

CANADA / JUDGMENT

Veeken v. British Columbia

2023 BCSC 943

COURT

Supreme Court of British Columbia

DECIDED

2 June 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 943 Veeken v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Veeken v. British Columbia,

2023 BCSC 943

Date: 20230602

Docket: S2261030

Registry: Prince George

Between:

Paul Veeken

Plaintiff

And:

His Majesty the King,

His Majesty the King in right of the Province of British Columbia,

the Attorney General of Canada, BC Minister of Public Safety and

Solicitor General, Minister of Public Safety and Solicitor General,

Lance Bernard, Heather Hughes

Defendants

Before: The Honourable Madam Justice Young

Reasons for Judgment

Appearing in Person:

P. Veeken

Counsel for His Majesty the King in right

of the Province of British Columbia:

L. F. de Lima

M. M. Salt

Counsel for the Attorney General of Canada:

R. A. Kemp

Counsel for Lance Bernard:

L. J. Zivot

Place and Date of Trial/Hearing:

Victoria, B.C.

November 23, 2022

April 14, 2023

Place and Date of Judgment:

Victoria, B.C.

June 2, 2023

Table of Contents

The Applications. 4

General claims. 5

Claims against the Defendant Bernard.. 6

Introduction. 6

Position of the Defendant Bernard. 7

Position of the Plaintiff 8

Analysis. 11

The principles of judicial immunity. 11

Costs awards against the Crown. 15

Discussion. 16

Claims Against the Province and the Defendant Hughes. 17

Claims Against the Province. 17

Claims Against the Defendant Hughes. 18

Crown Breach of Constitutional Duties. 18

The Province and the Defendant Hughes' position. 18

Plaintiff's position. 20

Defendants' reply. 23

Analysis. 24

Unlawful Detention or False Imprisonment 26

The Province and the Defendant Hughes' position. 26

Plaintiff's position. 27

Analysis. 29

Defamation and Breach of Privacy. 29

The Province and the Defendant Hughes' position. 29

Plaintiff's position. 30

Defendants' reply. 33

Analysis. 33

Assault and Van Transport Claims. 36

The Province and the Defendant Hughes' position. 36

Plaintiff's position. 37

Defendants' reply. 38

Analysis. 38

Negligence. 40

The Province and the Defendant Hughes' position. 40

Plaintiff's position. 40

Analysis. 41

Charter Claims and Challenge. 42

Plaintiff's position. 42

The Province and the Defendant Hughes' position. 42

Analysis. 42

Claims against the RCMP Defendants. 43

RCMP Defendants' position. 43

Plaintiff's position. 44

Analysis. 47

Application of R. 3-1(2), R. 3-7, and R. 9-5(1) 47

Defendants' position. 47

Plaintiff's position. 48

Analysis. 49

The Rules. 49

Discussion. 51

Conclusion.. 53

Costs. 54

The Applications

- [1] This decision arises in the context of an action by Mr. Paul Veeken (the "plaintiff") against a number of parties.
- [2] These reasons pertain to three applications filed by the defendants, seeking the following relief pursuant to the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]:
1. An application filed September 15, 2022 by Justice Lance Bernard (the "Defendant Bernard"), seeking: a) the claims made in the plaintiff's notice of civil claim filed July 8, 2022 (the "NOCC") and the amended notice of civil claim filed on September 20, 2022 (the "ANOCC") with respect to the Defendant Bernard be dismissed without leave to amend; b) the action as it pertains to the Defendant Bernard be dismissed and the ANOCC be amended to delete the Defendant Bernard's name from the style of cause; and c) costs of the application and the action. I note that the NOCC was amended after the Defendant Bernard filed his application. In submissions, counsel for the Defendant Bernard submitted that his arguments also apply to the ANOCC and I treat them as such in this decision.
 2. An application filed October 25, 2022 by the defendants His Majesty the King in right of the Province of British Columbia (the "Province"), and Heather Hughes, who was a bail supervisor (the "Defendant Hughes"), seeking an order striking the ANOCC without leave to amend, and dismissing the claim against the Province and the Defendant Hughes.

3. An application filed October 7, 2022 by His Majesty the King, the Attorney General of Canada, the BC Minister of Public Safety and the Solicitor General, and the Minister of Public Safety and Solicitor General with respect to the interests of the Royal Canadian Mounted Police Force and its members (the "RCMP Defendants"), seeking:
 - a) the claims against the RCMP Defendants based on the tort of negligent investigation be dismissed; and b) the costs of and incidental to the application be costs in the cause.
- [3] The plaintiff opposes all of the orders sought by the defendants.
- [4] If, after assuming that the facts as stated are true, I nonetheless find that those facts disclose no cause of action, the pleadings or portions of the pleadings will be struck. Accordingly, I will review the claims raised by the plaintiff in his ANOCC and notice of Charter application (the "Charter Notice").

General claims

- [5] The plaintiff makes several general statements, including that "the defendants were negligent, lazy, sloppy, incompetent and carelessly indifferent", and that "[c]umulatively, the defendants caused and/or contributed to wrongful imprisonment": ANOCC at paras. 74, 77, and 90.
- [6] At para. 84 of the ANOCC, the plaintiff claims his ss. 2(a), 2(d), 3, 7, 8, 9, 11(d), 11(e) and 12 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter] rights were violated, but does not attribute the violations to any particular defendant. The plaintiff makes a similar claim at para. 94 and references his Charter Notice.
- [7] Finally, on p. 4 of the ANOCC, the plaintiff lists several additional reasons in support of his claim for damages, including:
 - a) Loss of employment.
 - b) Numerous transfers in a sheriff secured vehicle.
 - c) Numerous strip searches.
 - d) A van ride from the Prince George Regional Correctional Centre ("PGRCC") to Fraser Regional Correctional Centre on March 20, 2019.
 - e) Cruel and unusual treatment.

Claims against the Defendant Bernard

Introduction

- [8] On February 5, 2015, the plaintiff was convicted of sexual interference and was sentenced to two years' incarceration and one year of probation. He successfully appealed the conviction and a new trial was ordered: *R. v. Veeken*, 2017 BCCA 417 at para. 1 [Veeken, BCCA 2017].
- [9] The Defendant Bernard presided at the second trial. The Court of Appeal reported that the Defendant Bernard found the plaintiff guilty of sexual interference, gave oral reasons for judgment (the "Conviction Reasons"), and edited the oral reasons after they were delivered: *R. v. Veeken*, 2020 BCCA 54 [Veeken, BCCA 2020]. The plaintiff was again sentenced to two years' incarceration. He appealed the second conviction and brought an application for release pending his appeal.
- [10] On March 13, 2019, Justice Groberman refused the plaintiff's application for release pending appeal.
- [11] The plaintiff applied for an order directing a review of Justice Groberman's decision pursuant to s. 680 of the Criminal Code. That application was dismissed by Chief Justice Bauman on May 21, 2019: *R. v. Veeken*, 2019 BCCA 175 [Veeken, BCCA 2019].
- [12] On January 17, 2020, the Court of Appeal overturned the plaintiff's second conviction: *Veeken*, BCCA 2020.
- [13] Those decisions and the identity of the complainant are protected by publication bans under s. 486.4 of the Criminal Code.
- [14] The criminal proceedings concluded when a stay of proceedings was entered on January 11, 2022.

Position of the Defendant Bernard

- [15] The Defendant Bernard submits that the plaintiff's case against him ought to be dismissed because it is barred by the doctrine of judicial immunity. Specifically, the Defendant Bernard maintains that he, as a Superior Court Justice, enjoys absolute judicial immunity, and that this constitutional principle is a complete answer to the plaintiff's claims. The Defendant Bernard further submits that the plaintiff's complaints exclusively relate to the defendant's performance of his judicial duties. The Defendant Bernard argues that the plaintiff's claim is thus barred as it pertains to him. In his application, the Defendant Bernard submits that the plaintiff's pleadings "cannot be repaired by amendment and as such the entirety of the claim against [the defendant] should be struck without leave to amend."
- [16] The Defendant Bernard submits that the ANOCC and the attached Appendix A set out a series of grievances in relation to himself, principally in regard to the Conviction Reasons, the media reporting on those reasons, and an application made by the plaintiff's counsel to obtain the digital audio recording systems' recording of those reasons.

- [17] The Defendant Bernard further submits that the plaintiff's pleadings seem to speak to the edits of the Conviction Reasons. The Defendant Bernard reminds the Court that, although the Court of Appeal considered the edits, the appeal succeeded on other grounds: see Veeken, BCCA 2020 at paras. 8-11. The Defendant Bernard also submits that, "[i]n any event the amendment of oral reasons by a trial judge is clearly a judicial act, one that is circumscribed by case law."
- [18] The Defendant Bernard maintains that the plaintiff provided no particulars in regard to how the Defendant Bernard violated the plaintiff's Charter rights, nor does the factual matrix indicate a Charter breach in connection to the Defendant Bernard. The Defendant Bernard argues that there was a judicial remedy to any Charter breach (if there indeed was one), and that the plaintiff even indicates in his ANOCC that he raised Charter issues in his judicial interim release applications.
- [19] The Defendant Bernard advances in his application that "[p]aragraph 76 of the notice of civil claim is clearly an impermissible rant", and as such "certainly falls within the category of statements that the court can ignore and not assume to be true for the purposes of an application under [R.] 9-5(1)" of the Rules.
- [20] Lastly, according to the Defendant Bernard, the plaintiff posits that the Defendant Bernard breached his constitutional duties, without further articulating the alleged breach. The Defendant Bernard argues that the finding of a lower court's legal error on appeal "has no connection to a breach of a Justice's '[c]onstitutional duties', which appears to be the [p]laintiff's contention."

Position of the Plaintiff

- [21] The plaintiff submits that the application must focus on the Defendant Bernard's actions as presider at the second trial. The plaintiff claims that judicial immunity does not extend to the Defendant Bernard because he was acting outside of his judicial function into his personal capacity. Specifically, the plaintiff submits that the Defendant Bernard cannot have made as many mistakes as the plaintiff alleges he made without having "tossed aside his oath" and acting in his personal capacity. The plaintiff also submits that these are exceptional circumstances that should give rise to an award of damages.
- [22] The plaintiff seeks damages for what he describes as constitutional breaches, and submits in his application response, filed September 23, 2022 (the "application response"), that the Defendant Bernard "operated outside of his constitutional duties". In the application response, the plaintiff cites s. 10 of the Supreme Court Act, R.S.C. 1985, c. S-26 in his claim that the Defendant Bernard "completely ignored his oath as a judge in order to carry out his own form of noble cause corruption". I pause here to note that this piece of legislation applies to the justices of the Supreme Court of Canada, and not to the Defendant Bernard as a justice of the Supreme Court of British Columbia. The plaintiff also claims that the Defendant Bernard breached a number of his judicial duties, as outlined in the Canadian

Judicial Council, Ethical Principles for Judges, Ottawa: Canadian Judicial Council, 2021.

- [23] The plaintiff further claims that the Defendant Bernard is liable for a series of torts, specifically those of negligence, false or wrongful imprisonment, and defamation and libel.
- [24] The plaintiff also claims that the Defendant Bernard breached the plaintiff's rights under ss. 7 and 11(d) of the Charter.
- [25] The plaintiff's position also includes that the Defendant Bernard "misapprehended", "cherry-picked", and "fabricated" evidence, and "abusively lied to the media and consequently to the ill-informed public".
- [26] The plaintiff submits in the application response that the Defendant Bernard suffers from a "misguided sense of morality", which "clearly shows the informed reasonable member of the public that when the truth of innocence gets in the way, self-serving judges will use distraction, lies and manipulation to convict innocent individuals."
- [27] In the application response, the plaintiff submits that a "mountain of evidence" exists that the Defendant Bernard made "demonstrably false and misleading statements" and communicated these to the courts and the public in order to "improperly bolster the judiciary" and the defendant, and thus to damage the plaintiff.
- [28] In response to the Defendant Bernard's position that there was a judicial remedy to any Charter breach, the plaintiff submits in the application response that the Defendant Bernard is attempting to "conflate Charter applications in previous matters at paragraph 36 of its [sic] application with the Charter application filed as part of this claim." The plaintiff further submits that he is not estopped from litigating the issues claimed in the ANOCC because he is doing so on a different factual footing; that is, the plaintiff is not re-litigating the criminal matter itself but seeks to air his grievances relating to the criminal matter in a civil action.
- [29] The plaintiff also replies to the Defendant Bernard's submission with respect to "[p]aragraph 76 of the notice of civil claim" by submitting that this paragraph sets out his emotional suffering, relying on the inclusion of emotional suffering as a common factor that influences an award of non-pecuniary damages: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006).
- [30] The plaintiff posits in the application response that the Charter protects individual members of the public, and not "judges who vastly ignore their oaths to their profession." The plaintiff furthers that judges are not in a superior position to other professionals, such as medical doctors.
- [31] In the application response, the plaintiff also states that the Defendant Bernard "purports that there is legislation that bars any legal action against [the Defendant Bernard]", but does not specify what legislation. The plaintiff further submits that the "Constitution is the supreme law of Canada", and that "[a]ll other laws must be consistent with [it]." The plaintiff submits that the courts play an important role in upholding the Constitution and protecting

the rights and freedoms of individuals. Moreover, the plaintiff takes the position that, because the courts apply but do not make the law, any judge-made "rules ... that seem to attempt to effect [sic] law" are unconstitutional because they "have not passed parliamentary assent and they violate the intent of the Charter."

- [32] Moreover, the plaintiff submits that the perception of fairness and impartiality is at issue in the claim. The plaintiff sets out a test for judicial impartiality, and calls for a jury to hear this matter (including this application), but does not tie any authorities to these statements.
- [33] Lastly, the plaintiff submits this application is premature, but does not provide authorities to support this submission. Instead, the plaintiff posits that he still awaits certain materials he intends to rely on to argue prematurity, including some of the other responses to the NOCC and materials relevant to the Defendant Bernard's "oath".

Analysis

The principles of judicial immunity

- [34] The doctrine of judicial immunity is grounded in the constitutional guarantee of judicial independence and the principle of judicial impartiality: see *Valente v. The Queen*, [1985] 2 S.C.R. 673, 1985 CanLII 25; *Morier and Boily v. Rivard*, [1985] 2 S.C.R. 716, 1985 CanLII 26; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, 1989 CanLII 40; *R. v. Lippé*, [1991] 2 S.C.R. 114, 1990 CanLII 18; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*; *Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, 1997 CanLII 317.
- [35] The Supreme Court of Canada has taken a broad view of impartiality and the independence of the judiciary, and has made it clear that judges will not be held liable for actions taken in their capacity as judges: see *Morier*; *Lippé*; *The Queen v. Beauregard*, [1986] 2 S.C.R. 56, 1986 CanLII 24. The majority in *Lippé* highlighted the interplay between judicial immunity, independence, and impartiality at 155-156:

The doctrine of judicial immunity as a protection of the independence of judges vis-à-vis the parties was expressed in colorful terms by Lord Denning, M.R., in the case of *Sirros v. Moore*, [1975] 1 Q.B. 118, quoted in the case of *Morier v. Rivard*, 1985 CanLII 26 (SCC), [1985] 2 S.C.R. 716, at p. 739:

If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?"

As judicial independence is a safeguard for judicial impartiality, understanding of its full scope is important to the fullness of protection of judicial impartiality. ...

[36] Moreover, as referenced by the majority in *Morier* at 737-738, judicial immunity serves to protect the public:

In *Fray v. Blackburn* (1863), 3 B. & S. 576, it states at p. 578:

It is a principle of our law that no action will lie against a Judge of one of the superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly; ...The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the Judges, and prevent their being harassed by vexatious actions.

[37] In *Tsai v. Klug*, [2005] O.J. No. 2277, 2005 CanLII 19788 (S.C.J.), *aff'd* [2006] O.J. No 665, 2006 CanLII 4942 (C.A.), leave to appeal to SCC *ref'd*, 31427 (17 August 2006), Justice Karakatsanis (as she then was) ordered the striking of a statement of claim and dismissed an action against two Deputy Small Claims Court Judges related to acts performed in their judicial capacity. Justice Karakatsanis found that the actions could not succeed because the judges were immune from civil liability for their actions relating to the exercise of their judicial duties. Justice Karakatsanis provided the following description of judicial immunity at para. 6:

In *Morier and Boiley [sic] v. Rivard*, [1985] 2 S.C.R. 716 (S.C.C.) at pp. 737 ..., the Supreme Court of Canada considered whether judicial immunity extended to acts that may be without or in excess of jurisdiction. The Supreme Court of Canada held that the civil immunity of Superior Court Judges in Ontario and Quebec was absolute. While the immunity does not extend to purely personal acts, judges are however immune for any acts done in the course of or in connection with their legal duties, even if the acts are malicious or *mal fides*. ...

[Emphasis added.]

[38] Justice Karakatsanis then further elaborated on judicial immunity:

[7] The plaintiff's submission that an illegal act cannot be part of judges' duties and therefore cannot be the subject of civil immunity is, at first blush, logical. However, all suits against judges in relation to their cases would necessarily allege that they have acted improperly -- either negligently, outside their jurisdiction, maliciously or even illegally. The civil immunity is absolute for any acts related to or in connection with their judicial capacity -- whether they are proper judicial actions or not. The immunity relates to civil liability only. The right to be tried by an independent and impartial tribunal is an integral part of the fundamental justice protected by s. 7 of the Charter. The constitutional protection is there to ensure that judges can perform their duties independently, impartially and free from concern that they will be personally sued for unpopular decisions.

[8] ... The rule of law is the foundation of our society; it requires that judges be free to carry out their judicial duties impartially, fearlessly -- without concern about how a decision may affect their personal interests. As a result, the common law and legislation have long protected judges from civil prosecution for the exercise of their judicial function.

[Emphasis added.]

- [39] The absolute immunity enjoyed by judges for actions taken in their judicial capacity has been affirmed in the following decisions by this Court and our Court of Appeal.
- [40] In *Gonzalez v. British Columbia (Attorney General)*, 2009 BCSC 639, Justice Bruce applied the principles of judicial immunity found in *Morier*, *MacKeigan*, and *Tsai* in evaluating the parameters of judicial immunity. This case involved alleged human rights violations committed in the course of carrying out judicial duties: see *Gonzalez* at paras. 32-47. Justice Bruce specified that, at least in the context of a complaint before the Human Rights Tribunal, there is no bad faith exception to judicial immunity: *Gonzalez* at para. 52. Ultimately, Justice Bruce found that the principle of judicial immunity applied because the judge's actions were performed in the course of carrying out his legal duties.
- [41] In *Canada v. Rudolf*, 2010 BCSC 565, Justice Myers ordered that filings advancing a claim against a judge for actions related to the exercise of his judicial duties be struck because they did not disclose a cause of action. Justice Myers summarized the principle of judicial immunity as follows:
- [11] But it is also a well-established principle that no action may be maintained in relation to acts or omissions of a judge in the performance of his or her judicial duties: see *Sirros v. Moore*, [1974] 3 All E.R. 776; *Morier v. Rivard*, [1985] 2 S.C.R. 716; and *Gonzalez v. British Columbia (Attorney General)*, 2009 BCSC 639, 95 B.C.L.R. (4th) 185. The judicial immunity from suit applies to all causes of action (*Darker v. Chief Constable of West Midlands*, [2001] 1 A.C. 435 at 456) and is almost absolute -- even extending to conduct which is alleged to have been fraudulent or malicious (*Schut v. Magee*, 2003 BCSC 36, 14 C.C.L.T. (3d) 301, *aff'd* 2003 BCCA 417, 15 B.C.L.R. (4th) 250).
- [42] In *Hokhold v. Canada (Attorney General)*, 2019 BCSC 1106 [*Hokhold BCSC*], the plaintiff submitted that his claims against judges arose from allegations of bad faith, and although judges have immunity, judicial immunity cannot extend to actions of bad faith and misfeasance knowingly committed outside of a judge's jurisdiction. Justice Betton ordered that a notice of civil claim brought against the three judges be struck, without leave to amend, and dismissed against all defendants pursuant to R. 9-5(1) of the Rules because of judicial immunity and because the action would have been a collateral attack on previous court decisions. Justice Betton found that absolute judicial immunity applied to the impugned conduct, which was performed in the defendant judges' judicial or administrative capacities. Justice Betton made the following findings regarding judicial immunity and vicarious liability:

[60] The foundation of judicial immunity is not in issue. The authorities describe judicial immunity as a constitutional principle arising directly from the principle of judicial independence. Judicial immunity exists to protect the public rather than judges, out of a concern that, to ensure a fair hearing by an independent and impartial tribunal, judges must be able to perform their duties with complete independence and without fear of civil liability or similar consequences: ...

...

[77] Based on the jurisprudence as a whole, I accept that judicial immunity is absolute and that there is no bad faith exception to this immunity with respect to any acts or omissions related to or done in connection with a judge's judicial or administrative capacity. ...

...

[84] ... I agree with the submissions of the Attorneys General that they cannot be held vicariously liable for the conduct of judges since they do not have a supervisory role in relation to judges: *Simpson v. Koenigsberg*, 2018 BCSC 499 at para. 31. The judiciary is separate and independent from the executive and legislative branches of government. As has been discussed in relation to the principles pertaining to judicial immunity, this independence is a fundamental and constitutionally-guaranteed cornerstone of the Canadian judicial system.

[43] The Court of Appeal upheld Justice Betton's decision: *Hokhold v. Canada (Attorney General)*, 2021 BCCA 475 [*Hokhold BCCA*], leave to appeal to SCC ref'd, 40295 (9 February 2023). Writing for the Court, Justice Saunders set out the principle of immunity issuing from *MacKeigan*:

[34] It is long established that a justice may not be called on to answer for, in particular testify about, matters that arose during performance of the justice's judicial duties: *MacKeigan v. Hickman* [1989] 2 S.C.R. 796. *MacKeigan* takes this principle back to *Knowles' Trial* (1692), 12 How. St. Tr. 1167, and describes this principle as fundamental to judicial independence. Judicial independence, in turn, is a constitutional principle that exists for the benefit of the community in its largest sense.

[35] A suit brought against a justice in his or her judicial role necessarily requires the justice to answer for decisions made, contrary to *MacKeigan*. The principle discussed in *MacKeigan* translates into the principle of absolute immunity from suit in respect of any matters that arose during performance of the justice's judicial duties, without exemption for any of the gradients of fault, including fraud. This principle was applied in the similar case of *Tsai v. Klug*, [2005] O.J. No. 2277 (S.C.), aff'd [2006] O.J. No. 665 (C.A.), leave to appeal ref'd [2006] S.C.C.A. No. 169, discussed by Justice Betton in his reasons at paras. 63-65. ...

Costs awards against the Crown

- [44] Crown prosecutors "play a quasi-judicial role" and are not always "shielded from cost consequences" in their position as Crown counsel: *R. v. Fercan Developments Inc.*, 2016 ONCA 269 at paras. 86, 123.
- [45] The plaintiff relies on a number of decisions concerning costs awards against the Crown, and argues that these are analogous to the claim against the Defendant Bernard: *Fercan Developments Inc.*; *R. v. 974649 Ontario Inc.*, 2001 SCC 81; *R. v. Robinson*, 1999 ABCA 367; *R. v. Munkonda*, 2015 ONCA 309; *R. v. Melrose*, 2016 BCCA 292, leave to appeal to SCC ref'd, 37363 (13 April 2017); *R. v. Logan* (2001), 52 O.R. (3d) 646, 2001 CanLII 28034 (S.C.J.), aff'd (2002), 59 O.R. (3d) 575, 2002 CanLII 44927 (C.A.).
- [46] In making this argument, the plaintiff relies heavily on *Fercan Developments Inc.* In that case, the Court reviewed the role of Crown counsel, which includes "an obligation to ensure that the power of the state is used only in pursuit of impartial justice", and discharging their role "with the utmost integrity and sound judgment, remaining open to the possibility of the innocence of the accused and avoiding 'tunnel vision'": para. 124. The Court also reiterated the circumstances where costs may be awarded against the Crown, notably "(i) where there has been a Charter violation; (ii) where there has been Crown misconduct; and (iii) where there are exceptional circumstances": para. 37. The restriction on the availability of costs against the Crown in ordinary circumstances is lifted when the Crown displays a marked and unacceptable departure from the reasonable standards expected of the prosecution: para. 86. The Court did not accept that a test higher than a marked and unacceptable departure applies outside the Charter context: para. 77.
- [47] The plaintiff submits the Defendant Bernard did not act in pursuit of impartial justice and with the level of integrity emphasised in *Fercan Developments Inc.* The plaintiff also submits the Defendant Bernard went beyond the standard of a marked and unacceptable departure, and that there is no higher standard. According to the plaintiff, all three of the circumstances set out in *Fercan Developments Inc.* where costs may be awarded against the Crown exist in the case at bar, and all of this should lead to costs against the Defendant Bernard.

Discussion

- [48] The main issue is whether the Defendant Bernard is protected by judicial immunity. I agree with the Defendant Bernard that the plaintiff has equated justices with the Crown in his submissions relying on decisions where costs were awarded against the Crown. These decisions do not pertain to costs awarded against a judge. I am unwilling to draw an analogy between the role of Crown counsel and justices in this regard; judicial immunity is absolute, and judges will not be held liable for actions taken in their capacity as judges.

[49] I further agree with the Defendant Bernard that the action brought against him is about an exercise of his judicial functions. The Defendant Bernard was not acting in his personal capacity in regards to the impugned actions; indeed, these actions were taken in the exercise of his judicial functions as presider at the second trial. I am not convinced by the plaintiff's submission that the Defendant Bernard abandoned his judicial duties and that such an abdication brought the impugned acts outside the realm of his judicial capacity. Absolute judicial immunity clearly attaches to the conduct attributed to the Defendant Bernard. The authorities on judicial immunity referred to above make this clear, and there is nothing on these facts that would take it outside the established law.

[50] For these reasons, I find the Defendant Bernard is protected by judicial immunity with regard to all the claims made in the plaintiff's ANOCC. I find it is plain and obvious the claims in regard to the Defendant Bernard will fail.

Claims Against the Province and the Defendant Hughes

Claims Against the Province

[51] It appears that the plaintiff is advancing the following allegations against the Province:

- a) At paras. 27 and 85 of the ANOCC (when read in conjunction with appendices "A" and "B" of the NOCC), the plaintiff alleges that the Crown Counsel for BC Prosecution Services lied and "breached their Constitutional Duties".
- b) On p. 4 and at paras. 3, 10, 16 to 23, 32 to 36, 43, 58, 62, 71 and 77 of the ANOCC, the plaintiff claims that he was subject to wrongful conditions of release between June 10, 2013, and February 22, 2019, and strict bail conditions.
- c) At p. 4 and at paras. 29, 65, 78, 79 and 91 of the ANOCC, the plaintiff claims that he was assaulted on or about February 22 or 26, 2019, while in custody at PGRCC.
- d) At p. 4 and at paras. 77, 83 and 89 of the ANOCC, the plaintiff claims that he was wrongfully imprisoned between the dates of November 18, 2015, and November 4, 2019.
- e) On p. 4 and at paras. 37 to 43 of the ANOCC, the plaintiff claims that he was subject to wrongful conditions of parole between the dates of November 4, 2019, and January 20, 2020.
- f) At p. 4 and at paras. 56, 69, 71, 75, and 87 of the ANOCC, the plaintiff claims that the Province breached his privacy by distributing his home address, and violated the Privacy Act. The plaintiff does not identify whether he is referring to the federal Privacy Act, R.S.C. 1985, c. P-21 or the provincial Privacy Act, R.S.B.C. 1996, c. 373 [BC Privacy Act].
- g) At para. 88 of the ANOCC, the plaintiff states that "BC Corrections and the RCMP were negligent", but does not provide any further details.
- h) At para. 91 of the ANOCC, the plaintiff claims that the Province is vicariously liable for the negligence of correctional staff.

- i) At para. 93 of the ANOCC, the plaintiff states that the Province is "liable for the tort of Defamation and Libel".

Claims Against the Defendant Hughes

- [52] The plaintiff makes a bare assertion that the Defendant Hughes is liable in negligence (paras. 51, 90 of the ANOCC) and "breached the Privacy Act" (para. 92 of the ANOCC).
- [53] The plaintiff's chief complaint is that the Defendant Hughes "imposed ad hoc rules, policies and practice on the Plaintiff that have no basis in law or written procedure": ANOCC at paras. 51, 69.
- [54] The plaintiff alleges at paras. 21 and 50 of the ANOCC that the Defendant Hughes imposed additionally restrictive conditions over and above court-imposed conditions by denying him permission to attend two funerals. He also alleges that the Defendant Hughes disclosed private information about him to various members of the public.

Crown Breach of Constitutional Duties

The Province and the Defendant Hughes' position

- [55] The Province and the Defendant Hughes refer to s. 2 of the Correction Act, S.B.C. 2004, c. 46 [Correction Act], which authorizes the minister to appoint probation officers, who are peace officers while exercising powers and performing duties under the Correction Act. The Defendant Hughes was a peace officer. According to s. 5(1) of the Correction Act, no action for damages lies or may be brought against a person holding an appointment as a peace officer because of anything done or omitted in the performance or intended performance of a duty under the Correction Act, or in the exercise or intended exercise of a power under the Correction Act, unless the thing was done or omitted in bad faith.
- [56] At para. 22 of his response to the application by the Province and the Defendant Hughes, filed October 31, 2022, the plaintiff clarifies that he is not making a claim for malicious prosecution. He is alleging that the defendants breached their constitutional duties. The Province and the Defendant Hughes submit that these pleadings are vague and contain a mix of evidence, factual allegations and conclusions of law, making it difficult for the defendants to identify and respond to the claims against them.
- [57] The Province and the Defendant Hughes submit that the pleadings are so confusing that it is difficult to understand what is pleaded. A similar claim against Crown counsel for breach of constitutional duties was made in *Hutcheson v. British Columbia*, 2020 BCSC 1986. At para. 29 of that case, Justice Gropper noted that the pleadings appeared to suggest that the Crown counsel and the RCMP pursued the criminal charges against the plaintiff when they should not have. Justice Gropper found that "[s]uch a claim against either Crown counsel or the RCMP cannot be made and does not disclose a reasonable cause of action": para. 29.

[58] Justice Gropper continued as follows:

[30] Crown counsel conduct criminal prosecutions as designated by the Assistant Deputy Attorney General of British Columbia. The functions and responsibilities of Crown counsel are set out in s. 2 of the Crown Counsel Act, R.S.B.C. 1996, c. 87 ...

[31] In *Krieger v. Law Society of Alberta*, 2002 SCC 65, the Court stated:

...

45 As discussed above, these powers emanate from the office holder's role as legal advisor of and officer to the Crown. In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies.

...

[Emphasis added.]

[59] Justice Gropper went on to find that the exercise of prosecution discretion cannot be the basis of a cause of action against the Province: *Hutcheson* at para. 32.

[60] Crown counsel enjoy immunity for decisions that fall within their prosecutorial discretion, absent flagrant impropriety or malicious prosecution: *Watchel v. British Columbia*, 2019 BCSC 1087 at paras. 17-19, *aff'd* 2020 BCCA 100, leave to appeal to SCC *ref'd*, 39310 (17 December 2020).

Plaintiff's position

[61] The plaintiff submits that the Defendant Hughes imposed additional restrictive conditions over him, above the court conditions. According to the plaintiff, she: unfairly denied his request to attend two funerals; disclosed his birthdate and home address; published a warning prior to trial, saying that this was office practice or policy; and denied the plaintiff's request to attend functions with adult supervisors.

[62] The plaintiff further submits that it is unclear whether the Defendant Hughes acted on her own or as a peace officer. This question was asked in *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 21, 1999 CanLII 692. The plaintiff submits that it is unknown at this pre-discovery stage whether the Defendant Hughes acted on her own or through her duties as a correctional employee. He submits it is up to the defendants to determine if they will accept vicarious liability for the Defendant Hughes' actions.

[63] The plaintiff relies on *Subbiah v. Canada*, 2013 FC 1194 at para. 83, where the Crown conceded that Correctional Services Canada ("CSC") has a duty of care.

[64] The plaintiff references Subbiah at para. 93, which says:

To be foreseeable, there must be a reasonable prospect that the event will occur. In *Bastarache v Canada*, 2003 FC 1463 Madam Justice Leyden-Stevenson described the duty owed to inmates by prison authorities as follows:

The prison authorities owe a duty to take reasonable care for the health and safety of the inmate while in custody: *Timm*, supra; *Abbott v. Canada* (1993), 64 F.T.R. 81 (T.D.); *Oswald v. Canada* (1997) 126 F.T.R. 281 (T.D.). In addressing the duty of care, regard must be had to the circumstances surrounding the incident: *Scott v. Canada*, [1985] F.C.J. No. 35 (T.D.). An important consideration in the foreseeability of risk is the likelihood of the occurrence of the event giving rise to the risk. The issue is not whether there is a duty of care, but whether the acts or omissions of the defendant fall below the standard of conduct of a reasonable person of ordinary prudence in the circumstances: *Russell v. Canada* 2000 BCSC 650, [2000] B.C.J. No. 848 ; *Hodgin v. Canada* (Solicitor General) (1998), 201 N.B.R. (2d) 279 (Q.B.T.D.), aff'd., [1999] N.B.J. No. 416 (C.A.) (at para. 23).

[65] The plaintiff notes that s. 3 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 establishes that the Crown is liable for damages for which, if it were a person, it would be liable in respect of a tort committed by a servant of the Crown or a breach of duty attaching to the ownership, occupation, possession or control of property. Moreover, pursuant to s. 2(c) of the Crown Proceeding Act, R.S.B.C. 1996, c. 89 [Crown Proceeding Act], the government is subject to all the liabilities to which it would be liable if it were a person.

[66] The plaintiff submits that the Defendant Hughes did not act in "a judicial nature and it was clear that she was not acting in connection with the judicial process". Alternatively, his Charter rights were abused. He submits that Ms. Salt represented the Defendant Hughes in this application, and so it appears that the Crown has accepted vicarious liability for the Defendant Hughes' actions.

[67] The plaintiff relies on *Joseph v. Meier*, 2020 BCSC 778 at paras. 73-89, where the Court found damages for Charter breaches were an appropriate remedy in vindication of the plaintiff's rights and in deterrence of future Charter breaches.

[68] The plaintiff also relies on *Vancouver (City) v. Ward*, 2010 SCC 27, where the trial judge awarded Mr. Ward damages for Charter breaches.

[69] In *Ward*, the Supreme Court of Canada found that Charter damages fulfilled the functions of compensation, vindication of the right, and/or deterrence of future breaches: para. 4. The Court stated that these are not private law damages, but the distinct remedy of constitutional damages: para. 22. An action for public law damages, including constitutional damages, lies against the state, and not against individual actors: para. 22. Actions against individual actors should be pursued in accordance with existing causes of action: para. 22.

[70] Although the plaintiff says he is not pursuing a claim for malicious prosecution, he also relies on *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 1989 CanLII 77, where of the Supreme Court of Canada considered policy rationales behind absolute immunity of prosecutors as troubling. The Court found at 195-196 that:

... public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust. ...

Regard must also be had for the victim of the malicious prosecution. ... When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur. ...

[71] Relying on *Bazley* at para. 13, the plaintiff submits that vicarious liability can be inferred; if the plaintiff establishes that the employee's act was done on the employer's premises, during working hours, and that it bears a close connection with the work that the employee was authorized to do, then the responsibility shifts to the employer to show that the act is one for which it was not responsible.

[72] The plaintiff submits that the vicarious liability of the Province for the wrongful intentional acts of the Defendant Hughes is a triable issue that should not be brushed aside by a bald denial from the Province.

Defendants' reply

[73] In reply, the Province and the Defendant Hughes say s. 3(2) of the Crown Proceeding Act provides immunity for anything done in the course of executing a function of the administration of justice. This is what a probation officer does.

[74] Further in reply, the Province and the Defendant Hughes say that the court will strike out a Charter damages claim if it duplicates a claim in the notice of civil claim. They submit that the Charter Notice is the duplicate of the claim in the ANOCC.

[75] The Province and the Defendant Hughes rely on *Johnson v. British Columbia (Attorney General)*, 2022 BCCA 82, leave to appeal to SCC ref'd, 40174 (16 February 2023). This case involved an appeal from an order striking portions of an amended notice of civil claim and an amended notice of constitutional question relating to damages under s. 24(1) of the Charter. The cross-appeal raised the issue of whether the Province owed a fiduciary duty to inmates in correctional institutions. The appellants claimed damages for sexual assault or sexual abuse allegedly committed by a corrections officer employed by the Corrections

Branch of the Province. The Court found that the harms or consequences alleged to have resulted from the Charter rights breach and the private law claims did not differ in any way. The appellants did not identify how they could amend their pleadings to remedy the concern of duplication. The case management judge refused to strike the claim against the Province for breach of fiduciary duty. The Province had contended that the claim for breach of fiduciary duty had no reasonable prospect of success.

[76] In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 44, the Chief Justice (as she then was) explained that compelling a fiduciary to put the best interests of the beneficiary before their own is essential to the relationship, and imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole. The Chief Justice found the following at para. 54:

... Claims against the government that fail to satisfy the legal requirements of a fiduciary duty should not be allowed to proceed in the speculative hope that they may ultimately succeed. ... Plaintiffs suing for breach of fiduciary duty must be prepared to have their claims tested at the pleadings stage, as for any cause of action.

[77] In *Johnson*, the appellants were unable to point to any decisions in which a government was found to have a fiduciary duty in a prison context: para. 159. The Court recognized the fact that the law has yet to recognize a novel claim is not a reason to strike a claim that has a reasonable prospect of success; however, the appellants failed to direct the Court to analogous situations in which fiduciary claims had been found: para. 159. The Court dismissed the appeal, allowed the cross-appeal, and struck the portions of the pleadings alleging the existence of a fiduciary duty by the Province.

Analysis

[78] Although the plaintiff says he is not claiming malicious prosecution, he relies on cases that deal with that subject. *Krieger v. Law Society of Alberta*, 2002 SCC 65 establishes that the exercise of prosecutorial discretion cannot be the basis of a cause of action against the Province.

[79] Instead, the plaintiff says his claim is for the Crown's breach of its constitutional duties.

[80] It appears that most of the plaintiff's breach of constitutional duties claim is directed at the Defendant Hughes for imposing harsh bail conditions on the plaintiff. The Defendant Hughes was acting in her capacity as a probation officer and following the policies of her office. She was not working in a personal capacity. She is protected by s. 5(1) of the *Correction Act* for acting in the performance of her duties under that Act.

[81] The Defendant Hughes' actions are governed by office policies. As a probation officer, she is responsible for supervising an accused or convicted offender to ensure compliance with court orders and to minimize the chance of reoffending.

- [82] The details of the conditions enforced by the Defendant Hughes may seem harsh to the plaintiff, but were in place to protect the public. It is plain and obvious to me that the claims against the Defendant Hughes for acting in her capacity as a peace officer will fail.
- [83] Moreover, CSC has a duty of care to ensure the safety of inmates where CSC has actual knowledge of potential harm: Subbiah at para. 90. That harm must be reasonably foreseeable. In Subbiah, the Court determined that it is the obligation of the CSC to take reasonable steps to ensure the safety of the at-risk inmate if there are pre-indicators of violence or if the violence is predictable. It is then that CSC is obliged to take steps to ensure the inmate's safety. Additionally, prison is an inherently dangerous environment, and CSC cannot guarantee each inmate's safety or protect inmates from unpredictable dangers: Subbiah at para. 84; Miclash v. Canada, 2003 FCT 113.
- [84] The plaintiff says that he was attacked while incarcerated. There are no facts alleged that CSC had any advanced notice or pre-indicators of violence. Once the attack occurred, the plaintiff was placed in isolation for his protection. There is no indication that the Province owed a duty of care to prevent an unforeseeable attack, or that the Province did not meet a reasonable standard of care when they became aware of the attack.
- [85] Paragraph 93 of Subbiah, as quoted by the plaintiff, sets out the duty owed to inmates by prison authorities. There are no facts in this ANOCC or Amended Charter Notice filed September 28, 2022 (the "Amended Charter Notice"), to support a breach of that duty.
- [86] It is possible to receive an award against an individual for civil damages, and a separate award against the state for constitutional damages, if a Charter breach has been established and the damages are not duplicative. This ANOCC does not support a claim for either private or public damages.
- [87] I find it is plain and obvious the claim of the Crown's breach of its constitutional duties will fail.

Unlawful Detention or False Imprisonment

The Province and the Defendant Hughes' position

- [88] The plaintiff alleges false imprisonment or wrongful imprisonment. The Province and the Defendant Hughes submit that there is no case law to support wrongful imprisonment, and the claim of false imprisonment is bound to fail. The Province and the Defendant Hughes say the claim of false imprisonment requires proof of total deprivation of liberty absent lawful justification, and may be defeated if the defendants can establish that there was lawful justification. They submit the plaintiff was incarcerated as a result of criminal convictions. He was released once those convictions were overturned.

- [89] The Province and the Defendant Hughes state that unlawful detention or false imprisonment is described as the "intentional and total confinement of a person against his or her will without lawful justification": Joseph, at para. 38, citing Hanisch v. Canada, 2003 BCSC 1000 at para. 88, rev'd in part on other grounds 2004 BCCA 539.
- [90] To succeed, say the Province and the Defendant Hughes, the plaintiff must show that he was totally deprived of his liberty against his will, and that the defendant was the cause of his imprisonment: R.T. v. Lowe, 2021 BCSC 590 at para. 49, citing Huang v. Silvercorp Metals Inc., 2015 BCSC 549 at para. 37, aff'd 2016 BCCA 100.
- [91] The Province and the Defendant Hughes submit that they can establish there was a lawful justification for the detention, and therefore the claim will not succeed: see Little v. Peers (1988), 47 D.L.R. (4th) 621 at 623-624, 1988 CanLII 2948 (B.C.C.A.). If there is a justification, there is a defence to the action for false imprisonment: see Little at 624. In Little, the Court looked to the Criminal Code to determine whether there was justification: at 624-625. The Court in Little found the two police officers acted in good faith in relation to an arrest that they made under warrant; they were authorized by law to execute the warrant.
- [92] The Province and the Defendant Hughes submit that the plaintiff was lawfully detained during periods of time where his conviction had not yet been overturned and his sentence was still in effect. They submit it is plain and obvious in these circumstances that this claim for unlawful detention is bound to fail.
- [93] The plaintiff relies on Henry v. British Columbia (Attorney General), 2015 SCC 24, and insists that the similarities to his case are "shocking to say the least". The Province and the Defendant Hughes distinguish Henry, which was a disclosure case. Henry involved the Crown's failure to disclose information to the accused when it knew, or would reasonably be expected to know, that the information was material to the defence and the failure to disclose would likely impinge on the accused's ability to make full answer and defence. The Court held that s. 24(1) of the Charter authorized a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct, absent proof of malice: paras. 30-31.

Plaintiff's position

- [94] The plaintiff relies on Frey v. Fedoruk, [1950] S.C.R. 517, 1950 CanLII 24 for the principle that the onus lies on the defendants to prove justification for an arrest. Justice Cartwright, writing for the majority, stated the following at 523:

The claim being one for damages for false imprisonment, in my opinion, the following short passage from Halsbury's Laws of England, Second Edition, Volume 33, page 38 correctly states the law:

The gist of the action of false imprisonment is the mere imprisonment; the plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification.

- [95] The plaintiff also relies on *R. v. Burt* (1987), 38 C.C.C. (3d) 299, 1987 Can LII 4619 (Sask. C.A.). In that case, the trial court had found that s. 253 of The Vehicles Act, R.S.S. 1978, c. V-3 contravened s. 7 of the Charter. Section 253 related to the penalty for, as a registered owner, allowing someone to operate a vehicle and cause excessive noise in its operation. It was a summary conviction offence with a fine as a penalty. On default of paying the fine for a second offence, the owner could be imprisoned for no less than 14 days and no more than 60 days.
- [96] The plaintiff relies on the statement made by the Court in *Burt* at 303 that the "law is now settled that where a statutory provision empowers a judge to impose imprisonment instead of a fine, the provision impinges upon the right described in the first branch of s. 7 of the Charter".
- [97] Furthermore, the plaintiff relies in *R. v. Trochym*, 2007 SCC 6, where Justice Deschamps, writing for the majority, spoke of the importance of protecting accused people from wrongful convictions at para.1:

In recent years, a number of public inquiries have highlighted the importance of safeguarding the criminal justice system -- and protecting the accused who are tried under it -- from the possibility of wrongful conviction. As this Court has previously noted, "[t]he names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case": *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1. In the case at bar, we consider once again the need to carefully scrutinize evidence presented against an accused for reliability and prejudicial effect, and to ensure the basic fairness of the criminal process. More specifically, the decisions at trial to admit post-hypnosis evidence and similar fact evidence in this case constitute errors of law that are neither harmless nor negligible. This is not a case where the remaining evidence is so overwhelming that I can conclude that a conviction would inevitably have been entered by the trier of fact had the evidence in issue not been adduced. I would set aside the conviction and order a new trial.

- [98] The plaintiff also relies on *P.L. v. Alberta*, 2011 ABQB 821, where the Court found there were similarities between the facts in that case and the facts in *Trevorrow v. State of South Australia* (No 5), [2007] SASC 285. In the latter case, the Court found the plaintiff had been imprisoned by being controlled in his freedom of movement arising from his foster placement and not being returned to his parents.
- [99] The Court in *P.L.* held that:

- [67] While as with trespass, damages are presumed with cases of false imprisonment or unlawful confinement (Klar at p. 58), there is no evidence of any direct application of force, so proving trespass is uncertain, and the Crown's statement of defence essentially alleges justification and the absence of any negligence or breach of fiduciary duty towards P.L. Those are factual matters and it cannot be said that the defence is hopeless, at least at this stage of the proceedings, as there has been no meaningful questioning as yet.
- [100] The plaintiff submits that he had multiple restrictions on his liberty, which were intentional, during multiple occasions of imprisonment. He says his imprisonment was wilful and it was intentional.
- [101] The plaintiff submits he has established a prima facie case for false imprisonment, and it is now up to the defendants to rebut that case. He submits this is a matter for trial.

Analysis

- [102] Assuming the facts pleaded to be true, the plaintiff would have been lawfully detained during the periods of time where his conviction had not yet been overturned and his sentence was still in effect. Therefore, it is plain and obvious in these circumstances that this claim for unlawful detention is bound to fail. I note the Supreme Court of Canada in *R. v. Tim*, 2022 SCC 12 found that the Court's conclusion in the civil cases of *Frey and Kosoian v. Société de transport de Montréal*, 2019 SCC 59, that a lawful arrest cannot be based on a mistake of law, applies equally in the criminal context: para. 29. The Court held there are compelling considerations of principle and legal policy confirming this. Allowing the police to arrest someone based on what they believe the law is -- rather than based on what the law actually is -- would dramatically expand police powers at the expense of civil liberties: para. 30.
- [103] However, I find there is no mistake of law in this case.

Defamation and Breach of Privacy

The Province and the Defendant Hughes' position

- [104] The plaintiff alleges defamation because, as a result of the conviction, the mainstream media publicized the matter nationally. There is no evidence that the Province made a statement or related information to the media, or of how the statement damaged the plaintiff. The Province and the Defendant Hughes say that there is insufficient evidence to support a claim for defamation.
- [105] The plaintiff alleges breach of privacy. According to *Ari v. Insurance Corporation of British Columbia*, 2013 BCSC 1308 at paras. 63-65, aff'd 2015 BCCA 468, the clear status of the law in British Columbia is that the tort for invasion of privacy does not exist. The Province and the Defendant Hughes submit it is plain and obvious the claim for common law breach of privacy would fail, and this claim must be struck.

- [106] The plaintiff alleges that the Province and the Defendant Hughes breached the Privacy Act, but does not indicate which Act he is referring to.
- [107] According to s. 2(2)(d)(i) of the BC Privacy Act, an act or conduct is not a violation of privacy if the act or conduct was that of a peace officer acting in the course of their duty to prevent, discover or investigate crime or to discover or apprehend the perpetrators of a crime.
- [108] Also, according to s. 2(3) of the BC Privacy Act, a publication of the matter is not a violation of privacy if the matter published was of public interest or was fair comment on a matter of public interest, or the publication was privileged in accordance with the rules of law relating to defamation.
- [109] The Province and the Defendant Hughes submit that there are not enough facts in the ANOCC to support a breach of privacy.

Plaintiff's position

- [110] The plaintiff submits that he relies on the BC Privacy Act, which says it is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another. It is his position that the analysis ends there. According to the plaintiff, whether or not the Defendant Hughes acted wilfully is a triable issue.
- [111] The plaintiff responds to the defendants' submission that the release of information was justifiable by saying that this again is a triable issue that should not be dealt with at the pleadings stage.
- [112] The plaintiff cites *Lu v. Shen*, 2020 BCSC 490 at para. 174, where Justice Adair set out the basic legal principles concerning defamation, as summarized by Justice Dixon in *Weaver v. Corcoran*, 2017 BCCA 160:

To obtain judgment in a defamation action, the plaintiff must prove three things: (i) that the impugned words were defamatory; (ii) that they referred to the plaintiff; and (iii) that they were published, meaning that they were communicated to at least one other person. Where the plaintiff establishes these elements, falsity and damage are presumed and the onus shifts to the defendant to advance a defence in order to escape liability. Defamation is a tort of strict liability, so it is unnecessary to prove that the defendant was careless or intended to cause harm. See *Weaver v. Corcoran*, at para. 70 (citing *Grant v. Torstar Corp.*, 2009 SCC 61, at paras. 28-29).

- [113] The plaintiff submits that the Defendant Bernard "fabricated the evidence" in his conviction and sentencing judgments. The plaintiff submits that the Province is the employer of the Defendant Bernard, and therefore the Province is vicariously liable for the misdeeds of the Defendant Bernard, which led to this claim for the defamation against the plaintiff.

- [114] The plaintiff relies on *Yenovkian v. Gulian*, 2019 ONSC 7279 at para. 164, which deals with the test for intentional infliction of mental suffering. The elements of intentional infliction of mental suffering are a) flagrant or outrageous conduct; b) calculated to produce harm; and c) resulting in a visible and provable illness.
- [115] The plaintiff submits that the Defendant Bernard's conduct was flagrant and outrageous, and calculated to produce harm against the plaintiff. He says the Province should be vicariously liable for this conduct. The plaintiff submits this conduct caused him pain and suffering.
- [116] At para. 166 of *Yenovkian*, the Court discussed aspects of tortious invasion of privacy in the form of intrusion upon seclusion, via reference to *Jones v. Tsige*, 2012 ONCA 32. In *Jones*, Justice Sharpe referred to invasion of privacy, described in the article of William L. Prosser, "Privacy" (1960) 48 Cal L Rev 383. There are four elements, as set out below:
- (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
 - (2) Public disclosure of embarrassing private facts about the plaintiff.
 - (3) Publicity which places the plaintiff in a false light in the public eye.
 - (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.
- [117] The Court in *Yenovkian* noted that the Ontario Superior Court of Justice has recognized the second form of invasion of privacy, that is, public disclosure of private facts: para. 168. This recognition involved the publishing of intimate videos of a victim on internet pornography sites: see *Yenovkian* at para. 168.
- [118] The plaintiff submits that the publication of the details of his conviction and aspects of his personal life, including his address, was a matter that would be highly offensive to a reasonable person, and that the publication was not of legitimate concern to the public. He equates the publication of the terms of his conviction and sentencing to cyber-bullying. He submits that this was intentional and aimed to cause him harm.
- [119] The plaintiff submits that once the elements of defamation are established, the onus then shifts to the other party to advance a defence in order to escape liability. Examples of defences are fair comment, justification and responsible communication.
- [120] The plaintiff submits that when the Defendant Hughes gave the complainant's mother private information about the plaintiff, this constituted a tortious invasion of his privacy. It was embarrassing to him and placed him in a false light.
- [121] The plaintiff submits that the Defendant Bernard had a reckless disregard. According to the plaintiff, during the sentencing hearing, the Defendant Bernard acknowledged the press were present and wanted to ensure that they were able to hear him, but ignored the fact that the plaintiff's counsel, who was attending by telephone, could not.

Defendants' reply

- [122] In reply, the Province says there is no recognized tort of invasion of privacy in British Columbia. The plaintiff submits the court has not yet had an opportunity to recognize the new tort of intrusion upon seclusion referenced in *Yenovkian*.
- [123] The Province and the Defendant Hughes reply to the plaintiff's suggestion that the Province is vicariously liable for the actions of the Defendant Bernard by referring to *Hokhold BCCA* at paras. 43-49, where the Court found that the vicarious liability claims against the Attorneys General "could never succeed" for two independent reasons. Firstly, the Court held that vicarious liability is only triggered when an actionable fault is established, and there was no possibility of establishing such a fault on the part of the justices. Therefore, there was no basis for a claim in vicarious liability against any other party deriving from the justices' actions. Secondly, the Court stated that the relationship between the judiciary and other branches of government did not support the possibility of vicarious liability, and that judicial independence was antithetical to the claim of vicarious liability for the actions of the justices.

Analysis

- [124] I am persuaded by the Province and the Defendant Hughes' position that the plaintiff has not pled the material facts required to support a claim for breach of privacy. The pleadings allege that "Community Corrections" and the Defendant Hughes breached the plaintiff's privacy by disclosing his personal information. This is insufficient to bolster a legal basis for the claim. The claim for breach of privacy ought to be dismissed on this basis alone. However, to be thorough, I will continue the analysis.
- [125] As held by the Court in *Ari*, the common law tort of invasion of privacy does not exist in British Columbia: paras. 63-65. I see no reason to depart from the clear status of the law in this province. I therefore reject the plaintiff's submissions regarding the tort of intrusion upon seclusion.
- [126] Alternatively, assuming the facts pled to be true, the claim for breach of privacy is bound to fail because the Province and its employees are exempt from liability under provincial legislation.
- [127] If the plaintiff's claim is based on s. 1(1) of the BC Privacy Act, any of the Province's alleged privacy breaches regarding the plaintiff were authorized pursuant to s. 2 of this Act. This section provides an exemption for peace officers acting in the course of their duties to prevent, discover or investigate a crime, and specifies that publication of a matter is not a violation of privacy if the matter published is of public interest or is fair comment on a matter of public interest.

- [128] Pursuant to s. 2(3) and s. 4 of the Correction Act, probation officers employed by the Province are peace officers, and are responsible for the supervision of persons on probation.
- [129] Moreover, s. 25 of the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 [FIPPA], states that the head of a public body must disclose to the public information, a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or b) the disclosure of which is, for any other reason, clearly in the public interest.
- [130] Pursuant to s. 33(3)(a) of FIPPA, a public body may disclose personal information if the head of the public body determines that compelling circumstances that affect anyone's health or safety exist, and notice of disclosure is mailed to the last known address of the individual the information is about, unless the head of the public body considers that the notice could harm anyone's health or safety.
- [131] Section 1 and Schedule 1 of FIPPA clarify that a "public body" means, amongst other things, a ministry of the government of British Columbia. This definition would include the Ministry of Public Safety and Solicitor General.
- [132] For these reasons, I find it is plain and obvious the claim of breach of privacy will fail.
- [133] Furthermore, I accept the Province and the Defendant Hughes' position that the plaintiff has not pled sufficient evidence, that is, the material facts required, to support a claim for defamation. The facts pled allege that the plaintiff's conviction was published nationally by the mainstream media. This is insufficient to bolster a legal basis for the tort of defamation.
- [134] Moreover, the Supreme Court of Canada held the following about the defence of qualified privilege in *Bent v. Platnick*, 2020 SCC 23 at para. 121:

An occasion of qualified privilege exists if a person making a communication has "an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published" and the recipient has "a corresponding interest or duty to receive it": Downard, at §9.6 (footnote omitted). Importantly, "[q]ualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself": Hill, at para. 143; Botiuk, at para. 78. Where the occasion is shown to be privileged, "the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff": Hill, at para. 144; Botiuk, at para. 79. However, the privilege is qualified in the sense that it can be defeated. This can occur particularly in two situations: where the dominant motive behind the words was malice, such as where the speaker was reckless as to the truth of the words spoken; or where the scope of the occasion of privilege was exceeded (Downard, at §1.9; see also Hill, at paras. 145-47; Botiuk, at paras. 79-80).

[Emphasis in original.]

[135] Based on the submissions, qualified privilege exists in regard to the communication of the plaintiff's conviction, and is not defeated by either scenario outlined in Bent. Therefore, I find that qualified privilege is attached to the occasion upon which the communication by the Province and the Defendant Hughes was made regarding the plaintiff's conviction.

[136] I find it is plain and obvious the claim of defamation will fail.

[137] As I have previously determined there is no possibility of establishing an actionable fault on the part of the Defendant Bernard because of absolute immunity, I also reject the plaintiff's position that the Province is vicariously liable for the actions of the Defendant Bernard for the same reasons found in Hokhold BCCA at paras. 43-49 and Hokhold BCSC at para. 84. I find it is plain and obvious the claim of vicarious liability will fail.

Assault and Van Transport Claims

The Province and the Defendant Hughes' position

[138] The Province and the Defendant Hughes submit that the claims for assault and in relation to a van transport are barred by s. 6(1) of the Limitation Act, S.B.C. 2012, c. 13 [Limitation Act], which says:

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

[139] The assault allegedly occurred on or about February 26, 2019, and the van ride on March 19 or 20, 2019.

[140] The Province and the Defendant Hughes submit these claims are bound to fail because of the expiration of the limitation period. They rely on *Edgar v. The British Columbia Institute of Technology*, 2015 BCSC 710 at para. 44, which says that an action that is clearly statute-barred by the expiration of a limitation period may be dismissed on an application under R. 9-6(4) of the Rules. The Court in *Edgar* also outlined the analysis under R. 9-6(5):

[9] The analysis under Rule 9-6(5)(a) is concerned with whether, based on all the material, the claim is so factually without merit that it is manifestly clear that there is no genuine issue to be tried. If the court reaches that conclusion, it must dismiss the claim; there is no discretion. ...

[141] Ministerial Order 86/2020, effective March 26, 2020 to April 14, 2020, temporarily suspended limitation periods because of the impact of the COVID-19 pandemic on court services. This order was replaced with respect to limitation periods by Ministerial Order 98/2020, effective April 15, 2020, the relevant portion of which reads as follows:

2 (1) Subject to subsection (2), every mandatory limitation period and any other mandatory time period that is established in an enactment or law of British Columbia within which a civil or family action, proceeding, claim or appeal must be commenced in the Provincial Court, Supreme Court or Court of Appeal is suspended.

[142] On March 25, 2021, limitation periods resumed pursuant to B.C. Reg. 292/2020.

[143] With these extensions, say the Province and the Defendant Hughes, the plaintiff had until February 27, 2022 and March 2022, respectively, to commence his action. They say he commenced it in June 2022.

Plaintiff's position

[144] The plaintiff submits that the limitation period should be suspended until Justice Tyndale issued a stay of proceedings on January 11, 2022. The plaintiff submits that he should not be deprived of the opportunity to place a complete factual context before the Court on the basis of the expired limitation period. He cites *Beardsley v. Ontario* (2001), 57 O.R. (3d) 1, 2001 CanLII 8621 (C.A.) at para. 22, where the Court said:

... The appearance of justice takes on an even greater significance where claims are made against those who administer the law. The limitation defence to the claims for false arrest, false imprisonment and negligence should not therefore be determined, without being pleaded, and the pleadings being completed.

[145] The plaintiff relies on *Jensen v. Ross*, 2014 BCCA 173 at para. 42, which establishes that R. 9-5 of the Rules is not the appropriate mechanism to determine a limitation issue.

[146] In *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 91, the Supreme Court of Canada found that imprisonment resulting from a wrongful conviction constitutes personal injury to the person imprisoned.

[147] In *Hill*, the respondents claimed that the appellant's action was statute-barred. The relevant limitation period in that case was under the Public Authorities Protection Act, R.S.O. 1990, c. P.38, s. 7(1). The Court held that the limitation period for negligent investigation begins to run when the cause of action is complete: para. 96. The cause of action in negligence arises not when the negligent act is committed but rather when the harmful consequences of the negligence result: para. 96. The cause of action for wrongful conviction is not complete until the plaintiff can establish that the conviction was in fact wrongful; so long as the valid conviction is in place, the plaintiff cannot do so: para. 97. The Court in *Hill* found that the limitation period did not start to run until the appellant, after a new trial, was acquitted of all charges of robbery.

[148] The plaintiff submits that this limitation period should not commence until the stay of proceedings was issued.

[149] In the alternative, the plaintiff submits that Chief Justice Bauman extended the limitation period by his "outrageous statements" in the bail review decision.

[150] The plaintiff says that he was penalized for challenging the conditions of his bail by being denied interim release by Chief Justice Bauman. He submits it would be "near suicide" to mount a civil suit while he was still in jail under the authority of the people he was challenging.

Defendants' reply

[151] The Province and the Defendant Hughes acknowledge that R. 9-5 is not appropriate to determine the limitation defence. That is why the Province and the Defendant Hughes brought their application to dismiss the claims of assault and in relation to the van transport under R. 9-6. They submit that, given the expiration of the limitation period, there is no triable issue.

Analysis

[152] I deny the plaintiff's claim that the limitation period should not commence until the stay of proceedings was issued. Hill is distinguishable from the case at bar. In Hill, the case involved a tort of negligent investigation related to a wrongful conviction, and not wrongful imprisonment alone. The appellant was acquitted at the second trial and brought a civil action that included a claim in negligence against the police, based on the conduct of their investigation. This is not the case here: the plaintiff was not acquitted, and his claims in relation to the assault and the van transport are not about a negligent investigation connected to a finding of wrongful conviction. I therefore see no reason to diverge from the limitation period and extension discussed below.

[153] I also deny the plaintiff's claim that Chief Justice Bauman extended the limitation period through his statements at the bail review decision. The pleadings do not appear to provide a legal basis for this argument.

[154] I find the two-year limitation period found in s. 6(1) of the Limitation Act applies. Taking into account the extension provided by the ministerial orders, the plaintiff had until February 2022 and March 2022, respectively, to commence his action. The plaintiff commenced his action in July 2022, and not in June, as submitted by the Province and the Defendant Hughes. Regardless, the limitation period had clearly expired before the claim was filed.

[155] The relevant portions of R. 9-6 of the Rules provide:

Application by answering party

- (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

- (5) On hearing an application under subrule (2) or (4), the court,
- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
- [156] The action is clearly statute-barred by the expiration of the limitation period. I am satisfied that there is no genuine issue for trial with respect to the plaintiff's claims of assault and in relation to the van transport.
- [157] The claims of assault and in relation to the van transport will be dismissed pursuant to R. 9-6(4) and R. 9-6(5)(a).

Negligence

The Province and the Defendant Hughes' position

- [158] The Province and the Defendant Hughes submit that the pleadings do not provide a clear factual basis to support a claim of negligence against the Defendant Hughes, or for the claim that the Province was vicariously liable for the negligent actions of a correctional officer while the plaintiff was incarcerated. Furthermore, they say the pleadings fail to specifically identify the actions of the applicants or their employees that fell below the standard of care, or how any of their actions caused damage to the plaintiff.
- [159] The Province and the Defendant Hughes submit that the plaintiff's claim for negligence against the defendants amounts to the unsupported legal conclusion that "BC Corrections and the Defendant Hughes were negligent" and that all of the applicants "are liable for the tort of negligence."

Plaintiff's position

- [160] In response, the plaintiff submits that the Defendant Hughes provided him with instructions to seek court directions to make changes to his bail conditions. According to the plaintiff, the Defendant Hughes said that CSC would always employ the strictest method of controlling his activities, and that if he wanted any variation, he would need the court to make the change. She did not advise him that seeking variation in court would risk his freedom. Chief Justice Bauman denied the plaintiff's bail review because of the attitude he had toward his bail conditions, seeking court directions on numerous occasions over seven years.

- [161] Accordingly, the plaintiff submits that the Defendant Hughes was lazy, sloppy and incompetent, and that she was in part responsible for his false imprisonment for not cautioning him against applying to court for variations.
- [162] The plaintiff relies on *D.H. v. Kline*, 2006 BCSC 1903 at para. 80, rev'd in part on other grounds *D.H. (Guardian ad litem of) v. British Columbia*, 2008 BCCA 222. In that case, the plaintiff's claim was against the Crown alleging breach of fiduciary duty and negligence after two provincial probation officers permitted the defendant, a convicted sex offender, to reside in the same home in which the plaintiffs occupied a basement suite, and failed to properly warn the plaintiff of the risk posed by the defendant. The Crown admitted that it was vicariously liable if the probation officers were found negligent: para. 2.
- [163] The plaintiff submits that the Correction Act does not protect the Province from vicarious liability for an act or omission for which it would be vicariously liable if s. 5 of the Act were not in force.
- [164] The plaintiff also submits that the Defendant Hughes (or an unnamed bail supervisor) was negligent for not providing him with an opportunity to vote in a provincial election. He submits this caused him damage and humiliation. The plaintiff further submits the Province is vicariously and directly liable for Charter breaches.

Analysis

- [165] Negligence is not properly pleaded. The plaintiff has not claimed that the Defendant Hughes owed him a duty of care or that she breached it. The Defendant Hughes had no duty to advise the plaintiff against applying to court for variations of his bail conditions.
- [166] The plaintiff was not denied release because of his many applications for variation of conditions. He was denied release because he had been found to have wilfully breached a bail condition on more than one occasion. On March 13, 2019, Justice Groberman determined that it would not be in the public interest to release the plaintiff out of concern for public safety because of his breach of recognizance and because of his litigation conduct. Chief Justice Bauman described this at para. 21 of his decision in *Veeken*, BCCA 2019:

Justice Groberman also rested his conclusion in part on Mr. Veeken's litigation conduct. He noted that Mr. Veeken had brought "a number of applications to amend and delete the bail conditions", including the aforementioned earlier s. 680 application. Justice Groberman observed that in his applications Mr. Veeken had argued the conditions were "unnecessary and unlawful" and that they were "examples of ridiculous burdens placed on him by the administration of justice" (at para. 20). Justice Groberman concluded that these applications indicated that Mr. Veeken had such an attitude that his release would reduce public confidence in the administration of justice.

- [167] The plaintiff brought about this result through his own contempt for his conditions, and not because a probation officer failed to caution him.

[168] I find it is plain and obvious the claim for negligence will fail.

Charter Claims and Challenge

Plaintiff's position

[169] The plaintiff alleges in the ANOCC that his ss. 2(a), 2(d), 3, 7, 8, 9, 11(d), 11(e) and 12 Charter rights were violated. In the plaintiff's original Charter Notice filed September 20, 2022, he relied on ss. 2(a), 2(d), 3, 6, 7, 8, 9, 11(d), 11(e), 12, and 24(1) of the Charter, and sought damages and costs of the application, pursuant to s. 24(1) of the Charter. In his Amended Charter Notice filed September 28, 2022, the plaintiff only relies on ss. 7, 11(d), 15(1), and 24(1) of the Charter, and seeks the dismissal of the Defendant Bernard's application for dismissal, pursuant to s. 24(1) of the Charter.

The Province and the Defendant Hughes' position

[170] The Province and the Defendant Hughes say the plaintiff fails to provide a basis for the plaintiff's Charter breach allegations beyond a vague legal conclusion and the reference to his Charter Notice pursuant to the Constitutional Question Act, R.S.B.C. 1996, c. 68.

Analysis

[171] At para. 22 of Ward, the Supreme Court of Canada confirmed that Charter damages under s. 24(1) are to be claimed against the state and not against private individuals. There is, then, no basis to advance any Charter claim directly against the individual defendants in this case.

[172] In regard to the claims against the other defendants, the plaintiff seems to claim damages for the same actions in both the tort and Charter contexts. The Court in Johnson spoke to the duplication of tort and Charter damages:

[85] In my view, there is no category of loss claimed by the appellants for which the court will not be able to provide redress through tort damages. If the allegations are proven, the appellants' claims would attract aggravated and punitive damages in tort. The appellants cannot show why, if aggravated and punitive damages are awarded in tort, it would be appropriate or necessary for an additional award of Charter damages to address the same conduct.

...

[87] In short, I am of the view that the appellants have not identified any principled reason why it was not possible for the judge to conclude on the basis of these pleadings that the availability of tort damages was an alternative remedy precluding the possibility of a successful Charter damage claim. ...

[173] This reasoning applies to the case at bar. To borrow the language in Johnson, what the plaintiff has attempted here is to "affix a Charter label on what is in substance a personal tort claim that can be fully addressed through private law processes": para. 87.

[174] For these reasons, I find it is plain and obvious that the Charter-related claims will fail.

Claims against the RCMP Defendants

RCMP Defendants' position

[175] In his ANOCC, the plaintiff alleges, among other things, that he was assaulted by a fellow inmate at the PGRCC on or about February 26, 2019. The plaintiff further alleges that one or more members of the RCMP negligently investigated the assault.

[176] The RCMP Defendants submit that it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action.

[177] In *Allen v. New Westminster (City)*, 2017 BCSC 1329, Justice Ehrcke found that police do not owe victims of crime a private law duty of care in relation to the investigation of alleged crimes: para. 18, referencing *Callan v. Cooke*, 2012 BCSC 1589 at para. 68. Justice Ehrcke referenced the test for determining the existence of a private law duty of care, as summarized by the Supreme Court of Canada in *Hill* at para. 20. Justice Ehrcke then provided a summary of *Wellington v. Ontario*, 2011 ONCA 274, leave to appeal to SCC ref'd, 34294 (13 October 2011). *Wellington* addressed whether victims of crimes committed by police officers have the right to sue for negligent investigation. The Court found that "there is now a long list of decisions rejecting the proposition that the police owe victims of crime and their families a private law duty of care in relation to the investigation of alleged crimes": *Wellington* at para. 20. The Court explained the rationale for a distinction between a private law duty of care and a duty to the public at paras. 43-45, and concluded that "[t]o impose a private law duty of care would ... introduce an element seriously at odds with the fundamental role of the [Special Investigation Unit] to investigate allegations of criminal misconduct in the public interest".

Plaintiff's position

[178] The plaintiff submits that he was assaulted while incarcerated and that he wanted to lay charges against the individual who assaulted him. He says he was transferred out of the unit, that he telephoned the RCMP, and never once did the RCMP return any of his calls.

[179] The plaintiff relies on *Hill* for the proposition that police are not immune from liability under the Canadian law of negligence, citing the following paragraphs from that decision:

[3] I conclude that police are not immune from liability under the Canadian law of negligence, that the police owe a duty of care in negligence to suspects being investigated, and that their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The tort of negligent

investigation exists in Canada, and the trial court and Court of Appeal were correct to consider the appellant's action on this basis. The law of negligence does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through negligence law for harm resulting to a suspect.

...

[25] Proximity may be seen as providing an umbrella covering types of relationships where a duty of care has been found by the courts. The vast number of negligence cases proceed on the basis of a type of relationship previously recognized as giving rise to a duty of care. The duty of care of the motorist to other users of the highway; the duty of care of the doctor to his patient; the duty of care of the solicitor to her client -- these are but a few of the relationships where sufficient proximity to give rise to a prima facie duty of care is recognized, provided foreseeability is established. The categories of relationships characterized by sufficient proximity to attract legal liability are not closed, however. From time to time, claims are made that relationships hitherto unconsidered by courts support a duty of care giving rise to legal liability. When such cases arise, the courts must consider whether the claim for sufficient proximity is established. If it is, and the prima facie duty is not negated for policy reasons at the second stage of the Anns test, the new category will thereafter be recognized as capable of giving rise to a duty of care and legal liability. The result is a concept of liability for negligence which provides a large measure of certainty, through settled categories of liability -- attracting relationships, while permitting expansion to meet new circumstances and evolving conceptions of justice.

[180] The plaintiff concludes that this establishes the RCMP does owe a duty of care to the complainant. He also cites the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10, ss. 18 and 37 [RCMP Act], which say:

18 It is the duty of members who are peace officers, subject to the orders of the Commissioner,

- (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
- (b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
- (c) to perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums or other places; and

- (d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

...

37 It is the responsibility of every member

- (a) to respect the rights of all persons;
- (b) to maintain the integrity of the law, law enforcement and the administration of justice;
- (c) to perform the member's duties promptly, impartially and diligently, in accordance with the law and without abusing the member's authority;

...

[181] The plaintiff submits that the RCMP officer in charge of the investigation of the assault on him did not comply with the RCMP Act. He allowed the assault to go on without challenge, and did not perform an investigation promptly and diligently. The plaintiff says the RCMP sabotaged the investigation. The plaintiff submits he telephoned the RCMP and left messages, and the RCMP returned calls to the plaintiff's cell phone while the plaintiff was incarcerated. According to the plaintiff, the RCMP ought to have known that he was incarcerated; the officer must have been aware of the plaintiff's location.

[182] The plaintiff further submits that if the RCMP does not owe a victim a duty of care in negligence, then misfeasance in public office may be a better term.

[183] The plaintiff refers to the headnote in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, which says:

The failure of a public officer to perform a statutory duty can constitute misfeasance in a public office. Misfeasance is not limited to unlawful exercises of statutory or prerogative powers. It is an intentional

tort distinguished by (1) deliberate, unlawful conduct in the exercise of

public functions; and (2) awareness that the conduct is unlawful and likely to injure the plaintiff. The requirement that the defendant must have been

aware that his or her unlawful conduct would harm the plaintiff establishes the required nexus between the parties. A plaintiff must also prove the

requirements common to all torts, specifically, that the tortious conduct was

the legal cause of his or her injuries, and that the injuries suffered are

compensable in tort law.

[184] The plaintiff submits that misfeasance of public office should apply to the failure of a public officer to perform a statutory duty. He says the RCMP officer's failure to return his telephone calls was deliberate, making this an intentional tort.

[185] The plaintiff seeks leave to amend his pleadings to plead misfeasance in a public office.

Analysis

[186] I reject the plaintiff's submission that I should allow him to amend his pleadings to allege a new tort and new duty of care, when the law as stated in *Allen* and is binding on me. There is no gap in the law. RCMP officers do not owe a duty of care to victims, and therefore the claim in negligence must fail. There is no evidence to support a claim of intentional tort.

[187] It is plain and obvious that the claims made by the plaintiff against the RCMP Defendants based on negligent investigation will fail.

Application of R. 3-1(2), R. 3-7, and R. 9-5(1)

Defendants' position

[188] The defendants submit the plaintiff's pleadings do not fulfil the requirements for a proper pleading under the Rules, relying on R. 3-1(2) and R. 3-7. They apply for the claims to be dismissed pursuant to R. 9-5(1) of the Rules.

[189] The Province and the Defendant Hughes argue that the ANOCC does not set out the facts and legal issues to be determined so the parties can focus their responses on the relevant issues, and so the defendants know the case to be met: *Sahyoun v. Ho*, 2015 BCSC 392 at para. 72, appeal dismissed as abandoned 2017 BCCA 96, leave to appeal to SCC ref'd, 37581 (18 October 2018).

[190] The Province and the Defendant Hughes also described the plaintiff's pleadings as follows: the ANOCC is 26 pages long, and contains irrelevant facts, bald assertions and conclusory statements. The original Charter Notice added 11 pages (the Amended Charter Notice now adds four). The plaintiff attached several appendices to the NOCC, referenced in the ANOCC, which include excerpts of previous court decisions, a table of alleged income loss and portions of the transcript of the first trial.

Plaintiff's position

[191] The plaintiff submits that the ANOCC lays out a detailed yet concise account of his claims for damages that span a timeline of eight years. Twenty-six pages plus an eleven-page Charter application is not excessive for a claim that spans eight years. The plaintiff has provided thirteen and one-half pages of history, two pages to comply with the requirements of *Stapley* setting out the factors in support of his claim for damages, two pages setting out the legal foundation and the remaining four pages to set out the relief sought. The plaintiff submits that the defendants have oversimplified the size of the pleadings.

- [192] The plaintiff submits that he relied on R. 3-7(18) of the Rules, when particulars are necessary; R. 3-7(19), lengthy particulars; and R. 3-7(21), particulars in libel or slander, to address additional documents for lengthy pleadings.
- [193] The plaintiff submits that the defendants have never asked for further particulars, yet now complain that there are insufficient facts to support the claims.
- [194] According to the plaintiff, he provided appendices to his original NOCC to flesh out the factual background supporting his claims. On reflection, he realized that the appendices contained evidence that should not be included in pleadings, and so he has amended his ANOCC and put the appendices in his list of documents. He submits that there was adequate factual background for each claim contained in those appendices and the defendants are well aware of the factual background.
- [195] The plaintiff further submits that any issue requiring clarification can be preserved by an amendment to the pleadings. He cites *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149 at para. 28, where the Court of Appeal held that "[w]hen there is an attack on a pleading as showing no reasonable claim or defence the court is well advised to first consider whether the pleading can be preserved by amendment."
- [196] He also relies on *Beardsley* at para. 23, where the Court of Appeal found the pleadings sparse and vague but declined to strike the pleadings.

Analysis

The Rules

[197] Rule 3-1(2) reads as follows:

Contents of notice of civil claim

- (2) A notice of civil claim must do the following:
- (a) set out a concise statement of the material facts giving rise to the claim;
 - (b) set out the relief sought by the plaintiff against each named defendant;
 - (c) set out a concise summary of the legal basis for the relief sought;
 - (d) set out the proposed place of trial;
 - (e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;
 - (f) provide the data collection information required in the appendix to the form;
 - (g) otherwise comply with Rule 3-7.

[198] The portions of R. 3-7 that are particularly relevant to this matter are:

Pleading must not contain evidence

- (1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.

...

Pleading conclusions of law

- (9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.

...

When particulars necessary

- (18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

Lengthy particulars

- (19) If the particulars required under subrule (18) of debt, expenses or damages are lengthy, the party pleading may refer to this fact and, instead of pleading the particulars, must serve the particulars in a separate document either before or with the pleading.

...

Particulars in libel or slander

- (21) In an action for libel or slander,
- (a) if the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff must give particulars of the facts and matters on which the plaintiff relies in support of that sense, and

...

[199] The relevant portions of R. 9-5(1) are:

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

- [200] In an application to strike pleadings for failure to disclose a reasonable cause of action, the Court looks to the facts pleaded to evaluate the possibility of the claim's success, and no evidence is admissible: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 22. As submitted by the defendant, the legal test for striking the whole or part of a pleading is found in the following passage from *Imperial Tobacco Canada Ltd.*:
- [17] ... A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action ... Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial ...
- [201] Although the Court must take the facts pleaded in a notice of civil claim as true, it need not do the same for allegations based on assumption and speculation: *Willow v. Chong*, 2013 BCSC 1083 at para. 19.
- [202] Moreover, the Court is only concerned with the sufficiency of the pleadings: *International Taoist Church of Canada* at para. 10.
- [203] The Court should also examine whether the pleadings are preservable by amendment: *International Taoist Church of Canada* at para. 28. However, the Court will not grant a party the opportunity to redraft "if it is plain and obvious that even if redrafted a pleading is bound to fail because it does not raise an arguable issue (that is, it is without legal foundation)": *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473 at para. 40, rev'd on other grounds 2012 BCCA 196.

Discussion

- [204] The ANOCC is a long narrative of the difficulties the plaintiff experienced while interacting with the justice system. Much of the detail may be testified to at trial, but is not appropriate for a notice of civil claim because it does not support a claim known to the law or remedies sought. What I mean by this is that a lot of the information in the ANOCC is background information or context, and so is marginally relevant, but is not material to support a factor in a legal claim.
- [205] An example of this is found at para. 2 of the ANOCC, where the plaintiff provides details of his interaction with his first bail supervisor, and his "adamant communication" with her that he was not convicted of anything and that he was innocent of the allegations until proven guilty in law. He describes the bail supervisor's quotation of office policy and its strict approach to pretrial release conditions. There is no claim against this probation officer. This entire paragraph is background context where no claim arises. The plaintiff also references the elusive office policy and why he was treated as a convicted offender, rather than a professed innocent person until proven guilty. This theme continues through paras. 4, 16, 18, 19, and 20.

- [206] In similar fashion, the plaintiff complains at paras. 19, 20, 23, and 32 of the ANOCC of the strict terms of his interim release after his first successful appeal, and how the courts, in his mind, failed to follow the law outlined in *R. v. Antic*, 2017 SCC 27. This appears to be a collateral attack on the decisions made by justices of this Court and of the Court of Appeal.
- [207] The ANOCC contains tirades about how judges fail to follow the law when hearing interim release applications, and the fact that anyone who dared to use the British Columbia Courts to exercise their Charter rights would be punished. This may be the plaintiff's opinion, but it is not appropriate for a notice of civil claim, which should contain material facts and legal claims, and not the opinion of the plaintiff.
- [208] The plaintiff describes the hardship that he had with employment and housing while he was charged with a criminal offence, and then after he was convicted. This may be evidence of damages he has suffered, but there is no cause of action pleaded that gives rise to a claim for these damages.
- [209] Paragraphs 33-48 do not contain any material facts that support a reasonable claim. They allege that the plaintiff suffered shame and humiliation as a result of having to go to a Community Corrections office, sadness for having to miss two funerals while he was on probation, financial costs he incurred, the exhausting impact of litigation and the negative impact on his relationships. These effects are not tied to a cause of action.
- [210] Paragraphs 49-73 set out the damages that the plaintiff suffered, but again are full of opinions from the plaintiff, which is not proper in a notice of civil claim.
- [211] The section entitled "Part 2: Relief Sought" does not just contain a summary of relief sought. It continues with the plaintiff's opinion about the actions of the defendants and his claims. The plaintiff does summarize the relief sought in paras. 80-84.
- [212] Paragraphs 84-94 do set out the legal basis for the claim.
- [213] "Part 4: Style of Hearing" is supposed to include one line on whether the plaintiff seeks to be tried by justice and jury, or justice alone. The plaintiff includes two long paragraphs of his opinion, which is not to be included in a notice of civil claim, on how he cannot get a fair hearing in a British Columbia Court.
- [214] It is not clear which facts relate to which cause of action, and against which defendant. When "it is apparent that several causes of action are being alleged against multiple defendants", as here, "then unless the statement of claim sets out with clarity what facts relate to what cause of action and against which defendant, the pleading fails to 'clearly define the issues of fact and law to be determined by the court' ...": *Stoneman v. Denman Island Local Trust Committee*, 2010 BCSC 636 at para. 27.

- [215] A great deal of the ANOCC is unnecessary or scandalous and vexatious, and discloses no cause of action. Some of the ANOCC might be salvageable by an amendment, but this is only if the ANOCC raises a claim that is known in law that has any prospect of success. As I have found, the claims for breach of constitutional duties, unlawful detention, defamation and breach of privacy, and negligence will fail.
- [216] Moreover, I am of the view that the plaintiff's pleadings in respect to the Defendant Bernard disclose no reasonable cause of action. Specifically, as I have found that the Defendant Bernard is protected by judicial immunity, the plaintiff's claim against him has no reasonable prospect of success.
- [217] As I have previously noted, judicial immunity clearly attaches to the conduct attributed to the Defendant Bernard, and this immunity is absolute. Based on this conclusion, it is also my view that the plaintiff should not be granted the opportunity to redraft the pleadings as they pertain to the Defendant Bernard. This is because it is plain and obvious that, even if redrafted, the claims in respect of the Defendant Bernard are bound to fail: they do not raise an arguable issue, and they cannot be repaired by amendment.

Conclusion

- [218] It is clear to me that the entire ANOCC and Amended Charter Notice must be struck. It is plain and obvious that the claims against the Defendant Bernard, and the claims for breach of constitutional duties, unlawful detention, defamation and breach of privacy, and negligence against the other defendants, will fail. These claims will be struck pursuant to R. 9-5(1)(a) of the Rules. The claims of assault and in relation to the van transport will be dismissed pursuant to R. 9-6 because of the expiration of the limitation period. Nothing is left in the ANOCC to support a claim. There is no point in allowing a further amendment, given that there is no viable cause of action.

Costs

- [219] The Defendant Bernard, the Province and the Defendant Hughes, and the RCMP Defendants have been fully successful in their applications. The Defendant Bernard and the RCMP Defendants have sought and are entitled to their costs at Scale B. The Province and the Defendant Hughes have not sought costs of their application.

"B. M. Young, J."

The Honourable Madam Justice Young

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/09/2023BCSC0943.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/veeken-v-british-columbia-2023>

Prepared on 26 October 2026 · Esheria