant which led to the award of punitive damages.

[11] The proviso that punitive damage awards are only subject to apportionment if the evidence proves that the wrongful conduct of the plaintiff contributed to the conduct of the defendant which led to that award is in keeping with the policy underlying apportionment of damages. That is, it is a policy of fairness. It is "to achieve fairness as between the parties, one of whom inflicted the injuries and the other who, in part, brought it on him or herself": ***Hurley v. Moore*** (1993), 107 D.L.R. (4th) 664 at para. 72 (Nfld. C.A.).

[12] In other words, if a plaintiff acts in a tortious manner and if that conduct contributes to a chain of events that ultimately culminates in a defendant's tortious conduct, for reasons of fairness, a defendant is liable for damages to the extent that his/her own conduct gives rise to the commission of the tort.

[13] It follows from these principles that if the tortious conduct of the plaintiff contributed to a chain of events that ultimately culminated in the tortious conduct of the defendant, and if that tortious conduct of the defendant is a basis for the punitive damages award, that award is subject to apportionment.

[14] If however, the award of punitive damages is due to conduct of a defendant other than the tortious conduct to which a plaintiff contributed, for reasons of fairness that award would not be subject to apportionment as the defendant was fully responsible for that conduct. (Unlike compensatory damage awards, punitive damages may arise from conduct other than the tortious conduct of a defendant. For example, it may be based on the high-handed or indifferent attitude of a defendant after the commission of the tort, conduct to which the prior tortious conduct of a plaintiff is relevant).

[15] It follows from these principles that if a punitive damages award is based on both the conduct of a defendant which is subject to apportionment, and on the conduct which is not subject to apportionment, the Court should adjust, for reasons of fairness, the apportionment of the award to reflect these findings.

[16] To decide the apportionment, if any, of the punitive damages award in the present case requires a determination of the probable grounds on which the Jury founded this award.

[17] To put this analysis in context, in the late evening of November 15, 2002, the Plaintiff and her boyfriend became involved in an altercation arising from the fact that the Plaintiff did not want her boyfriend to come home with her. By way of background, the Plaintiff and her boyfriend had a tumultuous relationship. The boyfriend was on bail on a charge of assaulting the Plaintiff. One of the conditions of this bail was that he not contact her directly or indirectly. In any event, he did contact her earlier that evening and they spent some time together.

[18] Because he was angry at the Plaintiff for not permitting him to accompany her home that evening, the boyfriend took, and then hid, the Plaintiff's wallet. The loss of her wallet prevented the Plaintiff from getting on the Skytrain because it contained all of her money, her Skytrain pass, and the keys to her apartment.

[19] To say the least, the Plaintiff became frustrated and angry with her boyfriend. She was crying and shouting at him. As this was going on, a Skytrain official approached the Plaintiff (either just inside or outside the Skytrain station) and asked whether she would like him to call the Skytrain police. The Plaintiff responded that she would appreciate him doing this as she was unable to locate her wallet. (By this time, the boyfriend had hidden the wallet in some bushes).

[20] Mr. Dorby and Mr. Rossa were the members of the Skytrain police who attended to assist the Plaintiff. After their arrival, Mr. Dorby helped the Plaintiff (without success) to look for her wallet. In the meantime, Mr. Rossa interviewed the boyfriend who denied taking the wallet.

[21] As the boyfriend did not have the wallet on him (Mr. Rossa searched his backpack), Mr. Rossa and Mr. Dorby told the boyfriend to leave. Meanwhile the Plaintiff continued to search for her wallet. By this time, the Skytrain had shut down for the day. Mr. Rossa and Mr. Dorby advised the Plaintiff that she would have to find another way home.

[22] It was just as Mr. Dorby and Mr. Rossa were explaining this situation to the Plaintiff that the boyfriend returned and walked passed the Plaintiff. (He was some distance away from her when he passed, approximately

15-20 feet). As the boyfriend explained in his evidence, the purpose of his return was to taunt the Plaintiff.

[23] Upon seeing her boyfriend, the Plaintiff (who was at this point extremely angry and frustrated) stepped towards him and swung at him with the bag of shoes that she was carrying in her right hand.

[24] Mr. Rossa then intervened to defend the boyfriend and to restrain the Plaintiff. The Plaintiff resisted this restraint and eventually ended up on the ground with Mr. Rossa holding down the upper part of her body and Mr. Dorby holding down the lower part of her body. She was then handcuffed and arrested for assaulting a police officer.

[25] Sometime after she swung the bag at her boyfriend, but before she was arrested, the Plaintiff sustained a blowout fracture of the orbit of her left eye. As was explained in the evidence led at trial, there is a very fine bone (about the thickness of papyrus) located inside the eye socket and on which the lower portion of the eyeball sits, thereby holding the eyeball in place. It was this fine bone which was fractured in this incident. As a consequence of this fracture, the eyeball was displaced. This injury is painful and the swelling began almost immediately.

[26] After she was handcuffed and arrested, Mr, Rossa and Mr. Dorby took the Plaintiff to jail where she was detained for 15 hours.

[27] There was no dispute that Mr. Rossa and Mr. Dorby assaulted the Plaintiff (they grabbed at her after she swung her bag at her boyfriend and they then put her on the ground and held her). Further, there was no issue they subsequently arrested and imprisoned her.

[28] Rather, the Jury had to determine whether Mr. Rossa had proven that he was justified in assaulting the Plaintiff because he was defending the boyfriend against her; whether Mr. Dorby had proven that he was justified in assaulting the Plaintiff because he was defending Mr. Rossa against her; and whether each of them respectively had proven that the force that he used in this defence was not excessive – that is, it was reasonable in the circumstances.

[29] Moreover, if the Jury found that either or both Mr. Rossa and Mr. Dorby had assaulted the Plaintiff, they then had to decide whether the Plaintiff had acted in a tortious manner (Mr. Rossa and Mr. Dorby alleged that she assaulted them) and, if so, to what extent, if any, did her tortious conduct contribute to a chain of events culminating in that assault.

[30] The outcome of the claim of false arrest and false imprisonment followed from the determination of these issues.

[31] The verdict of the Jury reveals that they were satisfied that Mr. Rossa had been justified in assaulting the Plaintiff initially because he was defending the boyfriend against her, but that he had used excessive force in that defence; that Mr. Dorby had been justified in assaulting the Plaintiff because he was defending Mr. Rossa against the Plaintiff and that he had not used excessive force in that defence, nor had he assisted Mr. Rossa in his use of excessive force; and that the Plaintiff, as a result of her own tortious conduct, contributed to the extent of 35% for the assault upon her.

[32] To make this finding of contributory fault, the Jury must have concluded that the acts of the Plaintiff in resisting the efforts of Mr. Rossa to restrain her constituted an assault on him. That is, she herself was acting in a tortious manner. The Plaintiff did not dispute that she struggled against Mr. Rossa from the moment that he grabbed her after she swung out at her boyfriend and that she continued to try to free herself throughout. She conceded in her testimony that she may very well have hit Mr. Rossa with her bag when she flung her arms back when he initially grabbed at her from behind.

[33] As far as the analysis of their finding that punitive damages should be awarded in this case, to reach this verdict the Jury had to have concluded that Mr. Rossa conducted himself in a malicious, outrageous, indifferent and/or high-handed manner.

[34] In my view, that conduct had to have arisen at the time that Mr. Rossa used the excessive force and injured the Plaintiff and/or after he had inflicted injury upon her.

[35] If the Jury based the award of punitive damages solely on Mr. Rossa‘s conduct after the infliction of the injury, the punitive damages award should not be apportioned as the Plaintiff’s tortious conduct could not have contributed to that conduct as she was restrained at this point in time.

[36] If however, the Jury based the award of punitive damages in whole or in part on the conduct of Mr. Rossa at the time he inflicted injury on the Plaintiff, the punitive damage award should be apportioned to the extent appropriate to reflect that finding.

[37] The orbital blowout fracture of the Plaintiff's left eye was her most serious injury. For this reason, I am satisfied that the Jury found that Mr. Rossa inflicted this injury through the excessive use of force.

[38] Whether the Jury probably included the conduct of Mr. Rossa at the time he inflicted this injury on the Plaintiff in their basis for an award of punitive damages turns, in my view, on their probable findings as to the manner in which the excessive force was applied. That is, if the Jury concluded that the manner in which the excessive force was applied was conduct such as a punch, it is unlikely that they included this conduct in their basis for an award of punitive damages.

[39] However, if the Jury concluded that Mr. Rossa inflicted the injury by hitting the Plaintiff in the eye with the end of a flashlight (as alleged by the Plaintiff), it is probable that they did conclude that conduct to be sufficiently outrageous to call for an award of punitive damages.

[40] The Plaintiff contended that her eye injury was caused by Mr. Rossa hitting her in the eye with a flashlight as he and Mr. Dorby were holding her on the ground. She testified that Mr. Rossa, who had one hand on her neck, shone a flashlight into her eyes and told her to be quiet. He then turned the flashlight off and struck her in the eye with one of the ends of the flashlight. She recalled feeling the metal touch her eye area and the pain of the blow.

[41] Mr. Rossa and Mr. Dorby contended that they did not know how the Plaintiff's eye injury occurred and that it must have happened accidentally during the altercation. Both Mr. Rossa and Mr. Dorby claimed that Mr. Rossa did not hit the Plaintiff with a flashlight or anything else. In their evidence they speculated that given the commotion, the Plaintiff's injury could have occurred in a number of ways, including an elbow, a knee, the palm of a hand, a punch with a fist or the microphone from Mr. Rossa's radio transmitter.

[42] By their verdict of assault, the Jury had to have concluded that, although Mr. Rossa may not have intended to fracture the bone in the Plaintiff's eye socket, he did intend to apply the force that he did – that force was not applied accidentally. For this reason, I am satisfied that the Jury did not find that the manner of the assault was an elbow, a knee or the palm of a hand because any of these manners would have been accidental and would not have resulted in their finding of assault.

[43] Furthermore, with respect to the manner of the assault being Mr. Rossa's microphone hitting her eye, again the Jury could not have made that finding and reached their verdict of assault as this would not have been an intentional application of force.

[44] To put this conclusion in context, as Mr. Rossa was endeavouring to restrain the Plaintiff and put her on the ground, she grabbed at his jacket to keep from falling. In doing this, she ripped the epaulet on the left shoulder of his jacket. The microphone for his radio was attached to this epaulet. This microphone was connected to the transmitter on his pant's belt by a wire that ran underneath his jacket. Mr. Rossa testified that the dislodging of this microphone may possibly have hit the Plaintiff in the eye, causing her injury. However, as was set out earlier, this would have constituted an accidental application of force. In any event, it is unlikely that the Jury accepted this explanation of how the Plaintiff was injured given that the microphone was located on Mr. Rossa's left shoulder. If this injury had occurred in this manner, it would have been the Plaintiff's right eye that was injured not her left eye.

[45] Moreover, I am satisfied that the Jury probably relied upon the evidence of Dr. Courtemanche (the doctor who performed the surgery on the Plaintiff's eye six days after she suffered the injury) that given the absence of any abrasion on her face and the fact that her cheekbone was not fractured, the Plaintiff's injury was not caused by a punch from a fist.

[46] In my view, the Jury probably preferred this evidence over the evidence of Dr. Van Lecken (who opined that a pure blowout orbital fracture, which is the injury that the Plaintiff sustained, may be caused by a punch with a fist) because of Dr. Courtemanche's extensive experience in the treatment of these types of injuries and because of the fact that he treated the Plaintiff and actually saw her injuries.

[47] For reasons which follow, I am satisfied that the Jury probably found that Mr. Rossa assaulted the Plaintiff by intentionally hitting her in the eye with the end of a flashlight. The evidence of the Plaintiff was corroborated by the boyfriend who testified that he saw Mr. Rossa hit the Plaintiff with either a flashlight or a baton. (He was not

close enough to identify it precisely. He could only see its general shape).

[48] Surprisingly, given the manner in which he conducted himself on the evening of this incident, the boyfriend, in my view, was a very credible witness. He gave his testimony in a candid and straightforward manner, endeavouring to be fair and to avoid exaggeration.

[49] In addition, the Plaintiff's description of the manner in which she was assaulted was corroborated by the evidence of Dr. Courtemanche.

[50] The Plaintiff suffered a "pure blowout fracture". That is, her injury was confined to the fracture of the small bone within her eye socket that holds the eyeball in place.

[51] As Dr. Courtemanche explained in his testimony, a pure blowout fracture is caused by something that is small enough that it does not cause injuries beyond the eye socket and that strikes the eye at the right angle (a slightly downward angle towards the bottom of eye orbit area).

[52] Dr. Courtemanche opined that the end of the larger Translink flashlight (which had been tendered in evidence) is consistent with the size of the object that caused the Plaintiff's injury, and that the downward manner in which the Plaintiff described being struck is consistent the geometry of the angle of the blow that caused her injury. (This flashlight tendered in evidence was the larger of the two flashlights that are, and were on the night of this incident, available to the Translink police).

[53] It is for all of these reasons that I am satisfied that the Jury found that Mr. Rossa had assaulted the Plaintiff by hitting her in the eye with the end of a flashlight. Having reached this conclusion, given the viciousness of this manner of assault, I am satisfied that the Jury probably found it to be sufficiently outrageous and malicious that they included it in the basis on which they awarded punitive damages.

[54] I am also satisfied, however, they probably included Mr. Rossa's conduct after he inflicted this injury in their basis for making this award.

[55] Dr. Courtemanche testified that this type of injury is painful because the eye is pulled out of its position and down towards the sinus cavity. Swelling usually occurs immediately. (It certainly occurred quickly in this case as the Plaintiff noticed it moments after when she caught sight of her face in the rear-view mirror of the vehicle in which Mr. Rossa and Mr. Dorby took her to the police station. Furthermore, the injury was visible enough that it was noted from the beginning on the jail records).

[56] The evidence was undisputed that Mr. Rossa was completely indifferent to the injury that he caused the Plaintiff. He ignored her pleas for medical assistance, refusing to look or speak to her as he transported her to the police station.

[57] Given these circumstances, it is my view that the Jury probably found this conduct to be sufficiently indifferent and high-handed as to call for punitive damages.

[58] To summarize, I am satisfied that the Jury probably based their award of punitive damages on the conduct of Mr. Rossa at the time that he assaulted the Plaintiff with the flashlight and injured her eye and at the time after he injured her. Given the seriousness of the conduct at both of these times, it is my view that the Jury probably based their award on them equally. That is, that they based 50% of the punitive damages award on Mr. Rossa's conduct at the time he inflicted injury on the Plaintiff, and 50% of it on Mr. Rossa's conduct after he inflicted injury on the Plaintiff.

[59] Given that the Plaintiff's tortious conduct could not have led to Mr. Rossa's conduct after he injured her because she was restrained at the time, the portion of the award based on this conduct is not subject to apportionment.

[60] However, as the Plaintiff's tortious conduct did contribute to the chain of events culminating in Mr. Rossa's assault of her, the portion of the award based on that conduct is subject to an apportionment.

[61] To reflect these findings, 50% of the punitive damages award will be apportioned by 35% (this is equivalent to apportioning the whole award by 17.5%). After apportionment, the punitive damages award is $24,750.

(III) THE INTEREST RATE TO BE APPLIED TO THE

PUNITIVE DAMAGES AWARD

[62] There is no dispute that an award of pre-judgment interest should be added to the award of punitive damages.

[63] Relying on the case of ***Huff v. Price*** (1990), 51 B.C.L.R. (2d) 282 (C.A.) and ***Y.(S.) v. C(F.G.)*** (1997), 32 B.C.L.R. (3d) 235 (S.C.), the Plaintiff contends that the award of interest should be "a minimum of five percent".

[64] The Defendants, on the other hand, contend that the interest should be set in accordance with the provisions of the ***Court Order Interest Act***, R.S.B.C. 1996, c.79, and thus be less than five percent***.***

[65] The case of ***Y.(S.)*** relies upon the decision of ***Huff***. At the time that ***Huff*** was decided, the ***Court Order Interest Act*** required a minimum rate of interest and the minimum rate was held to be "a minimum of five per cent".

[66] The provisions of this statute have since changed and there is no longer a minimum rate: ***J.L.M. v. P.H.***, [1998] B.C.J. No. 1546 (C.A.). For this reason, I did not rely upon the decisions in ***Y.(S.)*** or ***Huff*** regarding the rate of interest to be applied.

[67] Rather, I relied upon the decisions in ***J.L.M. v. P.H.*** *supra*; ***Osborne v. Harper***, 2006 BCSC 51; and ***Davies v. Pedersen***, 2003 BCSC 1788, which apply the updated provisions of the ***Court Order Interest Act***. In these cases the courts conclude that if the punitive damages award was made in current dollars, it is appropriate for the interest rate to be nominal, commencing from the date on which the cause of action arose. The nominal rate of interest chosen in these cases was 1/10 of 1% per annum.

[68] I am satisfied that the Jury made this punitive damages award in current dollars. Given that conclusion, I am satisfied that a nominal rate of interest should be imposed, commencing from November 16, 2002, which was the date on which the cause of action arose. I have concluded that the nominal rate of interest should be 1/10 of 1% per annum.

(IV) THE APPORTIONMENT OF COSTS

[69] There is no dispute that as the successful party, the Plaintiff is entitled to an award of costs, and that those costs should be calculated at Scale 3.

[70] There is also no dispute that the general rule is that costs are apportioned in accordance with the liability findings. Section 3 of the ***Negligence Act*** provides:

> Apportionment of liability for costs
>
> 3(1) Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.
>
> (2) Section 2 applies to the awarding of costs under this section.
>
> (3) If, as between 2 persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there is a further set off of the respective amounts and judgment must be given accordingly.

[71] In addition, there is no dispute that the phrase "unless the court otherwise directs" in s.3 confers on a Judge a broad discretion to depart from the general rule that costs are to be apportioned according to the findings of liability: ***Peters v. Davidson*** (1981), 125 D.L.R. (3d) 753 (B.C.S.C.), aff'd (1982), 141 D.L.R. (3d) 763 (B.C.C.A.).

[72] As was set out in the case of ***Sayers v. Fediuk*** (1992), 77 B.C.L.R. (2d) 117 (S.C.), the principle consideration for a Judge deciding whether to exercise his or her discretion is whether the imposition of the general rule under s.3 of the ***Negligence Act*** would be unjust in the circumstances of the case:

[73] The B.C. Court of Appeal in ***Brown v. Blacktop Cabs Ltd.*** (1997) 43 B.C.L.R. (3d) 76 (C.A.), held that in determining whether an unjust result would occur due to the imposition of a costs rule, it is the nature and the conduct of the litigation that are to be considered. Although in ***Brown*** the Court of Appeal was considering Rule 29 of the *Court of Appeal Rules*, this decision is of assistance in the present case because it provides guidance on

how to interpret the word “unjust” with respect to a costs award. In my opinion, the interpretation given to “unjust” in ***Brown*** is consistent with the interpretation that has been given in other cases that have considered the discretion to depart from the general rule in s.3 of the ***Negligence Act***.

[74] Thus, the specific question that I must address is whether, having regard to the nature and conduct of the litigation, I should exercise my discretion, depart from the general rule in s.3 of the ***Negligence Act***, and order that the Plaintiff be paid 100% rather than 65% of her costs, because to impose the general rule would be unjust

[75] Cases such as ***Ferguson v. Henshaw***, [1989] B.C.J. No. 1199 (S.C.); ***Sayers v. Fediuk*** (1992), 77 B.C.L.R. (2d) 117 (S.C.); ***Forsyth v. Sikorsky Aircraft Corp.*** (2002), 100 B.C.L.R. (3d) 66, 2002 BCCA 231; ***Secord v. Doulis***, 2002 BCSC 675; ***Graham v. Lee***, 2004 BCSC 1287; and ***C. (T.L.) v. Vancouver (City)*** (1995), 13 B.C.L.R. (3d) 201 (S.C.) illustrate that when determining whether the imposition of the general rule would be unjust, most, if not all, aspects of the nature and conduct of the litigation may be considered. For example, the Courts have looked at whether the plaintiff was forced to go to trial in order to obtain recovery; the costs of getting to trial, as well as the difficulty and length of the trial; whether, if costs are apportioned according to liability, the costs recovery available to the plaintiff will bear any reasonable relationship to his/her costs in obtaining the results achieved; the positions taken by the parties at trial, in particular whether the positions taken were appropriate and reasonable in the circumstances; whether the defendant made any settlement offers; and the ultimate results of the trial, asking whether the plaintiff achieved substantial success that would effectively be defeated if the costs were awarded pursuant to s.3.

[76] In the present case, the pivotal issue was how the Plaintiff’s eye injury occurred and, in particular, if it was caused by Mr. Rossa hitting her in the eye with a flashlight. Although there were other issues, such as where the Plaintiff was when she first spoke to Translink officials (that is, whether she was or was not on Translink property), and the extent to which the Plaintiff resisted the efforts of Mr. Rossa and Mr. Dorby to restrain her, these issues were very much secondary.

[77] From the outset Mr. Rossa denied touching the Plaintiff in the face in any manner, including in the eye with a flashlight. He never changed his position.

[78] As was set out earlier, I am satisfied the Jury concluded that Mr. Rossa did strike the Plaintiff in the eye with a flashlight. Ultimately, the Jury found that Mr. Rossa lied regarding this critical matter. In my opinion, whether Mr. Rossa intentionally struck the Plaintiff with a flashlight was not something about which he may have been mistaken or have forgotten. The Plaintiffs voiced her allegations immediately after the incident. This was not a situation in which Mr. Rossa was being asked to recall an event, for the first time, months or years after it had allegedly occurred before.

[79] Mr. Dorby was also untruthful. Although he may not have assisted Mr. Rossa in the commission of this assault and may not have actually seen Mr. Rossa strike the Plaintiff, Mr. Dorby had to have seen enough after the Plaintiff cried out in pain immediately after she was struck to piece the situation together. Yet, Mr. Dorby denied seeing or hearing anything. Throughout, he has tried to protect his colleague - his description on this pivotal issue being evasive and inconsistent.

[80] The blatant untruthfulness of both of these Defendants on this pivotal issue has had an adverse effect on both the nature and the conduct of this litigation. The complete denial of any involvement or knowledge of the circumstances in which this injury occurred rendered settlement impossible and made it more difficult for the Plaintiff to pursue her claims than it should have been, because it complicated rather than clarified the issues.

[81] The findings of the Jury indicate the unreasonableness of the position taken by Mr. Rossa and Mr. Dorby with respect to this pivotal issue.

[82] In addition to this, the Defendants chose to have this action tried by a Jury, thereby increasing both the costs and the stress of the trial.

[83] The dismissal of the claims against Mr. Dorby does not provide a basis on which I should decline to exercise my discretion under s.3 of the ***Negligence Act***. Rather, a review of his conduct supports the conclusion that an injustice would result if the general apportionment of costs rule was imposed. When Mr. Rossa struck the Plaintiff with the flashlight Mr. Dorby was right beside him, holding down the Plaintiff’s lower body. The Plaintiff’s boyfriend who was some distance away heard her cry out in pain.

[84] For all of these reasons, having regard to the nature and conduct of this litigation, I am satisfied that an injustice would arise if I imposed the general rule set out in s.3 of the ***Negligence Act*** and apportioned costs in accordance with the findings of liability.

[85] As far as Mr. Dorby is concerned, the fact that the Jury dismissed the claims against him does not provide a basis, in the present case, on which to award him costs. Specifically, he was represented throughout by the same counsel as Mr. Rossa and as his employer Translink. The evidence did not disclose that he personally incurred any costs. Moreover, as is set out above, Mr. Dorby's dishonesty with respect to the circumstances of this incident had an adverse effect on the nature and conduct of this litigation.

[86] In conclusion, for all of the reasons set out above the Plaintiff will be awarded 100% of her costs, to be calculated at Scale 3. I decline to award any costs to Mr. Dorby.

"J. Sinclair Prowse, J."
The Honourable Madam Justice J. Sinclair Prowse