

Date: 20060124

Docket: T-712-04

Citation: 2006 FC 63

Ottawa, Ontario, January 24, 2006

PRESENT: THE HONOURABLE MR. JUSTICE BEAUDRY

BETWEEN:

TRACY CURRY

Plaintiff

and

**THE ATTORNEY GENERAL
OF CANADA**

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a simplified action for damages resulting from alleged violations of sections 51 and 52 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, as a result of an incident that occurred at Grand Valley Institution at Kitchener, Ontario (Grand Valley).

FACTS

[2] The plaintiff, Tracy Curry, is a 31 year-old inmate who is incarcerated at Grand Valley. She began serving a sentence of life imprisonment without the possibility of parole for ten years on

October 26, 1994, for the murder of her grandmother. She has a history of substance abuse and psychiatric problems.

[3] On or around September 25, 2003, the plaintiff was allowed to leave Grand Valley for an Unescorted Temporary Absence (UTA) to a halfway house in preparation for full parole release. She left Grand Valley on October 20, 2003, and returned on October 23, 2003.

[4] Upon her return to Grand Valley, Skipper, the institution's drug-detecting dog's (the dog) behaviour indicated that it had detected the presence of illegal drugs on the plaintiff's person. Grand Valley's ion scanner being out of service, she was detained. She was strip searched and kept in the Visitors and Correspondence (V&C) area under supervision for several hours. No drugs were found. While she was there, the plaintiff protested and was adamant that she did not have any drugs on her.

[5] The plaintiff eventually signed a consent form authorizing the defendant to conduct x-rays and body cavity searches. She was then transported from Grand Valley to Kitchener's St. Mary's Hospital.

[6] The plaintiff first underwent an x-ray search of her pelvic area, which provided no evidence of drugs on her person. She was then subjected to cavity searches conducted by a medical doctor.

[7] The cavity examinations led the doctor to conclude that there was no evidence that the plaintiff had concealed drugs within her person. She was then returned to Grand Valley and the warden was made aware of the hospital's results.

[8] When the plaintiff arrived at Grand Valley, she was again submitted to another dog search. Again, it indicated that the plaintiff had drugs on her person. At or around 8 p.m., she was strip searched and placed in a room that the parties refer to as a "dry cell". Her clothes were bagged and she was given security gowns to wear. She remained in the dry cell until approximately 5 p.m. the next day. She had a bowel movement during her detention, and no drugs were found in her stool. The plaintiff exhibited signs of significant emotional distress during her detention in the dry cell.

[9] While the plaintiff was detained in the dry cell, she was submitted to another dog search and its behaviour indicated that there were no drugs. Though there was no policy in effect at the time in Grand Valley to conduct separate dog searches of inmates' clothing, her street clothes were then presented to the dog, which indicated the presence of drugs. After searching the clothes, no drugs were found.

[10] The dog handler, Marlene Mitsch, then communicated the results of the searches to the Grand Valley Warden. It was then determined that in the future, inmates returning from UTAs would be provided new clothing upon arrival and that the clothes they were wearing during their UTAs would be examined separately by the dog.

ISSUES

[11] This case raises the following issues:

1. Was the plaintiff's consent to x-rays and body cavity searches obtained legally?
2. Were any of the defendant's employees, agents or servants in any way negligent in the manner they acted toward the plaintiff?

[12] For the following reasons, the answer to the first question is negative and the answer to the second question is affirmative.

RELEVANT LEGISLATION

[13] Paragraph 3(a) and section 10 of the *Crown Liability and Proceedings Act*, R.S. 1985,

c. C-50, read as follows:

3. The Crown is liable for the damages for which, if it were a person, it would be liable

- (a) in the Province of Quebec, in respect of
- (i) the damage caused by the fault of a servant of the Crown, or
 - (ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

- (b) in any other province, in respect of
- (i) a tort committed by a servant of the Crown, or
 - (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

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.

3. En matière de responsabilité, l'État est assimilé à une personne pour :

- a) dans la province de Québec :
- (i) le dommage causé par la faute de ses préposés,
 - (ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;

- b) dans les autres provinces :
- (i) les délits civils commis par ses préposés,
 - (ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

10. L'État ne peut être poursuivi, sur le fondement des sous-alinéas 3a)(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.

[14] Sections 51, 52 and 70 of the *Corrections and Conditional Release Act*, S.C. 1992, c.20, read as follows:

51. Where the institutional head is satisfied that there are reasonable grounds to believe that an inmate has ingested contraband or is carrying contraband in a body cavity, the institutional head may authorize in writing one or both of the following:

(a) the use of an X-ray machine by a qualified X-ray technician to find the contraband, if the consent of the inmate and of a qualified medical practitioner is obtained; and

(b) the detention of the inmate in a cell without plumbing fixtures, with notice to the penitentiary's medical staff, on the expectation that the contraband will be expelled.

52. Where the institutional head is satisfied that there are reasonable grounds to believe that an inmate is carrying contraband in a body cavity and that a body cavity search is necessary in order to find or seize the contraband, the institutional head may authorize in writing a body cavity search to be conducted by a qualified medical practitioner, if the inmate's consent is obtained.

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.

51. Le directeur peut, s'il est convaincu qu'il existe des motifs raisonnables de croire qu'un détenu a dissimulé dans une cavité corporelle ou ingéré un objet interdit, autoriser par écrit l'une ou l'autre des mesures suivantes ou les deux à la fois :

a) avec le consentement de l'intéressé et d'un médecin compétent, la prise de radiographies par un technicien compétent afin de déceler l'objet;

b) l'isolement en cellule nue -- avec avis en ce sens au personnel médical -- jusqu'à l'expulsion de l'objet.

52. S'il est convaincu qu'il existe des motifs raisonnables de croire qu'un détenu dissimule dans une cavité corporelle un objet interdit et qu'un examen des cavités corporelles s'avère nécessaire afin de le déceler ou de le saisir, le directeur peut autoriser par écrit un médecin compétent à procéder à l'examen, avec le consentement du détenu.

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.

[15] Sections 7, 10, 12 and subsection 24(1) of the Charter read as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

10. Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefor;

b) to retain and instruct counsel without delay and to be informed of that right; and

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

10. Chacun a le droit, en cas d'arrestation ou de détention :

a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;

b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

c) de faire contrôler, par habeas corpus, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

ANALYSIS

1. Was the plaintiff's consent to x-rays and body cavity searches obtained legally?

[16] The plaintiff alleges that her consent to the x-ray and cavity searches was void because she was misled by Corrections officers into believing that undergoing x-ray and cavity searches would spare her from the ordeal of detention in a dry cell if they were negative, and because she was not informed of her right to counsel before signing the consent form.

[17] The plaintiff further argues that her consent was vitiated by threats and inducements emanating from Grand Valley authorities, and that consent provided under duress amounts to no consent.

[18] The defendant states that it was the plaintiff who requested the x-ray and cavity searches, and that she was not pressured into signing the consent form.

[19] Moreover, the defendant alleges that the plaintiff was afforded the right to contact legal counsel, and that she declined to make use of it. The defendant further argues that he was not required to afford the plaintiff the right to contact legal counsel in these circumstances.

[20] During the hearing, the defendant called Laura Laverty, the Corrections officer who presented the plaintiff with the consent form. She testified that the plaintiff was crying, but that she had insisted on the x-ray and cavity searches to prove that she was not smuggling drugs into prison. She denied having told the plaintiff that her consent to these searches would allow her not to be placed in a dry cell if they were negative, since the decision whether or not to place her in a dry cell was the Warden's. Officer Laverty added that she informed the plaintiff that she could stop the procedure at any time.

[21] The officer did not bring her log book at the trial, and her silence on the matter of whether the plaintiff was informed of her right to counsel allows for a negative inference to be drawn on this point. All of the testimonial evidence presented during the hearing established that the plaintiff was in extreme emotional distress before she signed the consent form, and in my opinion she was in no condition to provide her full and free consent to the x-ray and cavity searches she was subjected to.

[22] Moreover, the defendant's argument that Grand Valley staff were under no obligation to inform the plaintiff of her right to counsel is downright unreasonable. A cavity search is one of the most invasive and humiliating procedures a human being can be subjected to, and everyone should have the right to seek legal advice before consenting to it. In this case, I believe the plaintiff when

she stated that she could avoid detention in a dry cell by consenting to a cavity search. Otherwise, it makes no sense that she would consent to such a procedure knowing in advance that whatever results obtained from the hospital, she would be subject to detention in the dry cell. I also believe her when she testified that it is only the next day she was offered to contact legal counsel. I give more credibility to the plaintiff's testimony than those of officers Charlene Byfield and Sheila O'Neil on this. A copy of the dry cell log book confirms the plaintiff's evidence (note: 1:05 a.m. is October 24, 2003):

0105 log reviewed. When Curry wakes up, make sure she is offered lawyer's call ...

Scott

[23] In the report of the *Commission of Inquiry into Certain Events at the Prison for Women*, Catalogue No. JS42-73/1996E, ISBN 0-662-24355-2, Commissioner Louise Arbour (as she then was) addressed the matter of female inmates' consent to cavity searches:

The absence of a culture respectful of individual rights is perhaps nowhere more disturbing than on this issue. A body cavity search is the most intrusive form of searching a person, short of surgical intervention. As a result, the law requires that it be performed only pursuant to a request in writing of the Warden, that it be performed by a qualified medical practitioner, and the consent of the person subjected to the search must be obtained. The concept of informed, free and voluntary consent is well established in law, particularly in criminal law. Threats or inducement held out by a person in authority would clearly vitiate the voluntariness requirement that is implicit in the notion of consent. Yet in this case, many CSC witnesses who testified on this issue expressed the opinion that an offer of cigarettes, shower, or the removal of restraints to follow the body cavity search did not affect the validity of the consent that was given. In some cases, it was felt that since the law provided the Correctional Service with the option of placing the inmate in a "dry cell", that is a cell without plumbing fixtures, in order to retrieve contraband which may have been secreted in a body cavity, and since the placement in a dry cell was not contingent on the consent of the inmate, any inducement to the body cavity search was acceptable as providing a better and quicker alternative.

This approach was further justified on the basis that the law was written essentially for male prisoners. The argument was that dry-celling is effective for men, but not for women. The implication was that since the law does not provide for an effective non-consensual method for the recovery of secreted weapons or drugs from

women, inducement of consent is morally justified as a preferable alternative to lengthy dry-celling.

There can be and should be no ambiguity as to what the legal requirements of a valid consent are. [...]

This is therefore a case where the legal requirements were known, but very improperly understood and appreciated. Once again, this is an instance where the law is viewed as easily superseded by the “moral judgement” that an alternative is preferable, particularly if this is seen to be consistent with security concerns.

[24] It is this Court’s opinion that the plaintiff’s consent to the x-ray and cavity searches was obtained under inducement, and that Grand Valley authorities therefore did not obtain the plaintiff’s valid consent to these searches.

2. Were any of the defendant’s employees, agents or servants in any way negligent in the manner they acted toward the plaintiff?

[25] The plaintiff’s strongest argument regarding the defendant’s alleged negligence is founded upon her detention in a dry cell after having gone x-ray and cavity searches, as well as being strip searched with negative results. Despite the defendant’s claim that these events were consistent with the relevant provisions of the *Corrections and Conditional Release Act* and Grand Valley’s practices and procedures.

[26] While it is incontestable that the defendant did not need the plaintiff’s consent to place her in a dry cell, this is a case where the defendant’s overzealous and rigid adherence to procedure defied logic and showed little regard to the plaintiff’s personal dignity. How the plaintiff could have

managed to smuggle drugs on her person despite being strip searched and subjected to x-ray and cavity searches is a baffling question.

[27] At the time of the incident, there was no policy in effect at Grand Valley where an inmate's clothing should be inspected separately by a drug-detecting dog upon the inmate's return from a UTA. However, the fact that such a policy was instituted immediately after the plaintiff's unfortunate ordeal indicates that common sense finally prevailed and that other inmates may not need to go through the same experience as the plaintiff.

[28] The Court heard testimony from Marlene Mitsch, the Grand Valley's dog handler. She stated that she had the plaintiff's clothes inspected separately by the dog on her own initiative the day after the plaintiff returned from her UTA, and several hours after she had been placed in a dry cell. Officer Mitsch also stated that she had not thought of conducting such a search upon the plaintiff's return from her UTA because the dog was not trained to do so. But the next day, without training, the dog was presented with the plaintiff's clothes. This is unfortunate, as it may have spared the plaintiff from having to undergo a cavity search and the subsequent detention in a dry cell.

[29] A careful analysis of the facts and evidence in this case reveals that the defendant's operational decisions and procedures amounted to negligence, which caused the plaintiff considerable prejudice, and is incompatible with the duty of care imposed by section 70 of the *Corrections and Conditional Release Act*.

[30] During the hearing, the Court heard the expert testimony of Dr. Karen de Freitas, a psychiatrist who examined the plaintiff. She testified that the plaintiff displayed symptoms of post-traumatic stress disorder, including nightmares, major depression, and loss of pleasure and appetite. Though the plaintiff had an extensive history of mental and emotional problems, a report from Dr. Atkinson, who followed the plaintiff from within the institution, indicates that she was quite stable for a year and a half prior to the incident of October 23, 2003.

[31] Although the plaintiff may have suffered from mental and emotional incidents prior to the events of October 23, 2003, her ordeal clearly caused her a significant psychological prejudice.

Dr. Freitas sums up her uncontradicted opinion on page 8 of her report as follows:

In my opinion, Ms. Curry has experienced symptoms of Posttraumatic Stress Disorder as a result of the events of the UTA, although she does not fulfill all the necessary criteria for the diagnosis. In particular, she has had persistent reexperiencing of the trauma in the form of intrusive images and nightmares. These symptoms were more severe right after the UTA, but have lessened over time.

Ms. Curry also appears to be suffering from a moderately severe Major Depressive Episode, which began after the events of the UTA. Her history of depression, possible personality disorder, and unstable relationships may have increased her vulnerability to depression. However, from the information available, it is my opinion that it was the events of the UTA which provided the trigger for this depressive episode.

[32] In *Blackwater v. Plint*, 2005 SCC 58, Chief Justice McLachlin recently considered the matter of the quantification of damages when a plaintiff has suffered extensive prior trauma. Her findings at paragraphs 78 to 81 will guide our assessment of the damages to be awarded to the plaintiff:

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 tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the

plaintiff's damage, the defendant 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. [...]

Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.

All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.

[33] The defendant cannot therefore be found liable for damages the plaintiff suffered before her incarceration at Grand Valley. Nonetheless, the incident of October 23, 2003 caused the plaintiff considerable harm. In light of these facts, I would assess general damages, inclusive of the violation of her constitutional rights (section 10.b) of the Charter), in the amount of \$10,000.

JUDGMENT

THIS COURT ORDERS that the defendant shall pay to the plaintiff the amount of \$10,000 and a lump sum of \$3,500 for costs.

"Michel Beaudry"

JUDGE

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-712-04

STYLE OF CAUSE: **TRACY CURRY**
and
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Kitchener, Ontario

DATE OF HEARING: October 31 and November 1, 2005

REASONS FOR ORDER: BEAUDRY J.

DATED: January 24, 2006

APPEARANCES:

John L. Hill FOR PLAINTIFF

Derek Edwards FOR DEFENDANT

SOLICITORS OF RECORD:

John L. Hill FOR PLAINTIFF
Toronto, Ontario

John H. Sims, Q.C. FOR DEFENDANT
Deputy Attorney General
Toronto, Ontario