

CANADA / JUDGMENT

Russell v. HMQ & Matsqui

2000 BCSC 650

COURT

Supreme Court of British Columbia

DECIDED

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Citation: Russell v. HMQ & Matsqui 2000 BCSC 650

Date: 20000417

Docket No.:

S044348

Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LIAM RICHARD RUSSELL, ALSO KNOWN AS LEE RUSSELL
PLAINTIFF

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL OF
CANADA, MATSQUI INSTITUTION AND RODGER BROCK
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE A. F. WILSON

Counsel for the plaintiff: Lisa Parkes

Counsel for the defendants: Valerie J. Anderson

Date and Place of Trial: March 12th-17th, 2000

New Westminster, BC

INTRODUCTION

- [1] The claims of the plaintiff, Liam Richard Russell, arise from injuries he received on June 12th, 1996, while an inmate at the Matsqui Institution, a federal medium security prison.

- [2] The defendants are Her Majesty the Queen in Right of Canada, Attorney General of Canada, Matsqui Institution and Rodger Brock. Naming both Her Majesty the Queen in Right of Canada and the Attorney General of Canada is not necessary. Pursuant to s. 23(2) of the Crown Liability Act, R.S.C. 1985, c. C-50, proceedings against the federal Crown may be taken in the name of the Attorney General of Canada, or the agency of the Crown against which proceedings are authorized to be taken, in the name of that agency, by an Act of Parliament. Proceedings against the Correctional Service of Canada do not appear to be authorized in the Corrections and Conditional Release Act, S.C. 1992, c. C-44.6. It thus appears that the properly named defendant is the Attorney General of Canada. I accept the submissions of counsel for the defendants that Matsqui Institution is not a legal entity capable of being sued. The final named defendant, Rodger Brock, was the warden of Matsqui Institution at the relevant time. However, there are no claims made against him personally, nor is he alleged to be vicariously liable, and the action against him is thus dismissed.
- [3] Paragraph 5 of the Statement of Claim alleges that, on or about June 12th, 1996, while Mr. Russell was incarcerated at the Matsqui Institution, he was assaulted by another inmate "who intentionally and maliciously struck the plaintiff with a stocking containing two shuffleboard rocks." It is alleged that he sustained injury to his head, and struck his head upon a mop pail, prior to striking the floor. The Statement of Claim says the identity of the inmate is not known to Mr. Russell.
- [4] The claim is framed in negligence, the particulars of which are set out in paragraph 6 of the Statement of Claim as follows:
6. The said assault occurred as a direct result of the actions and/or omissions, negligence and breach of duty of the employees, servants and/or agents of the Defendants, and each of them, particulars of which include:
 - a. failing to or neglecting to provide proper supervision of the inmate population;
 - b. failing to or neglecting to provide proper surveillance of the institutional area wherein the assault occurred;
 - c. failing to or neglecting to take proper precautions to ensure that all sporting equipment including shuffleboard rocks is accounted for;
 - d. failing to or neglecting to take proper precautions to ensure that all sporting equipment is properly signed out for use by an inmate;
 - e. failing to or neglecting to take proper precautions to ensure that all sporting equipment is identified for use by a specific inmate;
 - f. failing to or neglecting to take any steps or reasonable steps to ensure that all sporting equipment is returned following use;

- g. failing to or neglecting to take any steps or reasonable steps to ascertain the identity of the inmate responsible for the said assault.
- [5] The Statement of Claim also alleges that the acts or omissions of the defendants violated Mr. Russell's right not to be subjected to cruel and unusual treatment or punishment, contrary to s. 12 of the Canadian Charter of Rights and Freedoms, and seeks a remedy pursuant to s. 24(1) of the Charter. However, that claim was abandoned at trial. The Statement of Claim also seeks aggravated or exemplary damages, and punitive damages, in addition to general and special damages. Those claims were also abandoned at trial.

LIABILITY

- [6] The onus is on the plaintiff to establish acts or omissions by the employees, servants, or agents of the federal Crown, in breach of their duty to exercise reasonable care to protect the plaintiff from foreseeable risks: *Maclean v. R.*, [1973] S.C.R. 2, at p. 7; *Smith v. B.C. (A.G.)* (1988), 30 B.C.L.R. (2d) 356 at p. 366 (C.A.); *Coumont v. Canada et al.* (1994), 77 F.T.R. 253 at p. 363. The issue in this case is not whether there is a duty of care, but whether the acts or omissions of the defendants fell below the standard of conduct of what a reasonable person of ordinary prudence would do in the circumstances. I am not satisfied that Mr. Russell has met that onus.
- [7] I find that Mr. Russell did sustain an injury at the hands of another inmate while in the Matsqui Institution on June 12th, 1996. Mr. Russell's initial explanation was that he slipped on a wet floor, and that his head struck a mop pail. However, the medical opinions tendered on behalf of both Mr. Russell and the defendants indicate that to be improbable. Dr. Gittens, the neurosurgeon who saw Mr. Russell when he was transferred to Royal Columbian Hospital on the early morning of June 13th, 1996, said that the injuries appear more in keeping with an assault, probably with a blunt object. Dr. Rees, the neurologist to whom Mr. Russell was referred by the defendants, in his report dated January 20th, 2000, said:

For reasons best known to himself, Mr. Russell soon after he was injured told his charges that his head struck a bucket after he fell on a wet floor. His head injuries were disproportionately severe for such a causation and were of a magnitude that he would have been likely rendered unconscious at least momentarily, and would not have remembered the head blow(s) or how the blow(s) came about. (By analogy, a KO'd boxer does not afterwards remember the delivering punch.) In his hospital consultation report, Dr. Gittens specifically mentioned that whereas Mr. Russell said that he fell on a wet floor, he had no recollection of what happened to him. Thus it is difficult to accept Mr. Russell's initial explanation for the injury.

In Dr. Gittens opinion, the head injury was in keeping with a blow delivered by a blunt object. In my opinion it was also consistent with a head impact against an unyielding surface, for example a concrete or masonry surface. The blow(s) was sufficiently forceful to produce multiple skull fractures, fractures that would not occur from impacting a bucket.

- [8] At trial, Mr. Russell said he had no recollection of how the injury occurred, but believes he was struck from behind. He said that he initially told the prison authorities that he had slipped and hit his head on a bucket as part of the inmates' code not to inform on other inmates. I accept that evidence, and find that Mr. Russell's injuries were as a result of being struck from behind with a blow, or blows, using a blunt object. I consider that more probable than the alternate hypothesis put forward by Dr. Rees, that Mr. Russell's head hit an unyielding surface such as a concrete or masonry surface. I consider that improbable in light of the fact that Mr. Russell sustained a depressed right skull fracture, as well as multiple other skull fractures, which are inconsistent with falling and hitting a flat surface. There was no evidence of any protrusions from the floors, or sharp edges in the area where Mr. Russell's injury took place.
- [9] However, I do not accept the mechanism of the injury, as alleged in paragraph 5 of the Statement of Claim, that Mr. Russell was struck with a stocking containing two shuffleboard rocks. The only evidence in support of that, apart from the medical opinions that he was struck with a blunt object, is the evidence that two shuffleboard rocks were missing from the recreational area of Matsqui Institution at that time, and a report received by Mr. Russell from an unnamed source, and rumours within the institution, that he was struck with a sock containing the missing shuffleboard rocks. That information, however, is hearsay, and not admissible as proof that he was, in fact, struck in that manner. In submissions, counsel for the plaintiff submitted that evidence should be admitted pursuant to the principled exception to the hearsay rule, relying on *Regina v. Khan*, [1990] 2 S.C.R. 531 and *Regina v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.), among other cases. However, no application was made to adduce the evidence on that basis at trial, so that the admissibility could be determined on a voir dire, as was suggested to be the appropriate procedure by Wood, J.A. in *Regina v. Chahley* (1992), 72 C.C.C. (3d) 193 at pages 210-211 (C.A.). Based on the information I do have, I am not satisfied the evidence satisfies the criterion of reliability, in that it is shown to be made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken. In this case, the source of the information is unknown, so it cannot be said, for example, whether that person, or persons, had any personal knowledge of the incident, or if he, or they, were just repeating rumours within the institution. It can also not be determined whether the person, or persons, who provided the information could have been untruthful or mistaken in providing that information. I thus find that evidence is not admissible under the principled exception. That leaves only the evidence that Mr. Russell was struck with a blunt object, and that two shuffleboard rocks were missing from the recreational area. Those rocks were never found. That is not sufficient evidence to establish, on the balance of probabilities, that Mr. Russell was struck with a stocking containing two shuffleboard rocks.
- [10] There is also not sufficient evidence to establish who Mr. Russell's assailant was. An investigation was done by the correctional authorities, but they were not able to determine who the perpetrator was. Further, most of the information received was hearsay, and, again, is not admissible for the truth of the contents. I do not find that the prison authorities were

negligent in failing to take reasonable steps to ascertain the identity of the inmate responsible for the assault, as alleged in paragraph 6(g) of the Statement of Claim. To the contrary, although the investigation was delayed, everything which could reasonably have been done to determine who the perpetrator was, was done, and I find that the delay made no material difference.

- [11] I thus find that Mr. Russell was assaulted by an unknown assailant, using an unknown weapon. That being the case, the allegations of negligence in paragraphs 6(c) to (f) must fail, as it has not been shown that sporting equipment, in particular, shuffleboard rocks, were used in the assault.
- [12] The only remaining particulars of negligence, then, as set out in paragraph 6(a) and (b), are in neglecting to provide proper supervision of the inmate population, and in neglecting to provide proper surveillance of the institutional area where the assault occurred. In that regard, the evidence is that, in a medium security institution, the inmates have fairly open access within the perimeters of the institution. There is good reason for that, as part of the attempt to provide an environment in which rehabilitation is most likely to take place. The result of that, however, is that the institution cannot be expected to have full-time supervision of all inmates at all times. As Mr. Brock said several times in his evidence, there is a delicate balance which always goes on, to give as much freedom as possible to inmates, consistent with the safety of the inmates and staff. He noted that if there were a high degree of control, it would not be possible to run the programs. In the context of recreational facilities, he said the prison uses control procedures comparable to those in community recreation facilities. I accept that evidence. It is consistent with one of the guiding principles of the Correctional Service of Canada, as set out in s. 4(d) of the Corrections and Conditional Release Act, to use the least restrictive measures consistent with the protection of the public, staff members and offenders. How that is done is a policy decision, not subject to review by the courts: *Just v. British Columbia*, [1992] 2 S.C.R. 1228.
- [13] With respect to the specific circumstances at the time of Mr. Russell's assault, it occurred at approximately 10:00 p.m., shortly before lock-down. At that time, the inmates were restricted to the wing of the institution where their cells were located. However, they had access between cells, and between floors on that wing. There were four wings, (referred to as "ranges") in a cross formation. Mr. Russell was in the north range, on the second floor. At the center of the cross formation was a control post, referred to as "the bubble", where a correctional officer remained at all times. He had a view down each range, although the control panels were on the south, east and west sides, so he normally sat facing south. When he turned around, he could see the north range. There was also a mirror on the corner of the bubble which gave limited visibility of the north range without turning around. There were two other correctional officers in an office about 8 or 10 feet from the bubble. In this case, the correctional officer on duty in the bubble, Mohammed Alam, heard a bang noise. He was not watching the north range at the time. He turned around, stood up, and saw an inmate on the floor, with others around. He immediately called the correctional officers in

the office, and they were on the scene within what he said was a maximum of 1 to 2 minutes. The correctional authorities were not aware of any threats to Mr. Russell, nor were they aware of any other inmates with whom he was incompatible. There was no reason to pay particular attention to his safety. In those circumstances, I cannot say that there was negligence on the part of the defendants in failing to protect Mr. Russell. There is no doubt that safety could have been improved by, for example, having a second correctional officer in the bubble, looking down the north range. However, that again is a policy decision, based, presumably, on budgetary considerations, and not one which I can review.

- [14] In submissions, counsel for Mr. Russell alleges negligence on the part of the defendants with respect to the medical treatment of Mr. Russell. However, that was not alleged in the pleadings, nor was it specifically dealt with at trial. Neither Dr. Gittens nor Dr. Rees, either in their reports or in their evidence at trial, suggested that the medical care provided to Mr. Russell was inadequate, inappropriate, or negligent in any regard. At most, Dr. Rees testified that it was possible that an early and massive injection of cortisone could have reduced swelling around the optic nerve, and preserved vision in the right eye. However, he considered that to be unlikely, given the extent of the damage. There is thus no basis for the submission that negligence in the medical treatment provided to Mr. Russell caused or contributed to his injuries.
- [15] In submissions, the plaintiff also alleges numerous breaches of the policies of the Matsqui Institution, as set out in its standing orders. I accept that there were breaches of the standing orders. However, they have not been shown to have any causative relationship either to the injuries suffered by Mr. Russell, or the damages sustained by him.
- [16] Finally, counsel for Mr. Russell submitted that an adverse inference should be drawn against the defendants as a result of the admitted failure of the defendants to provide full disclosure of documents. However, she did not suggest what adverse inference should be drawn. I am not able to determine any adverse inference from the failure to produce the documents listed which would be proof of an act or omission causally related to the injuries sustained by Mr. Russell, or the damages suffered by him. Most of the documents not produced relate to actions taken, or not taken, after the assault. They thus do not relate to any acts or omissions resulting in damage to Mr. Russell.
- [17] In summary, then, I am not satisfied that Mr. Russell has established negligence, on the balance of probabilities, against the defendants, or any of their agents. The action must thus be dismissed.

DAMAGES

- [18] In the event that I am determined to be wrong in this conclusion, I will briefly deal with the issue of damages.
- [19] There is no doubt Mr. Russell was seriously injured as a result of the assault upon him. The diagnosis upon discharge from Royal Columbian Hospital on June 16th, was:

1. Moderately severe head injury with right temporal and frontal hemorrhagic contusions;
 2. A right optical nerve injury;
 3. Multiple skull fractures including a depressed temporal skull fracture, fracture of the petrous bone, and fractures involving the right orbit.
- [20] When Dr. Gittens saw Mr. Russell again on September 24th, 1998, he reported blindness in his right eye, ringing in both ears, earaches, a pressure feeling in the right ear associated with right-sided temporal headaches which occurred approximately 3 times a week and lasted up to an hour, pain in his neck, and numbness and tingling in the hands. Dr. Gittens concluded that Mr. Russell had suffered a moderately severe head injury with right temporal and frontal lobe hemorrhagic contusions. He expected the blindness in the right eye to be permanent. He said: "He has recovered well from this head injury and did not appear to be left with any major deficits other than the possible mild impairment in memory, and chronic intermittent headaches." With respect to the problems with his ears, Dr. Gittens recommended that Mr. Russell be reviewed by an ear, nose and throat surgeon. Although I understand that was done, no report was produced. Dr. Gittens also said that if there was a question with respect to significant cognitive impairment, then a clinical neuropsychological assessment would be appropriate. That has not been done. I am not satisfied that there is any significant memory loss. Mr. Russell appeared to have a good memory at trial, for example, in reviewing the 12 steps of the Alcoholic Anonymous program. However, I do accept his evidence that as a result of his injuries, he is blind in the right eye, apart from an opaque shadow in the upper left quadrant, and has ringing in his ears, occasional pain in his neck, and headaches about once a month. I also accept that he is self-conscious about his injuries, feeling that they affect his appearance, and that that reduces his confidence in social interactions. I accept that he cannot participate in recreational activities which he did previously, or, at least, participate at the same level, such as playing hockey, as a result of lack of depth perception.
- [21] In his report, Dr. Gittens also noted that the skull fractures and cerebral contusions predisposed Mr. Russell to a slightly greater risk of seizures than the regular population. However, he felt that risk would probably subside. Dr. Rees, in his report dated January 20th, 2000, did not disagree, in substance, with the prognosis provided by Dr. Gittens. He did say that there was a reasonable chance that Mr. Russell's headaches would resolve with time. He also noted that most individuals who develop post-traumatic epilepsy do so in the first year following injury. He agreed with Dr. Gittens that the chances that Mr. Russell would develop epilepsy will continue to diminish with time. In his evidence at trial, Dr. Gittens agreed that if Mr. Russell has not had seizures in the almost four years since the injury, it is unlikely he will have them in the future, unless he sustains another head injury, or uses alcohol to excess. In view of Mr. Russell's history as an alcoholic, that may be of some significance.

- [22] The doctors were substantially in agreement that the injuries sustained, particularly the blindness in the right eye, would affect Mr. Russell's ability to be employed in occupations requiring sight of both eyes, or depth perception.

A. Non-pecuniary damages

- [23] Based on the facts as set out above, and my review of the cases provided by counsel, (particularly *Grund v. Norberg*, unreported, New Westminster Registry No. S0-1150, February 16, 1995; and *Pon v. Cannell Films Ltd.*, unreported, Vancouver Registry No. C901513, April 15, 1992) I assess non-pecuniary damages in the amount \$75,000.

B. Loss of income to trial

- [24] In submissions, counsel for the plaintiff has not made a claim for loss of income to trial, approaching the claim on the basis of loss of earning capacity.

C. Loss of earning capacity

- [25] Mr. Russell has a very spotty work history, interrupted by periods of imprisonment. However, he is now employed on a part-time basis by Na Pali Installations, as a wireless technician. He enjoys that work, and hopes to make a career out of it. He plans to take further education in the area, after getting further experience in it. However, his previous plans for upgrading his education have been set aside as a result of his ongoing problems in dealing with alcoholism. I accept that Mr. Russell is likely to continue with his employment in the wireless industry, and that there are good prospects for increased employment in that industry. I also accept that he will be restricted in that industry as a result of his eyesight deficits. There was evidence that Mr. Russell would not be sent on jobs alone which might otherwise be done by one worker, such as those on high towers. That will restrict the availability of work for him. In addition, there is no doubt Mr. Russell will be restricted in the type of jobs he can do. Dr. Rees noted that he would not be able to perform jobs involving eye/hand coordination, and would not be able to obtain a professional driver's license. I do not have a report from a vocational consultant, but it is clear, even without that, that there are many jobs which Mr. Russell formerly could do that he can do no longer.
- [26] In *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), Finch J.A., at page 269, noted two ways of attempting to assess a claim for future loss of income: the approach taken in *Brown v. Golaiy*, unreported, Vancouver Registry No. B831458, December 13th, 1985, and adopted by the British Columbia Court of Appeal in *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 392, of treating a person's capacity to earn income as a capital asset, the value of which may be lost or impaired by injury; and the approach taken in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.), of determining if there is a real or substantial possibility of some future event leading to a loss of income. Taking either approach, I am satisfied that the claim for loss of earning capacity has been established. The quantum of it is difficult to assess, however, in light of Mr. Russell's sporadic employment

history, his problems with alcohol and cocaine abuse, and the limited time he has spent in the wireless industry. I assess damages under this head in the amount of \$50,000.

D. Special Damages

[27] No claim for special damages has been put forward.

SUMMARY

[28] In summary, I find that negligence on the part of the defendants has not been proved, and the action must be dismissed. In the event that I am wrong, I would assess non-pecuniary damages in the amount of \$75,000, and loss of earning capacity in the amount of \$50,000.

[29] In view of the dismissal of the action, the defendants will be entitled to costs of this action.

"A.F. Wilson, J."

The Honourable Mr. Justice A.F. Wilson

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