
CANADA / JUDGMENT

Joseph v. Meier

2020 BCSC 778

COURT

Supreme Court of British Columbia

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2020 BCSC 778 Joseph v. Meier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Joseph v. Meier,

2020 BCSC 778

Date: 20200522

Docket: S17231

Registry: Smithers

Between:

Irene Joseph

Plaintiff

And

Darrin Meier and the Attorney General of Canada

Defendants

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for Plaintiff:

I. Lawson

Counsel for Defendants:

C. MacEachern

R. Hill

Place and Date of Trial:

Smithers, B.C.

November 27-29, 2019

December 5 and 6, 2019

January 16, 2020

Place and Date of Judgment:

Smithers, B.C.

May 22, 2020

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Introduction

- [1] Ms. Joseph seeks damages against Darrin Meier, a Constable with the Royal Canadian Mounted Police, and the Attorney General for Canada. Her claim arises out of events which took place December 6, 2014 when she had been shopping at Mark's Work Wearhouse in Smithers, British Columbia. She says that she received injuries when Cst. Meier improperly detained and arrested her. She argues that he committed the torts of false arrest, false imprisonment and assault and battery as well as breaches of her Charter rights.
- [2] The defendants say that Ms. Joseph was properly detained and properly arrested for theft.
- [3] They argue that the action names incorrect defendants. Pursuant to the Police Act, R.S.B.C. 1996, c. 367, they say that the Minister of Justice of British Columbia is jointly and severally liable for any torts committed by provincial constables in the performance of their duties in British Columbia. They argue that the only appropriate defendant is that Minister. They plead and rely on ss. 11 and 21 of the Police Act.
- [4] They say that in any event, Cst. Meier had reasonable grounds to believe that the plaintiff had shoplifted and he was justified in arresting the plaintiff for theft. He was authorized to arrest and detain the plaintiff without warrant and to use as much force as necessary for that purpose. The defendants plead and rely on ss. 25, 27 and 495 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. They deny that Cst. Meier used excessive force in arresting the plaintiff and say that any force used by him was reasonable and justified in law.
- [5] They deny that he violated any of the plaintiff's rights under the Charter, as alleged or at all. They argue that if any of her Charter rights were breached, then damages are not an appropriate remedy under s. 24 of the Charter.
- [6] The defendants argue that if the plaintiff suffered any injury, loss, damage or expense they were not caused by Cst. Meier's actions.
- [7] They say that any injury suffered by her could have been avoided had she not been negligent with respect to her own actions and safety.

Issues

- [8] This action raises the following issues:
 - 1. Did Cst. Meier have grounds to arrest Ms. Joseph/ does he come within the defence afforded by s. 25 of the Criminal Code?
 - 2. If not, has Ms. Joseph proven the alleged torts?
 - 3. If so, what injuries did Ms. Joseph receive? What damages are appropriate?
 - 4. Has Ms. Joseph established breach of her Charter rights? What damages are appropriate?

5. Do sections 11 and 21 of the Police Act apply? Has Ms. Joseph brought action against the wrong parties?

The Evidence

- [9] Much of the evidence is not contentious. On December 6, 2014 Ms. Joseph went shopping at Mark's Work Wearhouse. She was 61 years old and used a walker for mobility. She had a fused left ankle and various chronic medical complaints including chronic pain.
- [10] At the store she saw another younger woman that she recognized from earlier dealings. They were shopping in the same area of the store and speaking to each other. The store manager Tara Laughlin thought that they were together. Ms. Laughlin saw the younger woman put a pink scarf into her bag. She confronted them. The younger woman pulled the scarf from her bag and threw it down before she ran from the store. Ms. Joseph told Ms. Laughlin that she had a scarf around her neck that she was buying.
- [11] In the meantime, at Ms. Laughlin's request, another staff member had called police. Ms. Laughlin also spoke with dispatch in a second call. Dispatch relayed information to Cst. Meier. He was told that there were two suspects, the younger woman who had run from the store and an older woman (Ms. Joseph) who was still in the store. He decided to attend at the store rather than pursuing the woman who had fled. When he arrived, Ms. Joseph was in line to pay at the cash register. Ms. Laughlin met him to provide information.
- [12] Cst. Meier waited with Ms. Laughlin while Ms. Joseph made her purchases. As she left the store he told Ms. Joseph that he wanted to talk with her. She refused to stop or provide information to him. She repeatedly told him that she had done nothing wrong and did not need to talk to him. Cst. Meier called by radio for his partner to attend to provide backup.
- [13] Meanwhile, Cst. Meier decided to place Ms. Joseph in handcuffs. She resisted, turning away from him as he tried to take her arms back for cuffing, holding her hands clasped in front of her. Cst. Meier decided to take her to the ground. On the ground Ms. Joseph continued to resist. She was laying on her stomach. Her hands were clasped in front. Cst. Meier was on top of her, trying to pull her arms out to cuff them. They continued to struggle. Cst. Meier decided to stop the struggle without handcuffing Ms. Joseph. He said "enough" and stood up. He says he helped her to her feet. She says she got up on her own. At approximately the same time, Cst. Meier's partner arrived. Cst Meier searched Ms. Joseph's belongings and cell phone. He found no stolen merchandise. She was released. She received injuries in the struggle.

- [14] Cst. Meier says that initially he told Ms. Joseph that she was detained on suspicion of theft. Ms. Joseph would not speak with him about it, telling him that she had done nothing wrong. She turned to walk back into the store. He then told her that she was under arrest for theft and moved to handcuff her. Ms. Joseph says that she was not told of her detention or arrest or the reason for it. However in cross-examination she acknowledged that he told her that he thought she had some things in her bag that she had not paid for.
- [15] I am satisfied that Cst. Meier said something to Ms. Joseph about shoplifting or theft. That caused Ms. Joseph to try to return to the store. I am not satisfied that he told her clearly that she was detained for theft.
- [16] As Ms. Joseph tried to re-enter the store and refused to stop and talk to him, Cst. Meier decided to handcuff and arrest Ms. Joseph. I am satisfied that at this point Cst. Meier told Ms. Joseph that she was under arrest for theft. Cst. Meier was a 7 year veteran of the force. It would be automatic for him to advise a person of their arrest and reason for it when applying handcuffs. He would not have tried to handcuff Ms. Joseph without advising her of her arrest and the reason.
- [17] Constable Meier said that he was told by the store manager, Tara Laughlin that she felt that Ms. Joseph had concealed something in her bag. She was unsure if her friend (the other suspect) may have done it. To dispatch Tara Laughlin said "she is with an older female but still in my store which I think also has, um, decided to take items. She admitted to wearing the scarf and hiding the tag, but I cannot prove what ".
- [18] Testifying before me, Ms. Laughlin was clear that she did not believe that Ms. Joseph had taken anything and did not suggest to Cst. Meier that she had done so.
- [19] The defendants urge me to prefer the evidence of Cst. Meier to that of Ms. Laughlin. I am not persuaded that Cst. Meier's recollection is more reliable than Ms. Laughlin's. Ms. Laughlin is an independent witness. Her recollection of these events was not shaken.

Discussion

Reasonable Grounds to Arrest/ s. 25 of the Criminal Code

- [20] The defendants argue that s. 25 of the Code protects Cst. Meier (and indirectly the federal crown) from liability. S. 25 provides:

25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

...

(b) as a peace officer or public officer

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

- [21] To come within s. 25, the defendants must establish that Cst. Meier was authorized to arrest Ms. Joseph; that he acted on reasonable grounds; that he used no more force than necessary: *Crampton v. Walton*, 2005 ABCA 81. The provision also provides a defence to civil liability: *Crampton* at para. 5.
- [22] Constable Meier asserts that he arrested Ms. Joseph pursuant to s. 495 of the Criminal Code. That section permits a peace officer to arrest without warrant a person who, on reasonable grounds, he believes has committed an indictable offence. He says that he arrested Ms. Joseph for theft (s. 322).
- [23] There is no issue between the parties that before an officer may arrest without a warrant he must have reasonable grounds to do so. The officer must subjectively believe that there are reasonable grounds to arrest and those grounds must be objectively reasonable: *R. v. Jowett Work*, 2019 BCCA 236; *R. v. Storrey*, [1990] 1 S.C.R. 241, 1990 CanLII 125.
- [24] As discussed in *Crampton*, the assessment of whether there were "reasonable grounds" is the same under s. 25(1) as under other provisions of the Code:

19 The second element of the s. 25(1) defence requires the court, having determined that the type of action falls within the scope of the police officer's law enforcement duties, to examine the basis for the action and manner in which the action was carried out. The police officer must act on "reasonable grounds". Until a 1985 Criminal Code amendment, s. 25(1) required a police officer to act on "reasonable and probable grounds": R.S.C. 1985, c. C-46. Cases that refer to reasonable and probable grounds must be read in this light.

20 The phrase "reasonable grounds" also appears in s. 32(1) of the Criminal Code, which justifies the use of force to suppress a riot. In evaluating the conduct of a police officer, the court is to place itself in the shoes of the officer and assess whether reasonable grounds existed for the actions taken: *Berntt v. Vancouver (City)*, 1999 BCCA 345 (B.C. C.A.) at paras. 35-37. See also *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.).

21 The modified objective test used in relation to s. 32(1) is equally applicable in determining reasonable grounds under s. 25(1). See, for example, *Chartier*, supra, at para. 59. In order to satisfy the second element of s. 25(1), namely that the police officer acted on reasonable grounds, the court must determine whether there was an objectively reasonable basis, given the circumstances faced by the police officer, for the actions undertaken by the officer.

Although the above passage refers to reasonable grounds under s. 32, the comments are equally applicable to the assessment of reasonable grounds under s. 495 of the Code.

- [25] In this case I am not satisfied that Cst. Meier actually turned his mind to whether there were grounds to arrest Ms. Joseph. In any event, I am not persuaded that there were reasonable grounds to arrest Ms. Joseph.

- [26] If Cst. Meier were subjectively satisfied that there were grounds, objectively there were no reasonable grounds to arrest Ms. Joseph. At most there was a suspicion of the store manager that "she felt" that something was concealed.
- [27] I asked Cst. Meier whether he had questioned Ms. Laughlin on this point. Did he ask what led her to "feel" that Ms. Joseph might have concealed something? He said that he wasn't sure if he asked her why she thought that; he couldn't recall if he asked for more specifics. I conclude that he did not pursue inquiries to permit him to determine whether there were grounds for arrest. Were I to accept Cst. Meier's evidence of Tara Laughlin's statements to him, at most there is the suspicion of a third party that an offence might have been committed. A mere suspicion does not provide reasonable grounds to arrest. On this evidence, there were no reasonable grounds for Cst. Meier to arrest Ms. Joseph for theft.
- [28] Constable Meier points to two other bases as grounds for arrest: (i) his experience that shoplifters often pay for one item while concealing others that they are stealing; (ii) Ms. Joseph's suspicious behaviour in refusing to provide her name and in refusing to permit him to search her bag. Neither of these can provide a basis for concluding that Ms. Joseph was shoplifting. Both are neutral factors. Completely innocent purchasers pay for the item they are buying and have nothing in their bags or pockets that they are stealing. There was nothing unusual in Ms. Joseph paying for the scarf before she left the store. Nor does Ms. Joseph's conduct support reasonable grounds to arrest her. She said she had done nothing wrong and that she did not need to speak to Cst. Meier. She tried to return to the store to discuss the matter with Tara Laughlin. Constable Meier would not permit her to do so. She could have acceded to Cst. Meier's demands for her name and to search her bag. That she did not do so does not suggest that she has shoplifted.
- [29] I do not accept that Cst. Meier turned his mind to whether there were reasonable grounds to arrest Ms. Joseph. In cross-examination Cst. Meier was asked "why not immediately arrest Ms. Joseph if there were grounds to believe she had committed theft. Why question her, or tell her that she was detained?" He said that he was hoping she'd be co-operative, that she'd give him her name and she'd permit him to search her bag and she'd be on her way. He said that he was just trying to conduct an investigation and that after he arrested her he thought she would recognize the seriousness and comply. He tried to handcuff her because he thought that if she were handcuffed he could safely search her and search her bag. These answers demonstrate Cst. Meier's focus on searching the bag, not on reasonable grounds for arrest.
- [30] I am satisfied that Cst. Meier's primary goal was to search Ms. Joseph's bag for stolen property. Only once that was done would he be satisfied that she hadn't taken anything. He anticipated that she would be compliant. Things escalated very quickly when she was not. In these circumstances, a quickly escalating confrontation which surprised him, he did not turn his mind to whether there were reasonable grounds for arrest.

- [31] In any event, Cst. Meier did not have reasonable grounds to arrest Ms. Joseph. Accordingly, I am not satisfied that Cst. Meier was authorized to arrest Ms. Joseph, or that he acted with reasonable grounds as contemplated by s. 25 of the Code.
- [32] While I am not satisfied that Cst. Meier specifically advised Ms. Joseph that she was detained and the reason it, even if he had done so she need not have provided her name or permitted Cst. Meier to search her bag as part of the investigative detention. As the Court said in *R. v. Grant*, 2009 SCC 32:
- [21] More specifically, an individual confronted by state authority ordinarily has the option to choose simply to walk away: *R. v. Esposito* (1985), 1985 CanLII 118 (ON CA), 24 C.C.C. (3d) 88 (Ont. C.A.), at p. 94; *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at p. 11, citing *Martin J.A.* in the Ontario Court of Appeal ((1981), 1981 CanLII 1631 (ON CA), 32 O.R. (2d) 641, at p. 653):

Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless . . . [he] arrests him

- [33] At points in its argument the defence refers to the offence of obstruction. Cst. Meier did not suggest in evidence or argument that he arrested Ms. Joseph for obstruction. He arrested her for theft. There is no suggestion in his evidence or argument that he had reasonable grounds to arrest her for obstruction.

Necessary Force

- [34] The defendants must also satisfy me that Cst Meier used no more force than necessary. They have not persuaded me. A younger, fit person may need to be taken to the ground and have cuffs applied, particularly where backup is not immediately available. However, Ms. Joseph was 61 years old at the time of the incident. She walked with a walker. She had various health issues including a fused left ankle. Constable Meier would not have known that her ankle was fused nor would he have known about her other health conditions. However, it would have been obvious to all that she had limited mobility and hence used a walker. Things rapidly escalated when Cst. Meier decided to handcuff her. It is at that point that he decided to take Ms. Joseph to the ground, resulting in her injuries.
- [35] There were other options available to Cst. Meier. He did not need to attempt to handcuff her. He did not need to struggle with her. He did not need to take her to the ground and continue to wrestle with her. He called for backup very shortly into his dealings with Ms. Joseph. He knew that his partner was two minutes away. He could have waited. He could have followed Ms. Joseph if she walked away. In the circumstances, it was simply not necessary to physically subdue a woman of Ms. Joseph's age and limited mobility.

Overarching Reasonable Officer Standard

[36] The defendants rely on *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, for the principle that an officer need only act as a reasonable officer would in the circumstances. In *Kosoian*, the case turned on the duty set out in art. 1457 of the Civil Code of Quebec, which requires every person "abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another". The Quebec legislation has no application to this case. At common law, the standard imposed by art. 1457 is akin to the "reasonable person" test used to determine negligence. I agree that would be the applicable standard if the issue was whether Cst. Meier acted negligently. I do not accept that this principle modifies the test set out in s. 25 of the Code. The Code sets out clear and specific elements that must be met in order for an officer's conduct to be justified under s. 25.

Proof of Tort

[37] There is no real issue that (apart from the defences raised) Ms. Joseph was assaulted, confined and injured. The issue is the nature and extent of the injuries she received as a result of the incident.

[38] The elements of the torts are:

- i. False Arrest: A false arrest involves an arrest, without reasonable grounds for doing so (*Hanisch v. HMTQ in Right of Canada et al.*, 2003 BCSC 1000 at para. 88). As discussed above, Cst. Meier's arrest of Ms. Joseph was not lawful due to the absence of reasonable grounds.
- ii. False Imprisonment: false imprisonment "is the intentional and total confinement of a person against his or her will without lawful justification" (*Hanisch* at para. 88). Cst. Meier completely restricted Ms. Joseph's movement, as above, without lawful justification.
- iii. Assault and Battery: battery involves the intentional infliction of unlawful force on another person; assault is the act of "intentionally creating in another person an apprehension of imminent harmful or offensive contact" (*Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Fleming, The Law of Torts*, 5th ed. (1977), p. 24). Because the arrest was unlawful, Cst. Meier's subsequent use of force similarly had no basis in law.

[39] I am satisfied that Ms. Joseph was falsely arrested, falsely imprisoned, assaulted and battered.

Injuries/Damage Assessment

[40] The plaintiff argues that she should receive damages in the order of \$30,000 to \$50,000 for the assault and battery which she received in the course of her wrongful arrest and false imprisonment.

- [41] She argues that she should in addition receive Charter damages for injuries not covered by the tort claim of \$10,000.
- [42] She also seeks aggravated damages of \$20,000 and punitive damages of \$20,000.
- [43] The defendants argue that damages (if ordered) should be limited to general damages for bruising to her knees and small abrasions on her hands. They argue that the general damages should be reduced by reason of her contributory negligence and should be nominal. They say that her physical injuries were resolved within one month of the incident.
- [44] They argue that she was suffering from chronic pain and depression as early as 2008. Her injuries were complicated by an assault in January 2016. Following that assault she sought a referral for inpatient adult mental health services in January 2016. They say that the incident subject of this action did not cause the psychological/emotional complaints.
- [45] They argue that if she suffered injuries as a result of the police incident she failed to mitigate the damages by not seeking appropriate care, in particular not following through with psychological care that was recommended.
- [46] They say that damages at most would be in the \$5,500 range and should be reduced by 90% for contributory negligence.
- [47] With respect to aggravated damages, they say that aggravated damages compensate for distress and humiliation caused by a defendant's insulting behaviour, compensating the plaintiff for pain, anguish, grief, humiliation, wound to pride, self-confidence or self-esteem. Punitive damages are directed toward punishment and will be awarded only in exceptional cases. They argue that Cst. Meier's behaviour did not rise to the level of insult and no award of damages should be made. They argue that any distress and humiliation suffered by Ms. Joseph outside of Mark's Work Wearhouse was a result of her refusal to comply with Cst. Meier's lawful commands.
- [48] I am satisfied that Ms. Joseph suffered bruises and abrasions in the course Cst. Meier's arrest. Photos taken by Staff Sgt. Marshall show bruising and scrapes to Ms. Joseph's legs, knees and hands. I am also satisfied that she suffered some soft tissue complaints as a result of the arrest. On her admission to the emergency room on the day of the events she was complaining of a sore neck, ribs and back.
- [49] Ms. Joseph said that these injuries were largely recovered within one to two months.
- [50] She also suffered headaches for more than six months after the incident but they eventually went.
- [51] Ms. Joseph's most long-lasting and affecting complaints were aggravation to her pre-existing chronic pain and aggravation of her pre-existing anxiety.

- [52] The plaintiff introduced the opinion of Dr. Elizabeth Kruithof, Ms. Joseph's current treating physician. Dr. Kruithof says that Ms. Joseph has a history of complex multifactorial chronic musculoskeletal pain that predates December 6, 2014. She has also suffered other injuries and surgeries distinct from those of December 6, 2014. She continues to have chronic musculoskeletal pain. Ms. Joseph also currently still experiences anxiety especially with leaving her house as she is afraid she might be attacked.
- [53] Ms. Joseph suffered from chronic pain and anxiety before the police incident. I am satisfied that both of these conditions were aggravated by the police incident. Ms. Joseph testified that she had pain before the incident but the incident aggravated her pain. There were times after the police incident when she could not walk on her left ankle.
- [54] With respect to her anxiety and related complaints, she testified that after the incident she was embarrassed and wanted to hide. She did not want to talk about it. She started staying home and not going out. She was afraid of being attacked. She said that her anxiety and depression were primarily due to the RCMP incident. She said that by January 2017 her injuries were pretty well resolved including the psychological complaints.
- [55] I found Ms. Joseph to be a credible and reliable witness with respect to these complaints. She did not exaggerate these injuries or the effect on her. I accept her evidence with respect to these complaints.
- [56] Ms. Joseph also says that she received scrapes and bruises around her eyes in this incident and that she suffered blackouts as result of this incident. In one of those blackouts she fell and broke her knee.
- [57] I am not persuaded that the injury to the eyes described by Ms. Joseph and depicted in exhibit 3 is the result of this incident. I do accept that she likely had some scrapes around her eyes because her glasses were knocked askew and had some sort of scratch to the lens. However, the injuries depicted in exhibit 3 were more likely the result of the unrelated assault in January 2016. I accept Staff Sgt. Marshall's evidence that she did not see the injuries depicted in exhibit 3 when she interviewed Ms. Joseph on December 9, 2014.
- [58] Nor am I persuaded that the dizziness/blacking out and subsequent fall are the result of this incident. Dr. Kruithof said that it is her opinion that the incidents of blacking out are not related to the police incident of December 6, 2014.
- [59] The defendants argue that the injuries that Ms. Joseph received were minor and limited to the physical scrapes and bruises. They argue that Ms. Joseph's psychological complaints predated the police incident and any exacerbation was caused by the January 2016 assault, not the police incident. I am not persuaded that this is so. She did have scrapes and bruises, but she also suffered soft tissue complaints, headaches and aggravated chronic pain and anxiety as a result of this incident. She suffered from exacerbated anxiety and a fear of going outside, a fear of being attacked, arising from the police incident of December 2014. Although she undoubtedly suffered from anxiety before this incident, I am satisfied that the

incident materially contributed to her ongoing anxiety. She complained of this anxiety through 2015 well prior to the assault of January 2016. I am of the view that her anxiety was exacerbated due to the police incident for approximately two years. Other factors, such as the assault in January 2016 may also have contributed to her anxiety.

[60] The defendants argue that I should draw an adverse inference against Ms. Joseph because she did not call her former treating physician, Dr. Kotze.

[61] The Court of Appeal recently reviewed the adverse inference principle in *Singh v. Reddy*, 2019 BCCA 79. The court endorsed the following description:

[8] The principle is described by authors S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada* (2018, 5th ed.) as follows:

§6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [Emphasis added.]

[62] The Court of Appeal has previously remarked that "the tactic of asking for an adverse inference is much over-used in today's legal environment": *Buksh v. Miles*, 2008 BCCA 318 at para. 32. Singh stresses that the decision to draw an adverse inference is discretionary:

[9] As noted in *Rohl*, it is now generally accepted that the court is not required as a matter of law to draw an adverse inference where a party fails to call a witness. Thus in *Witnesses* (looseleaf), A.W. Mewett and P.J. Sankoff write:

A considerable number of cases now reinforce the view that there is no such thing as a "mandatory adverse inference" to be drawn where a party fails to call a witness. Rather, the question of whether to make such an inference seems to depend upon the specific circumstances, in particular whether:

- There is a legitimate explanation for the failure to call the witness;
- The witness is within the "exclusive control" of the party, and is not "equally available to both parties"; and
- The witness has material evidence to provide; and
- The witness is the only person or the best person who can provide the evidence.

Essentially, the decision to draw an adverse inference is discretionary and premised on the likelihood that the witness would have given harmful testimony to the party who failed to call him or her

- [63] I am not persuaded that an adverse inference is appropriate. Dr. Kotze is not the only person able to give evidence. Ms. Joseph provided the opinion of her current physician who was called for cross-examination.
- [64] The defendants argue that Ms. Joseph failed to mitigate her loss. The defendants bear the onus of establishing a failure to mitigate. The Court of Appeal set out a two-part test in *Chiu v. Chiu*, 2002 BCCA 618:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.
- [65] Whether the plaintiff acted reasonably is a question of fact to be determined in all the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.
- [66] Although the plaintiff says that she found that her anxiety was ultimately improved after seeing a mental health counsellor, I cannot be satisfied that had she seen a mental health counsellor more or earlier her complaints would have been reduced or to what extent.
- [67] The defendants argue that Ms. Joseph was contributorily negligent and her damage award should be reduced. I do not agree.
- [68] The defendants rely on the statement of the law in *Sweeney v. British Columbia*, 2018 BCSC 1832:
- [96] The foundational principle of contributory negligence is the duty to take reasonable care on one's own behalf: *Enviro West Inc. v. Copper Mountain Mining Corp.*, 2012 BCCA 23 at paras. 1 and 35; *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505 at para. 33.
- [97] In accordance with s. 4 of the Negligence Act, R.S.B.C. 1996, c. 333, when a plaintiff's actions are negligent and contribute to his or her injury, the court must determine relative degrees of fault. The inquiry is whether the plaintiff failed to take reasonable care for his or her own safety and whether that failure was one of the causes of the accident: *Bradley v. Bath*, 2010 BCCA 10 at para. 27, *Enviro West* at para. 37.
- [69] The defendants say Ms. Joseph did not take reasonable care for her own safety by struggling as Cst. Meier attempted to place her under arrest and apply handcuffs.
- [70] The Supreme Court of Canada said the following in *Kosoian*:

- [131] To conclude that Ms. Kosoian must be apportioned a share of the liability would amount to saying that there is, in all circumstances, a rule of conduct requiring compliance with an unlawful order given by a police officer, even where the order is based on an offence that simply does not exist in law. It is a short step from this to concluding that there must be blind obedience to any demand made by a police officer, no matter how unreasonable, arbitrary or capricious it may appear.
- [132] Average citizens will, of course, often prefer to be cautious and to comply with an order given by a police officer even where they have doubts about its lawfulness (Grant, at para. 170). They will identify themselves and they run serious risks if they refuse to comply because they believe that the offence alleged against them is non-existent or invalid. If they are mistaken, they could, for example, be convicted of a criminal offence: wilfully obstructing a peace officer (s. 129 of the Criminal Code, R.S.C. 1985, c. C-46 ; see, e.g., *Vigneault v. La Reine*, 2002 CanLII 63720 (Que. C.A.), aff'g 2001 CanLII 25420 (Que. Sup. Ct.)).
- [133] Nevertheless, a well-informed person does not commit a civil fault merely by refusing to comply with an order that proves to be unlawful. A person whose rights are infringed must be able to respond -- within reason, of course -- without being held civilly liable.
- [71] These comments are applicable in the case at bar. Ms. Joseph's response to the unlawful arrest was "within reason", she was not required to comply and should not be held contributorily negligent.
- [72] In assessing damages, I have considered the cases that the parties have provided to me, as well as the factors as enumerated in *Stapley v. Hejslet*, 2006 BCCA 34, including Ms. Joseph's age, the nature of her injuries, the severity and duration of pain, her emotional suffering and impairment of her life including social relationships, and the loss of her lifestyle. This incident had a significant impact on Ms. Joseph. Although her scrapes and bruises healed quickly, she suffered from the psychological impact as well as aggravated chronic pain for a significant period of time. It is my view that an appropriate award for general damages for Ms. Joseph is \$50,000.

Breach of Charter Rights/Appropriate relief

- [73] Ms. Joseph argues that her ss. 7, 8, 9 and 10(a) Charter rights were breached. Those sections provide as follows:
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
 8. Everyone has the right to be secure against unreasonable search or seizure.
 9. Everyone has the right not to be arbitrarily detained or imprisoned
 10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;

- [74] Ms. Joseph acknowledges that: "tort law and the Charter are distinct legal avenues" and that "a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation" (*Vancouver (City) v. Ward*, 2010 SCC 27, at para. 36).
- [75] She argues that traditional tort law does not provide a remedy for Cst. Meier's search of her pockets, belongings and cell phone. She argues that these searches are breaches of her reasonable expectation of privacy, of her right to be secure against unreasonable search and seizure and security of the person.
- [76] She argues as well that she had a right to be promptly informed of the reason for detention which Cst. Meier did not provide. She says that the tort of false arrest is capable of remedying his act of touching her but is not able to address his violation of her s. 10(a) rights.
- [77] The defendants acknowledge that a Charter breach and damages is not within s. 21 of the Police Act.
- [78] The defendants recognize that Ms. Joseph has not specifically pled a breach of s. 8 of the Charter, however, they do not appear to take issue with this. They address the substance of the claims.
- [79] They argue that Ms. Joseph has not established that her Charter rights have been breached. Secondly, they say that she has not established that Charter damages are just and appropriate. Third, they say she had alternate remedies available for her tort claims. Notably, she could have brought an action against the provincial government pursuant to the Police Act. They say that double compensation is not the intent of s. 24 of the Charter.
- [80] They argue that a declaration of a Charter breach would provide an adequate remedy if a Charter breach is found. They say that she has suffered no significant damages as a result of the breach and that any harm she suffered was contributed more than equally by her.
- [81] They argue that Charter damages would have a chilling effect on officers making on the ground decisions. They argue "we do not want to encourage people who are reasonably suspected of a crime to push back in hopes that the officer will back down and do nothing knowing their conduct will be put under the microscope in court at a later date." They argue that the remedy must be appropriate and just. Damages may be awarded to compensate the plaintiff, vindicate the right or deter future violations of the right. They say that the damages should be nominal. The search of Ms. Joseph's purse and phone was brief and Cst. Meier returned both items to her within minutes. She was detained for a very brief period of time and was released at the scene. She left the store at approximately 2:47 pm and was released approximately 30 minutes later.
- [82] They argue that Cst. Meier did not act with malice or bad faith and damages should be minimal.

- [83] In Ward the Supreme Court of Canada set out a framework for analysing damage claims pursuant to the Charter:
- [4] I conclude that damages may be awarded for Charter breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a Charter right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.
- [84] I am satisfied that Cst Meier advised Ms. Joseph that she was under arrest for theft as he tried to handcuff her. I am not persuaded that her s. 10(a) rights were breached. I am satisfied that the wrongful arrest, detention and search were breaches of Ms. Joseph's ss. 8 and 9 rights. Sections 8 and 9 address specific deprivations and it is not necessary to resort to s.7 of the Charter.
- [85] It is my view that damages are an appropriate remedy not for compensation (because compensatory damages have been awarded for all but the illegal search), but in vindication of her rights and in deterrence of future breaches. I am also satisfied that this would not constitute double recovery. The defence has not established countervailing factors to defeat a damage award and render damages inappropriate or unjust. A declaration would not be sufficient in these circumstances to vindicate her rights or to deter future breaches.
- [86] This leaves the assessment of the quantum of Charter damages.
- [87] In Ward the Supreme Court of Canada affirmed an award of \$5,000 for Charter damages. That case involved an unlawful strip search. In Fong v. British Columbia (Minister of Justice), 2019 BCSC 263, the court awarded \$2,000. That case also involved wrongful arrest, injuries and breach of ss. 8 and 9 of the Charter.
- [88] In my view, the circumstances in this case are more egregious than those in Fong: (i) Cst. Meier did not properly turn his mind to grounds for arrest; (ii) Ms. Joseph reiterated that she had done nothing wrong and that she did not need to comply with Cst. Meier's demands. She was correct; (iii) Cst. Meier was intent on searching Ms. Joseph's belongings and pursued that goal vigorously; (iv) Ms. Joseph was arrested and restrained in a very public manner and was humiliated by this activity.
- [89] Having considered the awarded damages in Fong and in Ward in my view \$5,000 is an appropriate award of Charter damages.
- [90] Ms. Joseph also claims punitive and aggravated damages. The court provided a succinct summary of the law on punitive and aggravated damages in Fong:

[434] In *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 at 299 (C.A.), the court observed that aggravated damages are awarded "for aggravation of the injury by the defendant's high-handed conduct". Punitive damages, on the other hand, are awarded to punish a defendant. As the Supreme Court of Canada said in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1208:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[91] I am not persuaded that Cst Meier's conduct warrants aggravated or punitive damages. Although I have found that he acted improperly, he did not do so maliciously or high-handedly. In addition, Charter damages also entail an element of behaviour modification.

Immunity/Wrong Party

[92] The defendants argue that Ms. Joseph has named the wrong party, that Constable Meier is immune from Ms. Joseph's claim unless she can establish dishonesty, gross negligence, malicious or wilful misconduct or libel or slander. He relies on ss. 11 and 21 of the Police Act.

[93] The plaintiff argues that the evidence establishes that Cst. Meier was a police officer in the employ of the RCMP and is a servant of the federal crown within the meaning of Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, which makes the federal crown vicariously liable. The plaintiff says that the defendants have not proven an agreement contemplated by the Police Act.

[94] The Police Act provides in sections 11 and 21:

11 (1) The minister, on behalf of the government, is jointly and severally liable for torts committed by

(a) provincial constables, if the tort is committed in the performance of their duties

21 (1) In this section, "police officer" means either of the following:

(a) a person holding an appointment as a constable under this Act;

(b) an IIO investigator.

- (2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.
- (3) Subsection (2) does not provide a defence if
 - (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
 - (b) the cause of action is libel or slander.
- (4) Subsection (2) does not absolve any of the following, if they would have been liable had this section not been in force, from vicarious liability arising out of a tort committed by the police officer or other person referred to in that subsection:
 - (a) a municipality, in the case of a tort committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or an employee of its municipal police board, if any;
 - (b) a regional district, government corporation or prescribed entity, in the case of a tort committed by any of its designated constables or enforcement officers;
 - (c) the minister, in a case to which section 11 applies.

[95] Section 14 of the Police Act provides:

14(1) Subject to the approval of the Lieutenant Governor in Council, the minister, on behalf of the government, may enter into, execute and carry out agreements with Canada, or with a department, agency or person on its behalf, authorizing the Royal Canadian Mounted Police to carry out powers and duties of the provincial police force specified in the agreement.

- (2) If an agreement is entered into under subsection (1),
 - (a) the Royal Canadian Mounted Police is, subject to the agreement, deemed to be a provincial police force,
 - (b) every member of the Royal Canadian Mounted Police is, subject to the agreement, deemed to be a provincial constable,
 - (c) the provisions of this Act respecting the powers and duties of the provincial police force and provincial constables apply, subject to the agreement, and with the necessary changes and insofar as applicable, to the Royal Canadian Mounted Police and its members

[Emphasis added.]

[96] Although it may be that there is an agreement as described in s.14(1), no agreement was entered in evidence before me. I cannot be satisfied that the RCMP was a provincial force or that Cst. Meier was deemed to be a provincial constable. That is expressly "subject to the agreement". Assuming that there was such an agreement in December 2014, I do not know what it provided with respect to members of the RCMP being provincial constables and the application of s. 21 of the Police Act.

[97] Section 3 of the Crown Liability and Proceedings Act provides:

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 of 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.

[98] Section 10 of the Crown Liability and Proceedings Act provides:

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.

[99] There appears to be no dispute that:

1. if Cst. Meier does not establish that he comes within the protection of the Police Act, he is liable for tort damages and the federal Crown is vicariously liable;
2. the Crown is also liable for the breaches of Ms. Joseph's Charter rights.

[100] Cst. Meier has not satisfied me that he comes within the protection afforded by s. 21 of the Police Act. Cst. Meier and the Crown are liable for the damages suffered by Ms. Joseph.

Miscellaneous matters

[101] The defendants argue that they were prejudiced by my refusal to grant an adjournment to them at the beginning of the trial for late delivery of medical records. I reject this submission. When refusing to adjourn I advised the defence that they could raise the issue again, were there matters that they needed time to address. They did not raise the matter again.

Conclusion

[102] In conclusion, I award Ms. Joseph \$50,000 for non-pecuniary damages and \$5,000 for Charter damages. She is entitled, pursuant to R. 14-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, to costs at Scale B.

"B.J. Brown J."

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