Federal Court  Cour fédérale

Date: 20220117

Docket: T-1365-18

Citation: 2022 FC 47

Ottawa, Ontario, January 17, 2022

PRESENT: Hon. Mr. Justice Henry S. Brown

BETWEEN:

MICHAEL BEAUCHAMP

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

JUDGMENT AND REASONS

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I. Nature of the matter

[1] This is an action for damages for personal injuries to the Plaintiff's jaw caused in an assault by unknown assailant(s) in 2017 while the plaintiff was an inmate at Beaver Creek Institution Medium [BCI]. BCI is a medium security facility in Ontario operated by Correctional Service of Canada [CSC] under the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*] and the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*]. CSC staff, who are servants of the Defendant, did not observe the assault. The action was tried under the Simplified Action rules of the *Federal Courts Rules*, SOR/98-106, ss.292-299.

[2] The Defendant denies liability, and asks that the action be dismissed with lump sum costs of $5,000.00. The Plaintiff did not provide a lump sum cost request as the Court asked him to do, however his Statement of Claim asks for costs on a substantial indemnity basis.

[3] The trial of this Simplified Action proceeded by the filing of affidavit evidence by the Plaintiff on which cross-examinations and re-direct took place. This procedure was followed by the Defendant in the same manner. There was no oral discovery. The parties filed a Joint Brief of Documents, the contents of which were agreed to be authentic consisting mainly of documents from CSC files. There was no reply evidence. Both parties were given time to file written submissions after the hearing, which they did. Both parties had the right to file written responding submissions, which neither did.

II. Issues

[4] The Plaintiff in his Closing Submissions frames the issues as follows, with slight modification by the Court to item D, and the addition of item E:

> A. Whether the Defendant's servants, the staff at Beaver Creek institution (BCI) breached their duty of care to reasonably ensure the safety and health of the Plaintiff by not anticipating and taking measures to avoid the assault on the Plaintiff, thereby causing foreseeable harm to him by other inmates;
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> B. Whether the Defendant's servants, health care and other staff at BCI breached their duties to reasonably protect the safety and health of the Plaintiff by subjecting him to unreasonable conditions in transporting him to and from hospitals and in placing him in segregation rather than in health care- related vehicles and accommodation, thereby foreseeably causing him harm;

C. Whether the Defendant is vicariously liable for the harm caused by wrongful conduct of her servants herein;

D. What award of damages is appropriate; and

E. What costs if any should be awarded to the successful party?

III. Legal standard in negligence action

A. *Statutory considerations*

[5] Section 3 of the *CCRA* provides the purpose of the federal correctional system, overseen by CSC is to contribute to the maintenance of a just, peaceful and safe society in a number of ways including:

Purpose of correctional system	**But du système correctionnel**
3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by	**3** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.
(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and	

> **(b)** assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

[6] Section 4 of the *CCRA* provides the principles that guide CSC in achieving the purposes referred to in section 3 including:

Principles that guide Service	**Principes de fonctionnement**
4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:	**4** Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants:
…	…
(c) the Service uses the least restrictive measures consistent with the protection of society, staff members and offenders;	**c)** il prend les mesures qui, compte tenu de la protection de la société, des agents et des délinquants, sont les moins privatives de liberté;
(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;	**d)** le délinquant continue à jouir des droits reconnus à tout citoyen, sauf de ceux dont la suppression ou la restriction légitime est une conséquence nécessaire de la peine qui lui est infligée;

[7] Subsection 30(1) of the *CCRA* requires CSC to assign each inmate a security classification be it minimum, medium, or maximum:

Service to classify each inmate	**Attribution de cote aux détenus**
30 (1) The Service shall assign a security classification of maximum, medium or minimum to each inmate in accordance with the regulations made under paragraph 96(z.6).	**30 (1)** Le Service attribue une cote de sécurité selon les catégories dites maximale, moyenne et minimale à chaque détenu conformément aux règlements d'application de l'alinéa 96z.6).

[8] Section 18 of the *CCRR*, made pursuant to section 30 of the *CCRA* recognizes the three different security levels pertaining to the supervision and control of inmates:

18 For the purposes of section 30 of the Act, an inmate shall be classified as	**18** Pour l'application de l'article 30 de la Loi, le détenu reçoit, selon le cas:
(a) maximum security where the inmate is assessed by the Service as	**a)** la cote de sécurité maximale, si l'évaluation du Service montre que le détenu:
(i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or	**(i)** soit présente un risque élevé d'évasion et, en cas d'évasion, constituerait une grande menace pour la sécurité du public,
(ii) requiring a high degree of supervision and control within the penitentiary;	**(ii)** soit exige un degré élevé de surveillance et de contrôle à l'intérieur du pénitencier;
(b) medium security where the inmate is assessed by the Service as	**b)** la cote de sécurité moyenne, si l'évaluation du Service montre que le détenu:
(i) presenting a low to moderate probability of escape and a moderate risk to the safety of the	**(i)** soit présente un risque d'évasion de faible à moyen et, en cas d'évasion,

public in the event of escape, or	constituerait une menace moyenne pour la sécurité du public,
(ii) requiring a moderate degree of supervision and control within the penitentiary; and	**(ii)** soit exige un degré moyen de surveillance et de contrôle à l'intérieur du pénitencier;
(c) minimum security where the inmate is assessed by the Service as	**c)** la cote de sécurité minimale, si l'évaluation du Service montre que le détenu:
(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and	**(i)** soit présente un faible risque d'évasion et, en cas d'évasion, constituerait une faible menace pour la sécurité du public,
(ii) requiring a low degree of supervision and control within the penitentiary	**(ii)** soit exige un faible degré de surveillance et de contrôle à l'intérieur du pénitencier

[9] Section 70 provides CSC is responsible to take all reasonable steps to ensure that penitentiaries are safe for inmates and staff alike:

Living conditions, etc.	**Conditions de vie**
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.

B. *Jurisprudence*

[10] In the recent case of *Canada v Greenwood*, 2021 FCA 186, Justice Gleason confirmed the Supreme Court of Canada's decision in *Saadati v Moorhead*, 2017 SCC 28, in which Justice Brown outlines the elements of negligence:

> [154] Justice Brown outlined the elements of the tort of negligence at paragraph 13 of *Saadati* in the following terms: "[l]iability in negligence law is conditioned upon the claimant showing (i) that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; (ii) that the defendant breached that duty by failing to observe the applicable standard of care; (iii) that the claimant sustained damage; and (iv) that such damage was caused, in fact and in law, by the defendant's breach." To the extent that the Federal Court suggested otherwise or that different elements pertain in a systemic negligence claim, it erred.

[11] In *Clements v Clements*, 2012 SCC 32 [*Clements*], the Supreme Court of Canada described the "but for..." test as the basis for determining whether negligence caused harm:

> [8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[12] I accept and agree with Justice Layden-Stevenson in *Bastarache v Canada*, 2003 FC 1463 at para 23 [*Bastarache*] where this Court held prison authorities such as CSC owe a duty to take reasonable care for the health and safety of inmates, such as the Plaintiff, while in custody:

> [23] The defendant, as earlier stated, concedes the existence of a duty of care. The content of the duty is well established. The prison authorities owe a duty to take reasonable care for the health and safety of the inmate while in custody: *Timm*, supra; *Abbott v. Canada* (1993), 64 F.T.R. 81 (T.D.); *Oswald v. Canada* (1997) 1997 CanLII 16271 (FC), 126 F.T.R. 281 (T.D.). In addressing the duty of care, regard must be had to the circumstances surrounding the incident: *Scott v. Canada*, [1985] F.C.J. No. 35 (T.D.). An important consideration in the foreseeability of risk is the likelihood of the occurrence of the event giving rise to the risk. The issue is not whether there is a duty of care, but whether the acts or omissions of the defendant fall below the standard of conduct of a reasonable person of ordinary prudence in the circumstances: *Russell v. Canada* 2000 BCSC 650, [2000] B.C.J. No. 848; *Hodgin v. Canada (Solicitor General)* (1998), 1998 CanLII 28450 (NB QB), 201 N.B.R. (2d) 279 (Q.B.T.D.), aff'd., 1999 CanLII 1244 (NB CA), [1999] N.B.J. No. 416 (C.A.).

[13] I also agree as a general rule that CSC is not liable for damages for personal injuries arising from an assault on an inmate by another inmate where the institution did not have, or could not reasonably have had knowledge of one or more pre-indicators of violence: *Subbiah v Canada*, 2013 FC 1194 [per Aalto P] [*Subbiah*]. A pre-indicator is an event or circumstance that makes the possibility of violence more likely. The Court at paragraphs 75-76 stated, and I agree that liability for damages for personal injuries only arises where that harm is reasonably foreseeable:

> [75] Mr. Subbiah argues that CSC was negligent because CSC staff failed to take reasonable care to protect his safety when they knew or ought to have known his safety was in jeopardy. There is a duty on prison officials to ensure the safety of inmates. This duty is accepted in Canadian law and arise from *Ellis v Home Office*, [1953] 2 All ER 146 (Eng CA) at 154 and adopted in *Timm v Canada, [1965] 1 ExCR 174.*
>
> [76] However, there is no absolute liability on prison authorities to prevent all harm to inmates; liability generally flows only where correctional authorities have actual knowledge of harm. In other words, harm must be reasonably foreseeable. In *Miclash v Canada*, 2003 FCT 113, CSC was held liable for an attack on an inmate

> where CSC "should have known" that the inmate's safety was compromised.
>
> [Emphasis added]

IV. Plaintiff's background: convictions and time spent in federal prison

[14] The Plaintiff is a male, former federal inmate currently 51 years old. According to the unchallenged report of the Parole Board of Canada [Parole Board] dated January 5, 2018 contained in the Joint Book of Documents, at the time of the alleged assault the Plaintiff was serving a seven-year sentence for a number of offences committed in 2009, including manslaughter, assault with a weapon, assault causing bodily harm, uttering threat, assault, and mischief.

[15] The Parole Board describes the 2009 manslaughter as follows: "On April 24, 2009, you followed employees who had escorted a man out of a bar and left him laying on the ground outside. You kicked him in the head and smashed him into a pole, before re-entering the bar. He was taken to hospital in a coma, and died a month later."

[16] This was the Plaintiff's second conviction for manslaughter, and third federal prison term. The Parole Board states: "Your criminal record includes convictions for property offences, and breaches of trust, and two previous federal sentences. Your first was in 1993 for Break & Enter with Intent, Assault. Fail to Comply x2, and Assault Causing Bodily Harm, after you assaulted your common-law spouse, and punching and kicking a man. Your second [previous federal sentence, ed.] was in 2002 for Manslaughter, after a child died in your care after being

abused, you blamed her mother but pled guilty to avoid a murder charge. During both these incarcerations, you were identified as having weapons and participating in assaults."

[17] The Plaintiff has a history of drug and alcohol abuse. For that reason, the Parole Board imposed a special condition on his conditional release decision dated January 5, 2018, that he abstain from alcohol and drugs other than prescribed medications. His history of drug and alcohol abuse was outlined in the 2013 sentencing decision of the British Columbia Supreme Court for convictions including the 2009 manslaughter: "[18] Substance abuse has a role in these offences. Mr. Beauchamp began drinking alcohol when he was 14 years old. At 23 years old when in custody, he began using both cocaine and heroin. His cocaine use commenced with recreational use, but it later escalated to heavy use of both cocaine and heroin. During this time, Mr. Beauchamp was arrested for manslaughter and spent approximately eight years in jail. During the time in jail, he stopped using cocaine and heroin. He has not returned to being a heavy drug user since and he has not used heroin since that time. However, alcohol abuse continues to be a factor in his life. At the time of the offence to which the manslaughter plea has been entered and accepted, Mr. Beauchamp was drinking and was intoxicated."

[18] By the time of the assault, the Plaintiff had spent 9 years and eight months in federal prisons.

V. Discussion and analysis

[19] I turn to the issues raised by the Plaintiff.

A. *Issue 1: Whether the Defendant's servants, the staff at Beaver Creek institution (BCI) breached their duty of care to reasonably ensure the safety and health of the Plaintiff by not anticipating and taking measures to avoid the assault on the Plaintiff, thereby causing foreseeable harm to him by other inmates*

[20] As set out in greater detail below, I find there is no reliable evidence of any pre-indicators of harm against the Plaintiff. Thus, the Plaintiff's issue ultimately resolves into whether there was a duty of care, and if so whether CSC breached its duty in terms of providing supervision through camera surveillance or directly of the area where the Plaintiff claims he was assaulted. To put this discussion in context, I will set out the circumstances of the assault. A key issue is whether there was reasonable video camera surveillance of the area where the Plaintiff claims the assault took place. I find that there was.

[21] In summary, and contrary to the Plaintiff's evidence and allegations, I am not satisfied the Plaintiff established on a balance of probabilities where the assault took place. However, assuming it took place in the area he claims, I find that area was covered by reasonable video surveillance, namely a pan-and-tilt camera operated remotely by prison guards. I also reject the Plaintiff's allegation he was assaulted in a "blind spot", that is, an area without video camera surveillance. I also find the placement and type of video camera security CSC used where the Plaintiff claims the assault took place conformed with CSC policy, such that CSC is immune from liability for negligence in that connection. Overall, I have concluded on the evidence and law that CSC is not liable in negligence in terms of providing inadequate or unreasonable video surveillance of the areas of assault claimed by the Plaintiff.

[22] I emphasize the Plaintiff identified two areas of this multi unit prison as where the assault took place. I therefore consider prison video surveillance only in connection with these two areas.

[23] The Plaintiff's allegations as to where he suffered his injury conflict: 1) he originally said he fell in his shower; therefore this Court reviewed a video review report prepared by prison staff concerning the area around his particular living unit. From this review, I conclude the Plaintiff's original "fell in the shower" story was not truthful; it is not consistent with the prison's video camera review. In the present action, the Plaintiff takes a different position. He now alleges 2) the assault took place in an entirely different location. I have reviewed this allegation and find on a balance of probabilities that the area he now claims the assault took place was not where it took place either. This is because there would have been too many witnesses – "twice as many" witnesses – because prison guards were changing shift in that area at that time.

[24] This is a trial on the allegations and submissions of the parties. I was not asked to and do not conduct an analysis of the many other locations on the prison grounds where the assault might have taken place.

(1) The assault and related issues

[25] During the afternoon of August 30, 2017, the Plaintiff sustained a serious injury to his jaw. I accept this submission which is not contradicted. At all material times he repeatedly told prison staff he fell in the shower. However, in this action started about a year later (July 17, 2018) and it seems for the first time, he claims he was assaulted on the prison grounds

somewhere away from his living unit. He claims to have no idea why he was assaulted. He testified he cannot identify his assailants. He says he never gave any reason for other inmates at BCI to assault him. He deposes there were no witnesses to the assault, and that he made his own way back to his unit or range after the assault.

(2) Absence of pre-indicators

[26] Deputy Warden Craig James of BCI ["Deputy Warden James"] gave evidence at trial by affidavit, in cross-examination and redirect. At the time of the assault, Deputy Warden James had been in CSC prison service for 19 years. I accept the evidence of Deputy Warden James who I find was both a credible and reliable witness. I come to these conclusions having listened to his evidence which was direct, complete, and succinct. It had the ring of truth. It was not weakened in cross-examination. I also give his evidence considerable weight because he was present at this prison at the time of the assault. He was then Assistant Warden Operations. He was promoted to Deputy Warden the following year, in 2018.

[27] Thus, Deputy Warden James had actual first hand knowledge, not of the assault itself – the only evidence in that respect comes from the Plaintiff – but of the BCI prison generally and particularly in terms of its operations and security surveillance among other things. Deputy Warden James also gave evidence based on his review of prison files, which were extensive, many of which were filed with the Court.

[28] I prefer the evidence of Deputy Warden to that of the Plaintiff on matters of prison security and operations where they conflict because of his personal knowledge of such matters.

[29] On the issue of reasonable foreseeability and pre-indicators of violence, Deputy Warden James deposed there were no pre-indicators of violence against the Plaintiff:

> 5. I am advised by Beaver Creek staff that they did not recall any pre-indication of an assault on Mr. Beauchamp. A review of casework record entries in the Offender Management System, prior to and following the assault, do not provide any expression of concern by Mr. Beauchamp to staff members.

[30] Deputy Warden James added in cross-examination that the lack of any pre-indicators of violence was not based solely on the Plaintiff not having expressed any concerns (he expressed none), but was the aggregate of the entire situation, including casework records, statement/observation reports, and daily interaction logbooks. From these Deputy Warden James concluded there's "nothing that – as a pre-indicator for me to tell me that he was in trouble."

[31] This evidence was not seriously contradicted by the Plaintiff who neither pleaded nor led any evidence of pre-indicators of harm towards himself. Indeed the Plaintiff testified he had no idea why he was assaulted. He says he never gave any reason for other inmates at BCI to assault him:

> 27 MR. PETERSON: Can you think of any reason
> 28 why any of the inmates that you were living with ---
> 1 MR. BEAUCHAMP: No.
> 2 MR. PETERSON: --- would have wanted to ---
> 3 MR. BEAUCHAMP: No.
> 4 MR. PETERSON: --- assault you?
> 5 MR. BEAUCHAMP: No, I was there going on two
> 6 years.

[32] That said, contrary to his sworn testimony at trial, several weeks after trial and for the first time (at paragraphs 4, 5 and 6 the counsel for the Plaintiff's Closing Arguments) counsel argued prison staff might have drawn an "inference" the Plaintiff was involved with other inmates involved in drug activities, and that there were "racial tensions between inmates, including black inmates" and the Plaintiff.

[33] I am unable to give these suggestions credence for several reasons. This suggestion is directly contrary to the Plaintiff's sworn testimony that he had no idea why he was assaulted. Both cannot be true. Secondly, it is contrary to his sworn testimony in cross to the effect he did not do hard drugs since 1999: "I haven't done hard drugs or anything like that since October 17th of 1999…." Third, the Plaintiff did not raise any suggestion he was a drug user (which he in fact emphatically denied before the Court) or that he was involved in racial issues, in either his Statement of Claim or his affidavit filed as his evidence in chief. The reference to racism is unattributed and uncorroborated hearsay: I do not accept it.

[34] Moreover, Deputy Warden James testified there were no pre-indicators of violence in the Plaintiff's "entire situation, including casework records, statement/observation reports, and daily interaction logbooks." I accept the evidence of Deputy Warden James regarding pre-indicators, and prefer it to that of the Plaintiff. With respect, the Court declines to draw an "inference" of pre-indicators. I find this evidence too weak a reed to carry any weight.

[35] Therefore, applying the law as set out in *Subbiah, supra* at paras 75-76 and *Adams, supra* at para 79, the Plaintiff has failed to establish on a balance of probabilities that BCI had any

actual or imputed knowledge of any pre-indicator of harm to the Plaintiff; BCI had neither actual knowledge the Plaintiff's safety was compromised or that he was at risk of assault. In this respect, I find harm to the Plaintiff was not reasonably foreseeable, and to the extent pre-indicators form a basis for this action, it must be dismissed.

(3) Potential motive for assault: unpaid drug debt owed by Plaintiff

[36] According to a written Observation Report given by another inmate to prison authorities dated September 11, 2017, 11 days after the alleged assault, another inmate living in Tundra Unit was selling "heroin and feninol (*sic*)" and the Plaintiff "Mike got his jaw broken already because he owed money."

[37] I also note the Plaintiff failed to provide a proper urine sample for a random prison drug test a few weeks before the assault at issue. I further note the report filed by the inmate who wrote "Mike got his jaw broken", also states "he also has been faking his piss tests tell your guy to pay closer attention he uses someone elses [*sic*] piss."

[38] Counsel for the Defendant observed in questioning Deputy Warden James that the "Mike" referred to appears to be the Plaintiff, whose jaw had been fractured less than two weeks before this note, which is trial exhibit D2. The Defendant acknowledges the statements in the Inmate Request form are hearsay. Notwithstanding, Deputy Warden James confirmed in redirect: "We do have a lot of drugs being, from our intelligence perspective, moving out of that unit." In context, the unit referred to was Tundra Unit. Deputy Warden James testified Tundra Unit, while

medium security, was “a more secure unit” and “we are constantly doing non-routine searches in that unit” for drugs. I accept the evidence of the Deputy Warden in this connection.

[39] In cross-examination, it was put to the Plaintiff that the reason for the assault was the Plaintiff owed money for drugs to somebody in Tundra Unit. While the Plaintiff denied this, it is significant that when asked, the Plaintiff claimed he had no idea why an inmate would write a form stating: “Mike got his jaw broken already because he owed money” and leave the note in the mailroom:

> MR. PETERSON: All right. Do you recall another unit in the medium security called Tundra unit?
> MR. BEAUCHAMP: Tundra unit? Yes.
> MR. PETERSON: All right. And did you -- were you aware that there were inmates in Tundra unit who were selling illegal narcotics (line cuts out) inmates?
> MR. BEAUCHAMP: No, I’m not aware of that.
> MR. PETERSON: All right. And Mr. Beauchamp, are you aware that other inmates have made the allegation that you were an inmate who was purchasing illegal drugs from inmates in Tundra unit?
> MR. BEAUCHAMP: No, I’m not aware of that.
> MR. PETERSON: All right. Has your counsel, Mr. Sloan, shown you in the productions for the trial, an inmate statement, a handwritten statement, saying that you were owing monies for drugs, and that was the reason why you were assaulted on August 30th, 2017?

> MR. BEAUCHAMP: I'm not aware of that either.
> MR. PETERSON: All right. So, I'm putting that to you that ---
> MR. BEAUCHAMP: Okay.
> MR. PETERSON: --- another inmate did make that statement about you. Do you have any idea why somebody would make that allegation about you?
> MR. BEAUCHAMP: Not at all actually.
>
> [Emphasis added]

[40] Deputy Warden James was asked in redirect how often he has seen an inmate injury of the severity of the Plaintiff's, caused for no apparent reason whatsoever, over his (23 years) service with CSC. He answered, "Never." When asked about what motivation the Plaintiff might have to lie about the reason for the assault, Deputy Warden James said the Plaintiff would stand to gain monetarily in a civil suit.

> MR. PETERSON: All right. And can you think of a reason why Mr. Beauchamp might want to lie about not having had some part to play in his being assaulted?
> MR. JAMES: Personal gain, monetary in a civil suit I guess. I'd be speculating.

[41] In this connection, it is also noteworthy the Plaintiff testified he was not aware that drugs were being sold by inmates in Tundra Unit. I do not accept his evidence for several reasons.

[42] First, by the time of the assault he had spent between 9 years and eight months in federal prisons. The Plaintiff was first incarcerated in federal prison in 1993 when sentenced to 2 1/2 years for “Break & Enter with Intent, Assault, Fail to Comply x2, and Assault Causing Bodily Harm.” He returned to federal prison a second time in 2002 upon his conviction for manslaughter after a 4-year-old girl died in his care after being abused. Regarding his third prison term (his second manslaughter conviction and the one he was serving at the time of the assault), he was sentenced to 7 years (12 years before credit).

[43] I had the opportunity to observe and listen to the Plaintiff as he was cross-examined and in re-direct. He impressed me as a street-smart individual, but with the ability to speak untruths. I accept the finding of the Parole Board of Canada in its January 5, 2018 report, and the finding of the British Columbia Supreme Court in sentencing him in 2013, that he has had serious drug and alcohol issues. I have accepted the evidence of the Deputy Warden that inmates in Tundra Unit were selling drugs to other inmates. Given these facts and the lengthy time the Plaintiff had spent in prison at the time of the assault – approaching 10 years – it would be naïve and implausible to accept the Plaintiff’s claim he was not aware inmates in Tundra were selling drugs. I do not believe his evidence in this regard.

[44] In assessing motive, I must also consider the Plaintiff was not truthful about where he was assaulted. He repeatedly told prison staff including Health Care staff he fell in the shower. That was not true as the video camera surveillance record of his unit area establishes; even the Plaintiff now must concede his previous story was not true because a different story is the basis of his present claim of inadequate surveillance.

[45] As noted, he now has completely changed his story. He now claims he was assaulted elsewhere where he ‘believes’, rather too conveniently in my view, there was no video surveillance. However I find he is again untruthful and that the assault did not occur where he now claims it did, primarily because if it had, in my view and more probably than not, an assault would have been witnessed and reported due to the large number – “twice as many” - of potential witnesses in that area during prison staff shift change, as Deputy Warded testified.

[46] That said I am unable to determine the motive for the assault on a balance of probabilities. However, the Court is unable to rule out the possibility the assault was a result of a failure by the Plaintiff to pay a drug debt.

(4) Video surveillance

[47] As an alternative argument and in the absence of pre-indicators of harm, the Plaintiff argues that CSC may still be liable to the Plaintiff in negligence. This is how the Plaintiff puts it:

> e) That the inherently violent character of medium security CSC institutions means that CSC is not required to anticipate every incident of violence but only to implement reasonable and adequate supervision to address and prevent violent incidents.
>
> f) That, absent evidence of incompatibles or actual conflict with respect to the inmates involved, it must be shown that CSC security measures in place were adequate and reasonable with respect to CSC’s mandate and objectives (to ensure public, staff and inmate safety).
>
> g) That surveillance of inmates will not fail to meet this standard if there exists adequate camera and in-person monitoring and observation, in essence, to address most potentially violent incidents and related locations.

[48] For the following reasons, I am not persuaded on a balance of probabilities either that CSC was negligent or that CSC negligently caused the assault or resulting damage to the Plaintiff in terms of video surveillance.

[49] I begin this discussion by noting that on the issue of video surveillance, Deputy Warden James testified BCI is a medium security institution with a capacity of over 500 inmates and "a couple hundred staff."

[50] In terms of video surveillance, the Deputy Warden's evidence was that BCI uses both fixed cameras and pan-and-tilt cameras. Fixed cameras have a fixed angle of view. With pan-and-tilt cameras, a guard in the control booth may use a toggle switch to rotate the angle of view. Deputy Warden James testified BCI security staff reviewed video footage within 24 hours and determined that an assault on the Plaintiff was not caught on camera.

[51] I have read the video review report, Tab 200 Joint Book of Documents. I note this report appears to focus on where the Plaintiff initially claimed his injury occurred, namely in his unit in his shower. The video review report does not address the "walkway" area where the Plaintiff now says he was assaulted. The walkway area was not raised by the Plaintiff when the video review was conducted (the same or the next day as the injury). The video review report focuses on the Plaintiff's particular living unit, one of many living units on the prison grounds, and does so in my view because the Plaintiff misled prison staff when he said he fell in his shower. The video report found "Camera footage is not available to track Beauchamp's movement upon exit of the unit"; "At 1553hrs Beauchamp is observed to enter the unit and attend E range door. He is

observed to be holding his jaw at this time"; "At 1559hrs Beauchamp is observed entering the unit and his range holding his jaw, left side"; and "I would believe there to be some physical injury to Beauchamp's mouth."

[52] From these findings of the video report, there is no evidence the Plaintiff's injury or assault took place in or around his living unit. I accept the video review report's findings, which confirm the Plaintiff was not truthful when he told prison staff he fell in the shower.

[53] So where did the assault take place? The Plaintiff deposes in his affidavit he was assaulted "between kitchen and gym." During his testimony in cross he said the assault took place on a "walkway" in between the kitchen/canteen and the back of the gym. The Plaintiff offered no corroboration as to either. Also without corroboration, he says in his affidavit "at least as far as I know" the area where he was assaulted was a "blind spot." He failed to substantiate his belief.

[54] I am not persuaded by his evidence the assault took place on a walkway between the kitchen and the gym. I say this based on evidence of Deputy Warden James who testified the walkway where the Plaintiff claims the assault took place was an unlikely site for an assault because there would be too many witnesses.

[55] Deputy Warden's evidence was given in a straightforward manner, candidly and without embellishment. Deputy Warden James testified – notably in cross-examination by Plaintiff's counsel – that the Plaintiff's claim is unlikely because of the time of day (mid afternoon) and

because that area was a high traffic area at that time. He testified there would have been "twice as many" BCI prison staff in that area than usual, because at that time of day prison staff would be in the process of changing shifts.

[56] In those circumstances, Deputy Warden James, who has been with CSC for approximately 23 years and who was at the time of the assault Assistant Warden Operations, testified he would have expected somebody to come forward as a witness. However, no one did:

> MR. JAMES: No, it actually -- I found it odd the time of the day, actually. It's the change of shift. We would have twice as many staff on during that period of time, which would increase our likelihood of observing something. So, I actually found it very odd and not an ideal time of -- that I -- in my history that I've seen assaults occur.

[57] In my respectful view, it is more probable than not that the assault took place somewhere other than the walkway kitchen gym area as claimed by the Plaintiff. I accept the evidence of Deputy Warden James that the assault could have occurred in any number of areas throughout the prison grounds that were "off camera." I agree if it occurred where the Plaintiff claims, it more likely than not would have been witnessed and reported. But it was not reported.

[58] I add it is also obvious from the video review report the Plaintiff was assaulted somewhere other than in or around his living unit or in his shower.

[59] The Court is unable to determine where the assault took place. This was also the conclusion of Deputy Warden James who stated in cross: “Where he was assaulted, I have no idea. It wasn’t in his living unit by virtue of the video review. It was somewhere outside of his living unit.” I accept this evidence.

[60] Not only is the Plaintiff’s evidence at trial inconsistent with his earlier reports to prison staff, it appears tailored to his mistaken belief the claimed area was a “blind spot.” This was not the case, as I discuss below. His testimony is self-serving in that if the area was not subject to video camera surveillance, as he wrongly believed, no one could contradict his story with video camera evidence.

[61] In any event, I also find that *if* the assault occurred where claimed by the Plaintiff, that area was not a “blind spot” as suggested by the Plaintiff. To begin with, I note the Plaintiff neither claims nor gives evidence the area he refers to is in fact a “blind spot.” Instead, he offers this assertion in a highly qualified manner: “at least as far as I know” he states. Without more, this is simply a statement of his belief. It fails to establish the area of the assault on a balance of probabilities. This is particularly so given the evidence of the Deputy Warden that the area between the kitchen and the gym was in fact monitored at the time of the assault by prison staff through use of a pan-and-tilt camera. To recall, Deputy Warden James testified that a pan-and–tilt camera allows prison staff to “toggle around to different areas of the institution.”

[62] Deputy Warden James testified in cross, that the pan-and-tilt video camera in the area claimed by the Plaintiff might have been pointed to the kitchen/canteen building or the yard at

that time, not the walkway, because the kitchen/canteen was operational at that time. Understandably, he did not wish to speculate. While it is possible, and while in my view it would be reasonable for the guard to focus on the kitchen/canteen area and not the walkway at that time, given it was operational, I am left with the Deputy Warden's evidence that "twice as many" persons as usual would have been in the walkway for a shift change. At best, I find the walkway might have been a *temporary* blind spot, but was not a *general* "blind spot" as the Plaintiff appears to believe.

[63] In my view, the Plaintiff must overcome the evidence of Deputy Warden James who was at the time Assistant Warden Operations. He failed to do so.

[64] I also find it significant the Plaintiff led no evidence, expert or otherwise, that other prisoners could tell in advance - or indeed at any time - where pan-and-tilt cameras generally are pointed, or where this particular camera was pointed at the time of the assault.

[65] Likewise, the Plaintiff led no evidence other prisoners knew or believed the area described by the Plaintiff was a "blind spot" (which it was not).

[66] There was no evidence inmates could tell if cameras were of the fixed or pan-and-tilt type.

[67] There was no evidence inmates could even tell if cameras were on or off.

[68] These are important omissions in the record. Cumulatively they leave a very substantial and almost insurmountable evidentiary gap in the Plaintiff's case.

[69] In summary, I find it more probable than not the assault would have been witnessed and reported to prison authorities if it occurred in the walkway area as claimed by the Plaintiff. On a balance of probabilities, I find the assault did not take place where the Plaintiff alleges it took place. I find the area he now claims the assault took place was covered by CSC pan-and-tilt video camera surveillance. I am not persuaded the walkway was a true "blind spot" or that it was considered by any inmate or inmates to be a "blind spot." Therefore, and with respect, the Plaintiff's claim relating to negligent video camera installation, monitoring and surveillance must be dismissed.

[70] The Plaintiff has the onus to establish negligence on a balance of probabilities. Given the foregoing, in my respectful view the Plaintiff has failed on a balance of probabilities to establish there was inadequate video camera surveillance because, among other things, he failed to establish either where the assault took place, or the level of video surveillance in place in that place at that time.

(5) Jurisprudence on security cameras: a) similar cases to the case at bar and b) surveillance camera placement as a policy decision

[71] The parties brought to the Court's attention jurisprudence from British Columbia and Alberta involving CSC's placement of video cameras on prison grounds in the context of inmates alleging negligence and inadequate video surveillance, causing them to be assaulted. These cases

are in some respects similar to the case at bar; as discussed below I agree and adopt relevant legal conclusions made by the provincial Superior Courts.

[72] There is also jurisprudence from the Supreme Court of Canada holding governments are not generally liable in negligence for the results of their policy decisions: *Just v British Columbia*, [1989] 2 SCR 1228 and *Nelson (City) v Marchi*, 2021 SCC 41.

[73] I will examine both the relevant case law and the consequences of policy decisions on liability for negligence after reviewing the legislative and regulatory framework.

[74] The starting point for both issues is section 30(1) of the *CCRA*:

Service to classify each inmate	**Attribution de cote aux détenus**
30 (1) The Service shall assign a security classification of maximum, medium or minimum to each inmate in accordance with the regulations made under paragraph 96(z.6).	**30 (1)** Le Service attribue une cote de sécurité selon les catégories dites maximale, moyenne et minimale à chaque détenu conformément aux règlements d'application de l'alinéa 96z.6).

[75] Section 18 of the *CCRR*, made pursuant to section 30 of the *CCRA* recognizes the three different security levels pertaining to the supervision and control of inmates:

18 For the purposes of section 30 of the Act, an inmate shall be classified as	**18** Pour l'application de l'article 30 de la Loi, le détenu reçoit, selon le cas:
(a) maximum security where the inmate is assessed by the Service as	**a)** la cote de sécurité maximale, si l'évaluation

du Service montre que le détenu:

(i) presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or

(i) soit présente un risque élevé d'évasion et, en cas d'évasion, constituerait une grande menace pour la sécurité du public,

(ii) requiring a high degree of supervision and control within the penitentiary;

(ii) soit exige un degré élevé de surveillance et de contrôle à l'intérieur du pénitencier;

(b) medium security where the inmate is assessed by the Service as

b) la cote de sécurité moyenne, si l'évaluation du Service montre que le détenu:

(i) presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or

(i) soit présente un risque d'évasion de faible à moyen et, en cas d'évasion, constituerait une menace moyenne pour la sécurité du public,

(ii) requiring a moderate degree of supervision and control within the penitentiary; and

(ii) soit exige un degré moyen de surveillance et de contrôle à l'intérieur du pénitencier;

(c) minimum security where the inmate is assessed by the Service as

c) la cote de sécurité minimale, si l'évaluation du Service montre que le détenu:

(i) presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and

(i) soit présente un faible risque d'évasion et, en cas d'évasion, constituerait une faible menace pour la sécurité du public,

(ii) requiring a low degree of supervision

(ii) soit exige un faible degré de surveillance et

and control within the penitentiary.	de contrôle à l'intérieur du pénitencier

[76] These distinctions (maximum, medium and minimum security inmates) are carried through to various rules and Directives issued by the federal Commissioner of Corrections [Directives]. Such Directives are made pursuant to section 97 of the *CCRA.* Section 98 of *CCRA* allows the Commissioner to designate any or all rules made under section 97 as "Commissioner's Directives".

[77] Section 97 authorizes the Commissioner to make rules: (a) for the management of the Correctional Service; (b) for the matters described in section 4; and (c) generally for carrying out the purposes and provisions of this Part and the regulations:

Rules	**Règles d'application**
97 Subject to this Part and the regulations, the Commissioner may make rules	**97** Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant:
(a) for the management of the Service;	**a)** la gestion du Service;
(b) for the matters described in section 4; and	**b)** les questions énumérées à l'article 4;
(c) generally for carrying out the purposes and provisions of this Part and the regulations.	**c)** toute autre mesure d'application de cette partie et des règlements

[78] With respect to section 97(b), section 4 of the *CCRA* sets out various principles that guide CSC, while section 3 of *CCRA* sets out the purpose of the federal correctional system and the

means by which that purpose is to be achieved. The Defendant submits and I agree that subsections 3(a) and (b) are each important but, I would add, require concrete resolution by prison management for application in the day to day administration of the correctional system:

Purpose of correctional system	**But du système correctionnel**
3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by	**3** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.
(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and	
(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.	

[79] Section 4 provides a number of guiding principles by which section 3's purposes are to be achieved. In my view, the implementation of these principles and purposes require concrete

resolution by prison management for application in the day-to-day administration of the correctional system. I also agree with the Defendant that subsections 4(c) is important in the context of this case, as I would add, subsection 4(d):

Principles that guide Service	**Principes de fonctionnement**
4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:	**4** Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants:
…	…
(c) the Service uses the least restrictive measures consistent with the protection of society, staff members and offenders	**c)** il prend les mesures qui, compte tenu de la protection de la société, des agents et des délinquants, sont les moins privatives de liberté;
…	…
(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;	**d)** le délinquant continue à jouir des droits reconnus à tout citoyen, sauf de ceux dont la suppression ou la restriction légitime est une conséquence nécessaire de la peine qui lui est infligée;
…	…

[80] I turn to the relevant Commissioner's Directives under sections 97 at issue in terms of surveillance cameras.

[81] Commissioner's Directive 706, *Classification of Institutions* establishes that in medium security institutions, inmate movement and association will be regulated and normally

monitored. In contrast, the Directive states that maximum security institutions, inmate movement and association will be strictly regulated and most often monitored.

[82] Commissioner's Directive 566-15, *Closed Circuit Television Systems* provides that medium security institutions (such as BCI) are not "required" to provide video surveillance of all areas of the institution. Instead, Annex B to this Directive sets out a chart identifying various areas in an institution, and the applicable video surveillance, namely, "required", "permitted", "no" or "not applicable". Annex B also explains that "permitted" applies to an area where cameras would reasonably be expected, but are not mandatory.

[83] In this respect, it is not contested the area where the Plaintiff claims he was assaulted is classified as a "leisure and recreation area", that is, an area open to the general population of inmates at BCI. As such, video surveillance of this type of area in a medium security institution is "permitted" and not "required". I attach the relevant portion of Annex B:

ANNEX B

CCTV CAMERA INSTALLATION LOCATIONS – MEN'S INSTITUTIONS/UNITS*

Location	SHU	Maximum	Multi-Level	Medium	Minimum	CCC
PIDS CCTV	Required	Required	Required	Required	N/A	N/A
SIDS CCTV	Permitted	Permitted	Permitted	Permitted	Permitted	Permitted
Principal Entrance	Required	Required	Required	Required	Permitted	Permitted
Controlled Entrance/ Exit Doors	Permitted	Permitted	Permitted	Permitted	Permitted	Required
Living Unit Ranges	Required	Required	Required	Required	No	N/A
Living Unit Common Areas	Permitted	Permitted	Permitted	Permitted	Permitted	Required
Segregation Ranges	Required	Required	Required	Required	N/A	N/A
Observation Cells	Required	Required	Required	Required	N/A	N/A
Segregation Recreation	Required	Required	Required	Required	N/A	N/A
Health Care	Required	Required	Required	Required	N/A	N/A
Kitchen Dining Rooms	Required	Required	Required	Required	Permitted	Permitted
Kitchen Cook/ Prep Areas	Permitted	Permitted	Permitted	Permitted	Permitted	Permitted
Visiting Areas	Required	Required	Required	Required	Required	Permitted
Visiting Areas – Exterior	Permitted	Permitted	Permitted	Permitted	Permitted	Permitted
Leisure and Recreation Areas	Permitted	Permitted	Permitted	Permitted	Permitted	Permitted
Gymnasium	Required	Required	Required	Required	Permitted	N/A
Walkways/Corridors	Permitted	Permitted	Permitted	Permitted	Permitted	Permitted

*For the purpose of clustered sites, security level of the unit applies.

"Permitted" is considered an area where cameras would reasonably be expected, but are not mandatory.

(a) *Jurisprudence: cases similar to the case at bar*

[84] Recent jurisprudence in the Superior Courts of British Columbia and Alberta deal with similar issues to those in the case at bar in terms of video camera placement, the assault of an inmate, and claims by an inmate against CSC in negligence.

[85] In *Russell v. Canada*, 2000 BCSC 650 [*Russell*], Justice Wilson of the Supreme Court of British Columbia tried a claim for damages by an inmate who was assaulted by another inmate in a true blind spot in Matsqui Institution in British Columbia, another federal medium security

institution operated by CSC under the *CCRA*. Wilson J. observed in reasons that resonate in the case at bar:

> [12]…[T]he evidence is that, in a medium security institution, the inmates have fairly open access within the perimeters of the institution. There is good reason for that, as part of the attempt to provide an environment in which rehabilitation is most likely to take place. The result of that, however, is that the institution cannot be expected to have full-time supervision of all inmates at all times. As Mr. Brock [the warden] said several times in his evidence, there is a delicate balance which always goes on, to give as much freedom as possible to inmates, consistent with the safety of the inmates and staff. … I accept that evidence. It is consistent with one of the guiding principles of the Correctional Service of Canada. as set out in s. 4(d) of the *Corrections and Conditional Release Act*, to use the least restrictive measures consistent with the protection of the public, staff members and offenders. How that is done is a policy decision, not subject to review by the courts: *Just v. British Columbia*, [1992] (*sic*, should be 1989, ed.) 2 S.C.R. 1228.
>
> [Emphasis added]

[86] Mr. Justice Wilson found CSC met the standard of care to supervise the inmates, and dismissed the action.

[87] In *Adams v Canada (A.G.)*, 2015 ABQB 527 [*Adams*], Justice Dario of the Alberta Court of Queen's Bench tried a claim for damages involving a plaintiff inmate who was assaulted by other inmates in Drumheller Institution in Alberta, another federal medium security institution operated by CSC under the *CCRA*. The assault occurred in a true blind spot behind a dense bush in an area open to the general population. Justice Dario found at paragraph 70, citing *Russell* at paragraph 12, that a medium security institution "cannot be expected to have full-time supervision of all inmates at all times". Justice Dario noted at para. 65, "The requirements for medium security facilities do not mandate constant and direct supervision."

[88] In my view this jurisprudence represents good law which I apply in the case at bar.

[89] In *Adams*, a video camera with continuous monitoring was directed towards the area in question. However, the area where the assault took place was obscured from view by the video camera [and a guard tower] by virtue of the bush: see *Adams* at para 13. Justice Dario found at paras 71-72 that CSC met the standard of care to provide supervision of inmates, even though the institution removed the bush just two weeks after the assault.

[90] Importantly, Justice Dario at para 30 of *Adams* set out the rationale for relatively relaxed video surveillance in medium security institutions compared to maximum security institutions, and essentially came to the same conclusions as Justice Wilson in *Russell*, with which I agree:

> [30] One of the goals of medium security facilities is to assist in the rehabilitation of offenders and their reintegration back into society: [CCRA] s. 3(b). To achieve this, these facilities must find a balance between supervision and allowing inmates such freedom as is consistent with the safety of the inmates and staff. … Medium security facilities are intended to create an environment that promotes and tests responsible, socially acceptable behaviour through moderately restricted freedom of movement, freedom of association and privileges, in preparation for eventual release directly back into the community. In contrast, maximum security inmates cannot be released directly back into society; instead, they are introduced to less structured environments (such as medium security institutions).

[91] I agree with Justice Wilson that BCI as a medium security institution "cannot be expected to have full-time supervision of all inmates at all times" [*Russell* at para 12, concurred in by Justice Dario in *Adams* at para 70]. I also agree with Justice Dario in *Adams* at para 65 that "The requirements for medium security facilities do not mandate constant and direct supervision". I also agree with the following conclusion drawn from subsection 3(b) of the *CCRA* discussed by

Justice Dario at para 30 of *Adams*: “One of the goals of medium security facilities is to assist in the rehabilitation of offenders and their reintegration back into society: [CCRA] s.3(b). To achieve this, these facilities must find a balance between supervision and allowing inmates such freedom as is consistent with the safety of the inmates and staff. … Medium security facilities are intended to create an environment that promotes and tests responsible, socially acceptable behaviour through moderately restricted freedom of movement, freedom of association and privileges, in preparation for eventual release directly back into the community.”

[92] On the basis of this jurisprudence I conclude CSC met the standard of care in its placement of the pan-and-tilt camera with a view of area the Plaintiff alleges the assault took place, notwithstanding at a particular time the camera might reasonably have been aimed elsewhere where more people might be present. I wish to emphasize this is an alternative finding because in my view the assault did not take place in the area claimed by the Plaintiff but at another but unknown location on the prison grounds.

(b) *Video camera placement is a policy decision: CSC is not liable for negligence*

[93] The Defendant submits the decision by the Commissioner of Corrections in Commissioner’s Directive 566-15, *Closed Circuit Television Systems* that video surveillance of leisure and recreation areas in medium security institutions such as BCI is not “required” but “permitted” is a core policy decision courts will not review. For the reasons that follow, I agree.

[94] To begin, I note Justice Wilson in *Russell* found to this effect at para 12: "It is consistent with one of the guiding principles of the Correctional Service of Canada. as set out in s. 4(d) of the *Corrections and Conditional Release Act*, to use the least restrictive measures consistent with the protection of the public, staff members and offenders. How that is done is a policy decision, not subject to review by the courts: *Just v. British Columbia*, [1992] 2 S.C.R. 1228." [Emphasis added]

[95] While Justice Wilson relied on *Just*, I agree this result is confirmed by the recent decision of our highest Court in *Nelson*. In its unanimous decision the Supreme Court of Canada outlines how to distinguish policy decisions from government activities that attract liability. There are four factors which assist in this distinction:

1. the level and responsibilities of the decision-maker;
2. the process by which the decision was made;
3. the nature and extent of budgetary considerations; and
4. the extent to which the decision was based on objective criteria.

[96] In Joint Reasons, Justices Karakatsanis and Martin discuss the four factors:

> [62] First: the level and responsibilities of the decision-maker. With this factor, what is relevant is how closely related the decision-maker is to a democratically-accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who

> are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles (*Just*, at pp. 1242 and 1245; *Imperial Tobacco*, at para. 87).
>
> [63] Second: the process by which the decision was made. The more the process for reaching the government decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.
>
> [64] Third: the nature and extent of budgetary considerations. A budgetary decision may be core policy depending on the type of budgetary decision it is. Government decisions "concerning budgetary allotments for departments or government agencies will be classified as policy decisions" because they are more likely to fall within the core competencies of the legislative and executive branches (see, e.g., *Criminal Lawyers' Association*, at para. 28). On the other hand, the day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.
>
> [65] Fourth: the extent to which the decision was based on objective criteria. The more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own value judgment (*Makuch*, at pp. 234-36 and 238). Conversely, the more a decision is based on "technical standards or general standards of reasonableness", the more likely it can be reviewed for negligence. Those decisions might also have analogues in the private sphere that courts are already used to assessing because they are based on objective criteria.

[97] The Supreme Court provided two clarifications. First, the mere presence of budgetary, financial, or resource implications does not determine whether a decision is core policy; it is one

consideration among many. Second, the word "policy" may refer to anything from broad directions to a set of ideas or a specific plan. "True" or "core" policy is determined by the nature of the decision not by its format or how the government labels it. Ultimately, the separation of powers is the underlying rationale for shielding core policy from liability. Policy choices are clearly within the role and competence of the legislative and executive branches of government. The Supreme Court held core policy decisions are immune from negligence liability because the legislative and executive branches have core institutional roles and competencies that must be protected from interference by the judiciary's private law oversight.

[98] The relevant document to consider is Commissioner's Directive 566-15, *Closed Circuit Television Systems* regarding video surveillance, and in particular, its direction concerning video camera surveillance for the "leisure and recreation" areas of medium security institutions such as BCI. I will review this Commissioner's Directive against four considerations identified in *Nelson*:

> 1. The level and responsibilities of the decision-maker: It is not disputed and I find the Commissioner of Corrections is the most senior executive of CSC, situated within the ambit of the Minister of Public Security or as the case may be at the time. This Directive is issued by the Commissioner. The Commissioner is close to the democratically elected and accountable Minister responsible to Parliament for Canada's` correctional services. This militates in favour of this decision being a policy matter. It is the Commissioner who decided that direct and constant video surveillance of the "leisure and recreation areas" of medium security institutions is not "required" but "permitted". In my respectful view, the Commissioner's responsibilities in making a regulation in this connection must include the assessment and balancing of public policy considerations set out in the *CCRA* including the need for prison security, the need to foster prisoner reintegration in the community, and the need for a degree of minimization as set out in subsections 3(a), (b) and 4(c), (d) of the *CCRA*. The task of melding the purposes of the *CCRA* set out in

> section 3 with the guidelines set out in sections 4 and 30 for the purposes of making rules governing the day to day administration of the numerous correctional services facilities across Canada also points to a policy decision, and as noted, one made at the highest levels. All of this in my view strongly points toward core policy immunity.
>
> 2. The process by which the decision was made: I agree with the Defendant that this decision also entails deliberation at the highest level within the CSC – by the Commissioner her or himself - and as noted already, necessarily involves the prospective balancing of the differing objectives set out in sections 3 and 4 of the *CCRA*, namely, security on the one hand, and reintegration and rehabilitation on the other, in the specific context in this case of Canadian medium security institutions. It is also apparent the Commissioner's decision on the issue of camera surveillance of "leisure and recreational areas" has broad application – it applies to every federal prison across Canada including every medium security prison such as BCI. And for all medium security prisons video surveillance is not mandatory, only "permitted". It is also prospective in nature. There is no evidence one way or the other concerning the processes followed in connection with the making of the Directive.
>
> 3. The nature and extent of budgetary considerations: 566-15, *Closed Circuit Television Systems* gives no indication as to any budgetary considerations made by the Commissioner.
>
> 4. The extent to which the decision was based on objective criteria: The Commissioner was required to weigh competing interests, namely, the prevention of harm in the face of surveillance blind spots, on the one hand, and the need to encourage freedom of movement and responsible, socially acceptable behaviour, and the requirements of reintegration and rehabilitation in medium security institutions, on the other, all as per sections 3 and 4 of the *CCRA*. In my respectful view, the weighing of these competing interests is well within the core responsibility and function of the executive branch.

[99] On balance, and reviewing the four points noted in *Nelson*, I find the decision by the Commissioner to designate video surveillance in "leisure and recreation areas" as not mandatory but only "permitted" is a core policy decision made by the Commissioner. For the reasons

mentioned, this core policy decision is consistent with the legislated objectives for medium security institutions in Canada as set out in the *CCRA* and the *CCRR*.

[100] BCI acted in accordance with 566-15, *Closed Circuit Television Systems* in not providing direct and continuous guard monitoring or video surveillance everywhere in its "leisure and recreation areas". CSC was under no mandatory duty or requirement to provide continuous video surveillance under this Commissioner's Directive of the area claimed by the Plaintiff.

[101] I am not persuaded the Plaintiff has established on a balance of probabilities that CSC was under a duty to provide constant video camera monitoring of the area the Plaintiff claims to have been assaulted.

[102] I conclude the Defendant would not be liable to the Plaintiff for negligence in the area claimed, even if that was the case, which is was not, because of the Defendant's immunity from suit concerning the core policy that video surveillance was not mandatory in "leisure and recreation areas."

[103] The Plaintiff's claims in respect of negligent surveillance must therefore be dismissed for this reason as well.

B. *Issue 2: Whether the Defendant's servants, health care and other staff at BCI breached their duties to reasonably protect the safety and health of the Plaintiff by subjecting him to unreasonable conditions in transporting him to and from hospitals and in placing him in segregation rather than in health care - related vehicles and accommodation, thereby foreseeably causing him harm;*

[104] The Plaintiff makes two basic allegations in relation to his treatment by BCI Health Care staff and or prison staff. First, he alleges negligence and breach of duty in that Health Care staff used a transport van to move him to and from hospitals on a number of occasions, instead of calling an ambulance. Second, he alleges negligence and breach of duty for the 16 days he spent in administrative segregation while waiting for surgery at Toronto's Mount Sinai Hospital.

[105] I will review each.

(1) Use of transport van versus ambulance

[106] The record shows the Plaintiff was transported a number of times in a transport van including 1) to SMMH after his initial assessment by BCI Health Care staff on August 30, 2017; 2) on his return from SMMH after receiving an x-ray at approximately 12:30 a.m. on August 31, 2017; 3) from BCI to Mount Sinai Hospital in Toronto for further assessment on August 31, 2017; and 4) departure the same day and return to BCI at 0:30 am on September 1st.

[107] I put these trips in context with related events as follows.

[108] After the assault in the afternoon of August 30, 2017, the Plaintiff returned to his cell. On subsequent video review by prison staff, he was seen holding his jaw. After he arrived in his cell, another inmate (not the Plaintiff) told prison Health Care staff at 4:25 p.m. the Plaintiff had "fallen in the shower". This statement was not true. I accept the Plaintiff was more than likely assaulted. The Plaintiff obviously put up another inmate to tell Health Care staff his untruth about falling in the shower.

[109] Upon being informed of his injury, four prison officers responded. They found the Plaintiff in his cell full clothed. Apparently the shower had been cleaned. Five minutes later a BCI Health Care nurse attended to assess his situation and offer first aid. Fifteen minutes later the Plaintiff was taken to prison Health Care with a possible broken jaw, were the Plaintiff repeated the falsehood that he "fainted" in the shower. He said he had hurt his teeth/jaw.

[110] At that time, he had no visible injuries except to his mouth. BCI Health Care staff determined the Plaintiff has suffered an injury to his left jaw, but that a proper diagnosis required a further assessment at an outside hospital, namely South Muskoka Memorial Hospital (SMMH).

[111] The Plaintiff deposes he was in pain while being transported from BCI to SMMH. He submits there is no evidence the Defendant's servants attempted to use alternate transportation more conducive to his comfort. The Plaintiff also submits Health Care and other staff at BCI had a duty to minimize his discomfort and anxiety. They knew his transport in a van foreseeably contributed to his pain and distress and yet did not take measures to address this, thereby exacerbating his pain and distress.

[112] With respect, and while I agree the Plaintiff was in considerable pain and discomfort before setting out for SMMH, I am not persuaded the use of a transport van was negligent or inappropriate and find his allegations in this respect unfounded.

[113] In answer to the Plaintiff's allegations regarding use of the transport van versus an ambulance, the Court had the evidence of BCI's Chief of Health Care, Johanna Kudoba, RN [Nurse Kudoba] who gave evidence by affidavit, on cross-examination and on re-direct.

[114] Nurse Kudoba is a Registered Nurse with 28 years experience in CSC at the time of trial. Nurse Kudoba was not at BCI when the assault occurred, but started the following month. Her testimony was direct, responsive and candid, and I accept it.

[115] Nurse Kudoba confirms BCI Health Services staff determined a transport van was suitable to take the Plaintiff to SMMH because his injuries did not constitute a medical emergency in that the injury to his jaw was not life threatening, and he was both conscious and ambulatory.

[116] In this connection, Nurse Kudoba provided uncontradicted evidence as to when an ambulance is required set out in Directive 800-4, *Response to Medical Emergencies*. This Directive issued by the Commissioner of Corrections, gives institutional direction to CSC health services, including BCI's Health Care staff, in determining medical response to situation.

[117] I accept Nurse Kudoba's uncontradicted evidence that Commissioner's Directive 800-4, *Response to Medical Emergencies* establishes CSC medical criteria for use of an ambulance. Her evidence which I accept given her professional qualifications and experience with CSC, confirmed the Plaintiff's injury did not constitute a medical emergency in that (1) he was ambulatory, (2) that he was not in an altered state of consciousness, and (3) that there was no

immediate threat to the Plaintiff's health requiring medical intervention. These three indicia govern the use of an ambulance by Health Care staff as set out in Commissioner's Directive 800-4, *Response to Medical Emergencies*. I also find the use of a transport van decisions by BCI Health Care staff complied with these criteria. Because the Plaintiff's situation was not a Medical Emergency as defined, use of an ambulance was not authorized by the Directive. Nurse Kudoba also testified that even if Health Care staff knew there was a fracture of the Plaintiff's jaw, which they did not, that in itself would still not present a "life-threatening emergency". I agree with her assessment.

[118] I acknowledge the Plaintiff believes his travel to and from hospital would have been more comfortable in an ambulance than in a transport van. However, there is no evidence in support of his beliefs in this respect.

[119] Indeed and directly to the contrary, Nurse Kudoba testified an inmate with a facial injury would be handcuffed and required to sit up during transfer to an outside hospital, regardless of whether the transfer was by transport van or ambulance. In addition, an inmate would not be allowed to lie down in either an ambulance or a transport van. These answers were elicited by the Plaintiff's counsel in cross. I accept Nurse Kuboda's evidence:

> MR. SLOAN: Well, what I'm getting at is, are you aware of the position, the physical positioning of an inmate who is being transferred by the institutional van as opposed to his physical condition and other aspects of that that would be involved in his being transferred by ambulance?

28 MS. KUDOBA: I'm not sure I understand other
1 than I know if he's going into an escort vehicle, he's
2 handcuffed and sitting, and he would be handcuffed and
3 sitting on a stretcher in the back of an ambulance.
4 MR. SLOAN: Could he not be handcuffed and
5 lying on a stretcher in the back of an ambulance?
6 MS. KUDOBA: We wouldn't lie him. We would
7 have him sitting up if he had a facial injury.

[120] Deputy Warden James was asked in cross-examination if there would have been considerable jostling and swerving by the transport van that would have affected the inmate inside. He answered, "No", there would be no more than him driving to work in the morning, and that the route from BCI to SMMH consisted of maintained roads including the Gravenhurst Parkway.

[121] Nurse Kudoba also testified in cross-examination that a transport van would have likely been the faster mode of transport from BCI to SMMH, as opposed to an ambulance. Nurse Kudoba testified an outside ambulance can take anywhere from 11 to 60 minutes to arrive at BCI. By contrast, the Plaintiff was arranged to be transferred "in the moment" via prison transport van.

[122] In terms of the Plaintiff's allegation that he was jostled around in the van, the Plaintiff failed to provide evidence that he sustained any serious or lasting injury, or, and most materially that such injury would have been avoided if he had been transported by ambulance.

[123] Nurse Kudoba also deposed to several other material points. The Plaintiff had no obvious swelling. He was fully ambulatory. He was free of abrasions; there was no deformity to his mandible regions. He was able to speak and breathe normally. He was moving his jaw independently, had no swelling or discoloration, and a small laceration to the lower gum line, with bleeding under control.

[124] Clinical documentation available in the Plaintiff's file indicates that the seriousness of his injuries was not apparent at the time the decision was made to send him to SMMH. Further, it is documented by a nurse on August 31, 2017 while the Plaintiff was at Mount Sinai Hospital, who made a report stating *"unable to classify injury yet."* In the absence of radiology, it would not have been possible for prison Health Care to determine the seriousness of the injury before being transported to SMMH. I accept this evidence.

[125] The Health Care staff therefore arranged for the Plaintiff to be transported by transport van to SMMH the evening of the assault.

[126] SMMH radiology testing confirmed a mandible fracture, and SMMH's attending staff referred the Plaintiff to Mount Sinai Hospital in Toronto for possible surgical intervention to occur on August 31, 2017 at 1100hrs the next day. The Plaintiff then returned from SMMH to BCI by transport van at approximately 0300hrs August 31, 2017 after Health Care service hours of operation to wait for transportation and escort to Mount Sinai.

[127] The Plaintiff was moved by transport van to Mount Sinai Hospital in Toronto later that morning (the 31st). He was in what he described as pain "++ through the roof."

[128] However, the Plaintiff's health care file indicates the Plaintiff was medicated for his pain and offered a soft meal, which he accepted.

[129] The Plaintiff was assessed at Mount Sinai in Toronto, and returned by transport van that evening, arriving shortly after midnight (September 1, 2017) at BCI to await surgical intervention Mount Sinai 16 days later.

[130] On the evidence before me, I am not persuaded on a balance of probabilities the Plaintiff would have been any more comfortable in an ambulance than in a transport van. I also accept using a transport van would provide faster service for all concerned including the Plaintiff.

[131] The Plaintiff tendered no personal or expert evidence to support his claim he would have been more comfortable in an ambulance than in a van. Given he would have been handcuffed and sitting upright in either an ambulance or a transport van, and could not lie down, and given use of the transport van determined by BCI Health Care staff was fully compliant with and based upon Commissioner's Directive 800-4, *Response to Medical Emergencies*, I am not persuaded the use of a transport van was negligent.

[132] In my view, the Plaintiff has not established negligence let alone damage as a result, on a balance of probabilities in relation to the use of a transport van.

[133] With respect, I am also unable to find negligence on the part of prison Health Care staff. They attended promptly and appear to have attended the Plaintiff responsibly, attentively and almost immediately. They correctly assessed a possible broken jaw. They arranged for transport in the fastest manner to SMMH where he would be more definitively assessed. Health Care use of the prison transport van was in compliance with Commissioner's Directive 800-4, *Response to Medical Emergencies*, and as already found, was not negligent. Arrangements were made for the Plaintiff to go to Mount Sinai hospital in Toronto for a further assessment the day after the assault, and for the Plaintiff to go to Millhaven Institution for two weeks recovery after the surgery. The claims of negligence and damage in this respect are without merit and are dismissed.

(2) Placement and length of time in administrative segregation

[134] The Plaintiff was placed in administrative segregation from the time he returned from his initial assessment at Mount Sinai Hospital, until his transfer back to Mount Sinai for surgery 16 days later. He alleges this was in breach of duty to him by prison staff resulting in damages.

[135] As I understand it, there are two aspects to this allegation. First, he was in administrative segregation for too long. Second, he should not have been in administrative segregation at all but elsewhere such as the CSC Regional Hospital at Millhaven or another outside hospital.

(a) *Length of time issue*

[136] With respect, I am not persuaded the Defendant is responsible for the time between when he was assessed by Mount Sinai Hospital the day after the assault and when Mount Sinai Hospital scheduled his surgery 16 days later. The physicians at Mount Sinai not the Defendant who decided when to schedule his surgery. They determined the wait time for the Plaintiff's surgery. BCI staff had nothing to do with the wait time for surgery.

[137] There is no evidence CSC, BCI or any of its staff had any input in the decision by Mount Sinai as to when to perform the Plaintiff's surgery. To recall, BCI arranged to have the Plaintiff assessed right away (the day of the assault) at the local hospital SMMH. SMMH recommended the Plaintiff be further assessed by physicians at Mount Sinai and arranged for his referral there. That assessment took place the very next day, BCI taking all necessary steps to get him to Mount Sinai and back the next day. At that time, the physicians at Mount Sinai recommended surgery, and scheduled surgery to take place 16 days later. I am unable to find the Defendant or her servants responsible for either the assessment at Mount Sinai, the time to schedule surgery, or the surgery itself.

[138] The Plaintiff has failed to establish on a balance of probabilities that the Defendant was implicated in let alone liable in negligence for any of these actions or decisions. Mount Sinai was not a party to this proceeding. In my respectful view there is no merit in the allegation the delay in his surgery was in any way unreasonable or negligent, let alone otherwise tortious.

(b) *Administrative segregation*

[139] Upon his return to BCI on August 31, 2017, prison staff determined the Plaintiff should be placed in administrative segregation to wait for surgery. The reason he was placed in administrative segregation was for his own safety. Deputy Warden James confirmed in cross-examination the Plaintiff's injury was not serious enough to warrant ongoing admission to an outside hospital.

[140] In this connection, Deputy Warden James deposed the Plaintiff "was placed in segregation from 2017-09-31 [date corrected to 2017-08-31 during cross ed.] to 2017-09-15 because it was believed his continued presence in population jeopardized his personal safety under *CCRA* section 31(3)(c). His report of falling in the shower was not consistent with officers' observations or his injuries. Videotapes were reviewed and it was determined that sometime between 1515-1600hrs, Mr. Beauchamp sustained injuries outside of the living unit. It was believed that Mr. Beauchamp sustained these injuries as a result of a physical altercation. All alternatives to administrative segregation were considered and eliminated as viable options as the assailant(s) were not able to be identified at that time. Given that BCI operates in a more open manner than other medium security institutions, staff were unable to ascertain the level of risk posed should Mr. Beauchamp remain in general population. Transfer to another unit was not deemed suitable as it is believed the assault took place outside of his living unit. There is no federal maximum security unit available in the proximity of BCI to transfer Mr. Beauchamp. As the assailant(s) were not known at that time, mediation was not viable. Mr. Beauchamp presented as cognizant of the circumstances and was not willing to divulge what transpired other than that he fell."

[141] Deputy Warden James also deposed he was advised by Beaver Creek health care staff "that Mr. Beauchamp was sent to an outside hospital and returned on 2017-08-31 at approximately 0030hrs. Mr. Beauchamp was then admitted to segregation. There is no documentation available on file to suggest that Mr. Beauchamp indicated adverse mental or physical effects related to segregation, with the exception of being cold the first morning upon return from SMMH hospital at 300hrs and prior to his transport to Mount Sinai Hospital for his l100hrs appointment later that same morning."

[142] Deputy Warden James further deposes the Plaintiff's files state the Plaintiff was "seen in interview room in Segregation... A/O Gait is steady and uninhibited... Denies any injury to inside of mouth, states a filling did fall out of a tooth after impact to floor. Denies any other injury as a result of this incident… Declines Psychology referral, denies any thoughts of suicide or self harm. Offender maintains that he slipped in the shower striking his chin directly onto the wet floor. Reports some minor neck discomfort. Able to perform ROM, with some associated discomfort from jaw evident during movement. Medication review and HT completed. Will continue to monitor."

[143] Deputy Warden James also deposes that "The only documentation regarding pain during the time Mr. Beauchamp was in segregation is on two occasions. First, on 2017-09-03, Mr. Beauchamp reposed experiencing moderate pain, "reports Tylenol #3 is fain" Second, on 2017-09-05, the nurse contacted the physician regarding pain control as Mr. Beauchamp was stating that the pain would keep him up at night. The physician prescribed Kadian 10 mg."

[144] I accept the foregoing evidence deposed by Deputy Warden James.

[145] As with use of video surveillance and an ambulance, there is a Commissioner's Directive respecting placing an inmate in administrative segregation. I accept that the following version of Commissioner's Directive 709 - *Administrative Segregation* was in effect at the time (promulgated 2017-08-01). This Directive required the following regarding placement of inmates in segregation:

> 19. The following inmates will not be admitted to administrative segregation:
>
> a. inmates with a serious mental illness with significant impairment, including inmates who are certified in accordance with the relevant provincial/territorial legislation
>
> b. inmates actively engaging in self-injury which is deemed likely to result in serious bodily harm or at elevated or imminent risk for suicide.
>
> 20. Inmates admitted to administrative segregation who are subsequently identified as falling within paragraph 19a and/or b will be released from administrative segregation and managed in accordance with CD 843 - Interventions to Preserve Life and Prevent Serious Bodily Harm.
>
> 21. An inmate may be admitted or readmitted to administrative segregation pursuant to section 31 of the CCRA only after discontinuation of the observation level in accordance with CD 843 - Interventions to Preserve Life and Prevent Serious Bodily Harm. All health considerations will be documented in the segregation admission screen of the Offender Management System (OMS).
>
> 22. Unless exceptional circumstances exist, the following inmates will not be admitted to administrative segregation:
>
> a. pregnant inmates
>
> b. inmates with significant mobility impairment
>
> c. inmates in palliative care.

[146] Deputy Warden James concludes, and I agree, that documentation related to the Plaintiff's placement in segregation indicates the injuries the Plaintiff sustained did not appear to preclude placement in administrative segregation based on the criteria outlined in paragraph 22 of Commissioner's Directive 709 - *Administrative Segregation*, and that he would continue to receive timely nursing care in that unit. In addition, mental health consultation and assessment completed as required by policy did not identify the Plaintiff as meeting criteria consistent with paragraph 19 of this Commissioner's Directive.

[147] I note the Plaintiff alleges he would have been more comfortable and received better health care had he been admitted to the Correctional Service Regional Hospital at Millhaven or another outside hospital.

[148] I am unable to agree with the Plaintiff because once again he offers no evidence to support his allegations, except in essence he says he rather would have been somewhere else. That with respect does not establish negligence.

[149] In addition, there is evidence to the contrary which I accept and which was not contradicted, namely that of Nurse Kudoba.

[150] Nurse Kudoba confirmed in cross-examination the decision to place the Plaintiff in administrative segregation was based on security considerations rather than health care considerations:

> 8 MS. KUDOBA: In my experience, his placement
> 9 in segregation not -- was not related to a healthcare

10 reason. Healthcare did not direct him to be in
11 segregation.
12 MR. SLOAN: Okay, I think my question then
13 becomes healthcare would have the authority, you've said,
14 to recommend that he be removed from segregation. So, what
15 would healthcare have decided in his case in terms of where
16 he was, or he was placed?
17 MS. KUDOBA: We didn't have any input as to
18 his placement. It was a security placement from what I
19 recall from the reading of the material.

[151] Nurse Kudoba clearly and credibly testified the Plaintiff received the same level of health care while in administrative segregation at BCI as he would have received in the CSC's regional hospital at Millhaven or at an outside hospital. Her evidence regarding the difference between a healthcare observation room and being in segregation was that: "The only difference between the two with -- in the healthcare observation room, there is your own personal shower, whereas in segregation, you would have to leave your area to get to a common shower." Her evidence regarding the difference between segregation and observation in an outside hospital was that: "a hospital bed is different than what they would have here for a bed."

[152] In my view, this evidence which I accept rebuts the Plaintiff's allegation of inferior treatment while he was in administrative segregation. Her evidence was exactly on the point: Nurse Kudoba made it clear and I accept that moving the Plaintiff out of segregation would not

have improved his situation or reduce his pain which, in any event was being managed by medications.

[153] The Plaintiff led no evidence expert or otherwise that he would have received better health care had he been admitted to either the prison hospital or an outside hospital. In fact, as noted the only evidence in this respect is to the exact opposite, namely from Nurse Kudoba who testified moving him out of segregation would not have improved his injury.

[154] Deputy Warden James confirmed the reasons for administrative segregation were security considerations. Again, this was not contradicted and with respect, the circumstances warranted Administrative Segregation for the Plaintiff's protection and I so find. While the Plaintiff actively misled prison staff about how he was injured, prison staff concluded he was likely assaulted by an unknown aggressor or aggressors in the prison population. In cross-examination, Deputy Warden James testified, as he had deposed in his affidavit, that in the circumstances and having considered other options, moving the Plaintiff to a bed in administrative segregation was warranted given security concerns:

1 MR. SLOAN: Thanks. Now, it's mentioned
2 that it was considered that his continued presence in
3 population jeopardized his personal safety. Is it not a
4 fact, though, that other considerations, alternatives to
5 segregation have to be considered ---
6 MR. JAMES: Yes, they were ---
7 MR. SLOAN: --- before a person is placed?
8 MR. JAMES: Yes, they were considered, and I

> think they were -- I don't have the segregation paper in front of me, but I know they were outlined, range alternatives, change of range, different units. But again, in an open environment of a medium security institution with lack of physical infrastructure being at the responsibility-based unit, it's very difficult to separate, especially because it's unknown aggressor or aggressors, that's what we had to operate on that premise, that there was an unknown aggressor or aggressors in the population.

[155] Deputy Warden James' testimony was direct and credible. In my view, his evidence in his affidavit referred to already, and the excerpt from the transcript of Deputy Warden James confirms the decision to place the Plaintiff in administrative segregation was reasonable in the circumstances, that is, not negligent. I also accept the evidence of Nurse Kudoba that his injury would not have improved even if he had been moved from administrative segregation.

[156] I find the Plaintiff has failed on a balance of probabilities to establish negligence or damage in being placed in administrative segregation while awaiting surgery at Mount Sinai Hospital. Therefore, this aspect of his claim must be dismissed.

(c) *Intentional infliction of harm and punitive damages*

[157] The Plaintiff pleaded both intentional infliction of harm and punitive damages in what might be described as a boilerplate Statement of Claim in that respect. However, this case proceeded as a negligence case to the exclusion of these other two heads of damages. In my view

and in any event neither have been established on a balance of probabilities, and neither were dealt with in the Plaintiff's Closing Submissions.

[158] Therefore, I dismiss the Plaintiff's claims in relation to both intentional infliction of harm and punitive damages.

C. *Issue 3: Whether the Defendant is vicariously liable for the harm caused by wrongful conduct of her servants herein;*

[159] While this issue is raised by the Plaintiff, the Defendant does not disagree and in any event I find employees of BCI are employees of the Defendant such that the Defendant is liable for their actions, see *Bastarache, supra* and *Crown Liability and Proceedings Act,* RSC, 1985, c C-50, paragraph 3(b)(i):

Liability	**Responsabilité**
3 The Crown is liable for the damages for which, if it were a person, it would be liable	**3** En matière de responsabilité, l'État est assimilé à une personne pour:
(a) in the Province of Quebec, in respect of	**a)** dans la province de Québec:
(i) the damage caused by the fault of a servant of the Crown, or	**(i)** le dommage causé par la faute de ses préposés,
(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	**(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) in any other province, in respect of	**b)** dans les autres provinces :
(i) a tort committed by a servant of the Crown, or	**(i)** les délits civils commis par ses préposés,
(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.	**(ii)** les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens
[Emphasis added]	[je souligne]

[160] Because I have found no negligence or tortious conduct by CSC or its employees, there is no liability on the Defendant in this action.

[161] While the intentional tort battery was alluded to in the Plaintiff's Statement of Claim, it was not pursued and was not mentioned in Plaintiff's Closing Arguments. In any event, I am not persuaded the conduct of the Defendant's servants in this matter may be so described.

[162] Therefore, this action must and will be dismissed in its entirety.

D. *Issue 4: What award of damages is appropriate;*

[163] In his Closing Submissions the Plaintiff submits as follows: “The Plaintiff claims $30,000.00 in compensatory damages for his injuries to his jaw and related pain, suffering and emotional distress.”

[164] Having found the Defendant not liable in negligence, intentional infliction of harm, or for punitive damages, I make no award in these respects. Indeed, because this action will be dismissed because none of the Plaintiff’s claims are proven on a balance of probabilities, no damages are awarded in this case.

[165] However, the Court will nonetheless assess damages on an “as if” basis in relation to his ongoing pain in his jaw, and in relation to his alleged PTSD.

[166] In his affidavit, the Plaintiff elaborates on his alleged injuries to include: 1) permanent nerve damage and ongoing pain to his jaw, 2) post traumatic stress disorder [PTSD] as a result of the assault and 3) organ failure involving his heart and liver caused by his jaw being wired shut for 33 days.

[167] At trial, the Plaintiff testified he sees his family doctor for PTSD once a month, in terms of suffering nightmares and not wanting to be around a lot of people. In his affidavit he deposed: “I suffer nightmares. I can't be around a lot of people. I went two months not talking to my kids due to my mouth being wired.”

[168] However, at trial he confirmed he has not produced this doctor's medical notes or records, nor did he produce one after trial.

[169] He testified the organ failure referred to in the Statement of Claim in fact related to his heart and kidneys, not his liver. He has since confirmed in cross-examination his heart and kidneys are now fine.

[170] In this connection, Nurse Kudoba also deposed: "I note that Mr. Beauchamp makes the allegation in his matter that he has suffered liver, heart and other organ failure as a result of his health care at Millhaven Regional Hospital and Beaver Creek during the period of time following his surgery. A review of Mr. Beauchamp's Electronic Medical Record indicates that he had been diagnosed with and successfully treated for Hepatitis C prior to his surgery. There is no mention in the medical file of any issues regarding liver, heart or other organ failure following his surgery."

[171] I find no merit in the claims relating to liver, heart or other organ failure. There is no evidence to support them or they have been withdrawn. Such claims must be dismissed and I will not assess damages in relation thereto.

[172] Therefore, the remaining alleged ongoing personal injuries considered are alleged chronic jaw pain and PTSD.

(1) Chronic jaw and related pain

[173] The Plaintiff offered his own subjective testimony at trial on the issue of ongoing jaw pain. He testified his jaw pain is 7 out of 10 on a bad day but improves to 5 out of 10 after he takes his pain medication. I note that Nurse Kudoba was asked in cross-examination about whether she was surprised the Plaintiff claims to suffer chronic jaw pain. She answered: "some level of pain would be expected in some cases."

[174] No expert evidence was provided by the Plaintiff in this connection.

[175] The Plaintiff confirmed he sees a methadone doctor at a clinic in Vanier, Ontario, and she prescribes Lyrica which he takes for pain. He also confirmed he thinks this doctor kept records of her treatment sessions with him. However, the Plaintiff produced no medical report or any evidence from this physician. When asked, he testified he is not sure why he has not produced anything from her.

[176] The Plaintiff testified he saw a neurologist a year ago because he "wanted it shown that I have permanent nerve damage which is progressing with age" and arranged a month to a month and a half ago for a follow up appointment. He testified he was seen by the neurologist two weeks ago, who will produce a report "soon". However, the Plaintiff did not produce this report.

[177] In this connection, I note the *Federal Courts Rules*, SOR/98-106 for Simplified Actions require delivery of expert reports at least 60 days before trial:

Admissibility of expert's evidence	**Admissibilité du témoignage d'expert**
299(1.1) Unless the Court orders otherwise, no evidence in chief of an expert witness is admissible at the trial of an action in respect of any issue unless	**299(1.1)** Sauf ordonnance contraire de la Cour, le témoignage d'un témoin expert recueilli à l'interrogatoire principal n'est admissible en preuve, à l'instruction d'une action, à l'égard d'une question en litige que si les conditions suivantes sont réunies:
(a) the issue has been defined by the pleadings or in an order made under rule 265;	**a)** cette question a été définie dans les actes de procédure ou dans une ordonnance rendue en vertu de la règle 265;
(b) an affidavit or statement of the expert witness prepared in accordance with rule 52.2 has been served on all other parties at least 60 days before the commencement of the trial; and	**b)** un affidavit ou une déclaration du témoin expert, établit conformément à la règle 52.2, a été signifié aux autres parties au moins soixante jours avant le début de l'instruction;
(c) the expert witness is available at the trial for cross-examination.	**c)** le témoin expert est disponible à l'instruction pour être contre-interrogé.

[178] The Plaintiff not only failed to file any evidence from his family doctor, his methadone doctor or the neurologist. Indeed, he failed to file any expert evidence related to any medical issue in this case.

[179] I note the Plaintiff was at all times in this proceeding represented by counsel: Plaintiff's counsel signed the Statement of Claim, counsel approved the Joint Book of Documents, counsel

attended at trial to submit evidence on the Plaintiff's behalf, conducted both cross-examinations of the Defendant's witnesses and redirect of the Plaintiff, and signed the Plaintiff's Closing Submissions.

[180] In the circumstances I take it as a given the Plaintiff knew that to succeed in his action the onus was on him to establish his case on evidence and on a balance of probabilities. This the Plaintiff failed to do.

[181] In connection with the Plaintiff's decision not to file any medical or expert evidence, the Defendant relies on *Dolha v Heft*, 2011 BCSC 738 [*Dolha*] at paragraphs 16-20, where Justice Bruce tried a claim for damages in which the plaintiff led no medical evidence of continuing soft tissue injuries, except for the plaintiff's own subjective evidence. Justice Bruce held at paragraph 18, where a plaintiff fails to adduce objective medical evidence, and offers only the plaintiff's subjective evidence, "a reasonable inference is that the pain was very minor or non-existent."

[182] The Defendant submits, the Court should draw the same inference here as in *Dolha* with respect to the Plaintiff's, and conclude the "reasonable inference is that the pain was very minor or non-existent."

[183] I decline to do as suggested in *Dolha*. Instead, I will assess and quantify damages on as "as if" basis for pain and suffering in terms of jaw and related pain. This is because the Plaintiff, even without any expert evidence, has established he suffered and still suffers pain in his jaw. As Nurse Kuboda testified, "some level of pain would be expected in some cases."

[184] That said it appears to me his jaw pain was managed with various medications.

[185] The pain has persisted for four years since the assault, and may continue into the future. However, there is no prognosis outlining the future course of this pain.

[186] I assess the Plaintiff's jaw and related pain, based on the original assessment of damage and fractures and the considerations just noted, as being of moderate severity. I am forced to rely on my judgment in this respect; I concede this aspect of his injury may be greater or less than of moderate severity in terms of pain and suffering. However, I am not able to be precise given the Plaintiff's near complete failure to provide the Court with evidence. I note again that the Plaintiff had the burden to lead evidence to support his claim for damages. The Defendant may also file evidence in this connection. Therefore, my assessment of jaw and related pain as of moderate severity is the best I can do given the evidence.

[187] As to quantum, the Plaintiff relies on a handful of cases, namely *Beger v MacAstocker Estate*, 192 AR 241; *Chisholm v Lindsay*, 2012 ABQB 81; *Olson v Ironside*, 2012 BCSC 546; *McLean v Parmer*, 2015 ABQB 62; *Kitching v Devlin*, 2016 ABQB 212; and *Prosser v 20 Vic Management Inc*., 2009 ABQB 177. I have considered these cases and find none of assistance in that none involve a broken jaw resulting in moderate severity in terms of pain and suffering. All involved significantly greater harm and injury.

[188] The Defendant relies on *Paskalidis v Caprice Hospitality Inc.*, 2011 BCSC 1699 at paragraphs 70-71 [*Paskalidis*], where the Supreme Court of British Columbia considered

damages for a broken jaw sustained as a result of an assault by a bouncer against a nightclub patron. The Court examined 11 cases involving a broken jaw, and found the range to be $10,000 to $65,000 with most in the $25,000 to $40,000 range. *Paskalidis* presented expert evidence; the Plaintiff here presented none. *Paskalidis* was awarded $45,000 for non-pecuniary damages.

[189] I also note the recent decision of *Jewkes v Scrosati,* 2020 NSSC 228, the Supreme Court of Nova Scotia considered the question of damages for pain and suffering in a case of a broken jaw from a punch thrown by the Defendant. The Court awarded $20,000 in general damages.

[190] Had I found liability in this case, which I did not, my assessment of damages in the circumstances, including the absence of expert evidence on both diagnosis and prognosis, would be $15,000 non-pecuniary damages for moderate severity in terms of pain and suffering.

(2) Alleged PTSD

[191] The Plaintiff alleges he has PTSD caused by the assault. Once again, he has chosen not to file any expert evidence as to the cause, nature, or effects of PTSD.

[192] I have no diagnosis nor forward looking prognosis as to how, if at all, this alleged condition will develop, and what, if any, treatment options are available.

[193] The Defendant again relies on *Dolha, supra* at paragraphs 16-20, where Justice Bruce held at paragraph 18 that where a plaintiff fails to adduce objective medical evidence, and offers

only the plaintiff's subjective evidence, "a reasonable inference is that the pain was very minor or non-existent."

[194] Thus if he has conditions or symptoms of PTSD I would assess it as very minor or non-existent as per *Dolha*.

[195] That said in this case I am not persuaded on a balance of probabilities that he has PTSD. Nor am I persuaded on a balance of probabilities that what he suffers from was caused by the assault, and not other incidents in his sometimes violent life. PTSD is a very specific medical diagnosis which I am not capable of making; it is a diagnosis only a medical doctor may make. With respect, in my opinion medical evidence is necessary and both could and should have been led to establish a diagnosis of PTSD but was not: *R v Mahon,* [1994] 2 SCR 9 [per Sopinka J]; *Masterpiece Inc. v Alavida Lifestyles Inc.,* 2011 SCC 27 [per Rothstein J] at para 75.

[196] However, while the Plaintiff chose not to lead any professional PTSD evidence, *Saadati v Moorhead,* 2017 SCC 28 at 38 per Brown J, holds expert medical evidence is not necessary as a matter of law to determine a mental injury: "While, for the reasons I have given, the lack of a diagnosis cannot on its own be dispositive, it is something that the trier of fact can choose to weigh against evidence supporting the existence of a mental injury."

[197] The only evidence of symptoms that might be relevant in this respect is that he suffers nightmares and cannot be around a lot of people. With respect, and since the Plaintiff did not give me more evidence, I would assess the mental injury in this case at the low end in terms of

mental injury. *Dolha* suggests a finding at the low end to non-existent. I would assess damages for this mental injury at $5,000.00.

(3) Amount of damages

[198] Given a hypothetical finding of liability, as noted I would assess $15,000 for jaw pain and suffering and an additional $5,000 for mental injury for a total of $20,000.

E. *Issue 5: What costs should be awarded to the successful party?*

[199] Despite the Court's encouragement, the parties did not agree on quantum of costs for the successful party. The Defendant asked for a lump sum all-inclusive award of $5,000. The Plaintiff asked for costs to be taxed on a substantial indemnity basis without reasons to provide a lump sum. No submissions were made to justify the Plaintiff's request for costs on a substantial indemnity basis, which I am unable to support in any event. There is nothing in his matter to persuade me to award anything but party and party costs had the Plaintiff been successful: see *Shoan v Canada (Attorney General)*, 2016 FCA 261 [as per Dawson JA] at para 11.

[200] There is no reason why costs should not follow the event. Therefore costs will be awarded to the successful Defendant payable by the Plaintiff. In my discretion a reasonable all inclusive amount of costs for this action, bearing in mind it took place under the Simplified Action rules, is $3,000 inclusive of fees, disbursements, and applicable taxes, and I will so order.

JUDGMENT in T-1365-18

THIS COURT'S JUDGMENT is that:

1. The Plaintiff's action is dismissed.
2. The Plaintiff shall pay all-inclusive costs to the Defendant in the amount of $3,000.00 inclusive of fees, disbursements and applicable taxes.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1365-18
STYLE OF CAUSE:	MICHAEL BEAUCHAMP v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 25, 2021
JUDGMENT AND REASONS:	BROWN J.
DATED:	JANUARY 17, 2022

APPEARANCES:

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Eric Peterson	FOR THE DEFENDANT

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