

Federal Court



Cour fédérale

**Date: 20230413**

**Docket: T-1016-12**

**Citation: 2023 FC 531**

**Ottawa, Ontario, April 13, 2023**

**PRESENT: Madam Justice Walker**

**BETWEEN:**

**SERGE EWONDE**

**Plaintiff**

**and**

**HIS MAJESTY THE KING IN RIGHT OF  
CANADA and MARC BOURQUE**

**Defendants**

**JUDGMENT AND REASONS**

I. Overview

[1] Mr. Serge Ewonde, the Plaintiff, filed a Statement of Claim against the Defendants in May 2012 seeking unspecified damages for negligence and misfeasance in public office, assault, mental suffering and physical injury, among other claims, all while he was an inmate at Dorchester Penitentiary, a federal medium security facility administered by Correctional Service of Canada (CSC) in accordance with the *Corrections and Conditional Release Act*, SC 1992,

c 20 and the *Corrections and Conditional Release Regulations*, SOR/92-620. The Plaintiff bases his claims on the alleged failure by the institution's staff to ensure that he received his insulin injections at the prescribed times and on an alleged assault by the individual Defendant, Mr. Marc Bourque. Mr. Bourque was at the relevant time a correctional officer at Dorchester Penitentiary.

[2] Following a long and arduous path to a five-day trial scheduled for June 2022 that did not proceed due to the Plaintiff's ill health, the parties agreed to resolve the remaining issues in this proceeding by way of a motion for judgment by summary trial in writing pursuant to Rule 213 of the *Federal Courts Rules*, SOR/98-106 (the Rules). This Judgment addresses the Defendants' Motion for summary trial and the Plaintiff's failure to file evidence or representations in response to the Motion.

[3] For the reasons that follow, I have found that this action is suitable for summary trial in writing as agreed by the parties, despite the Plaintiff's decision not to file a responding Motion Record. I have also found that the Plaintiff has not established the claims asserted in his Statement of Claim. His failure to file any evidence in support of his allegations is fatal to his case. As a result, the Plaintiff's action against the Defendants will be dismissed in its entirety with costs.

## II. Background

[4] According to the parties' Statement of Agreed Facts filed in anticipation of trial, the Plaintiff is serving a life sentence for, among other convictions, two counts of first-degree

murder. He has been incarcerated since 1993 in a variety of institutions across Canada. The Plaintiff is a Type 1 diabetic patient who requires daily insulin injections.

[5] The Defendant, the King in Right of Canada, is named as a Defendant in this action pursuant to section 48 of the *Federal Courts Act*, RSC 1985, c 9.

[6] Defendant Marc Bourque was employed by CSC as a correctional officer from 2004 to 2011. From 2008 to 2011, Defendant Bourque was posted to Dorchester Penitentiary.

[7] The Plaintiff was placed in administrative segregation upon arrival at Dorchester on August 31, 2010, where he remained until November 30, 2010.

[8] The Plaintiff alleges that correctional officers at Dorchester negligently and intentionally breached their duty of care to him by (1) failing to exercise due diligence in providing the Plaintiff his daily insulin injections at the required times; and (2) subjecting him to racial insults and to a violent physical assault on September 16, 2010 during one attendance at the healthcare unit for his insulin injection.

[9] In his Statement of Claim, the Plaintiff claimed damages for negligence, misfeasance in public office, intentional infliction of mental suffering and harassment, and breach of sections 7, 8 and 12 of the *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, c 11 (Charter). The Plaintiff also claimed aggravated and exemplary damages, and damages for assault and physical damage. On October 15, 2021,

the Court ordered that the factual and legal issues to be determined at trial were whether the Defendants were negligent as alleged and, if so, the existence of any resulting compensable damages.

[10] The Plaintiff first alleges that, from the date of his arrival at Dorchester, Defendant Bourque repeatedly failed to respond to his requests to be taken to healthcare for his insulin injections on time and that, at times, the delay extended to four or five hours. On occasion, he experienced distressing symptoms including physical pain, blurred vision, rapid pulse and loss of coordination, all of which could lead to long-term harm. The Plaintiff states that Defendant Bourque responded with racial epithets and threats after the Plaintiff rang the emergency call button in his cell. The Plaintiff subsequently filed a formal complaint against Defendant Bourque.

[11] Second, with respect to the alleged assault (the Incident), the parties agree that the Plaintiff was escorted to the healthcare unit on September 16, 2010 where he received his insulin injection. Following the injection, there was an altercation between the Plaintiff and correctional officers. The cause and facts of the Incident are in dispute in this action.

[12] The Plaintiff alleges that he was assaulted by Defendant Bourque on September 16, 2010 during an escort from the healthcare unit back to the segregation unit. The Plaintiff claims that Defendant Bourque held his neck with one hand and banged his head several times on the wall and then on the glass window of the door leading to the segregation unit, shattering the window, all while the Plaintiff's hands were handcuffed behind his back. The Plaintiff states that he feared

for his life as Defendant Bourque attempted to incite him to fight. The Plaintiff did not resist or fight back. According to the Plaintiff, he was thrown to the ground and pinned with his face against the floor. Defendant Bourque then pressed the Plaintiff's personal emergency alarm to summon other officers. The Plaintiff alleges that he was placed in a holding cell where he cleaned his own blood off his hands, face and head. The Plaintiff pressed criminal charges against Defendant Bourque after the Incident.

[13] The Defendants deny the Plaintiff's allegations. As the Defendants have filed evidence in support of their Motion for summary trial, I will set out the details of their evidence in Section IV of this judgment.

[14] Briefly, the Defendants state that, once healthcare staff at Dorchester were ready to receive the Plaintiff for his scheduled insulin injection, correctional officers would attend his cell to escort him to the healthcare unit. The Defendants allege that the Plaintiff refused to be escorted to the healthcare unit on numerous occasions.

[15] The Defendants allege that, after he received his insulin injection at approximately 8:30 a.m. on September 16, 2020, the Plaintiff demanded to see a doctor immediately. When he was advised by healthcare staff that would not be possible, the Plaintiff took a more aggressive stance toward healthcare staff. Correctional officers intervened and attempted to escort him back to the segregation unit. The Defendants state that the Plaintiff resisted and, as the officers were attempting to gain control, the Plaintiff came into contact with and broke through the window of the door leading to the segregation unit. The officers restrained the Plaintiff and returned him to

the segregation unit. They called healthcare staff who attended the Plaintiff later the same day and examined him for possible injuries.

### III. Procedural History

[16] The Plaintiff filed his Statement of Claim in this action on May 24, 2012. The Defendants' Statement of Defence was filed on June 25, 2012.

[17] Further procedural background to this action is set out in:

- (1) the judgment of the Federal Court of Appeal (FCA) allowing the Plaintiff's appeal of an April 2016 Order of this Court dismissing this action for delay (2017 FCA 112). Although the FCA acknowledged the lack of progress in this and two other actions brought by the Plaintiff in 2012, the FCA allowed the appeal on the basis that this Court had not upheld its obligations to the Plaintiff under the *Official Languages Act*, RSC 1985, c 31 (4th Supp.);
- (2) the Order and Reasons of Justice Kane of this Court reconsidering the April 16 Order as directed by the FCA (2017 FC 1120); and
- (3) my Order dated October 11, 2022, dismissing the Plaintiff's motion to adduce new evidence and to obtain answers to questions refused during cross-examination of Defendant Bourque (the Walker Order).

[18] The Court set this proceeding down for trial on November 8, 2021, with the trial to commence on June 13, 2022. Between November 2021 and the commencement of the trial, the parties engaged with the Court on numerous occasions, including a series of case and pre-trial management conferences and a full-day mediation.

[19] At the commencement of the trial on June 13, 2022, Plaintiff's counsel informed the Court that the Plaintiff had been taken to the healthcare unit of Warkworth Institution, where he was then incarcerated, and could not be moved due to a fever. The Plaintiff did not make himself

available at the resumption of the trial on the morning of June 14, 2022 because he continued to be unwell. The parties made representations concerning the viability of attempting to proceed with the trial in the allotted time remaining. The parties also addressed a request by the Plaintiff to introduce possible new evidence regarding his health care following the Incident.

[20] I adjourned the trial due to uncertainty surrounding the Plaintiff's ability to attend during the remainder of the week, the limited availability of the Defendants' witnesses and the constraints posed by the remaining time allotted for trial. I instructed the parties to discuss a resolution of the Plaintiff's request to introduce new evidence and to provide to the Court, on or before June 24, 2022, a proposed plan to bring the action to a conclusion.

[21] On June 21, 2022, the parties submitted their agreement to the Court that the Plaintiff would file a motion for an order granting his request for (a) the introduction of additional medical evidence that the Plaintiff anticipated he may receive as a result of an Access to Information request, and (b) the provision of answers to questions refused during the cross examination of Defendant Bourque. Within 10 days of the Court's decision on the motion, the Defendants would serve and file a motion for summary judgment or summary trial of this action, to which the Plaintiff would respond within a further 10 days.

[22] On August 5, 2022, the Plaintiff filed a Notice of Motion requesting the relief contemplated in the parties' June 21, 2022 agreement. The Defendants filed their responding Motion Record on August 15, 2022. I dismissed the Plaintiff's motion for the reasons set out in the Walker Order.

[23] The Defendants filed their Notice of Motion for summary trial in writing, affidavits in support of the Motion and written representations on October 21, 2022.

[24] The time within which the Plaintiff was required to serve and file responding motion materials expired on October 31, 2022, in accordance with the timetable agreed by the parties in their June 21, 2022 letter.

[25] The Plaintiff did not file a responding Motion Record in accordance with the parties' agreement.

[26] On November 14, 2022, I issued a direction to the parties informing them of the Court's receipt of the Motion Record filed on behalf of the Defendants on October 21, 2022 and the expiry of the time for the Plaintiff to file responding materials. I also informed the parties that the Court would consider the Defendants' motion requesting judgment by summary trial on the basis of the materials filed.

[27] I note the mandatory procedure for motions for summary judgment or summary trial established by the Court in Rules 213-216. Rule 213(4) states that a party served with a motion for summary judgment or summary trial shall serve and file a responding record by no later than 10 days prior to the hearing of the motion. Although the parties in this case have requested that the Motion be determined in writing, Rule 213(4) nonetheless emphasizes the importance of the responding party's required Motion record once a motion for summary judgment or summary trial has been filed.



IV. The Defendants' Motion for Judgment by way of Summary Trial and Affidavit Evidence

[28] The Defendants request an Order pursuant to Rule 216(6) granting judgment in their favour in this proceeding by summary trial, with costs. They submit that the issues before the Court are well defined and that the facts necessary to determine those issues are set out in the evidence. The Defendants acknowledge that the pleadings and the evidence give rise to certain questions regarding credibility but argue that the evidence filed permits the Court to properly consider and determine those questions. The Defendants also submit that the disposition of the Plaintiff's action in this manner is expeditious and preserves valuable court resources.

[29] The Defendants include six affidavits with their Notice of Motion, including that of the Defendant Marc Bourque. Each of the affiants, other than Ansle John, a legal assistant working with counsel to the Defendants, affirms that their respective affidavit stands as their evidence at trial.

(1) Affidavit of Marc Bourque affirmed May 16, 2022.

[30] As noted above, Defendant Bourque was employed by CSC from 2004 to 2011 and, from 2008 to 2011, was posted to Dorchester Penitentiary. In August and September 2010, Defendant Bourque's duties included shifts in the administrative segregation unit. In this capacity, he escorted inmates to the healthcare unit, always in the company of another correctional officer as required by CSC policy.

[31] In August and September 2010, Defendant Bourque had frequent interactions with the Plaintiff and affirms that at no time did he threaten, harass or make racist statements to the Plaintiff.

[32] On September 16, 2010, at or before 7:45 a.m., Defendant Bourque and another correctional officer, Mr. Corey Allain, escorted the Plaintiff to healthcare for his morning insulin injection. The Plaintiff was restrained with handcuffs in front of his body.

[33] After receiving his insulin injection, the Plaintiff demanded to see the doctor immediately but was informed he was not entitled to do so. Defendant Bourque affirms that the Plaintiff became belligerent and he, Mr. Allain and another officer, Kelly Bourque (no relation to Defendant Bourque) who was posted to healthcare that day, attempted to restrain the Plaintiff by pushing him against a wall. Mr. Allain and Mr. Bourque held the Plaintiff and Defendant Bourque took hold of his left shoulder with one hand and, in his other hand, held a canister of pepper spray. At that moment, the door to the hallway to the segregation unit opened and the Plaintiff bolted through. The three officers gave chase and caught up with the Plaintiff at the other end of the hallway. The officers pushed the Plaintiff against the firehose cabinet.

[34] Defendant Bourque affirms that the Plaintiff pushed off from the wall with his hands but was pushed back by the three officers against the door to the segregation unit, which was directly next to the firehose cabinet. Unexpectedly, the glass window in the door shattered. Defendant Bourque does not know whether the Plaintiff's head or shoulder broke through the glass. All four individuals froze and Defendant Bourque, Mr. Allain and Mr. Bourque carefully removed the

Plaintiff from the window and placed him on the floor. Defendant Bourque states that the Plaintiff was entirely compliant at that time. The Plaintiff's handcuffs were repositioned to his back and he was escorted to an empty cell in the segregation unit.

[35] Defendant Bourque affirms his belief that the use of force used to restrain the Plaintiff complied with CSC policies. He also affirms that he was up to date in his training on the date of the Incident.

[36] Defendant Bourque completed a Use of Force Report, Exhibit A to the affidavit, and an Officer's Statement and Observation Report detailing the Incident, Exhibit B to the affidavit. The two documents were signed by Defendant Bourque on September 16, 2010 and are consistent in all material respects with the facts affirmed in Defendant Bourque's affidavit. The Use of Force Report includes the observations of a healthcare practitioner dated September 16, 2010, noting two small scratches on the Plaintiff's right arm and some complaints of a sore head. The healthcare practitioner noticed no lumps or bumps on the Plaintiff's head. The Use of Force Report is also signed by the Chief of Health Services, the Correctional Manager (Matthew Alward), the Deputy Warden and the Institutional Head.

[37] Later on September 16, 2010, Defendant Bourque observed the nurse evaluating the Plaintiff when the Plaintiff became irate and threatened Defendant Bourque. Defendant Bourque issued a charge against the Plaintiff. Defendant Bourque completed and signed a second Officer's Statement the same day that describes the threats, a copy of which is attached as Exhibit C to his affidavit.

[38] Defendant Bourque affirms that he was charged with assault by the Royal Canadian Mounted Police in relation to the Incident but that the charge was withdrawn by the Crown Prosecutor at the first court appearance in April 2011.

(2) Affidavit of Corey Allain affirmed October 19, 2022.

[39] Mr. Allain is and has been employed by CSC as a correctional officer since 2008. In August and September 2010, he was posted to Dorchester Penitentiary where his duties included work in the administrative segregation unit.

[40] On the morning of September 16, 2010, Mr. Allain was stationed in the segregation unit and, together with Defendant Bourque, escorted the Plaintiff to his appointment in healthcare. The Plaintiff was restrained with handcuffs in front of his body as per protocol. Mr. Allain confirms that, while in the healthcare unit, the Plaintiff indicated that he wished to see the doctor. Although the nurse informed him that she would make an appointment with the doctor, the Plaintiff continued to demand to see a doctor and refused to comply with the officers' orders to return to the segregation unit.

[41] Mr. Allain and Defendant Bourque attempted to escort the Plaintiff into the hallway between healthcare and the segregation unit but, when the nurse opened the healthcare door into the hallway, the Plaintiff began to physically resist. The officers pressed the Plaintiff against the wall and firehose unit and then against the door into the segregation unit. The Plaintiff's shoulder broke through the glass window in the door, at which point Mr. Allain and Defendant Bourque took the Plaintiff to the ground and repositioned his hands behind his body. Once the officers

regained control, the Plaintiff was escorted to the segregation unit. The Plaintiff did not appear injured and was not bleeding.

[42] Mr. Allain affirms that Defendant Bourque was not alone with the Plaintiff at any point during the Incident.

[43] Mr. Allain completed an Officer's Statement and Observation Report on September 16, 2010 which he affirms to be an accurate account of the Incident (attached as Exhibit 1 to Mr. Allain's affidavit). The Report confirms that the Plaintiff ignored the officers' directions to leave the healthcare unit after his demand to see a doctor was refused and is consistent in all material respects with Mr. Allain's description of the Incident in his affidavit.

[44] Mr. Allain affirms that he had received CSC training prior to the Incident and is aware that the standard for the use of force by CSC employees is to apply the least amount of force necessary to control a situation. Mr. Allain affirms his belief that his actions and those of Defendant Bourque during the Incident conformed to the CSC standard for use of force.

[45] Mr. Allain recalls working with Defendant Bourque on other occasions at Dorchester Penitentiary and does not recall any verbal confrontations or bickering between Defendant Bourque and the Plaintiff.

[46] Mr. Allain self-identifies as a black man and is well aware of and alive to racist comments. He does not recall hearing Defendant Bourque make racist comments during the time they worked together.

(3) Affidavit of Kelly Bourque affirmed October 21, 2022.

[47] Mr. Kelly Bourque (again, of no relation to Defendant Bourque) is employed by CSC. He has been posted to Dorchester Penitentiary since 2000. In August and September 2010, Mr. Bourque's duties included four-hour shifts in the healthcare unit.

[48] Mr. Bourque does not recall interacting with the Plaintiff prior to September 16, 2010. On that morning, Mr. Bourque was stationed in healthcare when Mr. Allain and Defendant Bourque escorted the Plaintiff into the healthcare unit. At that time, the Plaintiff was restrained with handcuffs in front of his body.

[49] The Plaintiff became agitated when he was not permitted to see a doctor and, as Defendant Bourque and Mr. Bourque were escorting the Plaintiff into the hallway between healthcare and the segregation unit, he began to resist and turned back towards healthcare. The Plaintiff was pushed against the door to the segregation unit as the officers attempted to regain control. Mr. Bourque states that there may have been other correctional officers involved in the Incident but that his focus was on the Plaintiff. The window in the door to the segregation unit gave way and Mr. Bourque observed the Plaintiff's shoulder, and possibly his head, go through the window. In Mr. Bourque's view, the amount of force used to push the Plaintiff against the door was moderate and he expresses surprise that the window broke.

[50] Defendant Bourque and Mr. Bourque gently took the Plaintiff to the ground and the Plaintiff ceased resisting. His restraints were repositioned behind his back. The Plaintiff did not appear injured and was not bleeding. At no point during the Incident was Defendant Bourque alone with the Plaintiff.

[51] Mr. Bourque completed an Officer's Statement and Observation Report on September 16, 2010 which he affirms to be an accurate account of the Incident (attached as Exhibit 1 to Mr. Bourque's affidavit). The Report confirms that the Plaintiff was escorted to the healthcare unit on September 16, 2010 by Defendant Bourque and Mr. Allain for his insulin injection and is consistent in all material respects with Mr. Bourque's description of the Incident in his affidavit.

[52] Mr. Bourque affirms that he had received CSC training on the use of force prior to the Incident. He is aware that the standard for officers is to apply the least amount of force necessary to control the inmate to ensure compliance. Mr. Bourque affirms his belief that both his actions and those of Defendant Bourque during the Incident conformed to this standard and training.

(4) Affidavit of Matthew Alward affirmed October 19, 2022.

[53] Mr. Matthew Alward has been employed by CSC since 2000 and, in September 2010, held the post of Correctional Manager at Dorchester Penitentiary.

[54] Mr. Alward affirms that, in August and September 2010, correctional officers were trained in the use of force and physical control of inmates. The training included "Arrest and Control" training that taught methods for the use of force and control of inmates. Correctional

officers were instructed to use the least amount of force on inmates necessary to ensure their compliance with institutional rules and officers' instructions. This general rule applied for all inmates, including those in segregation.

[55] Mr. Alward states that he is aware of the Incident and was involved in the use of force review, as indicated on the post-Use of Force Report completed by Defendant Bourque (also Exhibit A to Mr. Alward's affidavit). Mr. Alward affirms that, following his review of the use of force by correctional officers during the Incident, he concluded that all policies and procedures were followed by the officers. Mr. Alward maintains this opinion as at the date of his affidavit.

[56] Mr. Alward details the institutional process for escorting inmates from the segregation unit to healthcare. At all times, the escort was comprised of two correctional officers. If sufficient officers were not available, the movement of an inmate would be delayed. Before an inmate left their cell, restraints were applied around their wrists.

[57] Prior to a healthcare appointment for an inmate in segregation, healthcare staff and correctional officers would communicate to ensure healthcare was ready to receive the inmate. Generally, the call was initiated from the healthcare unit but, on occasion, officers in the segregation unit may have called healthcare. Ultimately, it was healthcare's decision whether staff was ready to receive an inmate. The escorting correctional officers would remain with inmate until the healthcare visit was complete. They would then escort the inmate back to the segregation unit. Again, a minimum of two correctional officers was required for the escort.



[58] Mr. Alward is familiar with the location of the Incident and affirms that there was a small corridor between the segregation and healthcare units at Dorchester on the date of the Incident. At each end of the corridor, there was a heavy steel door with a small window. The doors opened either electronically or by key. For safety reasons, door windows were made of a material that could break easily in emergencies to avoid potential complications, such as a hostage situation in an area that cannot not be entered.

(5) Affidavit of Jennifer Lorette affirmed October 20, 2022.

[59] Ms. Jennifer Lorette was employed by CSC as a registered nurse in the healthcare unit of Dorchester Penitentiary in August and September 2010. She provided medications to inmates, managed emergency situations and arranged clinics with doctors and nurses. Ms. Lorette was also responsible for documenting treatment and appointments.

[60] In her affidavit, Ms. Lorette sets out the process for non-emergency inmate appointments in the healthcare unit. She affirms that appointments for weekly treatments were automatically booked. For inmates in the segregation unit, correctional officers were given the appointment list but were required to wait for confirmation from healthcare that the inmate could be seen. Healthcare only received inmates from segregation when no other inmate was present. Once healthcare was ready, they would call the correctional officers in the segregation unit to inform them of the unit's readiness and a minimum of two officers would provide the escort.

[61] For diabetic inmates, nurses would verify the inmate's sugar levels and the inmate would self-administer their insulin. Each insulin injection was recorded by the nurse by writing their

initials on the inmate's chart. Ms. Lorette includes as Exhibit 1 to her affidavit the Plaintiff's Medical Administration Record for August 2010 which shows twice-daily insulin doses with the exception of three afternoon doses for which there are no nurse's initials. Ms. Lorette states that the absence of a nurse's initials does not necessarily mean that the Plaintiff did not receive his insulin injection as the nurse may have been otherwise occupied.

[62] Ms. Lorette acknowledges that insulin treatments could be delayed for many reasons. In such circumstances, a snack would typically be provided or the upcoming meal delayed. She affirms that the occasional delay in treatment generally has no effect on a patient's health and that the Plaintiff's glucose levels did not show significant change during August and September of 2010.

(6) Affidavit of Ansle John affirmed October 20, 2022.

[63] Mr. Ansle John is a legal assistant with the Department of Justice. As part of his duties, Mr. John has worked with counsel for the Defendants in this proceeding.

[64] Mr. John affirms that Defendant Bourque was cross examined by Plaintiff's counsel on May 24, 2022 on his affidavit dated May 16, 2022. Mr. John attaches a copy of the transcript of the cross examination as Exhibit A to his affidavit.

V. The Plaintiff's failure to respond to the Motion

[65] The Plaintiff agreed to resolve this action by way of summary trial on June 21, 2022. At the same time, the Defendants agreed to a timetable for the filing and disposition of the

Plaintiff's motion requesting the admission of possible new evidence and a response to questions refused during the cross examination of Defendant Bourque.

[66] The Plaintiff duly filed his motion, the Defendants responded to the motion and the Court issued an Order dismissing the motion. The Defendants then served and filed their Motion Record for judgment by way of summary trial within the agreed 10 days. However, the Plaintiff elected not to file responding materials. He was alerted to the expiry of the deadline for his Motion Record by the Court on November 14, 2022.

[67] In the absence of a responding Motion Record, there is no evidence before the Court substantiating the Plaintiff's claims.

## VI. Issues

[68] The issues before the Court are:

- A. Is this action suitable for disposition by summary trial?
- B. Has the Plaintiff established any or some of his claims against the Defendants?

## VII. Analysis

A. *Is this action suitable for disposition by summary trial?*

[69] Rule 216(5) governs the Court's discretion as to whether to proceed by way of judgment for summary trial. The Court shall dismiss a motion for summary trial if "the issues raised are not suitable for summary trial" or if "a summary trial would not assist in the efficient resolution of the action". However, the Court may grant judgment, either generally or on an issue, if it is "satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved,

the complexities of the issues and the existence of conflicting evidence,” unless it would be unjust to do so (Rule 216(6)).

[70] The words of Rules 216(5) and (6) are to be interpreted and applied broadly, with full consideration of the principle of proportionality inherent in Rule 3 and the principles of fairness, access to affordable adjudication and timeliness (*ViiV Healthcare Company v Gilead Sciences Canada, Inc.*, 2021 FCA 122 at paras 18, 37 (*ViiV Healthcare FCA*)).

[71] The Court has identified a number of factors relevant to its assessment of the suitability of a party’s motion for summary trial within the parameters of Rules 3 and 216:

- a) The complexity of the matter;
- b) The urgency of the matter;
- c) The cost of taking the case forward to a conventional trial in relation to the amount involved;
- d) Whether the litigation is extensive;
- e) Whether the summary trial will take considerable time;
- f) Whether credibility is a crucial factor and whether deponents of conflicting affidavits have been examined;
- g) Whether the summary trial will involve a substantial risk of wasted time and effort;
- h) Whether the summary trial will result in litigating in slices; and
- i) Whether the parties have consented to summary trial

(*Wenzel Downhole Tools Ltd. v National-Oilwell Canada Ltd.*, 2010 FC 966 at para 37 (*Wenzel*); *Tremblay v Orio Canada Inc.*, 2013 FC 109 at para 24 (*Tremblay*); *Ark Innovation Technology*

*Inc. v Matidor Technologies Inc.*, 2021 FC 1336 at paras 17-19 (*Ark Innovation Technology*).  
*Wenzel and Tremblay* cited with approval by the FCA in *ViiV Healthcare FCA* at para 38).

[72] The moving party, the Defendants in the present case, must demonstrate that a summary trial is appropriate (*Janssen Inc. v Apotex Inc.*, 2022 FC 107 at para 51). In order to meet this requirement, the Defendants have filed with their Notice of Motion a comprehensive set of affidavits from the main actors implicated in the Plaintiff's claims, the transcript of the Plaintiff's cross-examination of Defendant Bourque, and written representations in support of the Motion.

[73] I agree with the Defendants that the present case is not complex. The factual issues in dispute are defined and the applicable legal questions and principles of negligence, duty of care, and causality are well established. In addition, this proceeding has suffered serious delay and, in my view, the path to a full, *viva voce* trial is not clear or straightforward.

[74] The parties' differing accounts of the timely administration of the Plaintiff's insulin injections and of the Incident raise some issues of credibility. The resolution of those issues in any form of trial of this action centres on evidence from the Plaintiff and Defendant Bourque, the main protagonists. Prior to the scheduled June 2022 trial, the Plaintiff agreed that Defendant Bourque's evidence would be given by affidavit. Defendant Bourque's affidavit was served on the Plaintiff on May 17, 2022 and the Plaintiff cross-examined Defendant Bourque on his affidavit on May 24, 2022. The transcript of the cross examination is before the Court.

[75] The Plaintiff had the opportunity to present his evidence in support of the allegations and claims described in his Statement of Claim. He chose not to do so. While the Plaintiff's affidavit evidence may have presented different versions of the facts surrounding the administration of his insulin injections in September 2010 and the Incident, I find that any credibility issues in this case are issues that could have been, and can be, resolved in the course of a summary trial. Rule 216(6) contemplates a summary trial regardless of the existence of conflicting evidence as long as such a trial would not be unjust. I see no unfairness to either party in the resolution of this proceeding by summary trial because of potential credibility concerns. Such a course of action is not unjust.

[76] In addition, the parties agreed to a summary trial in writing as the way forward after the collapse of the trial dates in June 2022. The Plaintiff has been represented by counsel for a number of years and was afforded a fair opportunity to consider the Defendants' proposal of a motion for summary judgment or summary trial. He agreed to proceed with a summary trial after cross-examining the Defendants' main fact witness, Defendant Bourque.

[77] I find that the Defendants have demonstrated that this action is suitable for summary trial in writing. Although the parties' consent is not determinative, it is an important factor in my consideration of whether it is just to proceed by summary trial (*Ark Innovation Technology* at para 18). Equally important is the fact that a summary trial provides the most expeditious process to resolve this long outstanding action. In my opinion, the converse decision and the resumption of the process leading to a full trial will entail further delay in what is already a 10-year litigation odyssey. The Plaintiff's decision to forego a response to the Defendants' Motion for summary

trial does not alter my conclusion. I am satisfied that the prerequisites in the Rules for summary trial, considered in light of Rule 3, are met and that I am able to assess and determine the Motion and this action fairly and justly while minimizing delay, cost and uncertainty.

B. *Has the Plaintiff established any or some of his claims against the Defendants?*

[78] Although the Defendants, as the moving party, must demonstrate that a summary trial is appropriate, ultimately the Plaintiff bears the onus of establishing the merits of the summary trial, in this case the issues in dispute in the underlying action, with clear, convincing and cogent evidence on a balance of probabilities. (*FH v McDougall*, 2008 SCC 53 at paras 40, 45-46; *ViiV Healthcare Company v Gilead Sciences Canada, Inc.*, 2020 FC 486 at para 20; *aff'd ViiV Healthcare FCA* at para 44).

[79] At the obvious risk of repetition, the Plaintiff has filed no evidence in support of the allegations set out in his Statement of Claim. The absence of evidence is fatal to his claims of negligence on the part of the Defendants and to his consequential claims for damages.

[80] I nevertheless carefully considered the Defendants' evidence in the affidavits filed with their Notice of Motion, largely to inform my analysis of the suitability of adjudicating this action by summary trial but also to highlight the importance of detailed responding evidence from the Plaintiff. The Defendants' evidence directly addresses those aspects of the Incident and the administration of the Plaintiff's insulin injections at Dorchester in August and September 2010 relevant to the Plaintiff's claims. I also considered the questions and answers from the cross-examination of Defendant Bourque conducted by the Plaintiff's counsel.

[81] Ms. Lorette's evidence speaks to the regular administration of the Plaintiff's required insulin injections and the circumstances in which an insulin treatment may be delayed.

Ms. Lorette, a registered nurse working at Dorchester, also affirms that the Plaintiff's glucose levels did not show any significant change during August and September 2010.

[82] The Defendants' remaining evidence focusses on the circumstances of the Incident, as relayed by Defendant Bourque and Messrs. Allain and Bourque. The Defendants' evidence also explains the normal process for inmates in the segregation unit at Dorchester Penitentiary to be summoned to the healthcare unit and the required escort at all times of two correctional officers (Mr. Alward). Defendant Bourque, Mr. Allain and Mr. Bourque each describe the Incident and the use of force to restrain the Plaintiff. Their descriptions are materially consistent with each other, differing only due to their respective roles and perspectives of the Incident and in some minor details. In his affidavit, Mr. Alward provides a description of the CSC training in use of force measures by correctional officers at Dorchester at the time of the Incident, his conclusion that the three officers complied with all CSC policies and procedures during the Incident, and the nature of the materials used in door windows at Dorchester.

[83] The transcript of Mr. Bourque's cross-examination reveals no material contradictions in or omissions from the narrative in his affidavit. Counsel for the Plaintiff highlighted minor differences or omissions among Defendant Bourque's affidavit, the Use of Force Report and the Officer's Statement and Observation Report attached to his affidavit, and the answers he provided on cross-examination. However, I find that the differences and omissions do not undermine Defendant Bourque's description of the Incident, nor do they contradict the facts set



out in the affidavits of Messrs. Allain and Bourque. I also find that the cross examination revealed no contradictions in Mr. Bourque's answers to questions regarding his role in the timely administration of the Plaintiff's insulin injections.

[84] In conclusion, I find that the Plaintiff has failed to establish negligent conduct by CSC or its employees, including Defendant Bourque. Accordingly, there is no liability on the Defendants in this action and no basis for any award of damages.

[85] Therefore, this action must and will be dismissed in its entirety.

#### VIII. Costs

[86] I see no reason for departing from the general rule of awarding costs in favour of the successful party and will award costs to the Defendants. Taking all the circumstances of this proceeding into account, including the fact that the Plaintiff is an inmate with limited means of paying a costs award, and considering the factors set out in Rule 400(3), a reasonable all inclusive amount of costs for this action is \$1,000.00 inclusive of fees, disbursements and applicable taxes.

**JUDGMENT IN T-1016-12**

**THIS COURT'S JUDGMENT is that:**

1. The Defendants' motion for summary trial is granted.
2. The Plaintiff's action is dismissed.
3. Costs in the amount of \$1,000.00, inclusive of all fees, disbursements, and applicable taxes, are awarded to the Defendants.

"Elizabeth Walker"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1016-12

**STYLE OF CAUSE:** SERGE EWONDE v HIS MAJESTY THE KING IN  
RIGHT OF CANADA AND MARC BOURQUE

**MOTION IN WRITING FOR SUMMARY TRIAL PURSUANT TO RULES 213 AND 216  
OF THE *FEDERAL COURTS RULES*, CONSIDERED AT OTTAWA, ONTARIO**

**JUDGMENT AND REASONS:** WALKER J.

**DATED:** APRIL 13, 2023

**WRITTEN REPRESENTATIONS BY:**

Helene Robertson  
Christian Holt

FOR THE DEFENDANTS

**SOLICITORS OF RECORD:**

Todd Sloan Legal Services  
Barrister and Solicitor  
Kanata, Ontario

FOR THE PLAINTIFF

Attorney General of Canada  
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FOR THE DEFENDANTS