

Federal Court



Cour fédérale

Date: 20221230

Docket: T-1366-18

Citation: 2022 FC 1805

Ottawa, Ontario, December 30, 2022

PRESENT: The Honourable Madam Justice Elliott

SIMPLIFIED ACTION

BETWEEN:

MICHAEL MULLINS

Plaintiff

and

**HIS MAJESTY THE KING
IN RIGHT OF CANADA**

Defendant

JUDGMENT AND REASONS

I. Overview

[1] On November 23, 2016, the Plaintiff, an inmate in the Federal Penitentiary system, was being involuntarily transferred by staff of the Correctional Service of Canada (CSC) from Bath Institution (Bath) to Warkworth Institution (Warkworth).

[2] On arrival at Warkworth, the Plaintiff says he was informed by CSC staff that a box containing his CSC files and another containing sensitive personal information, including his family's names, dental information, parole documents and case management information, had been lost in transit between the two correctional institutions.

[3] The parties agree that a box of the Plaintiff's records was misplaced by CSC staff at some point in the transfer process. It is also agreed that the box contained: 3 volumes of Case Management files, 1 volume of Sentence Management files, 1 volume of Discipline and Disassociation files and 1 volume of Health Care documents.

[4] CSC employees at Bath and Warkworth searched for the documents, without success.

[5] To the extent possible, CSC re-created the Plaintiff's documents by extracting data from the Offender Management System.

[6] To the Court's knowledge, the missing files have yet to be found.

[7] The Plaintiff alleges that CSC owed him a duty of care in the circumstances. He is seeking damages of \$30,000 as compensation for the negligent or deliberate loss or destruction of his personal effects and for the concomitant intentional infliction of emotional distress.

[8] In addition, the Plaintiff seeks punitive damages of \$20,000, pre-judgment and post-judgment interest pursuant to the *Federal Courts Act*, and costs.

[9] The Defendant states no duty of care was owed to the Plaintiff as there is no evidence of a compensable injury and there are adequate alternative remedies and procedures tailored to specifically address these types of situations. There are policies to deal with loss and disclosure of personal information. Any loss of information triggers an investigation pursuant to the *Privacy Breach Guidelines* and a grievance can be initiated if an inmate feels they have been treated in a manner that is not consistent with the legislation, including the *Privacy Act*, RSC 1985, c P-21 at section 29 or policy such as the *Guidelines*.

[10] This matter proceeded as a Simplified Action in accordance with Rules 292 – 299 of the *Federal Courts Rules* [Rules]. Evidence was received by way of affidavit with cross-examination and reply evidence available in accordance with the *Rules*.

II. Case Management

[11] This matter was case managed by Associate Judge Molgat. The pre-trial conference Memorandum indicates the Defendant's position was that no duty of care was owed to the Plaintiff as he had administrative remedies available that, in the circumstances, negate the existence of a duty of care to him.

[12] The Defendant admits that it is vicariously liable for torts committed by its servants in the course of their employment, that employees of CSC are servants of the Crown, that the Plaintiff was involuntarily transferred from Bath to Warkworth on November 23, 2016 and that a box of the Plaintiff's documents, containing sensitive personal information including

medical documents, was misplaced during the Plaintiff's transfer to Warkworth and it has not been recovered despite diligent investigation and searches.

[13] The Defendant maintains that even if a duty of care can be established, there is no evidence that the Plaintiff suffered a compensable injury.

[14] The parties engaged in settlement discussions, without success.

III. Preliminary Objection

[15] The Defendant's post-hearing closing submissions object to the Plaintiff making, in his post-hearing closing submissions, a claim for damages under a cause of action he did not plead in his statement of claim. The Plaintiff cited *Jones v Tsigie* 2012 ONCA 32 for the proposition that an invasion of privacy *per se* represents an actionable tort. In *Jones v Tsigie*, the Ontario Court of Appeal established the tort of "inclusion upon seclusion".

[16] The Defendant points out that at the pre-trial conference the parties agreed that the issues to be determined at trial were those listed in the Defendant's pre-trial conference memorandum. Intrusion upon seclusion was not included as an issue. It would be procedurally unfair to the Defendant to allow a new cause of action after the trial has concluded as before the trial commenced, the parties had agreed to the issues to be tried.

[17] For the above reasons, I find the Plaintiff cannot at this stage raise this new issue.

[18] In addition, as discussed below, the Plaintiff has failed to put forward evidence that any of the missing documents have been used or put on the internet. As a result, there is no evidence to support the “intrusion upon seclusion” argument had I allowed it to proceed.

IV. **Issues**

[19] The Defendant admits the box was misplaced and states there are five issues to be decided:

1. Is the Defendant liable in negligence for the loss of the documents?
2. Did the defendant owe a duty of care to the Plaintiff in the circumstances and;
3. Did the Plaintiff experience an injury and/or loss?
4. Did the Defendant intentionally inflict emotional distress on the Plaintiff?
5. Did the Defendant breach the Plaintiff’s rights under the *Privacy Act*?
6. Has the Plaintiff suffered an injury that is compensable in tort law (under either negligence or intentional infliction of emotional distress) such that he is entitled to damages?
7. Is the Plaintiff entitled to punitive damages?

[20] The Plaintiff has a similar list of issues although more detailed.

[21] Both parties agree the issues include whether the Defendant’s servants breached a duty of care to the Plaintiff to protect his documents.

[22] The Plaintiff says the breaches include failing to safely transport the documents and failing to reasonably investigate the loss of the documents that would make it possible to recover as many as possible and to recognize their importance as a matter of impact on the Plaintiff's privacy and the harm caused by their loss.

[23] The Plaintiff also submits that his right to privacy was breached when his documents were released without his consent and that represented a breach of the servants' duty of care and a foreseeable and actual harm to the Plaintiff.

[24] Another issue the Plaintiff puts forward, the same as, but worded differently than the Defendant's issue, is the quantum of damages given the alleged breaches and whether the servants breached their duties in a manner that rendered them liable for a finding of punitive damages.

[25] Akin to the above issue is whether the Defendant is vicariously liable for the harm caused by the wrongful conduct of their servants.

[26] I have found, as discussed below, that the Plaintiff failed to prove, on a balance of probabilities, that the Defendant is liable to him in negligence for any of the claimed heads of damage. Therefore, the action against the Defendant will be dismissed: *Clements v Clements*, 2012 SCC 32, at para 8.

V. **Allegations and Evidence**

[27] While the parties agree the box of documents was misplaced, the details surrounding the loss of the box and the aftermath remain factual disputes to be decided.

[28] The Plaintiff has made the four following allegations. Set out below each allegation is the Defendant's responding evidence refuting each allegation, followed by my assessment of whether the Plaintiff's allegation was proven on a balance of probabilities.

1. The box of documents containing the Plaintiff's personal information was placed on the back bumper/container of the transport vehicle.

[29] In his written answers to the Defendant, the Plaintiff said he first saw the box fall off the bumper of the transport van a few minutes into the ride. He said he banged on the vehicle to get the attention of the guards.

A. *CO DaSilveira*

[30] The Affidavit of Correctional Officer (CO) DaSilveira, who was one of the escorting Officers in the van, states that the usual practice during transfers is to keep the paperwork up front with the escorting COs. He recalled being called back to Bath, after leaving, in order to pick up the box. He stated he did not recall the box of records flying off the back of the vehicle or the Plaintiff banging on the vehicle during the escort.

[31] At trial, Officer DaSilveira testified that there was no outside space on the bumper to store materials. When they returned to Bath to pick up the box the Supervisor brought it out and

the Officer put it into the van through the side doors. He also testified that when the van arrived at Warkworth the box was placed on the floor to the right in the Admissions and Discharge unit.

B. *CO Hennessy*

[32] The Affidavit of Ryan Hennessy, the other CO accompanying the Plaintiff to Warkworth, states that a minivan was used for the Plaintiff's escort. It had a cell in the back and an open area in the front with two seats for the escorting officers and any boxes that were being transported with an inmate. He recalled having to go back to Bath, two minutes after leaving, to pick up the box of records because it had been forgotten. To the best of his recollection, and based on usual practice, the box of records was kept with the COs in the open area of the van during the drive to Warkworth.

[33] Mr. Hennessy also states that there are a number of sharp turns from the front of the jail to the highway and it would be unlikely that a box on a bumper, had it been placed there, would remain there long enough to enter the highway. He too had no recollection of the Plaintiff banging on the vehicle during the drive.

[34] At trial Mr. Hennessy testified that he drove the van back to Bath, pulled up to the front entrance and someone brought the box out. It was put in the side entrance of the van. With respect to the question of whether any of the vans had a platform to carry materials Mr. Hennessy testified there was a step to help an inmate get into the van. He also stated that an inmate would not bang to get the attention of the Officers, they usually spoke up and the Officer would respond.

C. *Colleen Van de Valk*

[35] The Affidavit of Colleen Van de Valk, states she was employed as the Chief of Administrative Services at Bath from 2009 until 2020. Her job included supervising offender records, complaints and grievances including incoming and outgoing file movement of offender records. Currently she is the Team Lead at National Headquarters in the contact-tracing unit.

[36] Ms. Van deValk attested to being notified on November 23, 2016 that the Plaintiff was being transferred to Warkworth. Her staff gathered up the records and packed them for transport

[37] Attached to Ms. Van deValk's affidavit as an exhibit is a copy of the Transmittal Note and Receipt (TNR) that summarizes the records being transferred. Her evidence was that the TNR is included in the box with the records.

[38] When Ms. Van de Valk noticed the records had not been picked up within the usual time she made an inquiry of the Correctional Manager's office. She was informed that the Officers had already left. The staff then called the Officers to return to retrieve the records.

[39] Ms. Van de Valk attests to being informed that the Correctional Manager's Office gave the records to the escorting Officers who then left again.

[40] Ms. Van de Valk also attests that in the normal course of business the TNR would be sent back to Bath from the receiving institution within 72 hours of the transfer. She states that in this instance the TNR was not returned.

D. *Sandra Newman*

[41] Sandra Newman was the Chief of Administrative Services at Warkworth where she supervised offender records, complaints and grievances. She first learned of the Plaintiff's missing records on December 23, 2016 when an employee in the records department made her aware of the missing documents.

[42] Ms. Newman affirmed in her affidavit that the Plaintiff did not file a grievance related to the loss of his documents. She initiated a search for the documents with assistance from Warkworth staff but the records were not found.

[43] The Admissions and Discharge (A&D) unit at Warkworth confirmed there were no unprocessed boxes in the office. Ms. Newman spoke with stores who confirmed they had received two boxes of effects, which did not include documents, and they were sent to A&D on December 16, 2016.

E. *The Plaintiff has not met his onus to prove the box fell off the back bumper/platform of the van.*

[44] The Plaintiff has put forward no concrete evidence to support his allegation that he saw the box fall onto the highway and that it was originally on the bumper of the van.

[45] I accept the evidence of the Defendant's witnesses who have shown why a box would not have been placed outside the van but, if it was, why it would have fallen off long before reaching the highway where the Plaintiff purported to see it.

[46] The Defendant submits that it is unlikely that the Plaintiff would fall asleep, as he said he had done, if he had seen the box fall off the back of the van and had tried to get the attention of the Officers. That the Plaintiff did not make a complaint upon arriving at Warkworth or ask the Officers to go back and get the box also belies his statement that he saw the box fall onto the highway.

[47] The evidence of Escort Officers DaSilveira and Hennessy was consistent, clear and convincing. I accept that the box of documents was not on a bumper or platform of the Van.

[48] I find the box was inside the van, with the escort Officers.

[49] The Defendant submits that there is no evidence that, at any time before these proceedings were commenced, the Plaintiff ever alleged the box had fallen on the road. This is supported by the Defendant's witnesses who testified when being cross-examined that until they read the Statement of Claim they were unaware of the allegations made by the Plaintiff.

[50] Considering the foregoing evidence, particularly that of the escort Officers and PO Frederick (outlined in the next section), I am unable to find the Plaintiff has proven on a balance

of probabilities that the box was placed on the back bumper/platform of the van or that it was lost while in transit to Warkworth.

- 2. In paragraph 12 of his own affidavit, the Plaintiff states that various staff members at Warkworth, including Parole Officer Michelle Frederick, informed him that the box had been placed by Bath staff on the back bumper/container of the vehicle and the box had fallen off the truck and no attempt was made to retrieve it.**

[51] The Affidavit of Michelle Frederick states that she did not inform the Plaintiff that the box had been placed on the back bumper/container and had fallen off as she was not involved in his transfer, the handling of the documents, how they were misplaced or the efforts to retrieve the documents.

[52] The Plaintiff has not been able to refute that testimony.

- 3. The Plaintiff never received the letter from Larry Ringler.**

[53] As required by the CSC protocol, Larry Ringler, Warden of Warkworth Institution, wrote a letter to the Plaintiff summarizing the nature of the personal information that was misplaced and providing information that the Plaintiff could register a complaint with the Office of the Privacy Commissioner of Canada.

[54] The letter, which is in the materials, is undated. Why the Plaintiff failed to receive the letter is unclear but the fact that it was written is clear.

- 4. The Plaintiff's family has been receiving telephone calls from anonymous persons threatening to put his sensitive information on the internet. As a result, his family has had to change phone numbers and the Plaintiff even changed his name.**

[55] The Defendant highlights there is no evidence to suggest that the Plaintiff's personal information was accessed by a third party, posted online or otherwise made public.

[56] In answering the questions put to him in his written examination, the Plaintiff was asked what evidence he intended to rely on to support the allegation that his family had been receiving phone calls from an anonymous person threatening to put his sensitive information on the internet.

[57] The Plaintiff's answer was "they told me so". Although the Plaintiff initially indicated his daughter was a potential witness as she received the threatening calls, no family member provided evidence either at the trial or by way of affidavit.

[58] In addition, no evidence in support of the Plaintiff's allegations of mental and emotional distress was provided at the trial or by affidavit.

[59] Given the lack of such important evidence, the Plaintiff has not met his burden to prove threatening telephone calls were made to his family or that his sensitive information had been put on the internet.

[60] I am persuaded that the Plaintiff has not met his onus to prove his allegation that his family has been receiving threatening telephone calls.

VI. **The Plaintiff's Claim for Damages**

[61] The Defendant's Amended Pre-Trial Conference Memorandum highlights that there is no evidence to suggest the Plaintiff's personal information was accessed by a third party, posted online or otherwise made public.

[62] Indeed, I have made such a finding based on the evidence received at trial.

[63] As previously stated, the Plaintiff had indicated that evidence would be provided by his daughter but no such evidence was ever received as part of this trial.

[64] No evidence in support of the Plaintiff's allegations of mental and emotional distress was provided. Tab 15 of the Joint Brief of Documents at is "Medical Records". There is a corresponding message from the Plaintiff stating "These will follow as I have been unable to Copy them from a Titan format".

[65] No medical records were submitted by the Plaintiff at the trial.

A. *Credibility of the Plaintiff*

[66] For the following reasons, I conclude the Plaintiff was not a credible witness.

[67] The Defendant points out that there are numerous contradictions and inconsistencies between the Plaintiff's evidence and the statement of claim.

[68] For example, the Plaintiff claims he was never provided with an explanation for the loss of the documents but he also claims that Ms. Frederick and other unnamed staff at Warkworth told him that they had fallen off the van and no one went to retrieve them.

[69] The Plaintiff claims he actually saw the box fall onto the highway and yet he claims to have needed Warkworth staff to provide him with this explanation. On cross-examination, the Plaintiff stated that Ms. Frederick had told him “that was the story they heard.” However, if the Plaintiff had seen the box fall off the van, it does not make sense that Ms. Frederick or anyone else at Warkworth would have had to tell him “this was the story”.

[70] At the trial of this action, the Plaintiff changed his story. He twice stated that the Officers had left the box on the bumper, he told them they forgot something, he was ignored and then fell asleep. The Defendant observes that the Plaintiff made no mention of seeing the documents fall off the van unless or until he was specifically asked.

[71] Other evidence on the record contradicts the Plaintiff’s evidence on various points.

[72] Despite the Plaintiff alleging that CSC failed to investigate, documentation and testimony from the Defendant’s witnesses show multiple searches were conducted by numerous staff members at both Bath and Warkworth.

[73] The Plaintiff testified to a conversation with Ms. Frederick that she testified did not occur.

[74] Ms. Frederick was certain she did not tell the Plaintiff that his box of documents had fallen off the van. Rather, she recalled telling the Plaintiff that she was not involved in the search and had no further information to provide to the Plaintiff. She stated that she counselled him to request information from individuals involved in the search.

[75] Ms. Frederick's testimony is supported by her February 21, 2017 response to the Plaintiff's February 9, 2017 inmate request asking whether "the box of records had been found".

[76] The response from Ms. Frederick was that to her knowledge, they had not been found and he should speak with the Coordinator Correctional Operations as the issue fell outside of her role as a Parole Officer.

[77] The Plaintiff claims that CSC did not investigate the loss of his documents but he also admits that Warkworth, which is part of CSC, conducted a search for them.

[78] There is evidence that extensive searching took place.

[79] In her capacity as the Chief of Administrative Services at Warkworth, Sandra Newman outlined in her affidavit the steps that were taken to search for the Plaintiff's missing documents

[80] Ms. Newman attested that a search of the file room was completed without the documents being found. The main gate and main security offices and all offices in the vicinity of the Correctional Managers office were searched, as were all the transport vehicles.

[81] In order to co-ordinate the Warkworth search with Bath, Ms. Newman communicated her search efforts and the outcome of her search with Colleen Van de Valk who was her counterpart at Bath.

[82] Ms. Newman stated the Plaintiff did not file a grievance with her office in relation to the loss of his documents.

VII. Tort of Negligence

[83] While there is a recognized duty of care for the health and safety of inmates, the duty of care for the protection of personal documents during an institutional transfer is a novel claim. An application of the *Anns-Cooper* test to the facts of this case fails at the first stage of establishing a duty of care as there was no reasonable foreseeability of harm.

[84] CSC personnel, namely CO DaSilveira and CO Hennessey, could not reasonably have contemplated that the Plaintiff would suffer personal injury in the form of serious trauma or illness for the loss of largely administrative and health related documents.

[85] While this Court is not privy to the contents of the documents at issue, the Plaintiff states that the documents included CSC files containing the names of family members, parole documents, dental information and case management information and “[i]n particular the papers included items such as assessments by CSC for decisions which considered my crimes and their circumstances, their effects on victims, who were described, and my risks to public safety.”

[86] There is evidence that the details surrounding the Plaintiff's crimes are publicly available over the internet. Therefore, it seems to me that the Plaintiff's concern for his harassment and physical harm predated the loss of his documents.

[87] I also note that Tim Hamilton, the Assistant Warden of Operations at Bath Institution, who completed the Privacy Risk Assessment assessed this incident as a low risk privacy breach on the following basis:

I assessed this as a low risk privacy breach as I did not believe the documents were in the community. Rather, I determined that they had been lost in one of the institutions. I also took into consideration the fact that a) you can google the Plaintiff's name and find the same information regarding his offence that would have been included in the missing documents and b) the majority of the records could be built electronically.

[88] I agree with the Defendant that someone in the position of the Officers responsible for the transfer of the Plaintiff could not reasonably foresee psychological injury arising from the loss of the personal documents in question. As there is no duty of care owed to Mr. Mullins in these circumstances, the foremost component of liability for negligence is not met and the Plaintiff's claim is dismissed.

VIII. **Tort of intentional infliction of emotional distress**

[89] The three elements of the tort of intentional infliction of mental distress are:

1. Flagrant or outrageous conduct;
2. Calculated to produce harm;

3. Resulting in a visible and provable illness

[90] The Plaintiff failed to adduce any evidence of the harm he sustained or the nature of the conduct of the Defendant that caused it such as would support this tort. He made broad and vague allegations of being fearful and in unspecified emotional distress over losing his documents. He provided no medical or other evidence of being ill or experiencing trauma related to the lost box of documents.

[91] Without evidence of trauma or illness that amounts to a compensable injury, the Plaintiff has failed to discharge his burden of proof for this tort.

IX. **There was no breach of the Privacy Act**

[92] Whether there is a breach of the *Privacy Act* is a task left with the Privacy Commissioner through their statutory powers of complaint investigation and recommendation to the governing body.

[93] The Privacy Commissioner cannot investigate unless a complaint is made.

[94] The Plaintiff did not file a complaint.

[95] Even if a complaint been filed and a breach found, the Plaintiff would not have access to the relief he seeks as a breach of the *Privacy Act* is not a recognized independent cause of action

and there are no civil remedies available for unauthorized disclosure of personal information in breach of the *Privacy Act*.

[96] If such civil remedies did exist, the Plaintiff could not avail himself of them as there is no evidence of any disclosure of his personal information.

[97] To the extent that the conduct of the CSC staff was to constitute a breach of the *Privacy Act*, any cause of action would, as for any other general breach of statutory duty, still be subsumed in the law of negligence: *Kim v Canada*, 2017 FC 848 at para 32.

X. **Conclusion**

[98] As set out above, the Plaintiff failed to prove his case on a balance of probabilities.

[99] Therefore, the Plaintiff's action is dismissed, with costs.

JUDGMENT in T-1366-18

THIS COURT'S JUDGMENT is that:

1. This action is dismissed, with costs.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1366-18

STYLE OF CAUSE: MICHAEL MULLINS v HIS MAJESTY THE KING IN
RIGHT OF CANADA

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 7, 2022

JUDGMENT AND REASONS: ELLIOTT J.

DATED: DECEMBER 30, 2022

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