Federal Court  Cour fédérale

Date: 20090602

Docket: T-62-06

Citation: 2009 FC 576

Toronto, Ontario, June 2, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BARRY CARR

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application brought by Her Majesty the Queen (Crown), pursuant to subsection 51(1) of the *Federal Courts Rules*, SOR/98-106 (Rules), appealing Prothonotary Milczynski's decision dated December 29, 2009 (Decision) which allowed the Plaintiff's simplified action for a claim that the Correctional Service of Canada (CSC) breached its duty of care and was negligent

towards the Plaintiff, who was an inmate at Millhaven Institution (Millhaven), a maximum security federal penitentiary.

BACKGROUND

[2] In the simplified action before Prothonotary Milczynski, the Plaintiff sought damages from the Crown in respect of injuries he allegedly sustained from an assault on June 23, 2005 while he was an inmate at Millhaven.

[3] The Plaintiff alleged that he had been assaulted by an unidentified black inmate in the alcove between the gym and the door leading to the yard.

[4] The Plaintiff stated that, on the evening of the incident, he was in the telephone area waiting to use the phone. The assailant jumped the queue in an attempt to use the phone. The Plaintiff and the assailant “bumped shoulders” and there was a verbal exchange during which the assailant referred to the Plaintiff as a “pussy clot” or “blood clot.” The Plaintiff said that he did not consider the confrontation to be serious at the time. The Plaintiff later testified that the other inmate told him that he “didn’t want no problems” and that “everything was good.” There were no further interactions between the two inmates in the telephone area.

[5] The Plaintiff did not advise CSC of the verbal altercation and/or that he feared for his safety from this unidentified black inmate. The Plaintiff entered the gym after his telephone call was completed to advise the next inmate that the phone was free. When he went to exit the gym, he was assaulted.

[6] Two Correctional Officers, Dustin Marshall and Sanford Hatch, responded to the assault and issued cease and desist orders. Officer Marshall was assigned to the recreation gallery, which is located over the area to the entrance to the gym and which oversees activities in the card room, gym, washroom area and the yard. At approximately 21:20 on June 23, 2005, Officer Marshall heard the fight break out. He opened the window from recreation and observed an unidentified black inmate over a white inmate whom he was able to identify as the Plaintiff. He gave the inmates a direct order to stop. Upon seeing Officer Marshall, the unidentified black inmate ran into the gym area while the Plaintiff lay on the floor. Officer Marshall then gave the Plaintiff a direct order to proceed to the S Control barrier. He was then escorted to Health Care.

[7] The other officer, acting Correctional Supervisor Hatch, was in Health Care, which is adjacent to the recreation area. He immediately responded to the altercation and issued an order to the inmates to desist. The Plaintiff was sent to Health Care immediately after the assault and received medical attention for minor abrasions and required two stitches on his left buttock.

[8] The inmates in the recreation area were frisk searched and the institution was locked down pending a search for weapons. The gym was searched but no weapons were found.

[9] There is a videotape from the recreation area for June 23, 2005. It does not show the actual assault, but it does show the movements of the Plaintiff and the unidentified inmate who assaulted him in the gym before the incident and directly after the incident. The timeline of the videotape indicates that it took 38 seconds from the time the Plaintiff exited the gym and was "jumped" until the assailant re-entered the gym. Based on the videotape timeline, it is assumed that the altercation lasted less than 38 seconds.

[10] The Plaintiff received one puncture wound to his left buttock. He claims that he suffered severe pain from the physical wounds. He also says that he suffered from Post Traumatic Stress Disorder as a result of the assault that occurred on June 23, 2005.

[11] The Plaintiff alleges that CSC was negligent. Specifically, he alleges that CSC: failed to monitor the actions and movements of the inmates; failed to see or recognize the pre-indicators that an assault would take place (including a "verbal argument" between the Plaintiff and the unidentified inmate who assaulted him); and failed to take swift and immediate action to end or minimize the assault.

DECISION UNDER REVIEW

[12] The trial took place on January 29, 2008 and lasted for one day. The Plaintiff filed one affidavit in his own name and three medical reports. He did not provide affidavits from his three expert witnesses: Dr. Cheston, Dr. Epelbaum and Dr. Cassells.

[13] The Crown filed two affidavits. The first from Dustin Marshall and the second from Sherri Crisp, the Security Intelligence Officer at Millhaven who investigated the altercation. Sherri Crisp also prepared the incident report.

[14] Prothonotary Milczynski found that CSC breached its duty of care when it failed to take reasonable steps, in light of pre-indicators of violence, in both its static and dynamic security to prevent the assault on the Plaintiff. The Plaintiff was awarded $12,000 for pain and suffering and for damages as he continues to deal with symptoms of PTSD.

[15] Prothonotary Milczynski also found that Officer Bill Jugloff, the Correctional Officer in S Control Module, would likely have noticed the verbal exchange between the Plaintiff and the assailant. It was concluded that there was evidence of a pre-indicator of violence. This was sufficient to find that there was a breach of the duty of care. Mr. Jugloff did not testify.

ISSUES

[16] The Crown submits the following issues on this appeal:

1) What is the standard of review applicable to the Prothonotary's Decision?
2) Did Prothonotary Milczynski err in law by:
    i. Failing to apply the correct standard of care of prison officials in her determination of whether or not there was a breach of the duty of care?

ii. Drawing an adverse inference against the Defendant for failing to call Officer Jugloff as a witness in defence of the action?

iii. Finding there was a statutory obligation to establish and adhere to a policy or procedure for telephone use within the penitentiary?

3) Did Prothonotary Milczynski err in fact and law by:

i. Failing to apply the correct standard of care to the evidence before her?

ii. Inferring, in the absence of evidence to support such an inference, that Officer Bill Jugloff had the requisite knowledge of the pre-indicator of violence to find that there was a breach of the duty of care?

iii. Misapprehending and disregarding the evidence before her?

iv. Finding that the Plaintiff had discharged his burden of proving that the assault was reasonably foreseeable?

v. Finding that the Plaintiff had discharged his burden of proving his damages?

[17] The following provisions of the *Federal Courts Rules* are applicable in these proceedings:

Appeals of Prothonotaries' Orders	**Appel des ordonnances du protonotaire**
Appeal	**Appel**
51. (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	**51.** (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.
Service of appeal	Signification de l'appel

(2) Notice of the motion shall be served and filed within 10 days after the day on which the order under appeal was made and at least four days before the day fixed for the hearing of the motion.	(2) L'avis de la requête est signifié et déposé dans les 10 jours suivant la date de l'ordonnance frappée d'appel et au moins quatre jours avant la date prévue pour l'audition de la requête.

[18] The following provisions of the *Corrections and Conditional Release Act*, 1992, c. 20 (Act) are applicable in these proceedings:

4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are	**4.** Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent :
…	…
(*d*) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;	*d*) les mesures nécessaires à la protection du public, des agents et des délinquants doivent être le moins restrictives possible;
70. The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.	**70.** Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.

STANDARD OF REVIEW

[19] The Crown submits that the Decision of a Prothonotary to allow or dismiss a simplified action at trial is not a discretionary decision: *R v. Aqua-Gem Investments Ltd.,* [1993] 2 F.C. 425, reaffirmed in *Z.I. Pompey Industrie v. ECU-Line N.V.,* [2003] 1 S.C.R. 450. It is a decision that settles the substantive merits of the action and is subject to the standard of review set out by the Supreme Court in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (*Housen*); *Beattie v. Canada*, [2005] F.C.J. No. 904 at paragraphs 37-40; *Giroux v. Canada*, [2001] F.C.J. No. 803 at paragraphs 21-37, aff'd [2002] F.C.J. No. 1269 and *Grenier v. Canada (Attorney General),* [2004] F.C.J. No. 1730 (F.C.) at paragraphs 11-17.

[20] The Crown says that a Prothonotary's decision is subject to the standard of correctness on questions of law, although factual findings will only be disturbed if a palpable and overriding error is found: *Housen* at paragraphs 8 and 10. Where the legal aspect can not be extricated from a question of mixed law and fact, the court will need to find a palpable and overriding error in order to overturn that finding: *Housen* at paragraph 36.

[21] The Plaintiff submits that there is no need to argue the standard of review, as the Plaintiff accepts as correct the Crown's statement of law on the Supreme Court case of *Housen.*

ARGUMENTS

The Crown

The Prothonotary Erred in Law by Failing to Apply the Correct Duty of Care of Prison Officials

[22] The Crown submits that the jurisprudence has consistently held that in order to impose liability on the Crown, a plaintiff must establish that prison officials, acting in their regular capacity, did or failed to do something that was unreasonable, creating a foreseeable risk of harm to the plaintiff-inmate: *Timm v. Canada,* [1965] Ex. C.R. 174 (*Timm)* at paragraphs 17-18; *MacLean v. The Queen* [1972] S.C.J. No. 69 (*MacLean*); *Abbott v. Canada,* [1993] F.C.J. No. 673 (F.C.T.D.) (*Abbott*); *Hodgin v. Canada,* [1999] N.B.J. No. 416 (N.B.C.A.) at paragraphs 15-16 (*Hodgin*); *Coumont v. Canada,* [1994] F.C.J. No. 655 (F.C.T.D.) (*Coumont*); *Eng v. Canada,* [1997] F.C.J. No. 380 (F.C.T.D.) (*Eng*); *Iwanicki v. Ontario,* [2000] O.J. No. 955 (Ont. S.C.J.) (*Iwanicki*); *Russell v. Canada,* [2000] B.C.J. No. 848 (B.C.S.C.) (*Russell*); *Corner v. Canada,* [2002] O.J. No. 4887 (Ont. S.C.J.) (*Corner*); *Miclash v. Canada* 2003 FCT 113 at paragraphs 46-47 (*Miclash*) and *Bastarache v. Her Majesty the Queen* 2003 FC 1463 at paragraph 49 (*Bastarache*).

[23] The Crown notes that the test was first established in *Timm*. The Supreme Court in *MacLean* adopted the reasoning in the *Timm* decision and established the principle of the duty of care owed by prison officials to inmates under their care.

[24] In *Hodgin,* an inmate received very serious injuries from other inmates when he was doused in gasoline and set on fire. The Court concluded that prison officials were not negligent for what the Court concluded was an unforeseeable act of violence. The court focused on the lack of prior indicators of gasoline being transported and also the fact that there was no information that the

plaintiff was in danger of being attacked by other inmates. In *Hodgin*, the plaintiff himself was unaware of any risk or danger and was surprised by the attack. The judge concluded that there was no breach of the duty of care for failure to prevent a "quick, planned and violent" attack: *Hodgin* at paragraphs 15-18.

[25] The Crown also relies upon *Coumont* and *Corner* where the plaintiff was stabbed by a fellow inmate. In *Coumont* the court held that at no time did the plaintiff identify to correctional officials any potential problems with regard to another inmate. The CSC staff had no information about a possible incompatibility. The court held that there was a duty of care owed by CSC that included an obligation to take reasonable steps to protect an inmate from fellow inmates. However, the duty on CSC was not breached in *Coumont* because CSC neither knew, nor ought to have known, that placement of the plaintiff in that particular institution could lead to a stabbing.

[26] In *Corner,* the plaintiff was stabbed while an inmate at Millhaven. He claimed that the prison authorities did not take reasonable steps to prevent inmates from being in possession of dangerous weapons. Prior to the attack, the plaintiff had no difficulties with either of the two inmates who stabbed him. The assault took place within two or three minutes and the plaintiff received approximately 30 to 40 puncture wounds. The court dismissed the action and found that the response to the attack was appropriate and that the attack was a random act of violence from which liability on the part of the prison officials could not flow. The court noted that no procedures or security measures are infallible.

[27] The court in *Miclash* decided that prison officials cannot be guarantors of the safety of inmates. Within an environment that has an inherent potential for violence, they cannot be expected to protect against unpredictable dangers. In the *Miclash* case, the plaintiff was labelled a “rat” for reporting a theft. The court found specific pre-indicators that indicated that the act of violence was foreseeable and that proper steps were not taken to prevent the violence.

[28] In *Bastrache*, the Federal Court reaffirmed the appropriate test to establish liability of prison officials as established by *Timm.* The court said it must be established that a prison official, acting in the course of his employment, did [or failed to do] that which a reasonable person in that position would not have done [or would have done] thereby creating a foreseeable risk of harm to the inmate resulting in liability. The court stated that corrections officers must take reasonable care with respect to reasonable risks of which they ought to be aware. Perfection or infallibility is not required. Reasonable and adequate measures in the circumstances will suffice.

Evidence Before the Prothonotary

[29] The Crown submits that the following evidence was before the Prothonotary with respect to the incident in the present case:

1) There was no violent altercation or physical contact that could be construed as a pre-indicator of the attack. Only words were exchanged and the two inmates merely brushed shoulders;

2) The Plaintiff and the assailant seemed to have resolved their differences after they had exchanged words in the telephone area. After the incident, the Plaintiff testified that the other inmate told him that he "didn't want no problems" and that "everything was good." There was no further interaction between the two inmates in the telephone area;

3) The Plaintiff did not advise CSC that he feared for his safety as a result of the earlier verbal altercation. He did not consider the confrontation to be serious at the time and he neither feared nor foresaw anything happening between himself and the other inmate after they exchanged words;

4) The assault was quick and unforeseeable;

5) Corrections officers responded immediately when the assault occurred and issued two cease and desist orders that resulted in the assailant stopping and running away;

6) The assault lasted less than 38 seconds;

7) The Plaintiff did not advise CSC of any incompatibility with the assailant or that he feared for his safety;

8) There was no evidence that any CSC employee or, specifically, Officer Jugloff witnessed or was aware of the verbal exchange between the Plaintiff and the assailant. The evidence was that the prison was loud, the inmates in the telephone area could also be loud, and that the Officer in S Control could not necessarily hear an altercation in the phone area if the prison was loud.

The Prothonotary's Decision

[30] The Crown submits that the standard of care that the Prothonotary applied was not in line with the jurisprudence on the issue of the duty of care of prison officials. The proper question to be considered by the court was whether CSC knew or ought to have known that the Plaintiff might have a problem with an incompatible inmate and, if CSC had that knowledge, did CSC take the appropriate steps to protect him from a reasonably foreseeable risk of injury. The Crown argues that Prothonotary Milczynski's Decision imposes a higher standard of care than that established by the jurisprudence since she saw a requirement of constant monitoring of the inmates and the requirement for surveillance cameras in the telephone area.

Monitoring of Areas Where Inmates Move Freely

[31] The Crown submits that the jurisprudence on the duty of care of prison officials does not require infallibility on the part of prison officials, and the lack of constant monitoring of inmates does not constitute a breach of the duty of care.

[32] The Crown cites *Russell*, which held that prison officials were not expected to constantly monitor inmates. The court held that an institution cannot be expected to have full-time supervision of all inmates at all times. The court stated that a delicate balance is required to give as much freedom as possible to inmates consistent with the safety of the inmates and staff. If there were a high degree of control, it would not be possible to run prison programs and, in the context of recreational facilities, the prison uses control procedures comparable to those in community recreation facilities. The court stated in *Russell* that this balance was consistent with one of the

guiding principles of the CSC, as set out in section 4(d) of the Act, which is to use the least restrictive measures consistent with the protection of the public, staff members and offenders.

[33] The Crown also cites *Miclash* for the proposition that prison officials cannot be guarantors of the safety of inmates within an environment that has an inherent potential for violence, and cannot be expected to protect against unpredictable dangers. The court in *Corner* noted that no procedures or security measures are infallible. In *Bastrache,* the court stated that perfection or infallibility is not required. Reasonable and adequate measures in the circumstances will suffice.

Surveillance Cameras

[34] The Crown submits that both this Court and the Ontario courts have held that a lack of surveillance cameras does not constitute a breach of the duty of care: *Iwanicki; Eng; Hamilton v. Canada (Solicitor General),* [2001] O.J. No. 3262 (Ont. S.C.J) at paragraph 14 and *Coumont.*

[35] The Crown points out that the jurisprudence has consistently held that prison officials must take reasonable care with respect to reasonable risks of which they ought to be aware. The jurisprudence is clear that perfection or infallibility is not required, and reasonable and adequate measures in the circumstances will suffice. A lack of surveillance cameras does not constitute a breach of the duty of care.

The Prothonotary Erred in Finding that the Plaintiff Had Discharged his Burden of Proving that the Assault Was Reasonably Foreseeable

[36] The Crown submits that to find a defendant liable in tort for negligence it must be established that he or she owed the plaintiff a duty of care. To establish a duty of care, the plaintiff must prove that the harm that occurred was a reasonably foreseeable consequence of the defendant's act: *Cooper v. Hobart*, [2001] S.C.J. No. 76 at paragraph 30.

[37] In law, "foreseeable" does not mean "imaginable." The legal concept of foreseeability incorporates the idea that the event is not only imaginable, but that there is some reasonable prospect or expectation that it will arise: *Fullowka v. Royal Oak Ventures Inc.*, [2008] N.W.T.J. No. 27 (N.W.T.C.A.).

[38] The Crown argues that an important consideration in the foreseeability of risk is the likelihood of the occurrence of the event giving rise to the risk: *Levasseur v. Canada*, [2004] F.C.J. No. 1197 at paragraph 71.

[39] The Crown submits that the Prothonotary erred in finding that the Plaintiff had discharged his burden of proving that the assault was reasonably foreseeable. The Crown notes that even the Prothonotary found that "it was not unreasonable for Mr. Carr to assume that the matter would not escalate further" and that the Plaintiff did not consider the confrontation to be serious. The Prothonotary also stated that the evidence before her was that the Plaintiff "agreed that there are lots of verbal altercations that don't lead to a physically violent event, and that he had no expectation that this one would be any different."

[40] Based on the evidence, the Crown submits that there were no grounds on which the Prothonotary could conclude that the attack on the Plaintiff was foreseeable. The Plaintiff himself could not foresee that his interaction with the other inmate would lead to an attack; a conclusion that the Prothonotary noted was not "unreasonable." Therefore, it was an error to conclude that CSC could have foreseen that the sudden attack would have occurred as a result of a brief, minor verbal exchange.

The Prothonotary Erred in Law in Drawing an Adverse Inference Against the Defendant for Failing to Call Officer Jugloff

[41] The Crown submits that the Prothonotary also erred in law by drawing an adverse inference against the Defendant for failing to call Officer Jugloff as a witness in its defence of the action. She also erred by inferring that a breach of the duty of care was made out on the basis of that adverse inference.

[42] The Crown states that a court should only draw adverse inferences on a failure to call a witness in very limited circumstances, none of which were present in this case. An adverse inference against a defendant is only proper when a plaintiff has made out a *prima facie* case; it cannot be used to fill in the gaps in the plaintiff's evidence: *Chippewas of Kettle & Stony Point Nations v. Shawkence*, [2005] F.C.J. No. 1030 (*Chippewas*) at paragraph 43.

[43] The Crown submits that the cause of action before Prothonotary Milczynski was a breach of the duty of care of prison officials. It is the Plaintiff who carried the burden of proof which, in the

Crown's submission, was not satisfied by the evidence before the Court. The Crown alleges that the Plaintiff was unable to make his case that CSC was aware of any pre-indicators of violence. Instead, the Prothonotary used an adverse inference to find that the Crown was aware of a pre-indicator of violence; specifically the verbal exchange between the Plaintiff and the assailant. As the party with the burden of proof, it was the Plaintiff's responsibility to provide evidence that CSC was aware of a pre-indicator of violence and to make out a *prima facie* case for a breach of the duty of care, the elements of which cannot be found on the basis of an adverse inference: *Chippewas* at paragraphs 43-44.

[44] The Crown argues that, even if it was open to the Prothonotary to make an adverse inference against the Crown, the effect of such an inference should have been minimal: *R v. Jolivet,* [2000] 1 S.C.R. 751 (*Jolivet*).

[45] The Crown submits that its affidavit evidence did not explain Officer Jugloff's absence; however, Officer Marshall and SIO Crisp were identified as the ideal witnesses because they could present the best evidence on the matter at issue. Officer Jugloff was not a necessary witness from the Crown's perspective. The fact that the Crown called witnesses to speak to the fundamental issue before the Court extinguishes any need for the drawing of an adverse inference: *Chippewas* at paragraph 44.

[46] The Crown notes that, if the Plaintiff thought Officer Jugloff was a necessary witness, he should have made the effort to subpoena him. The Plaintiff was provided with a copy of Officer

Jugloff's report. The issue of the production of Officer Jugloff's report was raised during the trial by the Prothonotary and the Crown advised the Prothonotary that the Plaintiff had been provided with a copy of the report and directed the court to the location of that report.

[47] The Crown concludes on this issue by noting that the adverse inference was not proffered by counsel for the Plaintiff and that a case should not be decided on issues that are not raised by counsel: *Scowby v. Glendinning*, [1986] 2 S.C.R. 226 at paragraph 69. Therefore, the Prothonotary erred by drawing an adverse inference against the Crown and by inferring that the breach of the duty of care was made out on the basis of that adverse inference. This is a palpable and overriding error.

The Prothonotary Erred in Law in Finding that there was a Duty to Create a Policy or Procedure for Telephone Use

[48] The Crown notes that the Prothonotary came to her conclusion that the absence of consistent or set policies or procedures for telephone use, in combination with a lack of surveillance of the telephone area, was a breach of the duty of care based on the following facts:

1) It should have been obvious that having prisoners wait around for a telephone would create a highly charged situation;
2) The possibility of a large amount of people in the telephone area due to the lack of a "one in, one out" policy to control the number of offenders who enter the area would increased the potential for conflict;
3) There was inadequate surveillance of the telephone area because:

i. The officer in the S Control Module who operated the barrier to the telephone area must turn his or her back on the entrance to the area in order to press the button which opens and closes the barrier; and

ii. There are no cameras watching the telephone area.

[49] The Crown submits that there is no statutory duty to establish and adhere to a policy or procedure for telephone use within a penitentiary and, consequently, there can be no breach of a duty of care for failure to do so. The statutory duty is to take reasonable care for the health and safety of an inmate while in custody. A policy for telephone use, or a policy decision not to develop a procedure for telephone use, cannot ground a finding that there was a breach of a duty of care. To find a breach of a duty of care, that authority and obligation must be found in statute.

[50] The Crown relies on the Supreme Court of Canada case in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (*Just*), where it was held that policy decisions are immune from the application of negligence law. The Crown also cites *Coumont*, at paragraph 47, where the Court relied on the *Just* decision and it was held that CSC's decision to implement three types of custody is a policy decision and, therefore, immune to the application of negligence law.

[51] The Crown further cites *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*, [2001] M.J. No. 167 (M.B.C.A.) (*Uni-Jet*) at paragraphs 37, where the defendant was found liable for misfeasance in public office, but only after an examination of the statutes at issue confirmed that there was indeed a public duty not to perform the activity complained of (alerting the media that

search warrants were going to be executed to search the plaintiff's property). Paragraphs 37-38 of *Uni-Jet* read as follows:

> **37** Publication of an operational or policy manual is not unusual. Such documents are commonplace in governmental and commercial operations. There is, however, nothing that gives the manual or any part thereof the status of a regulation or a Commissioner's standing order. It does not have the force of law and cannot be the basis for either of the torts that were alleged by the plaintiffs. Danch v. Nadon and the Government of Canada (1977), 18 N.R. 568 (Fed. C.A.), and Armstrong v. Royal Canadian Mounted Police Commissioner (1994), 24 Admin.L.R. (2d) 1 (F.C.T.D.), support this conclusion as they do Jennings' own response when he said at the trial:
>
> > Well this is an outline, a guideline. This is a base on which to formulate a course of action. In the absence of any other considerations, this would be a suggested course of action.
>
> **38** I think it can be safely said both that the manual is not a regulation or standing order with any attendant force of law. By itself, it cannot be taken either as a definition of the standard of care required or as a description of statutory authority.

[52] The Crown also cites paragraph 19 from *Iwanicki*:

> …The manpower used to guard the area, the lack of video cameras and the absence of classification officers working on weekends all appear to be policy issues and therefore exempt from "judicial scrutiny", except to the extent that they are in breach of the statutory duty to take reasonable care for the safety of the person in custody…

[53] The Crown concludes on this issue by stating that the alleged failure to implement and/or adhere to a policy for telephone use cannot create a breach of the duty of care because there is no statute or regulation that mandates the need to have a telephone use policy.

The Prothonotary Erred in Finding that there was Evidence on which to find a Breach of a Duty of Care

[54] The Crown submits that even if there were statutory grounds on which to found a duty to implement and enforce a telephone use policy, a statutory duty does not necessarily create a duty in tort: *Stewart v. Pettie,* [1995] 1 S.C.R. 131 at paragraph 36 and *Fullowka* at paragraph 49.

[55] The Crown notes that the evidence before the Prothonotary revealed that it was not foreseeable that having prisoners wait for a telephone would create a highly charged situation or inmate tension. The Prothonotary also noted that there was no evidence of a history of violence or of physical altercations in the telephone area, or that any such history resulted from there being no "one in, one out" policy.

[56] The Crown alleges that there was no evidence of any conflict or violence in the telephone area, that the absence of a "one in, one out" policy would increase the potentional for conflict, or that there had been any conflict as a result of a lack of a "one in, one out" policy. The evidence that there were more people in the telephone area than phones was not, in the Crown's view, definitive.

[57] There was evidence that three inmates were in the 5-phone area when the assailant and the Plaintiff were buzzed in. The Crown also points out that that the evidence fails to demonstrate that there was a lack of supervision in the telephone area, as there was a CSC officer stationed to observe activity in that area.

[58] The Crown notes that the lack of a camera in the telephone area at the time of the assault cannot found a conclusion that there was a breach of a duty of care. The Crown cites *Hamilton* at paragraph 14, which held that the lack of video surveillance at the time of an assault was not grounds to find a breach of the duty of care. There was also no evidence that having video cameras would have prevented the assault on the Plaintiff or that video cameras dissuaded inmates from attacking other inmates.

[59] Although the Crown acknowledged that the system could be improved, this does not mean it is defective, unreasonable or foolhardy. No disciplinary system or housing facility is foolproof, nor can it be expected to protect the entire prison population from itself, when considering the options available: *Scott v. Canada*, [1985] F.C.J. No. 35 (F.C.T.D.) citing *Raby v. Canada*, [1981] F.C.J. No. 423 (F.C.T.D.).

[60] The Crown concludes by stating that the CSC's way of dealing with the telephone area was reasonable and effective. The Prothonotary erred in finding that there was a duty to enact policies with respect to the telephone area.

The Prothonotary Erred in Finding that the Plaintiff had Discharged his Burden of Proving Causation of his Injury

[61] The Crown submits that the Prothonotary also erred in finding that the Plaintiff had discharged his burden of proving the Crown had caused his Post Traumatic Stress Disorder (PTSD). The Crown notes that the Plaintiff bears the burden of proving, on a balance of probabilities, that

negligence on the part of the Crown caused the Plaintiff's injuries. The question to be asked is, "but for" the Crown's actions, would the Plaintiff have been injured: *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333 (*Resurfice*) at paragraphs 21-22 and *Snell v. Farrell*, [1990] 2 S.C.R. 311 at paragraph 14. The Crown cites and relies upon the following paragraph from *Resurfice*:

> 23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J.

Psychological/Psychiatric Assessment Report of Dr. Cassells

[62] The Crown notes that Dr. Cassells was the Plaintiff's psychiatrist from August, 2005 until January 26, 2008. Contrary to the Prothonotary's finding, nowhere in his report is it mentioned that the Plaintiff suffered from PTSD. Dr. Cassells did not perform a diagnostic assessment to determine if the Plaintiff had PTSD. Also, Dr. Cassells testified that he was not treating the Plaintiff exclusively for his response to the events of June 23, 2005; there was a wide variety of other issues that had arisen out of trauma or other events prior to the Plaintiff being incarcerated.

[63] The Crown submits that the Prothonotary erred in relying on Dr. Cassells' report to find that the Plaintiff suffered from PTSD because Dr. Cassells never diagnosed the Plaintiff with PTSD, nor did he ever test him or treat him for the disorder. The Plaintiff provided no evidence that he was not already suffering the same degree of trauma before the incident at Milhaven. Dr. Cassells also did

not see the Plaintiff until 2 months after the incident. It was not possible to conclude the degree to which, if at all, the attack had affected the Plaintiff.

The Bath Institution Psychological Risk Assessment Update Provided by Dr. Cheston

[64] The Crown submits that the Prothonotary similarly erred in relying on Dr. Cheston's report to conclude that the Plaintiff had PTSD. Contrary to the Prothonotary's findings, Dr. Cheston did not diagnose the Plaintiff with PTSD. Furthermore, the purpose of Dr. Cheston's report was risk assessment and not to determine whether or not the Plaintiff suffered PTSD. Dr. Cheston did not perform a PTSD diagnostic assessment of the Applicant based on the DSM-IV and he agreed that he did not and could not provide a medical opinion as to whether or not the Plaintiff suffered from PTSD.

[65] The Prothonotary erred in relying on Dr. Cheston's report to determine that the Plaintiff suffered from PTSD because there was no testing performed to determine if the Plaintiff had actually suffered PTSD; there was no diagnosis of the condition by Dr. Cheston, and his report was simply a risk assessment. The Crown also notes that Dr. Cheston could not, and indeed did not, determine that the Plaintiff had PTSD, or that the assault caused any damage to the Applicant. Dr. Cheston's examination was focused on a risk assessment and was not a psychological examination.

The Psychiatric Report of Dr. Mikhail Epelbaum

[66] The Crown submits that the Prothonotary also erred in relying on Dr. Epelbaum's report as proof that the Plaintiff suffered from PTSD. The primary purpose of Dr. Epelbaum's visit was not to assess the Plaintiff as to whether or not he suffered from PTSD. Dr. Epelbaum did not use the two widely-used PTSD assessments to diagnose the Plaintiff and he failed to administer a test for malingering, a test the DSM-IV notes is very important when secondary gain is involved, such as when a patient is suing for damages in a civil law suit.

[67] As well, Dr. Epelbaum met with the Plaintiff only once before making his diagnosis based on what the Plaintiff told him. The meeting occurred on March 23, 2007; however, the assault had occurred two years earlier on June 23, 2005. It was only after the Plaintiff began this litigation that he was diagnosed with PTSD.

The Plaintiff

[68] The Plaintiff agrees that CSC owed a duty to inmates to take reasonable care for their safety. The Plaintiff also accepts that there is a line of cases setting out that prisons and their employees are not guarantors of an inmate's well-being except in cases where there are pre-indicators that harm may befall an inmate. In those cases, a duty of care is imposed on the prison to take reasonable steps to ensure protection from harm that CSC knows, or ought to have known, exists. The Plaintiff states that the Prothonotary correctly identified the sources of information upon which CSC relies in order to conclude that danger may exist. It comes from what CSC calls "dynamic" and "static" security.

[69] Dynamic security involves the use of relationships that may exist between the staff and inmates from which information of potential violence may be gleaned and acted upon. Static security, on the other hand, consists of the mechanical and electronic systems and structures that can operate to reduce potential harm. The Prothonotary identified a breakdown in both static and dynamic security as contributing to the stabbing of the Plaintiff. If there was a breakdown in these systems, CSC did not take the reasonable steps mandated by law to ascertain the pre-indicators of harm. CSC made itself wilfully blind to those pre-indicators.

[70] The Prothonotary found that dynamic security was breached because the staff were confused and had no instructions on how inmate queues should be managed. The Prothonotary outlined the confusion at paragraph 27 of her judgment. Officer Dustin claimed there is a “one-in, one-out” rule for managing access to the telephone room; whereas, Officer Crisp stated that the prison has nothing to do with establishing procedures for telephone access and further that there is no “one-in, one-out” rule.

[71] The Prothonotary correctly infers that in a prison setting, especially amongst newly-incarcerated inmates awaiting transfer in a relatively short time period, frustrations about the telephone access can build. It is a situation of which CSC should have known and been aware so that confusions as to policy by correctional staff ought not to exist.

[72] The Prothonotary also stated at paragraph 29 of her judgment that she was critical of the lack of camera surveillance. She pointed out that while there was some CCTV coverage, the images

captured would not necessarily have been monitored because there were only three monitors for four cameras. The Plaintiff disagrees with the Crown's reliance on *Iwanicki* that there is no breach of a duty of care when there are no surveillance cameras. *Iwanicki* held that the lack of cameras was a matter of provincial correctional policy and exempt from judicial scrutiny. The CSC adopted a policy of CCTV monitoring.

[73] The Plaintiff also disagrees with the Crown's reliance on *Coumont* for the proposition that there is no breach of a duty of care when surveillance cameras are not operating. In the present case, there were surveillance cameras in the area of the assault but there was no assurance that an argument between the Plaintiff and his attacker was observed by Officer Jugloff. Had the officer observed an altercation, it would have served as a pre-indicator of danger.

[74] The Plaintiff submits that the Crown's rephrasing of the "proper" question to be considered by the court is simply wrong because it assumes that static and dynamic security measures necessary to inform CSC of potential harm are adequate. When there are defects in security measures, as found by the Prothonotary, the proper question is formulated in the following terms: "Has CSC taken all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates are safe?"

[75] The Plaintiff submits that the Crown's argument that the facts leading up to the Plaintiff's assault were not foreseeable is at odds with the testimony given on cross-examination by Officer Dustin Marshall, at page 73 of the transcript:

> Q: When somebody screams an obscenity or calls another person a blood clot or a pussy clot in a loud voice, that is something that may not be extremely serious on the street, but it takes on added significance in a penitentiary environment. Is that fair?
> A: Yes
> Q: As part of the dynamic security of a penitentiary, Correctional Officers would be on guard for verbal outbursts such as that. Is that correct?
> A: Yes, if they can hear them.
> Q: Because it could be an indicator that there is going to be violence. Is that fair?
> A: Yes.

At page 74 of the transcript the following is documented:

> A: If it happened in the telephone area, I probably would not hear it. If it happened near the back door, I might have. If it is in the telephone area, that is underneath my area and I probably would not be able to hear the yelling match from the telephone area.
> Q: Indeed, a violent situation can arise in the telephone area. If there is monitoring of that area by Correctional Services Canada-in fact, there was no dynamic security in the area.
> A: S Control would have a view of the telephone area.
> Q: S Control?
> A: Yes.
> Q: Would that person have the ability to hear any screaming or altercations in that area?
> A: They might if it was loud enough.

[76] The Plaintiff submits that the fact that there was a loud exchange between the Plaintiff and his attacker has never been disputed. The Correctional Officer testified that such an exchange would be sufficient to put the staff on notice that a violent situation could erupt. The situation, regardless of whether the Plaintiff himself contemplated it or not, was such that CSC ought to have known that measures should have been taken to ensure staff and inmate safety in accordance with section 80 of the Act.

[77] The evidence as to what CSC knew or should have known fell to the S Control Officer at the time. This was Officer Jugloff. At trial, the case was established by the evidence of the Plaintiff that the stabbing had been preceded by a loud verbal exchange including some physical nudging that Officer Marshall conceded was a pre-indicator of violence. The Prothonotary drew an adverse inference because Officer Jugloff was not called and did not provide an affidavit. It was also noted that Officer Jugloff was identifiable and his name and responsibilities were available in advance of trial. Therefore, the Plaintiff submits that drawing a negative inference was appropriate. The Plaintiff cites *Wild v. Canada (Correctional Service)* 2004 FC 942 at paragraph 39 which reads as follows:

> **39** I draw a negative inference from the defendant's failure to adduce any evidence to counter the plaintiff's allegations with respect to the activities of certain staff members, particularly when the relevant staff members are clearly identifiable. In respect of these allegations of repeated nightly awakenings, I accept Mr. Wild's evidence. I find him to be credible and have no reason to disbelieve him…

[78] The Plaintiff submits that his counsel did ask the Prothonotary to draw an adverse inference. This is found at page 119 of the transcript:

> The key witness who could have told us a lot about that was not called by the Crown, the operator of S Control, so we have to say that the evidence of Mr. Carr on this issue has gone unchallenged.

[79] The Plaintiff states that, in the current case, the correctional officer with the best ability to observe the situation would have been Officer Jugloff. There was no explanation as to why Officer Jugloff had not been called and the Prothonotary did not exceed the permissible limits of what could be inferred by drawing an adverse inference: *Joviet* and Sopinka, Lederman and Bryant, *The Law of*

Evidence in Canada (2nd ed. 1999), at p. 297, paragraph 6.321 which states that failure to call evidence, may, depending on the circumstances, amount "to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it."

[80] The Plaintiff also notes that the Prothonotary stated at paragraph 22 of her judgment that in the absence of Officer Jugloff's testimony, she was left with the uncontradicted evidence of the Plaintiff that the altercation in the telephone area was of sufficient loudness or otherwise noticeable for a correctional officer in S Control to have observed. The Plaintiff insists that this was not a situation where the trier of fact filled in holes in the evidence to the detriment of the Crown. The evidence was that there was a pre-indicator of violence and that the Crown failed to produce evidence to negate what was properly before the Court.

[81] The Plaintiff submits that it was not his responsibility to produce Officer Jugloff. He made allegations in his Statement of Claim and in his affidavit that were sufficient to put the Crown on notice of the case to be met. An evidentiary burden was created that was the Crown's to dispute.

[82] The Plaintiff notes that what makes *Miclash* important is that the Court imposed a duty on CSC to extend protection not only when it knows harm may befall an inmate, but also when CSC ought to know that harm is likely to occur. The Prothonotary acted properly in applying the law and her common sense to the situation.

[83] In relation to the protocol for telephone use, the Crown suggests that not developing a protocol is a policy decision exempt from judicial examination. The Plaintiff states that the law requires CSC to use all reasonable means to ensure inmate safety. The lack of a policy on telephone access cannot shield CSC from its legislated responsibility. The Plaintiff cites and relies upon *Stewart*, specifically paragraphs 39-41:

> **39** In finding liability on the part of the owner Sundance, Wilson J. noted that courts have increasingly required a duty to act where there is a "special relationship" between the parties. Canadian courts have been willing to expand the kinds of relationships to which a positive duty to act attaches. Wilson J. reviewed cases where the courts will require a positive action on the part of the defendant, and said at p. 1197:
>
> > The common thread running through these cases is that one is under a duty not to place another person in a position where it is foreseeable that the person could suffer injury.
>
> **40** Wilson J. said that, given the fact that the activity was under Sundance's full control and was promoted by it for commercial gain, Sundance was under a positive obligation as the promoter of a dangerous sport to take all reasonable steps to prevent a visibly incapacitated person from participating. She concluded that these precautions were not taken.
>
> **41** It is apparent from Wilson J.'s reasoning that there are two questions to be answered. The first is whether the defendant was required, in the circumstances, to take any positive steps at all. If this is answered in the affirmative, the next question is whether the steps taken by the defendants were sufficient to discharge the burden placed on them.

[84] The Plaintiff submits that there is a “special relationship” between CSC and the inmates in its custody. Pursuant to section 70 of the Act, there is a legislated duty to take all reasonable steps to provide a safe living environment. The Plaintiff notes that the Crown assumes that Officer Jugloff would have observed the telephone area and would have observed the altercation. According to the

evidence of Officer Marshall, this observation ought to have alerted CSC of the potential for harm. The CSC Officer ought to have known of such potential and he should have acted immediately to ensure that violence did not occur. The steps taken by the Crown were not sufficient to discharge the burden placed on it.

[85] The Plaintiff also rejects the Crown's argument that the Prothonotary failed to properly assess the psychiatric and psychological evidence before her to conclude that the Plaintiff suffered from PTSD. All experts called had been hired by CSC to evaluate and treat the Plaintiff after his stabbing at the Millhaven Assessment Unit (MAU).

[86] The Plaintiff submits that the Crown is being hypercritical in complaining that Dr. Cassells did not testify that the Plaintiff suffered from PTSD. Dr. Cassells was quite clear that the incident at the MAU had significant psychological effects on the Plaintiff and stated at page 26 of the transcript as follows:

> I believe the incident at Millhaven affected Mr. Carr in that way insofar as it exaggerated his emotional responses to various stressful events, and thereby made it more difficult to manage himself and to cope with the issues in those events. The other aspect is that it severely disrupted or strongly disrupted his daily routine and daily functioning, thereby further making these issues difficult to deal with.

[87] At page 27 of the transcript, Dr. Cassells states as follows:

> When we started counselling with Mr. Carr, his sleeping was severely disrupted. He was experiencing nightmares, flashbacks and those sorts of things. Other than working out and going for some meals, he was virtually doing nothing but hiding out in his cell and occupying himself with activities that would just help him escape

> from the day-to-day, humdrum situation, and any memories he might have had of the events at Millhaven.

[88] The Plaintiff says that the Crown was incorrect in concluding that Dr. Cassells concluded that Mr. Carr did not suffer from PTSD. In answering a question posed by the Crown's counsel at trial at page 32, Dr. Cassells had the following to say:

> Q: You have stated that the symptoms that you were treating Mr. Carr for you would not characterize as post-traumatic stress symptoms, you would term them as anxiety symptoms. Is that correct?
> A: I think your question is perhaps misleading. It is not that I would or would not. It is that I didn't. I simply did not use that particular formal framework one way or the other. That's all.

At page 35 of the transcript he continued:

> Those did involve factors that could be characterized under formal diagnosis of post-traumatic stress disorder, and in fact had been done so by my colleagues, but I did not choose to take a formal diagnostic approach to this…

[89] While the Plaintiff acknowledges that Dr. Cheston did not diagnose PTSD, Dr. Cheston explains that he is a psychologist not a psychiatrist and it is not up to him to diagnose. He concludes his report by stating that the Plaintiff appeared to have suffered from a Post Traumatic Stress Reaction.

[90] The Plaintiff notes that after two years and on release to a Hamilton half-way house, the CSC had the Plaintiff examined by Dr. Epelbaum who is a psychiatrist. Dr. Epelbaum testified that he conducted a proper psychiatric examination and concluded that the Plaintiff had suffered from PTSD, but by this time it was quite mild. Hence, it was open on the evidence for the Prothonotary to

conclude that the Plaintiff had suffered from PTSD. The Prothonotary was also alive to the task confronting her of assessing damages that arose specifically from the stabbing incident and any psychological upset that may have predated the MAU incident.

[91] The Plaintiff concludes that the Prothonotary delivered a reasoned judgment sound in law and factually accurate.

ANALYSIS

Standard of Review

[92] Both parties agree that the applicable standard of review in this case is established by the Supreme Court of Canada decision in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. On questions of law the standard is correctness while factual findings should only be disturbed if a palpable and overriding error is found: *Housen* at paragraphs 8 and 10. Where the legal aspect cannot be separated from a question of mixed fact and law, then palpable and overriding error is again the appropriate standard: *Housen* at paragraph 36. I agree with this general statement of the applicable standard of review.

Duty of Care for Prison Officials

[93] The Crown says that Prothonotary Milczynski committed an error of law by failing to apply the correct duty of care for prison officials.

[94] The Crown says that the appropriate test established in *Timm* at paragraphs 17-18 and its progeny is simply that corrections officers must take reasonable care with respect to reasonable risks of which they ought to be aware. Perfection or infallibility is not required. Reasonable and adequate measures in the circumstances will suffice. See: *Bastarache* at paragraph 49.

[95] As Prothonotary Milczynski points out in her reasons, there is no doubt that CSC owed Mr. Carr a duty to take reasonable care for his safety while in custody. So the issue before the Prothonotary was "whether the acts and omissions of CSC fall below the standard of conduct of a reasonable person of ordinary prudence in the circumstances" and "whether in the circumstances and on the balance of probabilities, was the harm to Mr. Carr from other inmates reasonably foreseeable so that CSC knew or should have known of that risk of danger."

[96] It seems to me that, both as statements of general principle and as a characterization of the issues facing her in this case, these general remarks of the Prothonotary were entirely correct and are consistent with the case law relied upon by the Crown.

[97] Where the Crown parts company with the Prothonotary is over the issues of whether, in finding a breach of the duty of care, she should have found that Officer Jugloff would have noticed the verbal exchange between Mr. Carr and his assailant, and whether she should have found that a breach occurred as a result of CSC's failure to monitor the telephone area where inmates are able to move freely and where there was a lack of camera surveillance.

[98] The Crown refers to cases that have found that prison officials are not required to be infallible and where a lack of constant monitoring of inmates does not constitute a breach of the duty of care. See *Russell*, *Corner*, and *Bastarache*.

[99] There are also cases where the courts have found that a lack of surveillance cameras does not constitute a breach of the duty of care. See *Iwanicki*, *Eng*, *Hamilton*, and *Coumont*.

[100] In the present case, the evidence is quite clear that CSC did monitor the telephone area (by line-of-sight) and that cameras were used for surveillance in other areas of the prison but were not used in the telephone area where the altercation took place.

[101] It seems to me that the Prothonotary was correct to state that reasonable foreseeability in this case depended upon the pre-indicators of violence that should have been observed by line-of-sight surveillance and that, in deciding whether adequate precautions had been taken, the lack of camera surveillance was at least one factor that should be taken into account.

[102] In the end, the Prothonotary felt there had been a breach of the duty of care because there were pre-indicators of violence that should have been reasonably evident in CSC's "static and dynamic" security measures.

[103] In reading the Decision, it is evident that the Prothonotary was aware of the jurisprudence concerning what constitutes the duty of care in the circumstances before her, and what is required

for a breach of that duty to occur. In my view, the Crown simply disagrees with the Prothonotary's conclusions on the evidence.

[104] First of all, the Crown says that there really were no pre-indicators of violence in this case. This was an argument that the Prothonotary specifically addresses in her reasons. She felt, indeed, that there were pre-indicators of violence:

a. "…there was animosity between Mr. Carr and his assailant immediately prior to the assault. Mr. Carr testified that the two exchanged profanities and that they bumped shoulders when the assailant tried to push in front of him in the line for the telephone."

b. "Officer Dustin Marshall testified that the profanities exchanged between Mr. Carr and the assailant … may lead to violence if exchanged within a prison setting."

c. "Prison correctional officers are on alert for such verbal outbursts as indicators of potential violence."

d. "Officer Jugloff … would likely have noticed a verbal altercation and physical contact in the telephone area … ."

e. "… the first incident in the telephone area was of sufficient loudness or otherwise noticeable for a correctional officer in S Control Module to have observed."

[105] In other words, notwithstanding what Mr. Carr thought and did himself following the altercation in the telephone area, the Prothonotary concluded that this "current case is not a case

where it was a random act of violence without warning: there is evidence of pre-indicators of violence."

[106] The loud exchange of profanities that followed the slight physical contact between the Plaintiff and his assailant is not, *per se*, a pre-indicator of violence. It all depends on the context, and the Prothonotary is careful to place those acts in the full context of this case:

> **25** Officer Marshall stated in his testimony that turnover is high at MAU given that the average time an inmate stays is from four to six months. Unlike a regular prison where staff can get acquainted with the inmate population, the staff are often unable to identify which inmates are more violent. Officer Marshall agreed that while there are often verbal altercations that do not lead to violence, he also stated that in such a situation there is "nothing you can do but be extra vigilant... you just have to make sure that you are watching."
>
> **26** Furthermore, the static security measures in place were inadequate in providing a reasonable amount of protection for inmates. Use of the five telephones in the institution is limited because of their scarcity relative to the large prison population. There is a high demand to use these telephones, as evidenced by the fact that Mr. Carr waited in line for over an hour to use one. In a prison environment with inmates who have not yet been classified as warranting minimum, medium, or maximum security and governed by a prisoner hierarchy, it should have been obvious to CSC that having prisoners wait around for a telephone would create highly charged situations where tempers could flare up.
>
> **27** The prison officials who testified did not seem to be completely clear on their approach to this area. Officer Dustin stated his preference for a "one-in, one-out" rule with regard to the using the telephone area. In her testimony, however, Officer Crisp stated that the prison has nothing to do with establishing the procedure for using the telephones and in effect, the inmates regulate priority of access to the telephones among themselves. She stated that there is no "one in, one out" rule whereby inmates are only let into the telephone area if there is a telephone free for them to use. Instead, she suggested that inmates might obtain

priority access to the telephones solely based on their position in the hierarchy of the inmate population.

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

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

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

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

[107] It is clear that there was no direct evidence that the pre-indicators were observed. Officer Jugloff did not testify:

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

[108] The Crown alleges that Prothonotary Milczynski relied upon an adverse inference (the failure to call Officer Jugloff) “to find the awareness required of the defendant at a pre-indicator of violence to establish a breach of the duty of care.” However, this is clearly not the case.

[109] Prothonotary Milczynski relies upon Mr. Carr’s testimony as the basis for her conclusion “that the first incident in the telephone area was of sufficient loudness or otherwise noticeable for a correctional officer in S Control Module to have observed.” Without evidence from Officer Jugloff, Mr. Carr’s evidence of what happened in the telephone area was the only direct evidence she had before her on the altercation, and whether it was observable or ought, reasonably, to have been observed.

[110] It is, of course, possible to disagree with Prothonotary Milczynski's findings on this crucial issue of the presence of pre-indicators of violence. The Crown has advanced strong arguments, and pointed to other evidence as proof of the fact that such pre-indicators did not exist in this case. No one knows for sure what Officer Jugloff may have seen, or ought to have seen of the altercation. No one knows for sure what was observable and audible in S Control Module at the time of the altercation. Prothonotary Milczynski had to assess whether, given Mr. Carr's own evidence about the altercation and the context gleaned from other witnesses, whether a pre-indication of violence occurred in this case. The evidence on this point was certainly not conclusive. It is also possible to take exception to the Prothonotary's findings, as the Crown has done, based upon other factors relevant to the full context. But was this a palpable and overriding error? I cannot say it was.

[111] It is also evident from the Decision that the lack of surveillance in the telephone area was only "an indication of inadequate precautions." It was simply part of the whole context that Prothonotary Milczynski examined to decide whether there had been a breach of CSC's duty to take reasonable care regarding Mr. Carr's safety. The static security features come into play in two ways in the Decision:

a. "These inadequate static security features made it incumbent on the CSC to watch for situations of potential conflict, whether reported or not"; and

b. "This inability to monitor key areas where inmates are able to move freely in this highly charged environment is also a breach of the duty of care."

[112] It is important to note that what Prothonotary Milczynski means by “static security features” is not just camera surveillance. She also means the line-of-sight surveillance discussed in paragraph 28 of her Decision. The lack of camera surveillance is merely an indicator of general inadequate surveillance.

[113] In my view, this is not a Decision which holds that a lack of surveillance cameras constitutes a breach of the duty of care. This is a case in which the full context of surveillance is examined (including the use made of surveillance cameras) in order to determine whether reasonable steps were taken “in both [CSC’s] static and dynamic security to prevent the assault of Mr. Carr.”

[114] Once again, it is possible to take exception to Prothonotary Milczynski’s findings on this point, but I cannot say that she committed a palpable and overriding error. A palpable error is one that is plainly seen: *Housen*, paragraph 5.

The Burden of Proof

[115] The Crown says that the Prothonotary erred in finding that the Plaintiff had discharged his burden of proving that the assault was reasonably foreseeable.

[116] Once again, this boils down to an argument that “there was no violent altercation or physical contact that could be construed as a pre-indicator of the attack,” and a disagreement about the weight that Prothonotary Milczynski gave to various aspects of the evidence before her. The Crown

says that "[g]iven this evidence, there were no grounds on which the Prothonotary could conclude that the attack on the Plaintiff was foreseeable."

[117] Prothonotary Milczynski addresses all of the relevant evidence before her on this issue. As with the other issues raised by the Crown in this motion, it is certainly possible to disagree with the weight that the Prothonotary gives to each piece of evidence and with her ultimate findings. However, I cannot find a palpable and overriding error in what the Prothonotary did.

Adverse Inference

[118] The Crown says that Prothonotary Milczynski erred in law by drawing an adverse inference against the Defendant for failing to call Officer Jugloff as a witness in its defence action and by "inferring that the breach of the duty of care was made out on the basis of that adverse inference."

[119] I have already quoted paragraph 22 of the Decision where the Prothonotary refers to the Defendant's failure to call Officer Jugloff. I do not regard this paragraph as containing an adverse inference. Prothonotary Milczynski is merely saying that without Officer Jugloff's testimony there is nothing on the record to offset Mr. Carr's testimony "that the first incident in the telephone area was of sufficient loudness or otherwise noticeable for a correctional officer in S Control Module to have observed."

[120] This is a matter of drawing inferences and conclusions from the available evidence (the reasonableness of which I have already addressed); it is not, in my view, a question of inappropriately relying upon an adverse inference.

Policy and Procedure for Telephone Use

[121] The Crown says that Prothonotary Milczynski erred in law in finding that there was a duty to create a policy or procedure for telephone use.

[122] The Crown argues that there is no statutory duty to establish and adhere to a policy or procedure for telephone use within a penitentiary and "consequently there can be no breach of a duty of care for failure to do so. The statutory duty is to take reasonable care for the health and safety of an inmate while in custody."

[123] The Crown also puts the argument this way:

> Furthermore, a policy for telephone use, or a policy decision not to develop a procedure for telephone use, cannot ground a finding that there was a breach of a duty of care. In order to find a breach of a duty of care, that authority and obligation must be found in statute.

[124] In fact, at the hearing of this matter on March 31, 2009 in Toronto, the Crown argued that the Defendant did have a policy for telephone use and that this involved "line-of-sight observation."

The telephone area is situated right in front of S Control Module and, the Crown argues, this is in compliance with the Defendant's telephone policy.

[125] Prothonotary Milczynski concludes at paragraph 28 of her Decision that "[t]his absence of consistent or set policies or procedures for telephone use in combination with the lack of adequate surveillance of the telephone area is a breach of the duty of care."

[126] Once again, when the Decision is read as a whole, it is clear that the Prothonotary does not hold that there was a duty to create a policy or procedure for telephone use.

[127] She found that, in a highly charged situation with a strong potential for violence, there was no clear approach on telephone protocol and that this, in conjunction with the inadequate surveillance factors, contributed to a breach of the duty of care in the full context of this case.

[128] In other words, in deciding whether CSC had exercised reasonable prudence in the circumstances of this case, a lack of clarity over telephone protocol was a relevant factor to consider in conjunction with other factors to decide whether CSC had acted reasonably in its general duty to ensure Mr. Carr's safety.

[129] It is possible to disagree with the weight that Prothonotary Milczynski gave to the confusion she found concerning telephone protocol (a different factor from line-of-sight surveillance), but in my view it is not possible to say that she committed a palpable and overriding error on this point.

Evidence of Breach of Duty of Care

[130] The Crown makes a further argument on telephone usage that even “if there were statutory grounds on which to found a duty to implement and enforce a telephone use policy, a statutory duty does not necessarily create a duty in tort. The injury must be foreseeable.”

[131] I think I have already said enough to make it clear that I regard this position as a mischaracterization of the basis of Prothonotary Milczynski’s Decision. In the end, the Crown is simply disagreeing with the factors chosen by the Prothonotary as relevant to the general discussion concerning the breach of duty issue and the weight which she gave to those factors. This disagreement does not, in my view, amount to proof of a palpable and overriding error in the Decision.

Causation

[132] The Crown’s final point is that the Prothonotary erred in finding that the Plaintiff had discharged his burden of proving the Defendant caused his Post Traumatic Stress Disorder.

[133] The arguments raised by the Crown on this causation issue were raised with Prothonotary Milczynski and she dealt with them in a full and forthright way in her Decision:

> **35** At trial, CSC suggested there was no proof for Mr. Carr's claim of "on-going pain and suffering as a result of the assault", or a claim for PTSD as a result of the assault. CSC pointed to three areas that negated Mr. Carr's claims. One, CSC argued that Mr.

Carr had not consulted with the mental health professionals for PTSD specifically. Two, that there was a lack of a formal diagnosis of PTSD according to the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM IV). Three, that previous traumas in Mr. Carr's life were the cause for the symptoms that he claimed were PTSD and that it would be too difficult to differentiate the cause of these symptoms for the purposes of assessing damages. I reject these arguments.

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

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

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

38 Yet, CSC contended that the lack of a formal diagnosis of PTSD and insufficient evidence that treatment was oriented to the on-going pain and suffering from the assault meant that the Mr. Carr's claims were unfounded. I have difficulty with this argument. The expectation that evidence of mental illness comes to the

courtroom without co morbid factors (which will be discussed below), and with a clean and unqualified rigid diagnosis is not realistic or fair to claimants. The three mental health professionals were convincing that a less than formal approach does not in any way suggest that their findings of PTSD are incorrect.

39 Second, in any case, that there was a lack of formal diagnosis of PTSD is not evident. CSC contended that the lack of an investigation for malingering was a crucial element of a PTSD diagnosis that Dr. Epelbaum failed to perform. I accept, however, Dr. Epelbaum's expert testimony that the fact that the assault happened satisfied him that the claims relating to PTSD were legitimate. Dr. Epelbaum made his diagnosis of PTSD on the basis of his clinical interview with Mr. Carr. Furthermore, the symptoms of Mr. Carr and their improvement with treatment are in keeping with the normal diminishing over time of symptoms associated with chronic PTSD. Mr. Carr's gradual improvement is shown by the fact that he was prescribed medication in the aftermath of the assault, but Dr. Epelbaum felt that Mr. Carr's improved ability to cope with the PTSD was sufficient enough as to merit trying to discontinue medication.

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

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

> It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be

> several tortuous and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant's is fully liable for that damage. The rules of damages then consider what the original position of the Plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: Athey.
>
> [...]
> At the same time, the defendant takes his victim as he finds him - the thin skull rule.[...]

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

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

[134] I have reviewed the evidence in question together with the objections raised by the Crown. As with the other issues raised by the Crown in this appeal, I can certainly see that it is possible to take issue with the Prothonotary's approach and her conclusions. But given the evidence adduced, and her balanced and reasonable approach to the Crown's concerns, I cannot find that Prothonotary Milczynski committed a palpable and overriding error.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The motion is dismissed and the Decision of Prothonotary Milczynski is affirmed.

2. The parties are free to address the Court on the issue of costs. If agreement cannot be reached, submissions should be made in writing and each party should also respond in writing to the submissions of the other side.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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