Federal Court  Cour fédérale

Date: 20120528

Docket: T-1543-11

Citation: 2012 FC 648

Ottawa, Ontario, May 28, 2012

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

CHRISTOPHER BRAZEAU

Plaintiff (Defendant to Counterclaim)

and

THE ATTORNEY GENERAL OF CANADA

Defendant (Plaintiff by Counterclaim)

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The Plaintiff, Christopher Brazeau, is an inmate in a federal penitentiary in Prince Albert, Saskatchewan. On September 15, 2011, he filed a Statement of Claim seeking damages in relation to alleged sewage flooding (the Flooding Incidents) and the shut off of water to his cell (the Water Incident) while he was an inmate at Kent Institution in Agassiz, British Columbia.

[2] The Defendant, the Attorney General of Canada, has brought this motion in writing to strike the Statement of Claim and the Defence to Counterclaim of the Plaintiff. In the event that the Defendant is not successful in striking the claims, the Defendant seeks an Order under Rule 8(2) of the *Federal Courts Rules*, SOR/98-106 [*Rules*] extending the time for serving a list of documents.

II. Issues

[3] The following issues arise on this motion:

1. Should the Statement of Claim be struck, in whole or in part, as it fails to disclose a reasonable cause of action?

2. Should paragraphs 32 and 35 of the Defence to Counterclaim be struck on the basis that they fail to disclose a reasonable defence?

[4] For the reasons that follow, certain portions of the Statement of Claim and Defence will be struck. However, I have determined that the action will not be struck in its entirety.

III. The Pleadings

[5] In his Statement of Claim, the Plaintiff claims damages for:

(a) intentional infliction of mental suffering;

(b) negligent infliction of mental suffering;

(c) misfeasance in public office;

(d) negligence;

(e) breach of ss. 12, 8 and 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; and

(f) harassment.

[6] The total amount of damages claimed is unspecified but, as set out in the Plaintiff's Reply and Statement of Defence to Counterclaim at paragraph 50, exceeds $50,000.

[7] By Statement of Defence and Counterclaim filed October 24, 2011, the Defendant denied the Plaintiff's allegations and asserted that all of the Flooding Incidents were caused by the

Plaintiff and other inmates, who flushed towels, bed sheets, t-shirts, and other materials down the toilets. In addition, the Defendant counterclaimed for damages in excess of $10,212.87 in relation to cleaning, equipment, and overtime.

[8] In his Reply, filed on February 21, 2012, the Plaintiff provided further details and denied that he had caused or contributed to the Flooding Incidents. In addition, the Plaintiff pleaded that the Counterclaim should be struck because the Defendant has a statutory remedy, specifically, a disciplinary procedure.

IV. Applicable Rules and Principles

[9] Before embarking on an analysis of the pleadings, it is helpful to outline the overarching principles applicable to a motion to strike.

[10] Rule 221 of the *Rules* provides for striking pleadings in an action:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221**. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(*a*) discloses no reasonable cause of action or defence, as the case may be,	*a)* qu'il ne révèle aucune cause d'action ou de défense valable;
(*b*) is immaterial or redundant,	*b)* qu'il n'est pas pertinent ou qu'il est redondant;
(*c*) is scandalous, frivolous or vexatious,	*c)* qu'il est scandaleux, frivole ou vexatoire;

(*d*) may prejudice or delay the fair trial of the action,	*d)* qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(*e*) constitutes a departure from a previous pleading, or	*e)* qu'il diverge d'un acte de procédure antérieur;
(*f*) is otherwise an abuse of the process of the Court,	*f)* qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
(2) No evidence shall be heard on a motion for an order under paragraph (1)(*a*).	(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)*a*).

[11] Rules 174 and 181 are also relevant on this motion. Briefly stated, Rule 174 requires that a pleading "shall contain a concise statement of the material facts on which the party relies, but shall not include evidence". Rule 181 provides further detail on the required elements of pleadings:

181. (1) A pleading shall contain particulars of every allegation contained therein, including	**181.** (1) L'acte de procédure contient des précisions sur chaque allégation, notamment :
(*a*) particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and	*a)* des précisions sur les fausses déclarations, fraudes, abus de confiance, manquements délibérés ou influences indues reprochés;
(*b*) particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention.	*b)* des précisions sur toute allégation portant sur l'état mental d'une personne, tel un déséquilibre mental, une incapacité mentale ou une

> intention malicieuse ou
> frauduleuse.

[12] The Supreme Court of Canada recently explained the rationale behind the power to strike out claims in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 19, [2011] 3 SCR 45 [*Imperial*]:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[13] In that case, the Court also restated the test for striking out claims at paragraph 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: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. 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: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[14] A court should read an impugned statement of claim as generously as possible, and in a manner that accommodates any inadequacies in the allegations that are merely the result of drafting deficiencies (*Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 14, [1985] SCJ No 22).

[15] The jurisprudence also establishes that a statement of claim does not disclose a cause of action where it contains bare assertions, but no facts on which to base those assertions (*Vojic v Canada (MNR)*, [1987] 2 CTC 203, [1987] FCJ No 811 (CA)). Moreover, a conclusion of law pleaded without the requisite factual underpinning to support the legal conclusions asserted is defective, and may be struck out as an abuse of Court (*Sauve v Canada*, 2011 FC 1074 at para 21, [2011] FCJ No 1321).

V. Issue #1: Should the Statement of Claim be struck as it fails to disclose a reasonable cause of action?

A. *Parties' submissions*

[16] The Defendant points to a number of alleged deficiencies in the Statement of Claim. First, the Defendant submits that it violates Rules 174 and 181, as it discloses neither the material facts on which the Plaintiff relies, nor the particulars of his allegations, but is instead "premised on bare assertions of legal conclusions". Second, the Defendant submits that the Statement of Claim does not disclose a cause of action capable of succeeding against the Crown, as it fails to name a Crown servant for each of the actions or omissions alleged to give rise to a cause of action, as required under ss. 3 and 10 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [*CLPA*]. And third, the Defendant argues that the Plaintiff's claims for negligence, intentional infliction of mental suffering, misfeasance in public office, harassment, and damages pursuant to s. 24(1) of the *Charter* should all be struck for failing to disclose a reasonable cause of action.

[17] In response, the main thrust of the Plaintiff's submissions is that he has pleaded the material facts in support of the allegations made in the Statement of Claim and that he has represented himself to the best of his ability, given that he has no legal training.

[18] I will consider each of the alleged failings in the pleadings.

B. *Crown liability/misfeasance in public office*

[19] The Defendant argues that, pursuant to ss. 3 and 10 of the *CLPA*, a plaintiff seeking to establish the liability of the Crown in tort must demonstrate that the person who committed the tort was a Crown servant, acting within the course of his or her duties, and that there would be a cause of action against the Crown servant personally. Moreover, the Defendant argues that the Plaintiff has not pleaded material facts in support of the claim of misfeasance in public office.

[20] Section 3 of the *CLPA* establishes the liability of the Crown; paragraph (b) is relevant in this case, as each cause of action took place outside of Quebec:

3. The Crown is liable for the damages for which, if it were a person, it would be liable	**3.** En matière de responsabilité, l'État est assimilé à une personne pour :
…	…
(*b*) in any other province, in respect of	*b*) dans les autres provinces :
(i) a tort committed by a servant of the Crown, or	(i) les délits civils commis par ses préposés,
(ii) a breach of duty attaching to the ownership,	(ii) les manquements aux obligations liées à la propriété, à l'occupation, à

occupation, possession or control of property.	la possession ou à la garde de biens.

[21] Section 10 of the *CLPA* applies where the Crown's liability is vicarious:

10. No proceedings lie against the Crown by virtue of subparagraph 3(*a*)(i) or (*b*)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.	**10.** L'État ne peut être poursuivi, sur le fondement des sous-alinéas 3*a)*(i) ou *b)*(i), pour les actes ou omissions de ses préposés que lorsqu'il y a lieu en l'occurrence, compte non tenu de la présente loi, à une action en responsabilité contre leur auteur, ses représentants personnels ou sa succession.

[22] The decision of the Federal Court of Appeal in *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184 at para 38, 321 DLR (4th) 301 [*Merchant*], although not cited by the parties, is helpful as it describes the degree of specificity required by Rule 174 and s. 10 of the *CLPA* in the context of a claim for misfeasance in public office:

> I do agree that the individuals involved should be identified. The plaintiff is obligated under Rule 174 to plead material facts and the identity of the individual who are alleged to have engaged in misfeasance is a material fact which must be pleaded. But how particular does the identification have to be? In many cases, it may be impossible for a plaintiff to identify by name the particular individual who was responsible. However, in cases such as this, a plaintiff should be able to identify a particular group of individuals who were dealing with the matter, one or more of whom were allegedly responsible. This might involve identifying job positions, an organizational branch, an office, or a building in which those dealing with the matter worked. Often such information is readily available from the oral and written communications and dealings among the parties that gave rise to the claim. <u>In cases such as this, identification at least at this level of particularity, will usually be sufficient. The purposes of pleadings will be fulfilled: the issues in the action will be defined with reasonable precision, the respondents will have enough information to investigate the matter</u>

> and the respondents will be able to plead adequately in response within the time limits set out in the Rules.
>
> [Emphasis added]

[23] In this case, the Statement of Claim and Reply allege the following facts:

- Correctional Manager Don Labossiere instructed Corrections employees to relocate the Plaintiff to a different cell; the Plaintiff was ordered to carry his possessions through spilled sewage (Statement of Claim at para 5);

- "respondent corrections officers" turned off the Plaintiff's tap water and toilet water (Statement of Claim at para 11);

- "[o]n or about August 27, 2011 during the 11:00 pm range walk corrections officer refused the Applicant of his request to drink some water and flush his toilet" (Statement of Claim at para 12);

- "Correctional Manager Verville denied the [Plaintiff's] resolution to the security incident of allowing him a drink of water and to flush his toilet" (Statement of Claim at para 14);

- "[o]n August 27, 2011 … the corrections officer, upon arriving for the overnight shift, informed the prisoner in J 010 the plumber and hazmat personnel were not

being summoned as the Correctional Manager felt prompt cleanup of the sewage was not necessary" (Statement of Claim at para 17);

- the Plaintiff "informed respondent Mark Kemball bio hazard clean up was not being completed …" (Statement of Claim at para 19);

- "[t]he Manager delegated to daily rounds responded … then ordering [the Plaintiff's] relocation to another Unit and cell. This order resulted in [the Plaintiff] having to transport all [his] belongings through raw sewage again, and delayed [his] access to a shower" (Statement of Claim at para 19);

- "intentional, calculated, negligent decisions of the Warden and Correctional Managers, in directing, guiding and managing all Correctional Staff and contractors at their discretion, in response to the incidents …" (Reply at para 13);

- page 6 of the Reply refers to "Warden and Correctional Manager Labossiere"; and

- paragraph 17 of the Reply refers to the "calculated decisions of Prison Administrator Mark Kemball, Warden of Kent Institution".

[24] While some paragraphs name individuals, it is unclear who is responsible for certain decisions. For example, paragraph 5 of the Statement of Claim names Correctional Manager Don Labossiere, but it is not clear who ordered the Plaintiff to carry his possessions through the

sewage. However, it can be inferred that it was a Corrections employee working at Kent Institution. Similarly, at paragraph 17 of the Statement of Claim, it is not clear who made the "intentional decision" not to call the plumber.

[25] In making the specific allegation that the Defendant was negligent, the Plaintiff simply refers to the "Kent correctional officers" and the "prison administrators of the Kent Institution" (Statement of Claim at paras 20-23). Similarly, paragraph 24 of the Statement of Claim alleges that "the correctional staff committed the tort of intentional infliction of mental suffering", while paragraph 25 claims that "the correctional staff" committed the tort of misfeasance in public office. In paragraph 26, the Plaintiff again simply accuses "the correction staff" of harassing him or breaching the duty of care. Finally, with respect to the alleged *Charter* violations, the Plaintiff simply refers to the conduct of the "Defendants" (Statement of Claim at para 27).

[26] Considering the teachings of the Court of Appeal in *Merchant*, above, in my view, the Statement of Claim provides sufficient detail to allow the Defendant to respond to the pleadings. The pleadings are sufficient, at this early stage, to allow the claim of misfeasance in public office to proceed. Moreover, I am not persuaded that ss. 3 and 10 of the *CLPA* operate as a bar to these portions of the claim.

C. *Negligence*

[27] A plaintiff must prove three things to succeed in an action for negligence: (i) that the defendant owed the plaintiff a duty of care; (ii) that the defendant breached that duty of care; and

(iii) that damages resulted from that breach (*Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 44, [2003] 3 SCR 263 [*Odhavji*]). The Defendant asserts that the Plaintiff has failed to plead sufficient material facts in respect of any of the three branches.

[28] The Supreme Court provided the following description of the duty of care in *Odhavji*, above at paras 45-46:

> 45 It is a well-established principle that a defendant is not liable in negligence unless the law exacts an obligation in the circumstances to take reasonable care. As Lord Esher concluded in *Le Lievre v. Gould*, [1893] 1 Q.B. 491 (C.A.), at p. 497, "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." Duty may therefore be defined as an obligation, recognised by law, to take reasonable care to avoid conduct that entails an unreasonable risk of harm to others.
>
> 46 It is now well established in Canada that the existence of such a duty is to be determined in accordance with the two-step analysis first enunciated by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, at pp. 751-52:
>
> > First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.
>
> ...

[29] The question, then, with respect to duty, is whether the pleadings disclose material facts which could establish that, as between the Plaintiff and the Defendant, there is a sufficient relationship of proximity such that, in the reasonable contemplation of the former, carelessness on the Defendant's part may be likely to cause damage to the Plaintiff.

[30] While the Defendant argues that paragraphs 20 to 23 of the Statement of Claim merely plead that the staff and administrators of Kent Institution responsible for the management and care of the institution owed him a duty of care without specifying material facts, the pleadings arguably do establish a duty of care. In particular, they disclose the fact that the Plaintiff is an inmate and that the Defendant's employees are prison administrators and are alleged to be "responsible for the management and care of Mr. Brazeau and all other inmates" (Statement of Claim at para 22). In my view, this fact establishes a relationship of sufficient proximity that carelessness on the Defendant's part would foreseeably cause harm to the Plaintiff. Further, the Plaintiff's Reply alleges that he "is a uniquely vulnerable dependant prisoner entrusted to the care of the defendant" (Reply at para 24).

[31] The Defendant's assertion that the Statement of Claim fails to specify how or whether the allegations contained in paragraphs 21 and 23 constitute breaches of the standard of care owed to the Plaintiff is also without merit. Paragraphs 21 and 23 each allege that the prison administrators and staff of Kent Institution were negligent in several respects in relation to both the Flooding Incident and the Water Incident. While the Plaintiff uses the word "negligent" rather than specifying that the staff and administrators breached the standard of care, that is the clear implication of both paragraphs.

[32] Similarly, although the Defendant argues that the Plaintiff fails to plead that any damages were caused by the alleged breach, paragraph 29 of the Statement of Claim states that,

> The conduct of the Defendant caused extreme harm to the Plaintiff including but not limited to, physical, psychological and emotional trauma …

[33] In addition, the Plaintiff elaborates at paragraph 20 of his Reply that,

> The plaintiff has repeatedly described the embarrassment, hate, frustration and resentment, the cognitive distortions, auditory hallucinations, the difficulties in concentrating, the loss of emotional control and the associated depression, fear, personal disarray and distress, his difficulties socializing/reintegrating into the general population, the negative changes to his personality and personal appearance, the fear he is losing his mind and going insane, the constant feelings of subtle anger and distrust, the increased sensitivity and startle response, he feels/felt both during the incidents and subsequent to them. The effects are long lasting ….

[34] Further, at paragraph 26 of his Reply, the Plaintiff alleges that,

> To further remove any doubt surrounding the plaintiffs loss. injury and damage, the plaintiff states his psychiatric diagnosis's, symptoms and conditions have been severely exacerbated accumulating in separate incapacitating, and potentially permanent injuries, as a direct result of the defendants conduct both during the alleged conduct and after. The plaintiff has been and is currently seeking expert psychiatric and psychological opinions and definitions as to the material damages and durations of such….

[35] In my view, the pleadings disclose a cause of action in negligence, despite deficiencies in their drafting.

D. *Intentional infliction of mental suffering*

[36] The Plaintiff claims damages for intentional infliction of mental suffering. To succeed in a claim for intentional infliction of mental suffering, a plaintiff must prove the following: (i) flagrant or outrageous conduct; (ii) calculated to produce harm; and (iii) resulting in a visible and provable illness (*Prinzo v Baycrest Centre for Geriatric Care* (2002), 215 DLR (4th) 31 at para 48, 60 OR (3d) 474 (Ont CA)).

[37] Paragraph 24 of the Statement of Claim makes the following allegation:

> By virtue of the matters referred to in paragraph 17, the correctional staff committed the tort of intentional infliction of mental suffering by deliberately preventing / refusing to employ lawful, appropriate, warranted response to the Plaintiffs exposure to raw sewage.

[38] The Defendant submits that the Plaintiff has failed to plead any material facts that would establish a flagrant or outrageous act committed by officials of Kent Institution, and, in particular, that the Plaintiff's allegation at paragraph 17 that officials twice chose not to arrange for prompt clean up of sewage floods does not rise to the level of being flagrant, outrageous or extreme (*Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537).

[39] Even if I assume, without deciding, that the actions of the officials were "flagrant or outrageous", the Plaintiff fails to meet the second requirement for a claim of intentional infliction of mental suffering. Specifically, the pleadings do not contain material facts that show that the

"flagrant or outrageous conduct" was "calculated to produce harm". At paragraph 16 of his Reply, the Plaintiff alleges that

> [T]he defendant ought reasonably have known that any, let alone such repeated exposures, and durations, would likely result in, at minimum, extreme psychological harm, given the defendants personal knowledge of the plaintiffs' mental health issues and vulnerable state.

[40] Similar statements can be found at paragraphs 12, 13(e) and 20. At best, these statements may create an inference that the Defendant's conduct was reckless. However, I do not believe that they demonstrate that the Defendant's conduct was "calculated to produce harm".

[41] In sum, the Statement of Claim and Reply do not plead sufficient material facts to support the Plaintiff's allegation of intentional infliction of mental suffering.

E. *Misfeasance in public office*

[42] The Plaintiff claims damages with respect to "misfeasance in public office". The Supreme Court summarized the elements of the tort of misfeasance in public office in *Odhavji*, above at paragraph 32, as follows:

> [T]he tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[43] The Defendant submits that the Plaintiff has failed to plead material facts in support of any of these elements, or, more broadly, in support of his claim that his reasonable expectation of freedom from intentional injury was threatened.

[44] Paragraph 25 of the Statement of Claim contains the following allegation with respect to the tort of misfeasance in public office:

> By virtue of the matters referred to in paragraph 17 and 14, 11 and 12 the correctional staff committed the tort of misfeasance in public office.

[45] In brief, paragraphs 11, 12, 14 and 17 of the Statement of Claim allege that water to the Plaintiff's tap and toilet were turned off and that a corrections officer and Correctional Manager Verville refused to give him either drinking water or water to flush his toilet; and that the Correctional Manager twice refused to promptly arrange for the clean up of sewage floods.

[46] Also relevant to this tort, the Statement of Claim alleges that:

- correctional officers and prison administrators are federal government employees ("employees of Canada") (Statement of Claim at paras 20, 22);

- correctional officers "are required to carry out their duties in a professional, effective manner with due regard to the welfare of [the Plaintiff] and other inmates" (Statement of Claim at para 20);

- prison administrators are “responsible for the management and care of [the Plaintiff] and all other inmates” (Statement of Claim at para 22); and

- prison administrators and correctional staff violated ss. 69 and 70 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] and s. 83 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*] (Statement of Claim at paras 23, 26).

[47] Further, the Plaintiff’s Reply alleges that:

- “the defendant is well aware their conduct was in direct contravention of a wide array of nearly all Post Exposure Protocals, guidelines, procedures, related policies and their mandates, which the defendant is obligated to be knowledgeable of as per the CCRR 3 (a-b)” (Reply at para 10); and

- “the defendant is aware of his mandate and Direction under the Commissioner of Corrections Service of Canada to do these very things [regarding decontamination]. The plaintiff pleads and relies on the Commissioners Directives (“CD’s”), [the *CCRA*], [the *CCRR*] and amendments thereto. Which the defendant is mandated to be aware of as per CCRR 3 (a-b)” (Reply at para 12).

[48] While some of these facts are alleged in respect of other torts, that is arguably a drafting deficiency and not a basis for striking the Statement of Claim. In my view, these allegations satisfy the requirements of deliberate unlawful conduct in the exercise of public functions.

[49] As noted above, paragraph 16 of the Reply contains the allegation that,

> [T]he defendant ought reasonably have known that any, let alone such repeated exposures, and durations, would likely result in, at minimum, extreme psychological harm, given the defendants personal knowledge of the plaintiffs' mental health issues and vulnerable state.

[50] In my opinion, this allegation, coupled with those summarized in the preceding paragraph, satisfies the requirement of awareness that the conduct is unlawful and likely to injure the plaintiff.

[51] In sum, I do not believe that there is a basis for striking the Plaintiff's claim of misfeasance in public office.

F. *Harassment*

[52] The Plaintiff claims damages for "harassment". Paragraph 26 of the Statement of Claim alleges that,

> [T]he correctional staff harassed and/or breached the duty of care they owed to the Plaintiff by:
>
> > (a) prolonging circumstances which were degrading and failed to maintain dignity.

> (b) subjecting the Plaintiff to cruel inhumane and degrading treatments contrary to *section 69 of the CCRA*
>
> (c) failing to take all reasonable steps to ensure that the environment of the institution and the living conditions of the inmates were safe, healthful and free of practices that undermine a person's sense of personal dignity as required by *section 70 of CCRA*;
>
> (d) failing to provide the basic living requirements of access to drinking water, running toilet and an environment necessary for personal health and cleanliness as required by *section 83 of CCRR SOR/92-620*.

[53] The Defendant argues that there is no independent tort of harassment in Canada and that, even if there were, the Statement of Claim does not satisfy the elements that have been suggested for that hypothetical tort. Further, while acknowledging that ongoing acts of harassment may form the outrageous conduct required to support the tort of intentional infliction of mental suffering, the Defendant argues that the Statement of Claim fails to plead the cause of action of intentional infliction of mental suffering.

[54] To date, there has been no acceptance of the tort of harassment in Canadian law. I agree with the Defendant that, if such a tort did exist, it would require a demonstration of the elements of outrageous conduct by the defendant, the defendant's intention of causing or reckless disregard of causing emotional distress, the plaintiff's suffering of severe or extreme emotional distress and actual or proximate causation of that emotional distress by the defendant's outrageous conduct (*Mainland Sawmills Ltd et al v IWA-Canada et al*, 2006 BCSC 1195 at para 17, [2006] BCJ No 1814; *Prince George (City) v Riemer*, 2010 BCSC 118 at para 59, 5 BCLR (5th) 166).

[55] These requirements substantially mirror the elements of the tort of intentional infliction of mental suffering. As I have found above, the Statement of Claim and Reply do not plead sufficient material facts to support the Plaintiff's allegation of intentional infliction of mental suffering. It follows that, whether or not there is a tort of harassment in Canada, in this case, the Plaintiff has not pleaded all of the requirements or indicia to support such a claim.

G. *Alleged Charter violations*

[56] The Plaintiff claims that his rights under ss. 7, 8 and 12 of the *Charter* have been violated and that he is entitled to damages under s. 24 of the *Charter* for such violations. Specifically, in paragraphs 27 and 28 of the Statement of Claim, the Plaintiff alleges that,

> 27. The Defendants conduct violated the Plaintiffs rights and those of the other inmates under *sections 7, 8 and 12 of the Charter* and caused him and others severe harm.
>
> 28. Pursuant to section *24(1)* of the "*Charter*" the Plaintiff seeks damages as the appropriate remedy for the aforesaid violation of his *Charter* rights.

[57] The Defendant argues that the Statement of Claim does not describe any events that could support the claim that the Plaintiff's rights under ss. 7, 8 and 12 of the *Charter* have been violated, and that the Plaintiff has not pleaded any facts to support the award of damages in this case.

[58] The analysis required to determine whether s. 24(1) damages should be awarded has been described by the Supreme Court, in *Vancouver (City) v Ward*, 2010 SCC 27 at para 4, [2010] 2 SCR 28 [*Ward*], as follows:

> [D]amages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[59] Turning to the first step of the analysis taught by the Supreme Court, I observe that the most relevant facts pleaded in the Statement of Claim and Reply with respect to the Plaintiff's allegations are that:

- the Plaintiff was forced to walk through sewage (Statement of Claim at para 5);
- the Plaintiff was denied drinking water (Statement of Claim at paras 11-14);
- the Defendant's employees chose not to perform a prompt clean up following the Flooding Incidents (Statement of Claim at para 17);
- the Plaintiff was not permitted to shower for 62 hours after being forced to move his belongings through raw sewage (Statement of Claim at para 19);

- "the defendant is well aware they did not humanely respond, interrupt, alter or address the plaintiffs being repeatedly involuntarily confined, for prolonged periods to hazardous materials, daily movements through the contaminated areas to prevent cross contamination … of other parts of the institution and re contamination of the plaintiff and his personal living space" (Reply at para 11; see also para 16);

- "the defendant had, at all material times, full knowledge of the plaintiffs: vulnerable psychiatric state, diagnosis's and conditions, complete dependence upon the defendant, that he was being repeatedly exposed and confined to hazardous materials for prolonged periods" (Reply at para 12; see also para 13);

- the sewage "was routinely in excess of one foot in depth" (Reply at 6); and

- the Plaintiff alleges that he "is a uniquely vulnerable dependant prisoner" (Reply at para 24).

[60] The problem for the Plaintiff is that the facts pleaded, even if assumed true, cannot establish that the Plaintiff's rights have been violated under either ss. 7 or 8. The Plaintiff's alleged treatment cannot be said to offend his right to life, liberty and security of the person (s. 7); nor has the Plaintiff alleged that any search or seizure took place (s. 8). These claims should be struck. The only claim that appears to have material facts pleaded is the Plaintiff's claim that his s. 12 *Charter* rights to protection against cruel and unusual treatment or punishment may

have been violated. In my view, the Plaintiff has pleaded sufficient facts in relation to s. 12 of the *Charter* to allow this claim to stand.

[61] As noted above, if a plaintiff can establish that his *Charter* rights have been violated, the second step in the analysis is to show why s. 24(1) damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches (*Ward*, above at para 4). I am not persuaded that the Plaintiff's claim to s. 24 *Charter* damages in respect of a violation of his s. 12 *Charter* rights should be struck at this early stage. The second stage of the analysis will require a more complete examination than can or ought to be carried out in the context of this motion.

[62] Accordingly, I would strike the claims with respect to s. 7 and 8 of the *Charter* and allow the claim of violation of the Plaintiff's s. 12 rights to stand, along with the claim to damages for such breach under s. 24 of the *Charter*.

VI. Issue #2: Should paragraphs 32 and 35 of the Defence to Counterclaim be struck on the basis that they fail to disclose a reasonable defence?

[63] In his Statement of Defence to Counterclaim, at paragraphs 32 and 35, the Plaintiff (Defendant by Counterclaim) submits that the "the plaintiff has available to him a disciplinary procedure as outlined in sections 40 and 44 of the CCRA to address the material complaints concerns, issues and claim for damages". The Defendant (Plaintiff by Counterclaim) argues that paragraphs 32 and 35 of the Plaintiff's Defence to Counterclaim should be struck as there is no basis in law for the Plaintiff's claim that the Defendant is barred from pursuing an action in

Federal Court for property damage because the Plaintiff could have been charged pursuant to provisions in the *CCRA*.

[64] In the impugned passages of the Plaintiff's Defence to Counterclaim, the Plaintiff seeks to plead that the Defendant is required to invoke the disciplinary system established under the *CCRA* before it can pursue a claim against the Plaintiff in this Court. Nothing in ss. 38 to 44 of the *CCRA* creates such a requirement. Indeed, s. 41(2) is permissive in nature, providing that an institutional head "may" issue a charge. Further, there is no general principle of law that requires a plaintiff to exhaust statutory remedies before pursuing litigation. Accordingly, I agree with the Defendant that paragraphs 32 and 35 of the Plaintiff's Statement of Defence to Counterclaim should be struck on the basis that they fail to disclose a reasonable defence.

VII. Conclusion

[65] For the above reasons, I would strike paragraphs 1(a), 1(e) as it pertains to ss. 7 and 8 of the *Charter*, and 1(f) of the Statement of Claim. In addition, I would strike paragraphs 32 (as it appears at p. 15 of the Reply and Statement of Defence to Counterclaim) and 35 of the Plaintiff's Statement of Defence to Counterclaim.

[66] With respect to the balance of the pleadings, I return to the test for striking pleadings set out in *Imperial*, above, at paragraph 17. Paraphrasing the language of the Supreme Court, it is not plain and obvious, assuming the facts pleaded by the Plaintiff to be true, that the pleadings that remain disclose no reasonable cause of action. Stated differently, I cannot conclude that the

claims (except for those struck) have no reasonable prospect of success. Accordingly, the matter should be allowed to proceed to trial.

[67] The Defendant has asked that he be permitted an extension of time to serve his list of documents. This extension of time will be granted to both parties.

[68] In paragraph 15 of his submissions on this motion, the Plaintiff seeks a number of additional remedies. With the exception of the requested relief found at paragraphs 15(c) (motion of Defendant to be dismissed) and 15(e) (costs in the amount of $150), the Court denies the relief requested in this paragraph on the basis that none of the requests are supported by the motion record.

[69] I observe that the pleadings of the Plaintiff are far from ideal. It may well be that, as the process unfolds, further facts or clarification will create a situation where a continuation of one or more aspects of the claim would not be in the interests of justice. Further motions to strike or for summary judgment may be warranted. However, at this stage, I am prepared to allow the majority of the claims to stand.

[70] Since the Defendant was partially successful in this motion, no costs will be awarded to either party.

ORDER

THIS COURT ORDERS that:

1. paragraphs 1(a), 1(e) (as it pertains to ss. 7 and 8 of the *Charter*) and 1(f) of the Statement of Claim are struck, without leave to amend;

2. paragraphs 32 (as it appears at p. 15 of the Reply and Statement of Defence to Counterclaim) and 35 of the Plaintiff's Statement of Defence to Counterclaim are struck without leave to amend;

3. the parties are granted an extension of time to permit the serving of their documents within 15 days of the date of this Order; and

4. no costs are awarded on this motion.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1543-11
STYLE OF CAUSE:	CHRISTOPHER BRAZEAU v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369

REASONS FOR ORDER AND ORDER:	SNIDER J.
DATED:	MAY 28, 2012

WRITTEN REPRESENTATIONS BY:

Christopher Brazeau	FOR THE PLAINTIFF (DEFENDANT TO COUNTERCLAIM) (ON HIS OWN BEHALF)
Timothy Fairgrieve	FOR THE DEFENDANT (PLAINTIFF BY COUNTERCLAIM)

SOLICITORS OF RECORD:

Christopher Brazeau Prince Albert, Saskatchewan	FOR THE PLAINTIFF (DEFENDANT TO COUNTERCLAIM) (ON HIS OWN BEHALF)
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE DEFENDANT (PLAINTIFF BY COUNTERCLAIM)