Date: 20081229

Docket: T-62-06

Citation: 2008 FC 1416

Toronto, Ontario, December 29, 2008

PRESENT: Madam Prothonotary Milczynski

BETWEEN:

BARRY CARR

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] The issues in this action are whether Corrections Services Canada (CSC) has breached any duty to the Plaintiff, Mr. Barry Carr in respect of the injuries he suffered while in custody, and if so, what damages might reasonably be claimed.

[2] For the reasons set out below, I find in favour of Mr. Carr.

FACTS

[3] On June 23, 2005, Mr. Carr was assaulted by an unknown assailant in the Millhaven Assessment Unit (MAU), which is part of the Millhaven Institution ("Millhaven"), a maximum security federal penitentiary in Bath, Ontario. Individuals sentenced to federal custody are sent to the MAU to be assessed and classified as to what security level is appropriate for their prison term and what penitentiary best matches the inmate's rehabilitation needs. Therefore, the inmates in the MAU range from the most violent offenders to those inmates incarcerated for less serious offences.

[4] Mr. Carr was 35 years old at the time of the assault and was serving a three year sentence. He has been imprisoned in the past and was familiar with the "prison code" for inmates, which are unwritten rules of behavior among inmates that they are loathe to disobey because of the serious repercussions that can follow.

[5] On the evening of the assault, Mr. Carr went to the recreation area, which has telephones available for inmates. Correctional officers on the ground do not enter this area because of safety concerns for the officers, but there is an officer assigned to the observation gallery overlooking the recreation area.

[6] Mr. Carr waited in the queue for his turn to use the telephone for one and a half hours. When a telephone became available and it was Mr. Carr's turn, the assailant tried to enter the telephone area at the same time to use the telephone before Mr. Carr. Profanities were exchanged between Mr. Carr and the assailant and they bumped shoulders while entering the telephone area at the same

time. The assailant backed off when challenged by Mr. Carr, who was therefore able to use the available telephone. The assailant remained in the telephone area, used the next available telephone and finished his conversation and left before Mr. Carr was done with his conversation. At the time, Mr. Carr did not consider the confrontation to be serious, and felt that given the "prison code", it would have made his status in the prison "deplorable" had he given up his place in line to use the telephone and "ratted" to the staff about the situation.

[7] In order to enter the telephone area from the recreation area where the inmates wait for telephones to become available, a corrections officer in a nearby post called the S Control Module, must press a button to open a barrier separating the two areas. It was revealed during the hearing that Officer Bill Jugloff was the corrections officer on duty in the S Control Module at the time of the incident. It was also determined at the hearing that the button that opens the barrier controlling access to the telephone area is located on the opposite side to where an officer in the S Control Module could see the barrier to the telephone area. Consequently, Officer Jugloff had to turn his back to the telephone area when opening the barrier and thus might not be able to observe how many inmates entered or what might transpire between them.

[8] When Mr. Carr finished his call, he left the telephone area to find the next inmate in line for the telephone. Mr. Carr returned to the recreation area. Upon entering the recreation area, he noticed a group of inmates, and the assailant stepped out from this group and attacked Mr. Carr. The assailant stabbed Mr. Carr with a knife-like weapon about 12 inches in length. Five weapons were

discovered the day after the assault in the recreation area, of which one was a weapon fabricated from broken plastic 32 cm in length and another was 27 cm in length.

[9] Officer Marshall heard shouting and opened the window. When Officer Marshall observed the assailant on top of Mr. Carr, he gave a direct order to the inmates to stop. The assailant immediately ran into the gym area while Mr. Carr remained on the floor. Mr. Carr was then told by Officer Marshall to proceed to what is called S Control Barrier and then was escorted to Health Care. Mr. Carr reported after the assault that it felt like the assault lasted one or two minutes. The timeline of a videotape that recorded the area, just out of frame to where the assault took place, indicates that the assault lasted 38 seconds.

[10] Mr. Carr received a puncture wound to the left buttock that required two stitches and other superficial abrasions to his arms. Mr. Carr testified to having severe pain from the stabbing and claims that he has suffered from Post Traumatic Stress Disorder (PTSD) as a result of the assault. Mr. Carr saw three mental health professionals within two years following the assault and all three testified in court about the impact the assault has had on Mr. Carr.

[11] It is important to note that at the time of the assault, it was not possible to be observing the recreation area at all times for two reasons. First, the officer in the S Control Module must turn his or her back to press the button to open or close the barrier to the telephone area. Second, at the time of the assault there were no cameras in the telephone room and not all cameras in the recreation area could be monitored at the same time.

LEGISLATION

[12] The relevant legislation governing liability against the Crown is found in the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, (CLPA) as follows:

> Liability
> 3. The Crown is liable for the damages for which, if it were a person, it would be liable
> (*a*) in the Province of Quebec, in respect of
> (i) the damage caused by the fault of a servant of the Crown, or
> (ii) the damage resulting from the act of a thing in the custody or owned by the Crown or by the fault of the Crown as custodian or owner; and
> (*b*) in any other province, in respect of
> (i) a tort committed by a servant of the Crown, or
> (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.
>
> […]
>
> Liability for acts of servants
> 10. No proceedings lie against the Crown by virtue of subparagraph 3(*a*)(i) or (*b*)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

[13] The purpose of the federal corrections system is set out in section 3 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA):

> Purpose of correctional system
> 3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
> (*a*) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
>
> (*b*) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

[14] Certain guiding principles in order to achieve the above purpose are found in subsection 4(2) and 4(e) of the CCRA:

> 4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are
>
> […]
>
> (*d*) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;
>
> (*e*) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;

DISCUSSION

Liability of CSC

[15] Both parties agree that CSC owed Mr. Carr a duty to take reasonable care for his safety while in custody. The issue is whether the acts or omissions of CSC fall below the standard of conduct of a reasonable person of ordinary prudence in the circumstances. The question is whether in the circumstances and on the balance of probabilities, was the harm to Mr. Carr from other inmates reasonably foreseeable so that CSC knew or should have known of that risk of danger. (*Coumont v. Canada (Correctional Service)*, 77 F.T.R. 253, 47 A.C.W.S. (3d) 1196, [1994] F.C.J. No. 655 (QL) at para. 38-39; *Miclash v. Canada*, 2003 FCT 113, 227 F.T.R. 116, [2003] F.C.J. No. 155 (QL) at para 37; and *McLellan v. Canada (Attorney General)*, 2005 ABQB 486, 382 A.R. 287, [2005] A.J. No. 784 (QL) at para. 38; *Bastarache c. Canada*, 2003 FC 1463, 243 F.T.R. 274, 127 A.C.W.S. (3d) 658, [2003] F.C.J. No. 1858 (QL) at para. 23).

[16] The requirement of reasonable foreseeability is satisfied if there are pre-indicators of violence, that is events or circumstances that make more likely the possibility of violence. Animosities among inmates or threats of violence are examples of pre-indicators of violence. An inmate who feels his or her safety is threatened by such animosity may notify prison officials by filing an incompatibility report. The definition of "incompatible" is set out in Commissioner's Directive 568-07, which states that incompatibles are "offenders who, for whatever reason or situation, pose a threat to the safety and well-being of each other and hence may pose a safety risk to the institution and to others." A pre-indicator of violence may, however, be established in other ways.

[17] While case law cited by CSC indicates that there is no breach of duty for failure to prevent a "quick, planned and violent attack" (*Hodgin v. Canada (Solicitor General)*, 218 N.B.R. (2d) 164, 91 A.C.W.S. (3d) 961, [1999] N.B.J. No. 416 (QL) (N.B.C.A.) at para. 3), if pre-indicators of violence exist or if violence is otherwise predictable, then it is the obligation of the CSC to take reasonable steps to ensure the safety of the at risk inmate (*Coumont*, above, at paras. 38-39; *Miclash*, above, at para. 37). Given that prisons have an inherent potential for violence and that CSC cannot be guarantors of the safety of inmates, security measure need not be perfect nor infallible (*Miclash*, above, at para. 40; *Bastarache*, above, at para. 49). They must, however, be adequate and reasonable (*Corner*, at para. 32; *Bastarache*, above, at para. 49). The circumstances of the institution and the inmates as well as the existence of pre-indicators are all relevant in determining the adequacy of supervision and whether the CSC have fulfilled their obligation (*McLellan*, at para. 39).

[18] CSC argues that in the present case there were no pre-indicators that would alert the prison staff that violence would occur. Mr. Carr did not know the assailant and they were not listed as incompatible. The verbal altercation and bumping of shoulders between the two in the telephone area went unnoticed. Finally, the attack occurred quickly, 38 seconds, before CSC could act to prevent it. Rather, CSC claims to have taken reasonable measures after the attack had commenced to protect Mr. Carr and in trying to apprehend the assailant.

[19] That CSC was not aware of an incompatibility between the two inmates, however, is not determinative of liability. In *Miclash*, above, the Court found CSC liable despite there being no incompatibility between the inmates. The Court stated that undue reliance should not be placed on the fact that two inmates are not listed as incompatible. The court in *McLellan*, above, found that despite the plaintiff being unaware of the animosity, CSC was liable because there were pre-indicators of violence that CSC should have acted upon.

[20] That Mr. Carr did not advise CSC that he feared for his safety does not mean there were no pre-indicators. In this case, there was animosity between Mr. Carr and his assailant immediately prior to the assault. Mr. Carr testified that the two exchanged profanities and that they bumped shoulders when the assailant tried to push in front of him in the line for the telephones. Mr. Carr's reasons for not reporting this incident are understandable. There was no time for him to do so, and it was not unreasonable for Mr. Carr to assume that the matter would not escalate further.

[21] One of the other guards on duty in the observation gallery overlooking the recreation area where the assault took place filed an affidavit and testified at trial. Officer Dustin Marshall testified that the profanities exchanged between Mr. Carr and the assailant if exchanged outside a prison environment would not be significant, but may lead to violence if exchanged within a prison setting. Prison correctional officers are on alert for such verbal outbursts as indicators of potential violence. Officer Marshall also stated, however, that he was not within sight or hearing of the initial altercation because the telephone area is immediately underneath his observation post. Thus, Officer Marshall's testimony as to not noticing the verbal altercation between Mr. Carr and his assailants does not directly contradict Mr. Carr.

[22] Both Officer Crisp and Officer Marshall agreed that the correctional officer stationed at the S Control Module, Officer Bill Jugloff, had the best vantage point to observe the verbal altercation and bumping of shoulders between Mr. Carr and the assailant in the telephone area. There was no affidavit by Officer Jugloff submitted into court; nor was the report that he had written about the incident. As well, CSC did not call Officer Jugloff to testify. Officer Crisp only read Officer Jugloff's report but did not interview him. Without the benefit of evidence from Officer Jugloff, who would likely have noticed a verbal altercation and physical contact in the telephone area, I must give weight to Mr. Carr's testimony that the first incident in the telephone area was of sufficient loudness or otherwise noticeable for a correctional officer in S Control Module to have observed.

[23] Shortness of time frame is also not necessarily a bar to liability since correctional officers who recognize or who ought to recognize pre-indicators of violence have an obligation to take

reasonable steps to intervene and protect the at-risk inmate. The events in *Miclash*, above, also occurred in a short time frame, but CSC was held liable because there were pre-indicators of violence. In that case, the correctional officer should have noted pre-indicators of violence and should have taken immediate action to protect the inmate. In other cases such as *Corner*, above, where a short time frame did exclude liability, this was only because there were no pre-indicators.

[24] This current case is not a case where it was a random act of violence without warning: there is evidence of pre-indicators of violence. The fact that corrections officers responded immediately when the assault occurred was too late. CSC had a duty to take steps to ensure the safety of Mr. Carr once CSC has notice of the existence of a risk to Mr. Carr's safety.

[25] Officer Marshall stated in his testimony that turnover is high at MAU given that the average time an inmate stays is from four to six months. Unlike a regular prison where staff can get acquainted with the inmate population, the staff are often unable to identify which inmates are more violent. Officer Marshall agreed that while there are often verbal altercations that do not lead to violence, he also stated that in such a situation there is "nothing you can do but be extra vigilant… you just have to make sure that you are watching."

[26] Furthermore, the static security measures in place were inadequate in providing a reasonable amount of protection for inmates. Use of the five telephones in the institution is limited because of their scarcity relative to the large prison population. There is a high demand to use these telephones, as evidenced by the fact that Mr. Carr waited in line for over an hour to use one. In a prison

environment with inmates who have not yet been classified as warranting minimum, medium, or maximum security and governed by a prisoner hierarchy, it should have been obvious to CSC that having prisoners wait around for a telephone would create highly charged situations where tempers could flare up.

[27] The prison officials who testified did not seem to be completely clear on their approach to this area. Officer Dustin stated his preference for a “one-in, one-out” rule with regard to the using the telephone area. In her testimony, however, Officer Crisp stated that the prison has nothing to do with establishing the procedure for using the telephones and in effect, the inmates regulate priority of access to the telephones among themselves. She stated that there is no “one in, one out” rule whereby inmates are only let into the telephone area if there is a telephone free for them to use. Instead, she suggested that inmates might obtain priority access to the telephones solely based on their position in the hierarchy of the inmate population.

[28] Officer Crisp also testified that CSC is ultimately unable to control the number of offenders who go into the telephone area. This lack of control is exacerbated by the fact that the correctional officer in the S Control Module must turn his or her back on the entrance to the telephone area in order to press the button to open and close the barrier. In so doing, the officer is unable to adequately monitor how many people enter the telephone room at any one time. If more people enter than there are available telephones, there is the potential for conflict given the high demand for telephones and lack of surveillance. This absence of consistent or set policies or procedures for

telephone use in combination with the lack of adequate surveillance of the telephone area is a breach of the duty of care.

[29] The lack of camera surveillance is also an indication of inadequate precautions. At the time of the first incident between the two inmates in the telephone area, there was no surveillance camera. Moreover, while there are cameras in the area of the assault, not all cameras would broadcast to the observation gallery since there are only three monitors for four cameras. Adequate security would warrant that an operating camera would broadcast events in the area where the assault took place to the observation gallery so as to keep correctional officers informed of potential problems.

[30] Furthermore, what is recorded is only that which is shown on the monitor that a correctional officer in the observation gallery is actually viewing. Thus, in this case, there is no direct recording of the initial altercation or the assault to aid in identifying the assailant or what actually occurred. These inadequate static security features made it incumbent on the CSC to watch for situations of potential conflict, whether reported or not. This inability to monitor key areas where inmates are able to move freely in this highly charged environment is also a breach of the duty of care.

[31] I find that CSC breached its duty of care when it failed to take reasonable steps, in light of pre-indicators of violence, in both its static and dynamic security to prevent the assault on Mr. Carr.

Damages

[32] Three mental health professionals interviewed Mr. Carr within two years after the assault. Mr. Carr was first referred to a psychologist, Dr. Bryan Cassells, in late August 2005, approximately two months following the assault, "to address issues arising from being stabbed at MAU in June, 2005 and concerns regarding community relationships" (Psychological/Psychiatric Assessment Report dated January 26, 2006). Mr. Carr was also referred to Dr. Jim Cheston, a contract psychologist with the Bath Institution, for a "Psychological Risk Assessment Update" for his parole officer. Mr. Carr was referred to a psychiatrist, Dr. Mikhail Epelbaum, because he was released from prison on parole without a supply of medication and needed an assessment for the purposes of treatment during his stay in Hamilton, Ontario on parole. Dr. Epelbaum was accepted as an expert in psychiatry.

[33] All three mental health professionals testified in Court and provided reports finding that Mr. Carr suffered from post traumatic stress disorder. They were unanimous in attributing the assault to Mr. Carr's symptoms of PTSD. Mr. Carr also testified in court about the impact on him mentally. I found all of these witnesses to be credible and their reports and testimony establish on the balance of probabilities that Mr. Carr suffers from PTSD as a result of the assault (See *Blackwater v. Plint*, [2005] S.C.J. No. 59, 2005 SCC 58 at para. 78).

[34] I find that Mr. Carr did not overstate the impact of the assault and his PTSD symptoms to the Court. The reports from the three mental health professionals suggest Mr. Carr worked to address the on-going difficulties he was experiencing after the assault, thereby mitigating his

anxiety, sleep-disturbances, flashbacks and his functioning in the prison community. In fact, through psychological counseling, Mr. Carr has made progress to understand how his reaction to traumatic experiences in general has caused difficulties for him in the past.

[35] At trial, CSC suggested there was no proof for Mr. Carr's claim of "on-going pain and suffering as a result of the assault", or a claim for PTSD as a result of the assault. CSC pointed to three areas that negated Mr. Carr's claims. One, CSC argued that Mr. Carr had not consulted with the mental health professionals for PTSD specifically. Two, that there was a lack of a formal diagnosis of PTSD according to the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM IV). Three, that previous traumas in Mr. Carr's life were the cause for the symptoms that he claimed were PTSD and that it would be too difficult to differentiate the cause of these symptoms for the purposes of assessing damages. I reject these arguments.

[36] First, despite Mr. Carr being referred to all three mental health professionals for different purposes, the impact of the assault was a central issue that came up in each interview with Mr. Carr. Dr. Cheston examined Mr. Carr to evaluate the likelihood of recidivism and to conduct other evaluations consistent with release from penitentiary. Dr. Epelbaum was following up on Mr. Carr's post-release medication use, which was initially prescribed following the assault. Despite the different purposes for the interviews with Dr. Epelbaum and Dr. Cheston, it is significant that the impact of the assault featured prominently and the need to address the presenting symptoms of PTSD. These considerations support the legitimacy of Mr. Carr's PTSD claims because it is realistic for his symptoms of PTSD to exist among many differing concerns and challenges.

[37] Dr. Cassels was specifically seen by Mr. Carr because of the difficulties he was having after the assault. His comments demonstrate the detrimental impact the assault was having on Mr. Carr's ability to function daily in the prison community:

> "[…] When we started counseling with Mr. Carr, his sleeping was severely disrupted. He was experiencing nightmares, flashbacks and those sorts of things. Other than working out and going for some meals, he was virtually doing nothing but hiding out in his cell and occupying himself with activities that would just help him escape from the day-to-day, humdrum situation, and any memories he might have had of the events at Millhaven."

[38] Yet, CSC contended that the lack of a formal diagnosis of PTSD and insufficient evidence that treatment was oriented to the on-going pain and suffering from the assault meant that the Mr. Carr's claims were unfounded. I have difficulty with this argument. The expectation that evidence of mental illness comes to the courtroom without co morbid factors (which will be discussed below), and with a clean and unqualified rigid diagnosis is not realistic or fair to claimants. The three mental health professionals were convincing that a less than formal approach does not in any way suggest that their findings of PTSD are incorrect.

[39] Second, in any case, that there was a lack of formal diagnosis of PTSD is not evident. CSC contended that the lack of an investigation for malingering was a crucial element of a PTSD diagnosis that Dr. Epelbaum failed to perform. I accept, however, Dr. Epelbaum's expert testimony that the fact that the assault happened satisfied him that the claims relating to PTSD were legitimate. Dr. Epelbaum made his diagnosis of PTSD on the basis of his clinical interview with Mr. Carr. Furthermore, the symptoms of Mr. Carr and their improvement with treatment are in keeping with the normal diminishing over time of symptoms associated with chronic PTSD. Mr. Carr's gradual

improvement is shown by the fact that he was prescribed medication in the aftermath of the assault, but Dr. Epelbaum felt that Mr. Carr's improved ability to cope with the PTSD was sufficient enough as to merit trying to discontinue medication.

[40] Finally, CSC argued that Mr. Carr's anxiety symptoms may have partially been the result of previous traumas and incidents This argument suggests that claimants with previous traumas and mental illness could be precluded from damages related to PTSD because the differentiation of symptoms is difficult. This is an undesirable outcome. Symptoms must be differentiated to the best of the court's ability. Additionally, there were symptoms of Mr. Carr's that could easily be attributed directly to the assault, such as, the nightmares, the flashbacks, the anxiety of being in large crowds and the inability to cope generally day to day following the assault.

[41] The Supreme Court of Canada in *Blackwater v. Plint*, above, set out how to assess damages when a plaintiff has suffered earlier traumas. Chief Justice Beverly McLachlin stated at paragraphs 78-81:

> It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortuous and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant's is fully liable for that damage. The rules of damages then consider what the original position of the Plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: Athey. […]

> At the same time, the defendant takes his victim as he finds him - the thin skull rule.
>
> […]

[42] Mr. Carr has a history of traumas and related anxieties pre-dating the assault. The thin skull rule normally means that a defendant will have to compensate more in damages where an individual or group was impacted more seriously because of their pre-existing vulnerability. Despite the psychologically difficult prison environment, Mr. Carr responded to treatment and learned better coping mechanisms that will hopefully assist him in the future. The intent of a damages award is to return a plaintiff to the position had the assault never occurred. In Mr. Carr's case, his treatment seems to have been quite effective to help reaching this goal so that Dr. Epelbaum, almost two years later, found the elements of PTSD to be mild.

[43] Mr. Carr has not shown that his past traumas impeded his recovery. To his credit, he appears to have used the difficulties from the assault as an opportunity to learn more positive responses to challenges in his life. This does not suggest that earlier traumas did not make the period after the assault particularly painful and difficult. Even though it was clear that Mr. Carr needed mental health assistance as soon as possible following such a terrifying event, Mr. Carr did not see a mental health professional until two months following the assault. There is no mention of his emotional state in the CSC medical report following the assault despite the psychological impact being more detrimental and devastating than the physical scars. CSC contributed to further damages when they were not alive to the possibility that Mr. Carr would experience PTSD symptoms that needed immediate assistance.

[44] Counsel for both parties argued various CSC cases of negligence damages that I have considered. I do find, therefore, that Mr. Carr is entitled to $12,000.00 exclusive of costs for pain and suffering and for damages as he continues to deal with symptoms of PTSD, albeit mild at this point.

JUDGMENT

THIS COURT ORDERS that Correctional Services Canada be held liable to Mr. Carr in the amount of $12,000.00 plus costs.

"Martha Milczynski"
Prothonotary

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-62-06
STYLE OF CAUSE:	BARRY CARR v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	January 29, 2008
REASONS FOR JUDGMENT AND JUDGMENT :	MILCZYNSKI P.
DATED:	December 29, 2008

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