

R.C.v. POLICE CONSTABLE C. AND THE POLICE SERVICES BOARD

(2010) JUSTICE HOURIGAN.

I have reproduced below my closing address in this fiercely contested 17 day jury trial at the Milton Superior Court before Justice Hourigan. This was a claim that we brought that Police constable C. assaulted our client at the end of a police chase. We had to deal with very difficult issues. Our client had a lengthy criminal record and caused damage to other vehicles during the chase. He was also above the prescribed limit of alcohol for driving.

It was a difficult case for the Plaintiff to win but through very meticulous preparation I was able to persuade the jury that my client and no human deserved to have been assaulted in the way that Police constable C. assaulted him. I was against lead and junior counsel from a top firm in Toronto and this was a fierce battle from the first day of the trial but after lengthy jury deliberations I was able to secure a verdict for my client and compensation of \$50,000 for him. Below, I have reproduced the closing address to the jurors.

CLOSING ADDRESS

A. LIABILITY

1. Common sense and the incident

I ask you to apply a large dose of your collective common sense when you decide whether C. assaulted R. and whether C. has satisfied you that on a balance of probabilities that he was justified in doing what he did.

Look at the facts:

C. was approaching the end of his shift. It was about 5.00 p.m. and he found himself in a police pursuit of R. with R. on a number of occasions frustrating C.'s efforts to catch R. I suggest to you that C. was frustrated and angry and when R. came out of the car. When he stopped the car in the parking lot of the Red Dog Café, C. was determined to put this situation to a close quickly. When R.'s back was facing C., this was C.'s golden opportunity to end the situation quickly.

But all sense of judgement, all thoughts about the serious injuries he would cause in tackling R. the way he did, deserted him. His intent was to overpower R. and when R. was on the ground to punch him and pin him to the ground with his knee on his back. Officer C. did not think of other ways he could arrest R. like approaching him from behind with a straight arm lock and if he resisted, to do a control grounding as described in the use of force manual. No, and was R. resisting arrest with his back facing C. and just walking away? I suggest to you that R. was merely walking away even if you accept C.'s evidence, could not under any circumstances have justified what C. did. R. says in any event that his back was to C. and he was not walking and he had his arms up from the time he came out of the car to surrender and after he went round the back of his car and the front of .'s cruiser as shown in exhibit #1.

The other side's own expert Mr. L. quite fairly said that tackling someone from behind even if they are walking away with their arms to the side is not justified. I will deal with each of the concerns C. had to try and justify his actions to you in a moment. What I suggest to you boldly is what R. said C. did to him at that Red Dog café parking lot rings true.

Look at exhibit # the colour pictures of the scene of the incident. Page 245 and page 246 where R. was tackled from behind and forced forward - Look at exhibit #1, R.'s sketch. I suggest he was propelled a number of feet -note the area between R.'s car and where we see the blood is only 8-9 feet on C.'s evidence. In the sketch, R. is away from his car so does it not make sense that he would be 6 feet or so as he is pushed from behind by C. It makes a lot of sense for him in such a hard tackle to go forward a number of feet to where we see the blood. It is a matter for you.

And what about all the blood we see on the ground? R. said he was punched on the face when he was face down on the ground and according to Dr. P., R. told him that he was punched 10-15 times and blood was spraying from his nose. I suggest to you that the large amount of blood we see on the ground is not only from the injury he suffered when his face hit the ground but also from being punched. It is a matter for you but it makes sense.

When I deal with the injuries that R. suffered as a result of the assault I will look at some of the medical evidence which I suggest to you is very consistent with what R. says C. did to him that early evening at the Red

Dog Café parking lot.

2. Analysis of C.'s Concerns and which he tells you, caused him and justified him in tackling R. from behind.

Lets look at the various concerns that C. had at the time and see how it matches up to the other evidence that has been given during this trial:

→ Concern for the public and C.'s own personal safety - C. describes in his evidence, two incidences when R. drove at him during the police pursuit so he wants you to believe.

One would expect as a matter of pure common sense that if C. had actually suffered such a trauma it would appear in his notes which he wrote up so he says in the cruiser on the way to the hospital or at the hospital. Everything was fresh in C.'s mind at the time and these 2 incidences were serious so C. told you during his evidence, **but he does not describe in his notes for example “ C. drove at me or towards me”**

Look at the arrest reports and the synopsis and it is not there either - see exhibits #

I suggest to you that the reason these incidences is not in the arrest reports

or his notebook is **because it did not happen-C. has told you this so that he can try to justify what he did to R.**

There was no evidence presented at this trial by any witness that R. was carrying any form of weapons but C. would have you believe that R. may have accessed weapons behind the fence or got help from someone there- there was no evidence of this -again another attempt by C. to try and justify what he did.

→ C. was concerned that R. was going round the fence and there was the element of the unknown as to what was behind the fence so he had to quickly stop R.

The use of force expert actually says this unknown with the fence was a critical factor in the assessment of the situation and the appropriate use of the tackle.

But again if he is so concerned and he said it was major concern why did he not mention in his notes anything about the fence. It could have occupied just 10 words- "C. is going round the fence I must stop him" Why did C. not mention the fence in the arrest reports we have seen, it's just 10 words.

At his discovery in 2004 when I asked him the question about why he felt he had to tackle R. from behind. **C. says absolutely nothing about the fence and R. making C. concerned because R. is heading towards the fence.**

The **FIRST TIME** he talks about the fence is when he gave evidence to you at this trial 9 years later and after he had looked at the pictures several weeks ago at tab 40 and saw the fence- and I suggest to you that he used what he saw in the pictures to make up his evidence that the fence was a big concern. I suggest to you that the fence had absolutely nothing to do with it and it is *just one more and another way* of presenting new things to you after the event to try and justify his actions to you. But the reality is there was I suggest no fence concern at all. He just had enough of R. in that cold day in the parking lot at the Red Dog café and inflicted serious damage to R. to end it.

Another matter is that while R. is on the ground and says C. had his knee on his back and was applying pressure to his back and that his hand was underneath him and could not move his elbows or grab C.'s microphone, use your common sense even if you believe that C. lay prone on R.'s back and his face is on the ground, how could he even see the microphone - and

what do you make of C.'s evidence which he disclosed when he was cross examined that when he tackled R., he held him in a bear hug-did not mention the bear hug in his evidence in chief or even during cross examination, it is only when I led him to his discovery transcripts, he affirms that he bear hugged R. Is C. making up his evidence as he goes along when he testified to you? Can you really believe anything he said?

3. Cautions about R.'s criminal convictions

We live in a civilized society and although R. has criminal convictions and perhaps had alcohol dependency problems in the past and had dabbled in street drugs in the past, he is nevertheless a **HUMAN BEING** and **DESERVES AND IN FACT DEMANDS LIKE ALL OF US TO BE FREE FROM HAVING VIOLENCE INFLICTED UPON HIM.**

No one deserves to be assaulted in the violent way R. says he was assaulted by C.

We live in a society where people who commit crimes are punished by the Judges in our courts by a sentence that is appropriate. In this case R. was punished by the courts and was jailed and as we know he spent 7 months at the Maplehurst Correction Centre between February 16th 2001 and September 17th 2001 after which he was released from jail. He served his

sentence and punishment.

BUT as we know from the Maplehurst Medical records R. was to endure pain which required various courses of treatment and suffering while he was there serving his sentence and they are all at exhibit # 56 TAB 111. Look at them very carefully. I am not going to go through these records again, you have looked at it a lot during this trial and what is clear when you look at it and I am now coming to the medical evidence here at this point.....

B. The Medical Evidence

What were the injuries that R. says was caused as a result of C.'s assault on him:

R. said "the next thing I knew he tackled me and my face smashed on the ground, my knee hit the ground and with C. on my back I could not breath"
C. then describes hitting him on the *right side of the face*. R. says that C. *applied pressure to his mid back with his knee*.

1. Sinus and Septum

R. says all his sinus and septum problem that you have heard evidence about from Dr. B. and from the records of Dr. S. was caused by the assault.

Look at exhibits # **89 (Tab 54) and Exhibit # 59 (tab 78)**

In fact look at all the exhibits relating to the sinus and septum and septoplasty surgery operative note that Dr B. performed in March 2002. The x ray of May 16th 2001 (exhibit # 48 -tab 52) shows septum is midline but Dr. B. says the x ray would not pick up that septum is deviated. Dr. B. says that on his examination the septum was deviated to the left and he did the septoplasty- see exhibits 97 at tab 51 and exhibit 93 at tab 98.

Is not the injury you see consistent with the way that R. describes he was assaulted by C. R. says he was not able to breath at the time of the incident and he still has breathing problems now. Dr. B. said that one of the symptoms of a deviated septum is the inability to breath through one side of the nose.

Can you really accept the evidence of Dr. L. that the sinus and septum condition has nothing to do with the injuries he says he got when he was assaulted by C.? Is it a pure coincidence? Note the note of R. having sinusitis was a note in 1997, 4 years earlier.

2. The Right Knee

R. says his knee hit the ground and we know from the Maplehurst Records

that on February 17th 2001 that R. complained of right knee pain and swelling was noted. We also know from these records that R. had an extensive course of physiotherapy mostly for his right knee pain. Dr. T., the Maplehurst doctor says the nurse was mistaken as she originally had it correct when she said it was the “right knee”.

Dr. J. as the treating specialist doctor was in the best position out of all the doctors including Dr. L. and Dr. P. called by the defence to make the right diagnosis. I ask you to accept his evidence (which was confirmed by Dr. A.) that the results of the MRI in December 2001-**Tab 91 exhibit 63** and the bone scan in August 2001 **tab 72-exhibit 68 made it clear to Dr. J. that the trauma to R. knee when it hit the ground caused the chondromalacia Patella condition.** I think all the doctors said that this condition was not curable. Interestingly Dr. J when he looked at the note made by the nurse at page of the Maplehurst Records at exhibit # 56 tab 111 page 466 noted swelling to the right knee, Dr. J says that inflammation is evidence of trauma and injury and also confirms his diagnosis. Dr. A. said this kind of injury causes pain and restrictions.

The defence however through both Dr. L. and Dr. P. say that this condition was caused by the arthroscopy that Dr. J performed. Can you really accept

that or is it not a way whereby the defence doctors are trying to explain it away? Interestingly in my cross-examination of both Dr. L. and Dr. P. they accept that CP can be caused by violent trauma to the knee.

3. The Back

R. during the course of this trial did not try to pull the wool over your eyes by telling you he did not have a problem with his low back before this incident. He admitted that the accident he had in 1983 paralyzed him for a few years and he had to learn to work. What R. said is confirmed by the pre-incident notes and records you saw during the trial. However both Dr. L. and R. said that his back condition became worse after the incident.

Again as with the knee there is objective and clear evidence in the form of x rays, namely the x ray done on February 16th 2001 the day of the incident by Dr. L. at **exhibit # 8 tab 34 and duplicated on the back of exhibit # 37 tab 39** that we called upon Dr. A. to interpret that x ray and Dr. A. said that the pressure applied on R.'s back by C. caused the muscle spasms and the **scoliosis, the twisting of the spine that Dr. A. vividly demonstrated on the model spine that he vividly manipulated with his hands during his evidence in chief.**

I believe that both the defence doctors L. and P. accepted that scoliosis was a twisting of the spine and Dr. P. accepted that scoliosis means twisting of the spine and that the muscle spasm can cause a concave spine and that the spasm can be caused by trauma to the spine.

What is interesting about both Dr. L. and Dr. P.'s evidence is what they say about chronic pain. According to them, a sprain and soft tissue injury will heal within 6 weeks to 6 months according to P. and I think L. said 3 months but you, as members of the jury have seen from tab 111 - Exhibit # 56 Maplehurst Records and Dr. L.'s notes at tab 8 and tab 89 exhibits # the chronic pain persisted for much longer than that and he still has this chronic pain today.

You have also looked at Dr. G.'s notes and what is very clear is the fact that R. is seeking increased medication after the incident and both Dr. L. and Dr. G. said that increased pain medication can mean increased pain. It is clear that over the years of knee pain and back pain that he has chronic pain. R. says that he would not have had this severe chronic pain if it was not for the serious assault he received at the hands of C.

Dr. P. and Dr. L. however in their attempt to assist the defence case attribute the increased medication to R.'s addiction to the medication. Use your common sense. Do you really believe this "addiction" theory of the defence in the face of the very serious injuries that R. suffered which increased his pain and increased the dosage of medication he needed to relieve his pain?

4. The neck swelling

The onset of the neck swelling occurred some 5 months after the incident. R. feels that it was caused through the injuries he suffered when he was assaulted by C. However I am not going to be unrealistic with you, there is certainly no medical evidence that links the neck swelling to the assault and I will not say anymore about this injury.

D. Closing Remarks

· I have attempted to be helpful in my closing arguments

- You are the judges of fact and you will consider the evidence carefully and reach your own conclusions but I say common sense will lead you to the right verdict which is that C. assaulted R. and there was no justification for it- and most of the injuries R. suffered is consistent with what R. says as to how he was assaulted.
- I will be asking for substantial compensation for the pain and suffering that he has gone through as a result of the injuries inflicted on him by C.
- I ask you to dismiss the counterclaim brought by C. that he was assaulted by R. by R.'s attempt to elbow him and the 2 incidences of R. driving at him. It did not happen and I suggest that it was just part and parcel of C.'s attempt to justify his assault on R.
- As far as his past loss of income and future loss of income is concerned R. recognized and admitted that he had back pain before the incident which he says hindered him working and that his work history was irregular - although he maintains that he was suffering from depression in 1999 and this affected his ability to work. Note his suicide attempt in May 1999. I have significantly reduced the numbers for past and future loss of income to reflect some of his pre-incident issues in connection with his ability to work and also the period of time he was in jail between February 2001 and 2008.

I ask that you provide reasonable compensation for his injuries.

Yours Respectfully

Raj Napal

Counsel for R. C.

Dated this 31st day of January 2010 in the Town of Orangeville