Federal Court  Cour fédérale

Date: 20220221

Docket: T-1413-19

Citation: 2021 FC 230

Ottawa, Ontario, February 21, 2022

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JAMES SIPOS

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

[1] The Plaintiff, Mr. James Sipos, claims negligence, misfeasance of public office, assault and battery, *Charter* violations, and breach of an agreement by the Correctional Service of Canada [CSC].

[2] Mr. Sipos claims that his treatment by injection of the anti-androgen drug, Lupron, was administered to him without his informed consent and caused him harm. He also claims that CSC

breached their agreement to transfer him from Bath Institution, where he is currently incarcerated, to a minimum-security institution if he complied with Lupron treatment.

[3] The Defendant brought a motion for summary judgment pursuant to Rule 215 of the *Federal Courts Rules*, SOR/98-106, seeking to have Mr. Sipos' action dismissed.

[4] The Defendant proposed that its motion be determined in writing pursuant to Rule 369. Mr. Sipos objected. On October 15, 2021, the Court ordered that the motion be heard orally and the matter was then set down for a hearing. The Court has considered all the written and oral submissions, the evidence and the relevant jurisprudence.

[5] For the reasons that follow, the Defendant's motion is granted and the Plaintiff's action is dismissed. The Defendant has met its evidentiary burden to demonstrate that there is no genuine issue for trial. The Defendant has established that the Crown is not vicariously liable for any alleged wrongful conduct of the psychiatrists or physicians who treated Mr. Sipos and monitored his health, who were independent contractors at all material times. The Defendant has also established that there is no evidence of any agreement, express or implied, between CSC and Mr. Sipos. Although Mr. Sipos held the belief and hope that his Lupron treatment would lead to his transfer to a minimum-security institution, his annual security level assessments demonstrate that several factors were considered, including his Lupron treatment, and his security classification remained at the medium-security level. Mr. Sipos' expectation or hope for a transfer, although known to his parole officers and others, does not establish any agreement.

[6] The applicability of the limitation period does not raise a genuine issue for trial given that the other issues are dispositive. Mr. Sipos does not have a valid claim against the CSC.

I. Background

[7] Mr. Sipos is currently incarcerated at Bath Institution, a medium-security level federal penitentiary. Mr. Sipos has been designated a dangerous offender, based on his convictions for several sexual and violent offences and, as a result, he is serving an indeterminate sentence.

[8] In April 2007, Dr. Robert Dickey conducted a pre-parole psychiatric assessment of Mr. Sipos. In his report, Dr. Dickey canvassed Mr. Sipos' convictions and their circumstances and noted that all previous mental health evaluations found Mr. Sipos to be at very significant risk of reoffending. Dr. Dickey interviewed Mr. Sipos and concluded that he presented an "unassumable" risk for any type of release involving community contact. Dr. Dickey recommended continued incarceration and stated, "[a]ny contemplated community exposure should be preceded with treatment with long-acting intramuscular sex drive–reducing medications."

[9] In June 2008, Mr. Sipos requested to meet with his treating psychiatrist, Dr. Oliver, to discuss the possibility of commencing treatment. In July 2008, Dr. Oliver prescribed the drug leuprolide acetate (known as Lupron), which has the effect of reducing testosterone levels and is intended to lower sex drive.

[10] Mr. Sipos received his first Lupron injection on July 19, 2008. He continued to receive injections at four-week intervals and later at longer intervals until 2014.

[11] Mr. Sipos now claims that Lupron caused him significant side effects, including testicular, gastrointestinal, breast and back pain; fever, chills, and cold sweats; vomiting, headaches, psoriasis, and several other symptoms.

[12] The notes of the physicians who treated Mr. Sipos and monitored his health indicate that at times, he reported no side effects at all and at other times, he complained of sleep disturbances, back pain, abdominal and joint pain, and gastrointestinal issues. The records, as noted below, do not clearly indicate if these issues were attributable to Lupron or other causes. The record also contains several requests by Mr. Sipos, during the time he was taking Lupron, to meet with health-care professionals regarding other ailments.

[13] As further described below, Mr. Brent Dye, a nurse at Bath Institution, attests that he met with Mr. Sipos on July 16, 2014, in response to Mr. Sipos' request to discontinue Lupron. Mr. Dye notes that Mr. Sipos stated that he chose to discontinue Lupron "for now" given his view that his legal avenues had been exhausted. Mr. Sipos received no further Lupron injections.

[14] On April 2, 2019, CSC provided Mr. Sipos with a copy of an internal memorandum from the Ontario Regional Manager of Institutional Mental Health to the Chiefs of Mental Health Services, dated March 2017 [the 2017 Memo]. The 2017 Memo is about the use of anti-androgens (such as Lupron) as a risk management measure for sexual offenders.

[15] The 2017 Memo is premised on changes within CSC that place the entire responsibility for risk assessments for male sex offenders and recommendations for risk management strategies on psychologists and mental health clinicians. The memo clarifies that the practice of making referrals to the institutional psychiatrist for a risk assessment in order to recommend whether anti-androgen treatment is needed has ended. It explains that where an institutional psychiatrist receives such a referral—from a psychologist as part of a comprehensive risk assessment—the psychiatrist will assess the case from a health perspective (i.e., not a risk management perspective). In this context, the memo provides further information on anti-androgens and considerations specific to the relevant population within CSC.

[16] The 2017 Memo notes that some comparative research shows that those treated with anti-androgens have lower rates of detected recidivism, while other research shows that those treated with anti-androgens alone (i.e., no other programming) have similar rates of recidivism to those not treated.

[17] Under the heading “Limitations,” the Memo states that anti-androgens must be prescribed by a physician and their use is voluntary. The possible side effects and contra-indications are noted. The Memo states that prescribing anti-androgens to reduce male sex drive is an “off-label” use.

[18] Under the heading “Recommendations,” the 2017 Memo suggests that overall, anti-androgen treatment is not a good long-term risk management strategy and that any referrals

(i.e., from psychologists) to institutional psychiatrists should be limited to those identified as high risk for sexual recidivism, noting the tools available for an actuarial assessment.

[19] The Memo states that support for a transfer to lower security should not be based on a referral for or compliance with anti-androgen treatment, but on "an overall assessment of the offender's compliance with relevant programming and conditions and his understanding and willingness to implement other non-pharmacological risk management strategies."

[20] Mr. Sipos recounts that shortly after receiving the 2017 Memo, he pursued his action against the Defendant.

II. The Plaintiff's Claim

[21] Mr. Sipos filed his Statement of Claim on August 28, 2019. He alleges that he had agreed to take Lupron injections only because agents of CSC had represented to him that this was a condition of any transfer to a lower-security institution. He also alleges that, by failing to transfer him to a lower-security facility, CSC and the Defendant breached this agreement.

[22] Mr. Sipos claims that Lupron injections were administered without his informed consent. He claims that he was unaware of the potential side effects, that the use of Lupron to decrease sex drive was "off label" (i.e., not an approved medical use), and that there was a lack of clear evidence about the efficacy of Lupron to reduce the risk of sexual recidivism.

[23] As a result, Mr. Sipos asserts several causes of action against the Defendant:

- Assault and battery for administration of Lupron injections without his informed consent;
- Misfeasance of public office for acting outside CSC's statutory authority pursuant to section 69 and paragraph 88(1)(a) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] or, if within statutory authority, for acting with an improper purpose to punish or inflict cruel, inhumane or degrading treatment on him; and
- Negligence in failing to obtain informed consent, in failing to provide health care in conformity with professionally accepted standards, and in failing to properly consider his health and health-care needs.

[24] Mr. Sipos also alleges violations of his rights pursuant to sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*.

[25] Mr. Sipos seeks declaratory relief and compensatory damages for his physical and psychological suffering, as well as aggravated and punitive damages. He further claims damages under section 24(1) of the *Charter*.

III. The Defendant's Statement of Defence

[26] The Defendant disputes all claims and argues, among other things, that: Mr. Sipos' claim is statute-barred; there is no vicarious liability for the alleged wrongful conduct; Mr. Sipos' treatment was authorized by law and consistent with CSC policy; and Mr. Sipos gave his informed consent to the treatment and his condition was monitored by physicians. In the alternative, the Defendant argues that any injury suffered by Mr. Sipos was the result of pre-existing conditions and/or his own contributory negligence or failure to mitigate damages by reporting side effects.

IV. The Defendant's Motion for Summary Judgment

[27] The Defendant filed a motion for summary judgment on January 11, 2021 on the basis that there is no genuine issue for trial.

[28] The Defendant submits that there is no evidence that Mr. Sipos' medical care was deficient. Moreover, the Defendant is not liable for the alleged conduct, which was undertaken by independent contractors and not by servants of the Crown. The Defendant also submits that there is no evidence of any agreement by CSC to transfer Mr. Sipos to a lower-security institution in exchange for his agreement to take Lupron. The Defendant adds that even if the allegations could be established, which the Defendant denies, Mr. Sipos filed his claim beyond the applicable limitation period of two years.

[29] The Defendant acknowledges that the bar is high to establish that summary judgment should be granted, but submits that it is met in the present circumstances and should be granted in the Defendant's favour.

[30] The Defendant relies on the evidence of Mr. Dye, Mr. Irving and Mr. Zuber and the exhibits to their affidavits, which include records from psychiatrists and other physicians who treated Mr. Sipos, requests from Mr. Sipos for health services, and annual and biannual assessments for Mr. Sipos' security classification. The Defendant notes that the exhibits are admissible as business records, in accordance with section 30 of the *Canada Evidence Act*, RSC 1985, c C-5.

[31] The Defendant argues that Mr. Sipos has not adduced sufficient evidence to demonstrate that there is any genuine issue for trial. The Defendant notes that Mr. Sipos cross-examined the Defendant's affiants. Mr. Sipos also provided his own evidence in the form of two affidavits with exhibits. The Defendant submits that Mr. Sipos has not put forward any other evidence and cannot rely on his assertion that he will adduce other evidence at trial.

[32] The Defendant submits that Mr. Sipos has failed to provide evidence of any wrongful conduct by an employee of CSC. Any alleged misconduct would have been that of physicians who provided care to Mr. Sipos as independent contractors. The Defendant points to the evidence of Mr. Irving, who explains how the health-care needs of federally incarcerated inmates are met by providing access to physicians in the community and, more specifically, that the physicians who treated Mr. Sipos were not employed by CSC. The Defendant submits that CSC (the Crown) is not vicariously liable for the actions of the physicians who treated Mr. Sipos.

[33] The Defendant also points to *Walker v Canada*, 2019 ONSC 4578 at paras 35–36 [*Walker*], where the Ontario Superior Court of Justice, in a similar case, found that there was no evidence of negligent medical care, and more significantly, that the doctors who treated the plaintiff were independent contractors for whose conduct the Crown was not vicariously liable.

[34] The Defendant further submits that Mr. Sipos has not provided any expert or other evidence to establish that the physicians who treated him did not meet the standard of care or did not obtain his informed consent.

[35] The Defendant also argues that Mr. Sipos has not provided any evidence, beyond his own assertions, of any agreement with CSC that he would be transferred to a minimum-security institution in exchange for undergoing treatment with Lupron. The Defendant notes that Mr. Sipos has not indicated the particulars of the alleged agreement, including its terms, when and with whom it was made.

[36] The Defendant points to Mr. Sipos' own pleadings as acknowledging that there was no express agreement with CSC. The Defendant adds that no agreement can be inferred, noting that this would be contrary to the law and CSC policy regarding security classification, which requires the consideration of several factors.

[37] The Defendant further argues that even if Mr. Sipos had a valid claim against CSC, it would be statute-barred due to the applicable two-year limitation period.

[38] The Defendant notes that Mr. Sipos received his last Lupron injection in May 2014. If this treatment constituted an assault or battery, as Mr. Sipos alleges, any action should have been commenced within two years of the last treatment—by May 2016.

[39] The Defendant again points to Mr. Sipos' own pleadings, which acknowledge that he had reached the realization before or, at least by, 2014 that CSC would not transfer him—that CSC had breached the alleged agreement, adding to his "ever greater injury." The Defendant submits that Mr. Sipos would have been aware of any harm or injury by that point and was aware that he

was not being transferred. The Defendant argues that by 2014, Mr. Sipos had knowledge of the cause of action he now brings, so he should have commenced his claim by 2016.

[40] The Defendant disputes that Mr. Sipos' receipt of the 2017 Memo, which occurred in 2019, supports his contention that he only became aware of the side effects of Lupron at that point or that this information vitiated his informed consent to Lupron.

[41] The Defendant submits that it is apparent from Mr. Sipos' medical records that Mr. Sipos had some medical concerns (some of which may have been related to Lupron) which he reported to his physicians, but on other occasions he reported no side effects.

[42] The Defendant notes, in particular, that in 2012, Mr. Sipos reported gastrointestinal issues. Dr. Louw, a specialist, suggested that Lupron be discontinued temporarily. Mr. Sipos refused to do so. The Defendant notes that if these issues were a side effect, it was known long before the start of the applicable limitation period.

[43] The Defendant adds that there is no evidence that Dr. Dickey, who discussed Lupron treatment with Mr. Sipos in 2007, and Dr. Oliver, who first prescribed it in 2008 on Mr. Sipos' request, did not obtain his informed consent.

[44] The Defendant disputes that any of the exceptions to the two-year limitation period apply. The Defendant submits that the injection of Lupron for the treatment of a sexual disorder would not constitute a sexual assault.

V. The Plaintiff's Submissions on the Motion for Summary Judgment

[45] Mr. Sipos submits that there are several genuine issues for trial, including: whether there was an agreement by CSC to transfer him based on his Lupron treatment or whether an agreement can be inferred; whether any limitation applies to what Mr. Sipos characterizes as a sexual assault or an assault committed by those upon whom Mr. Sipos is dependent; whether the Defendant can rely on records of physicians and others that Mr. Sipos has not had an opportunity to cross-examine; why CSC was administering Lupron to persons convicted of sexual offences without clear evidence of its effectiveness in reducing the risk of sexual recidivism; why, in 2017, CSC clarified in a memo that a transfer to a lower-security institution should not be contingent on compliance with anti-androgen treatment; and why CSC waited until 2019 to provide the 2017 Memo to Mr. Sipos.

[46] Mr. Sipos disputes that CSC is not liable for the harm he has suffered. He submits that CSC is required, pursuant to paragraph 86(1)(a) of the *CCRA*, to provide health care to inmates incarcerated in CSC institutions and is therefore responsible for the acts of any psychiatrists and other physicians that CSC engages.

[47] Mr. Sipos contends that he had an agreement with CSC that CSC would transfer him to a minimum-security institution contingent on his treatment with Lupron. He submits that the Defendant's own pleadings admit that he only consented to Lupron injections "in consideration for the expectation he would then be transferred accordingly."

[48] Mr. Sipos argues that several other interactions support finding that there was an agreement, or that an agreement can be inferred.

[49] Mr. Sipos argues that the agreement can be inferred from the recommendation of Dr. Dickey in 2007. He notes that Dr. Dickey's evaluation stated that Lupron should be considered before any change in his classification. At the hearing, Mr. Sipos offered the explanation that he initially did not want to take Lupron but he reconsidered due to ongoing litigation regarding his sentence and dangerous offender designation. Mr. Sipos recounts (although there is no supporting evidence) that Dr. Oliver explained that Lupron would reduce his sex drive and could result in some fat redistribution, but did not advise him of other side effects.

[50] Mr. Sipos submits that his various parole officers discussed different programs with him and held out to him that he could receive a lower security classification contingent on continuing with Lupron.

[51] Mr. Sipos also recounts that in 2010, another psychologist, Dr. Yokubynas, updated his risk assessment, noting that consideration should be given to a minimum-security classification if he continued on Lupron "at all times." Mr. Sipos adds that Dr. Dickey made similar comments.

[52] Mr. Sipos also recounts that in 2012, his parole officer, who encouraged him to continue the Lupron treatment with the goal of being transferred, attended his consultation with Dr. Skladman, who was his treating psychiatrist at the time. However, Dr. Skladman declined to

increase the Lupron dosage. Mr. Sipos submits that his parole officer's support for his transfer to minimum security in 2012 was not supported by others because his Lupron dosage had not been increased. With respect to the Defendant's reliance on his refusal to discontinue Lupron despite Dr. Louw's suggestion in 2012 that it may have been the cause of his gastrointestinal complaints, Mr. Sipos now suggests that he refused because this would have made all his previous years of taking Lupron in order to be transferred to minimum security worthless.

[53] Mr. Sipos submits that the Defendant's evidence, in particular the exhibits of medical records, includes inadmissible hearsay. He submits that he has been deprived of the opportunity to cross-examine the physicians whose records are attached as exhibits to the Defendant's affidavit evidence and medical staff at CSC regarding his Lupron treatments, in order to, among other things, address their knowledge of its harmful effects.

[54] Mr. Sipos further submits that the Defendant's affiants provided incomplete information. Mr. Sipos suggests that Mr. Zuber omitted reference to the agreement with CSC. Mr. Sipos submits that he would elicit this evidence at trial.

[55] Mr. Sipos suggests that Mr. Dye's affidavit omits some of the relevant records and that because Mr. Dye was not present at Mr. Sipos' sessions with Dr. Skladman or Dr. Oliver, his evidence is limited. Mr. Sipos also submits that Mr. Irving omitted the details of the contracts and failed to identify who, within CSC, was responsible for contracting with the physicians who treated him.

[56] Mr. Sipos asserts that until he received the 2017 Memo in 2019, he was not aware of the noted side effects, that his treatment with Lupron was "off label," or that there was a lack of research on its effectiveness for the risk of recidivism. He argues that the 2017 Memo vitiates his consent to treatment because he did not have this information at the time he agreed to take Lupron.

[57] Mr. Sipos disputes that his action is barred by any statutory limitation period. He cites section 16 of the Ontario statute of limitations and submits that several exceptions to the otherwise two-year time limitation apply. He asserts that his injections with Lupron were sexual assaults. He also asserts that he was totally dependent on CSC, and given that he was assaulted by CSC staff, the exceptions applicable to claims by dependent persons apply.

VI. The Test for a Motion for Summary Judgment

[58] As the Supreme Court explained in *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*], motions for summary judgment are an important means to avoid the time and expense associated with a full trial in appropriate cases, thereby conserving judicial resources and promoting access to justice.

[59] In *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 [*Milano Pizza*], Justice Mactavish summarized the law regarding motions for summary judgment as they apply in this Court. The Court noted that the Supreme Court of Canada's decision in *Hryniak*, which addressed the summary judgment process and its underlying values in the context of the Ontario *Rules of Civil Procedure*, has a more general and broad application (at paras 27–29) and provides

guidance with respect to how the summary judgment rules (Rules 214 and 215) in the Federal Court are interpreted.

[60] Justice Mactavish explained the notion of a "genuine issue for trial," the test on a motion for summary judgment, the onus on the respective parties, and other key principles which apply in this case, at paras 31, 33–36 and 40, which are set out below in their entirety:

> [31] Rule 215(1) provides that the Court shall grant summary judgment where the judge is satisfied that "there is no genuine issue for trial with respect to a claim or defence". According to the Supreme Court, there will be "no genuine issue for trial" if there is no legal basis to the claim, or if the judge has "the evidence required to fairly and justly adjudicate the dispute": *Hryniak*, above at para. 66. See also *Manitoba*, above at para. 15, and *Burns Bog Conservation Society v. Canada*, 2014 FCA 170, at paras. 35-36, 2014 F.C.J. No. 655.
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> [33] The test on a motion for summary judgment "is not whether a party cannot possibly succeed at trial; rather, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial". As a consequence, "summary judgment is not restricted to the clearest of cases": both quotes from *Canada (Citizenship and Immigration) v. Campbell*, 2014 FC 40 at para. 14, [2014] F.C.J. No. 30, citing *ITV Technologies Inc. v. WIC Television Ltd.*, 2001 FCA 11 at paras 4-6, 199 F.T.R. 319; *Premakumaran v. Canada*, 2006 FCA 213 at paras 9-11, [2007] 2 F.C.R. 191; *Canada (Minister of Citizenship and Immigration) v. Schneeberger*, 2003 FC 970 at para. 17, [2004] 1 F.C.R. 280.
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> [34] The onus is on the party seeking summary judgment to establish that there is no genuine issue for trial. However, parties responding to motions for summary judgment are also required to "put their best foot forward" in their response: *F. Von Langsdorff Licensing Ltd. v. S.F. Concrete Technology, Inc.* (1999), 165 F.T.R. 74 at paras. 12 and 27, [1999] F.C.J. No. 526.
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> [35] Responses to motions for summary judgment cannot be based upon what might be adduced as evidence at a later stage in

> the proceeding. Respondents must instead set out specific facts in their response to a motion for summary judgment and adduce the evidence showing that there is a genuine issue for trial: Rule 214. See also *MacNeil Estate v. Canada (Indian and Northern Affairs Department)*, 2004 FCA 50 at para. 37, [2004] F.C.J. No. 201. This requirement has been described as necessitating that a responding party "lead trump or risk losing": see *Kirkbi AG v. Ritvik Holdings Inc.* (1998), 150 F.T.R. 205 at para. 18, [1998] F.C.J. No. 912.
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> [36] As noted above, to be "fair and just", the record before the motions judge must permit the judge to find the facts necessary to resolve the dispute: *Hryniak*, above at para. 28. Summary judgment should therefore not be granted where the necessary facts cannot be found, or where it would be unjust to do so.
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> [40] Judges dealing with motions for summary judgment must, moreover, proceed with care, as the effect of the granting of summary judgment will be to preclude a party from presenting any evidence at trial with respect to the issue in dispute. In other words, the unsuccessful party will lose its "day in court": see *Apotex Inc. v. Merck & Co.*, 2004 FC 314 at para. 12, 248 F.T.R. 82, aff'd 2004 FCA 298, [2004] F.C.J. No. 1495.
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> [Emphasis added.]

[61] I have applied these principles in determining the Defendant's motion for summary judgment.

VII. The Evidence on the Record

[62] The Defendant's evidence includes the affidavits of Mr. Irving, Mr. Zuber and Mr. Dye. The affiants attach several exhibits to their affidavits, which constitute business records of CSC. Mr. Sipos cross-examined the affiants and their responses are included in the Defendant's record.

[63] Mr. Irving, Regional Manager of Clinical Services at CSC in Kingston, describes his role in tendering and awarding contracts for medical services on behalf of CSC. He describes how health-care services are administered at Bath Institution, noting that health care for inmates is generally provided by doctors who work on contract and attend the institution on specific days and are supported by nurses who work full-time. He adds that for emergencies and where specialists are required, inmates are generally transferred to public hospitals for treatment.

[64] Mr. Irving attests that none of the physicians and psychiatrists who treated Mr. Sipos from 2008–2014 were employees of CSC nor agents or servants of CSC. These doctors all maintained their own medical practices.

[65] Mr. Irving attests that CSC does not own, occupy, possess or control any hospital where Mr. Sipos was treated.

[66] Mr. Irving further attests that CSC did not direct how the medical professionals who treated Mr. Sipos should provide treatment or services.

[67] Mr. Zuber, Assistant Warden—Interventions at Bath Institution since 2011, describes his previous experience at CSC, including as a behavioural scientist, parole officer and Manager of Assessment. He describes the role of parole officers, including conducting annual security classification assessments (biannual since 2013). Mr. Zuber attaches to his affidavit the Assessments for Decision [Assessments] for Mr. Sipos' security classification from 2008–2019, all of which recommended that he remain at the medium-security level.

[68] Mr. Zuber attests that these Assessments indicate that the parole officers considered the effect of treatment with Lupron on Mr. Sipos' security classification, along with the seriousness of the offences committed, his institutional adjustment, programming, escape risk, public safety risk, results based on actuarial assessment tools, psychological and psychiatric assessments and evidence given to the Parole Board. Mr. Zuber notes that these considerations are consistent with the requirements of the *CCRA* and the related regulations.

[69] Mr. Zuber attests that he was not aware of any communications between any parole officer or other CSC employee and Mr. Sipos that guaranteed his transfer solely based on his undergoing treatment with Lupron.

[70] On cross-examination by Mr. Sipos, Mr. Zuber reiterated that none of the Assessments referred to any agreement and that he was not aware of any communications regarding a transfer on this basis.

[71] Mr. Brent Dye describes his role as a Registered Nurse in the Institutional Mental Health Services department at Bath Institution, where he has worked since 2011. Mr. Dye attests that he reviewed Mr. Sipos' complete medical file in the possession of CSC. Mr. Dye describes how requests for routine health services by inmates are processed and responded to.

[72] Mr. Dye describes Mr. Sipos' treatment with Lupron, beginning with Mr. Sipos' first consultation with Dr. Dickey in 2007, followed by Dr. Oliver's prescription of Lupron in 2008 and Dr. Skladman's continued prescription of Lupron from April 2010 to May 2014. Mr. Dye

attaches as exhibits several of the clinical notes of the treating physicians, including those of Dr. Oliver, dated July 16, 2008, September 10, 2008, July 8, 2009 and January 5, 2010 and those of Dr. Skladman, dated March 7, 2011, October 3, 2011, April 30, 2012, August 10, 2012, February 8, 2013, May 24, 2013, October 25, 2013 and May 22, 2014. The clinical notes document any side effects or other conditions reported by Mr. Sipos.

[73] The clinical notes of Dr. Skladman, dated May 22, 2014, state that Mr. Sipos reported generally feeling well, but "shares his reflections on cons and pros of being on Lupron. After lengthy deliberation he is adamant he wants to be on Lupron after having been off Lupron for 10 weeks now and this is related to his current aspirations to be moved to a minimum security unit."

[74] Mr. Dye attests that he met with Mr. Sipos on February 23, 2011. The notes from that meeting are attached as exhibits and indicate that Mr. Sipos hoped that his use of Lupron would be seen as a goodwill gesture to allow his eventual transfer to a minimum-security institution.

[75] Mr. Dye also attaches the records from Mr. Sipos' consultation with Dr. Louw, a specialist, regarding a gastrointestinal issue, on August 7, 2012. Dr. Louw's clinical report indicates that "it is quite difficult to postulate a primary GI issue. The use of leuprolide seems to be the obvious culprit." Dr. Louw's report indicates that he suggested that Mr. Sipos stop the medication for a period to see if the symptoms persist, as he could not justify subjecting Mr. Sipos to investigation of the GI tract. Dr. Louw notes that Mr. Sipos told him that Lupron was a voluntary treatment.

[76] Mr. Dye attests that on November 7, 2012, Mr. Sipos signed a statement of refusal to Dr. Louw's recommendation to discontinue Lupron and did not attend his follow-up appointment. The statement is attached as an exhibit.

[77] Mr. Dye attests that he met with Mr. Sipos on July 16, 2014, in response to Mr. Sipos' request to discontinue Lupron. Mr. Dye states that Mr. Sipos advised that, as he had exhausted his legal avenues and did not have a chance of parole in the near future, he had chosen to stop Lupron "for now", but indicated that he would be willing to resume treatment in the future if parole became a possibility.

[78] Mr. Dye also attaches Mr. Sipos' request to discontinue Lupron, dated July 16, 2014, and the order of Dr. Wyatt (an institutional physician at Bath Institution) that treatment be discontinued.

[79] Mr. Dye also attaches as exhibits the medication administration records for Mr. Sipos, which document the Lupron injections by date and dosage and other prescription and non-prescription medications.

[80] Mr. Dye attests that Mr. Sipos submitted numerous requests regarding other health issues, including pain in his hands and feet, a skin condition, fungal toe infection and gastrointestinal complaints. Mr. Dye attaches as exhibits the copies of Mr. Sipos' requests for health services.

[81] Mr. Sipos provided two affidavits. The first affidavit, dated February 24, 2020, states that the Defendant omitted to provide evidence to show the misrepresentation by CSC and Mr. Sipos' injuries. Mr. Sipos attaches the 2017 Memo. Mr. Sipos cites the side effects of Lupron (from the Lupron brochure) and states that he suffered most of the noted side effects. Mr. Sipos also attaches records regarding his treatment for psoriasis and the side effects of the medication prescribed for psoriasis. He attests that from 2008 onward, he suffered "excruciating pain, all the while as became apparent to [him] by 2014, CSC reneged on the Agreement."

[82] Mr. Sipos lists 21 side effects of Lupron that he claims he experienced, including fevers, chills, hot flashes, loss of sleep, gastrointestinal issues, loss of bone density, headaches, and weight gain.

VIII. There Is No Genuine Issue for Trial

[83] As noted above, there is no genuine issue for trial where there is no legal basis to the claim, based on the law and the evidence, or where the evidence on the summary judgment motion allows the Court to make the necessary factual findings and apply the relevant legal principles so as to fairly resolve the dispute: *Hryniak* at paras 49–50; *Manitoba v Canada*, 2015 FCA 57 at para 15; *Milano Pizza* at para 31.

[84] In the present case, I am satisfied that I have the evidence to fairly determine this claim. The Defendant has established that Mr. Sipos' claim is "so doubtful that it does not deserve … a future trial" (*Milano Pizza* at para 33). The Defendant has met its onus and established that there

is no genuine issue for trial. Mr. Sipos, in turn, has not provided sufficient evidence to show that there is a genuine issue.

[85] Mr. Sipos submits that if a trial were to proceed, he would seek to call witnesses including a coroner, other persons who received Lupron, and the doctors who treated him and whose records are before the Court, which Mr. Sipos suggests are selective and incomplete. However, Mr. Sipos has not provided any of this evidence in response to the Defendant's motion. I acknowledge that it may be challenging for Mr. Sipos to "put his best foot forward" and garner such evidence, but this is required. Rule 214 clearly provides that the party responding to a motion for summary judgment cannot rely on evidence that "might" be adduced later.

[86] Moreover, based on the record before the Court, there is nothing to support the notion that the Defendant's records are selective or that they are not accurate. The evidence of other persons who received Lupron would not establish Mr. Sipos' claims. In addition, there is at least one dispositive issue that would not change if further evidence were available.

[87] I am satisfied that the record permits the Court to find the facts necessary to decide this matter.

A. *The Crown Is Not Liable for the Conduct Alleged*

[88] Mr. Sipos has not established any legal basis for liability on the part of the Defendant. Apart from his claim that CSC breached an alleged agreement, the acts and omissions that

Mr. Sipos argues give rise to liability in tort or in contravention of the *Charter*—namely, the improper prescription and administration of Lupron injections without his informed consent—are the acts of the physicians or psychiatrists (or nurses acting on their orders) who treated him and regularly monitored his health.

[89] These psychiatrists and other physicians were, according to the Defendant's uncontroverted affidavit evidence—in particular, that of Mr. Irving—independent contractors and not employees of CSC or otherwise servants of the Crown at the relevant time.

[90] The jurisprudence has established that CSC is not vicariously liable for the wrongful conduct of doctors who are independent contractors: *Walker* at para 35; *Hickey v Canada*, 2007 FC 246 at para 90; *Oswald v Canada*, 1997 CanLII 16271 (FC), 126 FTR 281 [*Oswald*]; *Rice v Canada*, 2018 FC 983 at para 6 [*Rice*].

[91] In *Walker*, an inmate claimed to have suffered an injury while working at Frontenac Institution and alleged inadequate medical care. On the Defendant's motion for summary judgment, the Court found that there was no genuine issue for trial, including because the Crown was not liable for the alleged malpractice of the treating doctors. The Court noted at paras 35–36:

> Finally, there is no genuine issue requiring a trial with respect to the issue of vicarious liability of the Crown defendants for the acts or omissions of the defendant physicians. There is no evidence that Mr. Walker received negligent medical care. In any event, the uncontroverted evidence is that Drs. Campbell and Wyatt were not employees of the Crown defendants and that they provided medical services to Mr. Walker as independent contractors.
>
> As for the allegation that the Crown defendants are liable for the conditions at the hospitals where Mr. Walker was treated, paragraph 3(b)(ii) of the *Crown Liability and Proceedings*

> *Act*, R.S.C. 1985, c. C-50 provides that the Crown is liable for damages where it breaches a duty attaching to the ownership, occupation, possession or control of property. The uncontroverted evidence is that CSC does not own, occupy, possess or control any of the hospitals at which Mr. Walker was treated.

[92] In *Oswald*, the plaintiff claimed negligence in relation to pain and suffering caused by a surgery performed on him and the subsequent inadequate care he received while he was incarcerated at Warkworth Institution. This Court found, among other things, that CSC was not vicariously liable. The Court relied on the statutory provision that is now paragraph 3(b)(i) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, and the accompanying definition of a "servant" of the Crown. The Court distinguished this legislation from the equivalent provincial legislation in British Columbia that expressly included independent contractors, concluding that CSC's liability did not extend to the acts of independent contractors, in the absence of an independent and non-delegable duty of care. The Court found that CSC's common law duty to provide health care to incarcerated persons, as reflected in the relevant statutory provisions, may be met by contracting with qualified health-care professionals.

[93] Similarly, in *Rice*, this Court found no genuine issue for trial, noting among other reasons, at para 6:

> The sole Defendant, being Her Majesty the Queen, bears no liability for the actions of the doctors in this instance, as they were providing their services under a contract and thus were neither Crown servants nor agents for the purposes of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50.

[94] Mr. Sipos' circumstances do not differ. The uncontroverted evidence is that the physicians and psychiatrists who treated Mr. Sipos were independent contractors.

[95] I am satisfied that there is no legal basis for liability on the part of the Crown.

[96] I also observe that the record (e.g., the exhibits attached to the affidavit of Mr. Dye, which include clinical notes of the psychiatrists and other physicians who monitored Mr. Sipos' physical and mental health) show that they were alert to any possible side effects. The clinical notes show that Mr. Sipos was routinely asked if he was experiencing side effects and record what Mr. Sipos reported, as well as other issues that may have had no connection with his Lupron treatment. In addition, the exhibits show that Mr. Sipos made several requests for health services for a range of issues, from a fungal toe infection, plantar fasciitis to gastrointestinal problems, which resulted in appointments with the appropriate health-care provider.

[97] The Defendant's record includes comprehensive records setting out the date and the medications administered to Mr. Sipos while incarcerated, including Lupron, ASA, Metamucil and other prescribed medications for particular ailments or conditions.

[98] Although Mr. Sipos now claims that he suffered a long list of side effects, the clinical records show that he only reported a few. As noted, his health was monitored regularly. For example, Dr. Skladman's clinical record dated May 24, 2013, notes that osteoporosis was discussed but the bone density test "showed no pathology." Dr. Skladman's notes indicate that she explained to Mr. Sipos that Lupron was not provided for any medical reason and that it was his decision whether to stop.

[99] Dr. Louw's clinical records note his recommendation that Lupron could be the "culprit" for non-specific stomach issues; however, Mr. Sipos declined to follow the recommendation to pause Lupron.

B. *There Is No Evidence of Any Agreement with CSC*

[100] There is no evidence of any agreement between CSC and Mr. Sipos that he would be transferred to a minimum-security institution contingent on being treated with Lupron. Therefore, there is no breach of any agreement that would provide the foundation for any legal action.

[101] Mr. Sipos' request to be treated with Lupron and his consent to Lupron injections "in consideration for the expectation" that he would eventually be transferred to minimum security does not establish any agreement, nor can such an agreement be inferred.

[102] The Defendant does not dispute that Mr. Sipos held this hope and acknowledges that Mr. Sipos discussed this with his parole officers. The clinical notes of the physicians who treated Mr. Sipos also reflect that he hoped that the Lupron treatment would lead to his transfer.

[103] For example, Dr. Skladman's clinical record, dated November 15, 2010, notes that Mr. Sipos reported that he was recommended for a transfer to a minimum security facility provided his dosage of Lupron was increased. Dr. Skladman's notes state "unsure if this increase is warranted" and express the concern that Mr. Sipos "tries to manipulate".

[104] The exhibits attached to Mr. Zuber's affidavit demonstrate that Mr. Sipos was assessed annually (and biannually after 2013) to determine his security level. The Assessments are thorough and note many relevant factors, including that Mr. Sipos was taking Lupron. The security assessments consistently found Mr. Sipos to be at the medium security level. Two of the reports, in 2012 and 2013, noted that his score placed him slightly within the minimum security level classification, but the overall conclusion continued to be that he should remain at the medium level.

[105] The record establishes that Mr. Sipos acknowledged that his treatment with Lupron was not leading to his transfer to a minimum-security institution. In addition, the evidence of Mr. Dye is that Mr. Sipos, upon discontinuing Lupron in 2014, noted that he would consider resuming treatment if it would assist in future consideration for parole.

[106] Overall, the evidence supports the conclusion that Mr. Sipos held the belief and the hope that his treatment with Lupron would lead to his transfer to a minimum-security institution. However, he was aware before he discontinued its use and long before he brought his action that his treatment with Lupron had been considered in his annual assessments, along with several other factors, and had not resulted in a transfer. The evidence also shows that Mr. Sipos' parole officers and his treating psychiatrists and physicians were privy to his hope to be transferred and his ongoing treatment with Lupron to further this goal. However, the evidence does not support the conclusion that there was any agreement or *quid pro quo* with CSC that he would be transferred if or because he was treated with Lupron. As the Defendant noted, and as the annual assessments reflect, several factors are considered in determining the security level.

[107] I note that Mr. Sipos' dissatisfaction with his security classification and his continued detention in a medium-security institution could have been raised by way of a grievance. At the hearing of the Defendant's motion, Mr. Sipos offered his reasons for not pursuing a grievance, including the delays in the grievance process. Regardless, Mr. Sipos was aware of the process to challenge his security level classification.

C. *The Applicable Limitation Period*

[108] Given my findings that there is no liability on the part of CSC and there is no evidence of any agreement or breach thereof, these issues are dispositive and Mr. Sipos' claim can be summarily dismissed. The applicable limitation period would not have any impact on those findings.

[109] The Defendant notes that the interaction of subsection 39(1) of the *Federal Courts Act*, RSC 1985, c F-7, and section 32 of the *Crown Liability and Proceedings Act* renders the Ontario *Limitations Act, 2002*, SO 2002, c 24, Sched B [*Limitations Act*] applicable; as a result, a claim must be commenced within two years of the day on which it was discovered, unless provided otherwise.

[110] The evidence on the record supports the conclusion that Mr. Sipos was aware or should have been aware of any side effects of Lupron before his last injection. He did not discover the side effects that he may have experienced only upon receiving the 2017 Memo, which he received in 2019. The evidence shows that Mr. Sipos was aware that Lupron was not prescribed for a medical purpose but rather to reduce his sex drive as part of a broader management plan.

Dr. Oliver's notes refer to Mr. Sipos' "informed consent" and Dr. Skladman's notes indicate that she explained that treatment was voluntary and on Mr. Sipos' request. The clinical notes of all the physicians either state "no side effects reported" or report some conditions or concerns (not all of which are potential side effects of Lupron).

[111] As noted, Mr. Sipos disputes that his action is subject to a limitation period, and relies on one or more of the exceptions in paragraphs 16(1)(h), 16(1)(h.1) and 16(1)(h.2) of the *Limitations Act*, arguing that the assault and battery he experienced in being injected with Lupron is a sexual assault, or if it is simply an assault, that it was perpetrated by those with whom he was in dependent relationship. However, Mr. Sipos has not pointed to any jurisprudence in support of his view that this conduct could be characterized as a sexual assault or that he falls within the exception for relationships of dependency. Mr. Sipos' assertions raise an interesting issue, but not a genuine issue for trial given that he does not have any valid claim against the Defendant.

IX. Costs

[112] Generally the successful party is entitled to their costs. In this case, costs could be awarded to the Defendant. As noted at the hearing of this motion, imposing costs—even very modest amounts as suggested by the Defendant—on an incarcerated person, who has a limited ability to earn income, is a greater imposition than for other litigants. Although costs can be awarded against incarcerated persons, in the present case, I decline to do so.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Defendant's motion for summary judgment is granted.

2. The Plaintiff's claim is dismissed in its entirety.

3. No costs are ordered.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1413-19
STYLE OF CAUSE:	JAMES SIPOS v HER MAJESTY THE QUEEN
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 24, 2022
JUDGMENT AND REASONS:	KANE J.
DATED:	FEBRUARY 21, 2022

APPEARANCES:

Mr. James Sipos	ON HIS OWN BEHALF
Ms. Vanessa Wynn-Williams	FOR THE DEFENDANT

SOLICITORS OF RECORD:

None	FOR THE PLAINTIFF
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT